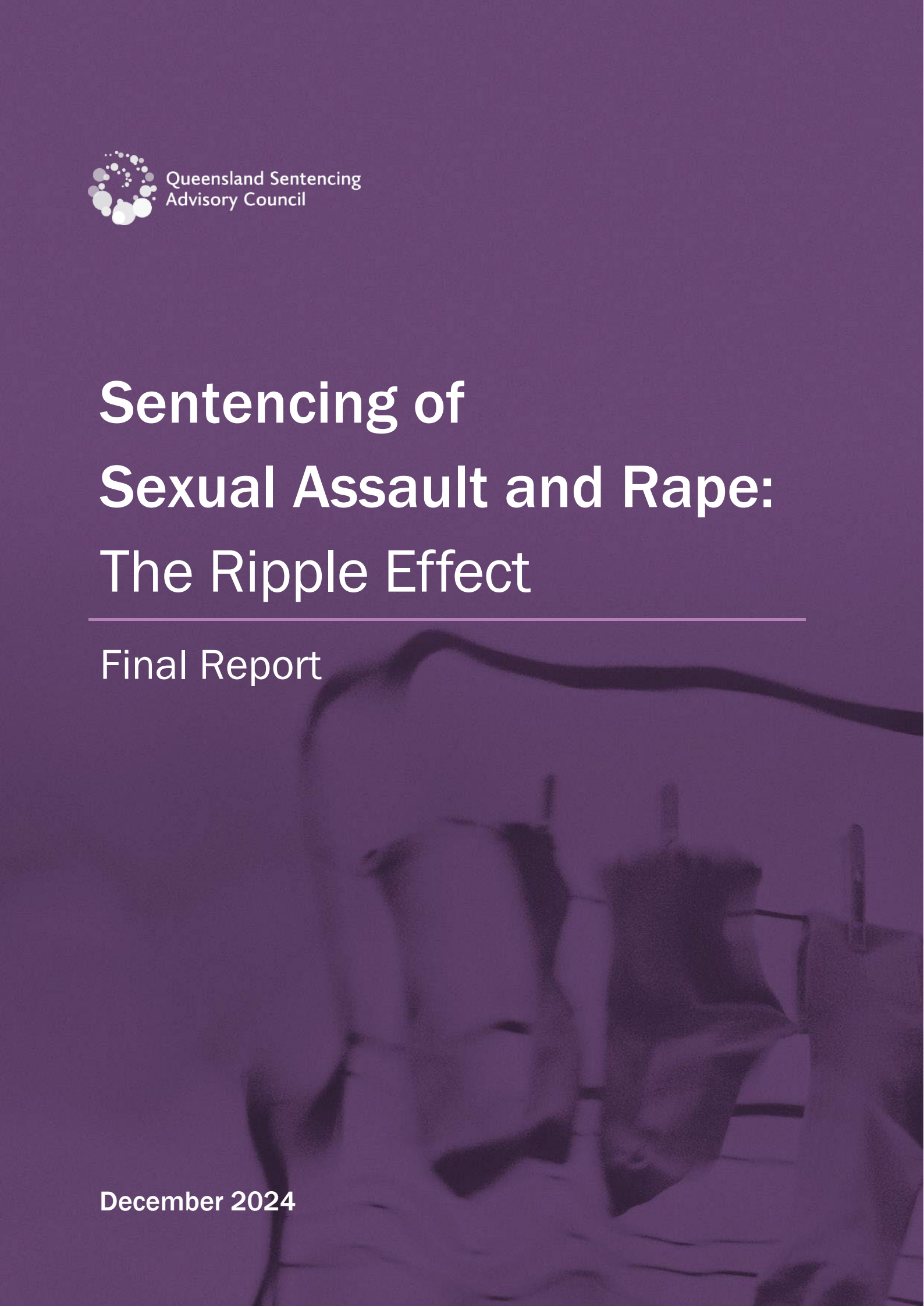
Queensland Sentencing Advisory Council

Sentencing of Sexual Assault and Rape: The Ripple Effect

Final Report



December 2024

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The Final Report is available for download from the Council's website: www.sentencingcouncil.qld.gov.au.

Paper title

The ripple effect refers to the way in which a single action or event can have far reaching consequences. For a victim survivor of sexual violence, the impacts of the offending can be long lasting and extend beyond the direct immediate impacts of the offence, affecting their relationships, family dynamics and social networks, as well as impacting the community and wider society.

Effective responses to sexual violence require a whole-of-community approach, not only legal reform but challenging harmful beliefs through education and awareness. In doing so, we can work towards minimising the ripple effect of sexual violence.

Review artwork

Socks are a seemingly harmless, personal everyday item. However, to a victim-survivor of sexual violence, they can represent a pathway to a memory of the traumatic event. This concept is referenced in the novel *Time Shelter* by Georgi Gospodinov, which talks of normal, everyday things being 'potentially charged with hidden violence'. Socks can be used in many different ways in sexual violence cases – to control or restrain a victim, to block access to door, or to avoid detection. Victims may be forced to leave the scene of a sexual assault without their socks, shoes and other items of clothing – making them feel exposed, vulnerable and stripped of their dignity.

Disclaimer

The content of this paper presents the views of the Queensland Sentencing Advisory Council and does not represent Queensland Government policy. While all reasonable care has been taken in the preparation of this paper, no responsibility or liability is assumed for any errors or omissions or any loss, damage, or injury, financial or otherwise, suffered by any person acting or relying on information contained in or omitted from this publication. This paper follows the Melbourne University Law Review Association Inc, *Australian Guide to Legal Citation* (4th ed., 2018) and reflects the law as at 1 December 2024.

The Queensland Sentencing Advisory Council

The Queensland Sentencing Advisory Council is established by section 198 of the *Penalties and Sentences Act 1992* (Qld). The Council provides independent research and advice, seeks public views and promotes community understanding of sentencing matters. The Council's functions are detailed in section 199 of the Act.

Further information

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Warning to readers

This report contains subject matter that may be distressing to readers. Material describing serious violent offences, including case examples drawn from sentencing remarks and subject-matter expert interviews, and descriptions of the impact these offences can have on victims are included in this report. If you need to talk to someone, support is available:

DV Connect (24 hours): 1800 811 811

Lifeline Australia (24 hours): 13 11 14

Mensline (9.00 am - midnight, 7 days): 1800 600 636

Queensland Sexual Assault Helpline (7.30am - 11.30 pm, 7 days): 1800 010 120

VictimConnect (24 hours): 1300 318 940

Queensland Sentencing Advisory Council
Inform. Engage. Advise.

In reply please quote: 608603/3; 7239406

16 December 2024

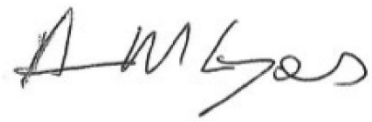
The Honourable Deb Frecklington MP
Attorney-General and Minister for Justice and
Minister for Integrity
1 William Street
BRISBANE QLD 4000

Dear Attorney-General

On 17 May 2023, the Queensland Sentencing Advisory Council received Terms of Reference to undertake a review of sentencing practices for sexual assault and rape offences in conjunction with a review of the aggravating factor for domestic and family violence offences.

I am pleased to provide you with the Council's final report on the first part of this reference on the sentencing of sexual assault and rape offences, *Sentencing of Sexual Assault and Rape: The Ripple Effect – Final Report*.

Yours sincerely



The Honourable Ann Lyons AM
Chair
Queensland Sentencing Advisory Council

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Statement on conflicts of interest: Any conflicts arising during Council reviews are managed in accordance with the Council's *Conflicts of Interest Policy*. More information is available on the Council's website.

Contents

Overview

PART A: Context of the review and Council approach

PART B: Offence seriousness and adequacy of outcomes

PART C: Sentencing principles, guidance and processes

PART D: Sentencing options and processes

PART E: Other considerations and enhancing the evidence base

PART F: Reference List

List of Figures

List of Tables

Preface

In 2022, the Women's Safety and Justice Taskforce delivered its second and final report to the Queensland Government following its landmark inquiry into women and girls' experiences across the Queensland criminal justice system.

The findings of the Taskforce were instrumental in the Council being asked to review current sentencing practices for sexual assault and rape and to advise whether these are adequate and appropriate and, if not, what reforms should be made. In conducting this review, we acknowledge that sexual offending affects people of all genders, ages, cultural and ethnic backgrounds, and sexual orientations.

While all references raise unique issues, this review has been particularly complex and challenging. It was limited to just two offences – sexual assault and rape – while covering a broad spectrum of issues, from sentencing levels and penalty types to legislative and non-legislative forms of sentencing guidance, and sentencing processes and procedures.

While challenging, we consider it a great privilege to have been given the opportunity through this review to assess how well current sentencing practices reflect the seriousness of these offences – and, more importantly, what can be improved for the benefit of victim survivors and the broader Queensland community.

Simply put, sexual offending often has significant, profound and devastating impacts on those who experience it. The impacts can be life-changing, and ripple out across families and the broader community.

For children, the impacts of sexual violence are compounded. The loss of a normal childhood and development represents a fundamental disruption to a child's life, including to their innate right to feel safe, their trust in others and their sense of bodily autonomy. This harm can be overcome, but it can never be repaired.

Sexual offending disproportionately impacts those members of our community who are particularly vulnerable or who experience disadvantage and discrimination when accessing justice processes, including women and children, people with disability, Aboriginal and Torres Strait Islander peoples, and people from other vulnerable and disadvantaged groups.

Sentencing comes at the end of an often long and protracted legal process. Only a small proportion of sexual offences are reported to police, with far fewer still resulting in prosecution, conviction and sentence. The New South Wales Bureau of Crime Statistics and Research has put the figure for successful prosecutions of reported sexual assaults in that state at as low as 7 per cent.[1]

1 Bridget Gilbert, 'Attrition of sexual assaults from the New South Wales criminal justice system' (Crime and Justice Statistics Bureau Brief No 170, NSW Bureau of Crime Statistics and Research, May 2024) 16.

In the context of high attrition rates, sentencing assumes great significance. This is because a central purpose of the criminal law and sentencing is 'to publicly denounce the unlawful conduct of an offender',[2] thereby reinforcing important societal values and standards which we are all expected to observe. The imposition of sentence is one of the clearest ways the criminal justice system communicates the wrongfulness of the person's actions on behalf of the broader community. It also shows the community what the consequences are for those who decide to engage in this form of criminal conduct.

Sentences that are viewed as 'inadequate' or 'weak' can compromise the criminal justice system's ability to communicate this important message. Of equal concern, they can impact victim survivors' willingness to report these offences and go through the criminal justice system process.

Improving public perceptions of the adequacy of sentences therefore plays a pivotal role in the development of a safe society for all Queenslanders.

At the heart of this reference was the question: Are sentences for rape and sexual assault in Queensland adequate and appropriate, and do they reflect the views of the community regarding the seriousness of these crimes?

In the case of rape, our answer is a resounding 'no'. There are two reasons for this.

First, sentences imposed for the rape of a child are not commensurate with the gravity of the harm, or the perpetrator's degree of criminal responsibility. While they are generally higher than for similar conduct against adult victims, they do not sufficiently reflect the views of the Queensland community that this offending is more serious than the rape of an adult. Sexual violence against children often has lifelong and profound impacts and involves inherent wrongfulness by the offender. The Queensland Court of Appeal has previously provided clear guidance that an uplift in sentences directed by Parliament in relation to substantial reforms regarding child sexual offences is required, and 'judges are under a duty to give them effect'. The Court has also recognised that current sentencing practices with respect to sexual offences can 'depart from past practices by reason of changes in understanding about the long-term harm done to victims'.[3] However, we found that this guidance is not adequately reflected in current sentencing practices, so legislative reform is required.

Second, the community, the legal profession and the courts recognise that any rape, no matter the type of penetration, can have significant impacts for all victim survivors, irrespective of age. It is a matter of principle that that the seriousness of the offences of rape and sexual assault must be determined based on the individual circumstances of the case, acknowledging the impact this offending has on a victim survivor. The Queensland Court of Appeal has provided clear guidance to legal practitioners and sentencing courts that different forms of rape conduct should not be 'compartmentalised' based on penetration type and treated 'worse' or 'more serious' based on this fact alone. This guidance, in our view, is not sufficiently reflected in current sentencing practices and must be applied.

For sexual assault, the assessment of whether sentences are adequate and appropriate was more complex, taking into account the fact that this offence captures a broad range of conduct.

2 *Ryan v The Queen* (2001) 206 CLR 267, 302 [118] (Kirby J).
3 *R v Stable (a pseudonym)* [2020] QCA 270, [45] citing *R v Kilic* (2016) 259 CLR 256, [21].

We have identified that there has been a shift in sentencing patterns in recent years – in particular, for cases sentenced in the Magistrates Courts, increasing use of custodial sentences. This suggests that courts are treating these offences as involving a more serious form of offending than may have been the case previously.

There is always potential for unwanted forms of sexual touching to be trivialised, and for those who experience this form of harm to be labelled as 'over-sensitive' and as 'overreacting' to 'fun' or 'harmless' behaviour, or because those who perpetrate the harm (usually men) are 'misreading the signals'. For women and girls, and other vulnerable people who are commonly targeted by this form of unwanted sexual behaviour, the experience is anything but 'fun' or 'harmless'. It can cause significant distress and trauma, and can compromise that person's feelings of safety.

Sexual assault sends a message to the person subjected to this form of unwanted sexual behaviour that they are not equal, but an 'object' to be used by (usually) men and they have no power to make decisions about their own bodies. Fundamentally, these offences involve a total disregard of the victim survivor's human dignity and bodily autonomy.

Problems with how seriously this form of conduct is viewed reflect broader societal problems that can only be addressed through a commitment by government, criminal justice stakeholders and the courts to embrace change and to collectively act in a way that adequately recognises the impacts of these offences on victim survivors at sentence.

We have recommended reforms that will reinforce the seriousness of this conduct and provide members of the judiciary with the appropriate options to impose sentences that meet community expectations, and that are adequate and appropriate in all the circumstances, having regard to the rights and justice needs of all parties – particularly victim survivors.

Opportunities for perpetrators to be better supervised within the community and to have access to programs and other forms of interventions were seen as of critical importance, recognising that victim survivors often told us that they want to feel safe, and to know that these offences will not happen to them, or to anyone else, in the future. The courts must have the mechanisms to impose orders which allow a person to be detained where necessary, to have certainty of release where appropriate and to be supervised regardless of what type of order is made.

There are also some aspects of the sentencing process that we consider in urgent need of reform with respect to the use of 'good character' evidence and to improve victim survivors' experiences.

It can be particularly galling to a victim survivor to hear at the time of sentence that the person who perpetrated sexual harm on them is otherwise a 'good guy', a 'great father' or a model employee or citizen. It is even more upsetting when these statements are referred to uncritically by the sentencing judge and magistrate – even if in practice they may be given little weight.

It is understandably difficult for victim survivors to reconcile how the person who raped or sexually assaulted them can, at the same time, be called a generally 'good' person. The more serious the offence, the less weight any suggestion an offence was 'out of character' and deserves some degree of mitigation.

Equally it is important that those who perpetrate this form of harm are encouraged to take responsibility for their actions and believe they have the capacity to change.

This issue goes beyond a mere use of language and general misunderstanding of the use of this evidence. It is about the importance of providing clear guidance on how this evidence should be, and is being, used, and articulating this in a way that is understood by all victim survivors and the broader community.

In this report, we recommend reforms that will limit the use of some types of 'good character' evidence for sexual offences at sentence and to allow it to be relied upon only for specific defined purposes.

We have also found opportunities to recognise that victim survivors, their rights and their justice needs within the sentence context are not being promoted and should be enhanced, including through improved communication, trauma-informed sentencing practices and enhanced recognition within the sentence hearing.

Significant issues were raised with the victim impact statement regime, which was concerning for the Council, as this process is intended, in great part, to be therapeutic; in practice, however, it can result in further trauma. The victim impact statement process must be improved to ensure victim survivors do not leave the legal process feeling silenced and sidelined, and that the value of victim impact statements within the sentencing context is supported.

Our review comes at a time of significant reform to the criminal justice system in response to the findings of the Women's Safety and Justice Taskforce and we acknowledge that significant work is underway in response to improve the experience for victim survivors. Our recommendations should be viewed in the context of these broader reforms.

We are grateful to the victim survivors and support advocates who shared their sentencing experiences and stories with us. Their experiences reminded the Council that every victim survivor of rape or sexual assault is a real person with their own individual experiences. The impact of these offences was not forgotten in the Council's deliberations, and we thank them for their contributions, recognising how challenging this might have been.

We further extend our gratitude to members of the community who independently contributed to the review, as well as members of the judiciary, the legal profession and relevant justice agencies who participated in interviews with us or attended consultation events and shared their views. The information they provided was critical to our understanding of the issues as they arise in practice.

We would also like to recognise the continued invaluable expertise contributed to our work by members of our Aboriginal and Torres Strait Islander Advisory Panel, who informed our consideration of the criminal justice experiences of Aboriginal and Torres Strait Islander peoples. It is critical that our system is responsive to the needs of all Queenslanders and takes into account the disproportionate impacts our justice system has on some parts of our community. Importantly, Panel members told us that sexual violence has no place in Aboriginal and Torres Strait Islander culture and the barriers to victim survivors reporting this violence, which is perpetrated by both non-Indigenous and Indigenous people, are significant. Any impediments to creating a more culturally responsive and safe criminal justice system must be removed as a matter of priority.

Finally, we express our gratitude to the Council members who contributed to this review (including our former members), and to a shared vision of improved sentencing for rape and sexual assault offences in Queensland. We would like to particularly thank Julie Dick, SC, Matt Jackson, Jo Bryant and Debbie Kilroy OAM who, alongside us, have formed the project board for this review, and who have contributed tirelessly to its delivery.

Sentencing is also a complicated process. But we must embrace opportunities to listen to those who have participated in the system as victim survivors, legal and justice stakeholders and members of the community when they tell us there is a case for change, and to be bold in recommending reforms.

We appreciate that significant change will require resourcing to support enhanced communication and recognition of victim survivors. But we know that sentencing for rape and sexual assault offences can be better.

Together, we can make it so.

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The Honourable Ann Lyons AM

Chair

Queensland Sentencing Advisory Council

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Professor Elena Marchetti

Deputy Chair

Queensland Sentencing Advisory Council

Executive Summary

Introduction

In May 2023, the Sentencing Advisory Council received Terms of Reference to undertake a review of sentencing for sexual assault and rape offences in conjunction with a separate review of the aggravating factor for domestic and family violence offences.

This report presents the Council's findings and recommendations on the first part of its review of sentencing practices for sexual assault and rape offences.

In asking the Council to undertake this review, the Attorney-General referred to:

- amendments to the *Penalties and Sentences Act 1992* ('PSA') making domestic and family violence an aggravating factor at sentence;[4]
- the reports of the Women's Safety and Justice Taskforce[5] and the Special Taskforce on Domestic and Family Violence;[6]
- the maximum penalties for sexual assault and rape offences;
- commentary expressing that penalties currently imposed on sentences for sexual assault and rape offences may not always meet the Queensland community's expectations;
- Queensland community expectations that penalties imposed on offenders convicted of sexual assault and rape offences appropriately reflect the nature and seriousness of sexual violence;
- the need to protect victims from sexual violence;
- the need to hold sexual violence offenders to account;
- the sentencing principles and purposes of sentencing as outlined in the PSA;
- the need to maintain judicial discretion to impose a just and appropriate sentence in individual cases; and
- the need to promote public confidence in the criminal justice system.[7]

The Council's approach to this review

The Council conducted extensive research and consulted widely with legal and non-legal stakeholders, including sexual violence victim survivors and victim survivor support and advocacy organisations.

The Council undertook the review in 4 key stages.

4 The Terms of Reference contain a second, separate part to examine the operation of the aggravating factor in section 9(10A) of the *Penalties and Sentences Act 1992* (Qld) ('PSA') and the impact of the increase in maximum penalties for the contravention of a domestic violence order. Part 2 will be delivered to the Attorney-General by 30 December 2025.

5 Women's Safety Justice Taskforce, *Hear Her Voice, Report One: Addressing Coercive Control and Domestic and Family Violence in Queensland* (2021); Women's Safety Justice Taskforce, *Hear Her Voice – Report Two: Women and Girls' Experiences Across the Criminal Justice System* (2022) (*'Hear Her Voice – Report Two'*).

6 Special Taskforce on Domestic and Family Violence in Queensland, *Not Now, Not Ever: Putting an End to Domestic and Family Violence in Queensland* (Report, February 2015).

7 Appendix 1, Terms of Reference.

The initial stage (May to July 2023) of the review called for preliminary feedback to help inform the Council's approach. We commissioned a literature review of sentencing practices for sexual assault and rape offences. We also published a background paper on the Terms of Reference and an information sheet on sentencing for sexual assault and rape offences.

Stage 2 (May to October 2023) focused on preliminary research and overlapped with the initial phase. During this stage, the Council commissioned the Sexual Violence Research and Prevention Unit at the University of the Sunshine Coast ('UniSC') to undertake research on the views of the community on the importance of sentencing purposes and the seriousness of sexual assault and rape offences. The Council released a *Sentencing Spotlight on Sexual Assault*, an updated *Sentencing Spotlight on Rape* and the 28 preliminary submissions received.[8] We also commenced our preliminary legal research and analysis, began quantitative analysis of sentencing data, and scoped and developed research projects for the review, including a subject-matter expert interview ('SME') project with legal practitioners and judicial officers to better understand the current approach to sentencing for sexual assault and rape offence and related matters.

During Stage 3 (October 2023 to April 2024), the Council completed stakeholder consultation activities, including interviews with SMEs, meetings with victim survivors and holding 2 in-person and 2 online consultation events.

In March 2024, we released a consultation paper, *Sentencing of Sexual Assault and Rape: The Ripple Effect - Consultation Paper: Issues and Questions*, together with a more detailed background paper.[9] The Council invited written submissions in response to 25 questions. The Council also published the literature review[10] and the *Working Paper on the Development of the Queensland Crime Harm Index* prepared by the Griffith University Criminology Institute.[11]

During Stage 4 (April to December 2024), the Council finalised its consultation activities and developed its key findings and recommendations, which are presented in this report. We received 35 submissions in response to our Consultation Paper.[12] We sought input from the Aboriginal and Torres Strait Islander Advisory Panel and legal stakeholders on particular options we were considering. We received UniSC's final report on *Community Views on Rape and Sexual Assault Sentencing*.

The publication of this report, *Sentencing of Sexual Assault and Rape: The Ripple Effect - Final Report, marks the conclusion of the final stage of the review*.

The Council's approach to assessing adequacy and appropriateness

The Terms of Reference required the Council to 'review sentencing practices' for sexual assault and rape and to advise whether penalties currently imposed adequately reflect community views about the seriousness of this form of offending.[13]

8 A copy of these preliminary submissions was published on our website on 13 September 2023. Preliminary submissions were made in relation to both parts of the Terms of Reference.
9 Queensland Sentencing Advisory Council, *Sentencing of Sexual Assault and Rape: The Ripple Effect - Consultation Paper: Issues and Questions* (March 2024); Queensland Sentencing Advisory Council, *Sentencing of Sexual Assault and Rape: The Ripple Effect - Consultation Paper: Background* (March 2024).
10 Lacey Schaefer et al, *Sentencing Practices for Sexual Assault and Rape Offences* (Griffith University for Queensland Sentencing Advisory Council, Final Report, February 2024).
11 Janet Ransley and Kristina Murphy, *Working Paper on the Development of the Queensland Crime Harm Index* (March 2024).
12 These are available to read on the Council's website, with the exception of confidential and anonymous submissions.
13 Appendix 1, Terms of Reference.

The Council developed a set of measures against which to assess adequacy and appropriateness of current sentencing practices for sexual assault offences and rape. We adopted a mixed-methods approach, considering both qualitative and quantitative evidence.

1. Evidence of misalignment between current sentencing practices and community and stakeholder views:
    - Evidence from informed and structured consultation of community views on sentencing/seriousness of sexual assault and rape offences;
    - Evidence of Parliament's views on the seriousness of sexual assault and rape;
    - Evidence of alignment between sentencing outcomes and the community's and Parliament's views of offence seriousness;
    - Evidence of alignment between sentencing outcomes and the purposes of sentencing;
    - Evidence of Court of Appeal and/or District Court appeal decisions[14] statements or questioning of whether current sentencing levels, outcomes or guidance for sexual assault and/or rape are adequate and whether practices change following statements or questioning;
    - Evidence of sentencing outcomes for sexual assault and rape offences compared with other offence types of similar assessed levels of seriousness.
2. Evidence of inconsistencies or problems with the current approach to sentencing:
    - Evidence of the weight given to aggravating and mitigating factors;
    - Evidence of the categorisation of the objective seriousness of sexual assault and rape offences;
    - Evidence of the treatment of victim survivors of sexual assault and rape in the sentencing process;
    - Evidence of adequacy of information to inform sentencing of sexual assault and rape offences;
    - Evidence of the impact of systemic disadvantage on Aboriginal and Torres Strait Islander peoples, and human rights considerations pursuant to the *Human Rights Act 2019* (Qld).
3. Evidence of inconsistency of approach with other jurisdictions:
    - Evidence of the approach taken in other jurisdictions to sentencing for sexual assault and rape.

Sentencing of rape: key data findings

Over the 18-year data period (July 2005 to June 2023), 1,817 cases involving a rape offence as the most serious offence (MSO) sentenced were sentenced in the higher courts.

Almost all rape (MSO) cases sentenced resulted in a custodial penalty (98.7%). The median imprisonment sentence length was 6.5 years. The median custodial sentence length (including all forms of custodial

14 *Justices Act 1886* (Qld) s 222.

orders, not just imprisonment) has been stable over time, ranging between 5 and 6 years over the 18-year data period.[15]

Over one-third of sentenced rape (MSO) cases were also domestic violence offences (35.5%). For rape offences sentenced as a domestic violence offence, imprisonment, rather than a partly suspended sentence of imprisonment, was more likely, and the median custodial sentence length was also longer.

The total share of custodial sentences that were partially suspended prison sentences increased over time at the same time as sentences of imprisonment decreased. In the most recent 3-year period examined (July 2020 to June 2023), imprisonment sentences represented just under two-thirds of all penalties imposed for rape (64.7%), while just under one-third of cases resulted in a partially suspended prison sentence (30.7%).

We present detailed data findings on sentencing of rape in Appendix 4 of our report.

Sentencing of sexual assault: key data findings

Over the 18-year data period (July 2005 to June 2023), 1,904 cases involving a sexual assault offence as the MSO were sentenced in the higher and lower courts.

Almost all sexual assaults (MSO) sentenced are non-aggravated offences, which have a 10-year maximum penalty (95.4%, n=1,816). Just over half of these were sentenced in the Magistrates Courts (53.1%).

All cases involving circumstances of aggravation (14-year and life maximum penalties) were sentenced in the higher courts (n=88).

Magistrates Courts outcomes (non-aggravated sexual assault)

In the Magistrates Courts, wholly suspended prison sentences were the most common penalty type, being ordered in just over one-quarter of all cases with a median sentence length of 6 months (25.2%). Approximately 15 per cent of penalties in the Magistrates Courts were sentences of imprisonment (15.4%), with a median sentence length of 9 months. The use of imprisonment and wholly suspended prison sentences increased over the 18-year period, while the use of monetary penalties decreased.

Higher court outcomes

Just under half of non-aggravated sexual assault cases were sentenced in the higher courts (46.0%, n=852). Over one-third of cases of non-aggravated sexual assault (MSO) sentenced in the higher courts resulted in a wholly suspended prison sentence being imposed (37.4%). The median sentence length was 9 months.

The use of wholly suspended prison sentences for non-aggravated sexual assault in the higher courts has increased over time, while the use of imprisonment has decreased. However, there has been little change in proportion of sentences that are custodial, representing about 80 per cent of all penalties imposed over the 18-year data period, or the median or average custodial sentence length.

All cases involving circumstances of aggravation (14-year and life maximum penalties) were sentenced in the higher courts. Almost all aggravated sexual assaults received a custodial penalty: 95.1 per cent of sexual assault (aggravated) and 96.3 per cent of sexual assault (aggravated life) cases. The most

15 This calculation excluded life sentences.

common penalties were partially suspended prison sentences and imprisonment. The median imprisonment sentence for sexual assault (aggravated life) was 3.0 years.

Domestic violence offences and co-sentenced order types

Very few sexual assaults (MSO) were committed in a domestic and family violence context (7.2%). Aggravated sexual assault offences were slightly more likely to be domestic violence offences.

Over half of all sexual assault cases (MSO, sentenced across all court levels) with a custodial penalty were sentenced for another offence at the same hearing (55.2%). In those cases, the person was more likely to receive a longer head sentence for the sexual assault offence (MSO).

It was more common to combine a suspended prison sentence with a probation order for additional sexual assault and other sexual offences, compared with other offence types.

We present detailed data findings on sentencing of sexual assault in Appendix 4 of this report.

The case for reform

The review identified a number of issues impacting the adequacy and appropriateness of sentences for sexual assault and rape offences in Queensland. Based on the evidence gathered, the Council concluded that there is a problem with sentencing outcomes across both offences.

We have made recommendations in response to the issues we found. Ultimately, the recommendations aim to ensure that:

- penalties imposed for sexual assault and rape adequately reflect community views about the seriousness of this form of offending and sentencing purposes, including just punishment, denunciation and community protection;
- the sentencing purposes and principles set out in the PSA provide a proper framework for the sentencing of sexual assault and rape offences; and
- the penalty and sentencing framework supports sentences being imposed for this form of offending that enable the person sentenced to have access to supervision, programs and treatment interventions, and allow Queensland Corrective Services to respond better than they can under the current orders available to issues of escalating risk.

Penalties imposed for rape are not adequate, particularly when the victim survivor is a child

We examined all rape (MSO) matters sentenced between July 2020 to June 2023 in more detail and found that sentencing outcomes varied considerably by type of penetrative conduct, as well as by victim age. The Council's analysis showed penile–vaginal and penile–anal rapes are commonly treated as more serious than acts of digital and oral rape.[16] This finding is supported by an analysis of sentencing submissions, stakeholder submissions and feedback received in SME interviews.

16 'Oral rape' was defined for the purposes of this analysis as including forced penile–mouth penetration and lingual–vaginal and lingual–anal rape.

Our analysis found sentencing outcomes generally 'cluster' at different levels based on the type of penetration – digital–vaginal rape of an adult or a child both had medians of 3.0 years, while penile–vaginal rapes had a median of 6.0 years for adult victim survivors and 7.0 years for child victim survivors.

Considering this evidence alongside other evidence gathered, the Council concluded that penalties imposed for the offence of rape do not reflect the objective seriousness of this form of offending and support important sentencing purposes, particularly with respect to offences against children. There are several main reasons for this:

- Courts place too much emphasis on the type of penetrative conduct when assessing offence seriousness rather than on issues of harm and perpetrator culpability. This is contrary to Court of Appeal guidance, which cautions against the 'compartmentalisation' of offending based on penetration type.[17]
- Sentencing practices for rape of a child do not adequately reflect community views of offence seriousness. The majority of participants in the UniSC's focus group research ranked the digital–vaginal rape of a child as being more serious than any of the adult rape scenarios presented based on the potential for significant and serious immediate and long-term harm regardless of penetration type. This included offences against adults involving penile-vaginal rape and penile-anal rape. The median sentence for the digital–vaginal rape of a child based on our analysis of sentencing outcomes over a 3-year period was 3.0 years (the same as for an adult victim) compared with 6.0 years for the penile–vaginal rape of an adult. This suggests current sentencing levels are inadequate.
- The increasing use of partially suspended prison sentences and the inability to combine a suspended prison sentence with probation or another form of community-based order when sentencing a person for a single offence mean a court has no ability to attach supervision, treatment and program conditions where the rape offence is the only offence sentenced. This may reduce the ability of the orders made to support the sentencing purposes of rehabilitation and community protection.
- There are limited opportunities for program engagement and completion prior to release or eligibility for release from custody due to the extended periods many people spend in pre-sentence custody and issues regarding accessing programs while on remand.

There are problems with sentencing practices for sexual assault offences

We also found evidence that sentencing outcomes for sexual assault offences do not reflect the seriousness of this offending.

We received significant feedback from victim survivors and the services that support them, indicating that the seriousness of this offending is not being reflected in the sentences imposed and that sentencing levels should increase.

17 See, for example, *R v Wallace* [2023] QCA 22, [13] (Bowskill CJ); [44]–[45] (Dalton J); and *R v RBG* [2022] QCA 143, [4] (Dalton JA); *R v Smith* [2020] QCA 23, [37] (Morrison JA, Holmes CJ and McMurdo JA agreeing).

Based on the evidence gathered and the Council's analysis, we have found there are problems with sentencing levels and penalty types for sexual assault due to:

- the objective seriousness of some forms of offending, including the nature of the offending and the harm caused being poorly understood;
- the current structure of the offence of sexual assault, including:
    - the breadth of conduct captured ranges significantly in terms of both seriousness and the type of acts captured;
    - the treatment of non-consensual fellatio performed by a perpetrator on a male victim as aggravated sexual assault, which has a 14-year maximum penalty, compared with penile-oral rape, which carries a maximum penalty of life imprisonment; this might be viewed as anomalous based on the approach in other jurisdictions; and
    - inconsistencies between the structuring of acts involving self-penetration or being forced to penetrate another person in Queensland and the approach in several jurisdictions, which makes this a separate offence;
- for offences of rape, the need to ensure that sexual assaults against children are treated more seriously than offences against adults and for this to be reflected in sentencing outcomes; and
- the significant use of suspended prison sentences that do not involve supervision, program and treatment conditions, as well as short prison sentences and fines, which may not be appropriate given the nature of this offending and the significant infringement of the rights of victim survivors.

The majority of community members who participated in the UniSC focus group research ranked the case example of non-aggravated sexual assault of an employee by their employer[18] as more serious than burglary (at night, no harm caused to the occupants), despite Queensland courts being more likely to impose a custodial sentence for burglary and median sentences for burglary being longer.

Legislative sentencing guidance is not adequate for sentencing sexual violence offences

The Terms of Reference also asked us to consider whether any legislative or other changes are required to ensure the imposition of appropriate sentences.

The Council identified several issues with current legislative guidance for sexual assault and rape, which may result in sentencing practices that are not adequate or appropriate.

The increased seriousness of sexual assault and rape offences committed against children needs to be recognised

Section 9 of the PSA recognises the increased vulnerability of children and the need for different sentencing principles and factors to apply. This includes a requirement under section 9(6) for a court, in sentencing a person for an offence of a sexual nature committed in relation to a child under 16 years, to have primary regard to factors, including:

- the effect of the offence on the child;
- the age of the child;

18 The sexual assault was described as an offence involving an employer touching an employee's breasts over the top of her clothing without her consent.

- the nature of the offence – including, for example, any physical harm or the threat of physical harm to the child; and
- any relationship between the offender and the child.

Despite the existence of this form of guidance, the increased level of harm inherent in this form of offending and the higher culpability of those who commit these offences are not being sufficiently reflected in the sentences imposed. This suggests a need for legislative reform.

The purposes of sentencing do not expressly recognise the harm caused to victim survivors

Victim survivors and the services that support them were strongly of the view that the harm caused by sexual assault and rape is not being adequately recognised and reflected in the sentences imposed for sexual assault and rape offences.

Section 9(2)(c) of the PSA requires a court to consider any harm done to a victim in sentencing for any offence, including for sexual assault and rape. Courts must also have primary regard to certain factors in sentencing a person for an offence involving the use of violence and when sentencing a person for an offence of a sexual nature committed against a child under 16 years, including the effect on, and personal circumstances of, the victim.[19]

While the current factors listed in section 9 encourage consideration of victim harm, the recognition of the harm caused to a victim is not identified among the purposes for which a sentence may be imposed in section 9(1). The Queensland position contrasts with many other jurisdictions, including the Australian Capital Territory, New South Wales, South Australia, Canada and New Zealand, where the harm caused to any victim and promotion of perpetrator accountability form an integral part of the purposes for which a sentence may be imposed.[20]

Section 9 of the PSA is lengthy, complex and applied inconsistently

As the primary source of sentencing guidance, section 9 of the PSA has been a convenient focus of law reform since it was first introduced in 1992. Over the past 32 years, the sentencing factors in this section have been amended, created, repealed or reintroduced on 29 separate occasions.

The frequency of amendments and volume of changes can make the law difficult to navigate and understand. This can create an unnecessary burden on the criminal justice system, impacting efficiency by causing delays or unnecessary appeals, and undermining public confidence.

Legal stakeholders told us that the length and complexity of section 9 is becoming increasingly problematic, and that any additional reforms would further complicate an already unwieldy section.

The Council identified the following problems with section 9:

- inconsistencies and anomalies in the way certain provisions are applied;
- the focus of the factors listed in section 9(3) on considerations that are most relevant to the sentencing of non-sexual forms of physical violence rather than to sentencing sexual violence offences; and
- the overall length and number of principles and factors listed in the various subsections.

19 See PSA (n 4) ss 9(3), (6).
20 For a summary of these provisions, see Appendix 14.

These issues undermine two important overarching purposes of the Act, which are to promote consistency of approach in the sentencing of offenders and to promote public understanding of sentencing practices and procedures.[21]

Certain types of 'good character' evidence are problematic

The use of 'good character' evidence is contentious and divisive, attracting the most submissions to this review from victim survivor support and advocacy organisations calling for reform.

Many victim survivors and advocacy and support organisations are strongly opposed to the use of 'good character' evidence for sexual offences, calling for its restriction or abolition in sentencing sexual violence. In contrast, some legal stakeholders did not advocate for any changes, given that there is already a provision preventing the use of 'good character' for offences of a sexual nature committed against a child under 16 years if 'good character' was of assistance in the commission of the offence.[22] They reiterated to the Council that evidence of 'good character' is already given little weight based on the circumstances of the case, that it is important to maintain judicial discretion and that the sentencing courts should be able to recognise the lack of a prior criminal history.

The Council was told by victim survivor and advocacy groups' stakeholders that character references can be deeply distressing and retraumatising for victim survivors and undermine the sentencing purposes of denunciation. This stakeholder cohort was concerned that these references are accepted – seemingly without question – and appear to be given mitigating weight, despite the very serious nature of the offending involved.

The Council's analysis suggests problematic types of 'good character' evidence are:

- evidence in the form of a **character reference** that often contain subjective and a non-professional opinions about a sentenced person's personality traits;
- evidence of a person's **standing in the community**; and
- evidence of **contributions to the community**.

From a review of sentencing remarks of 131 rape (MSO) cases sentenced from July 2022 to June 2023 in the District Court, we found the following:

- 'Good character' evidence was referred to in 91.6 per cent of cases.
- A character reference was used in over one-third of cases (35.9%) and was most commonly provided by a family member.
- 'Good character' appeared to be given 'a lot of weight' in over a quarter of cases (28.2%).
- The most commonly mentioned type of 'good character' evidence was having good employment prospects, and this was considered mitigating in one-fifth of cases (21.3%).
- The 'good character' evidence most commonly treated as mitigating was behaviour described as being 'out of character', followed by 'of otherwise good character'.

21 PSA (n 4) ss 3(d), (h).
22 Ibid s 9(6A). See also s 9(7AA).

The Council's review of sentencing remarks suggests that evidence of 'good character' is commonly referred to and, where it is mitigating, appears to be used by the court to determine the person's prospects of rehabilitation and risk of reoffending.

Evidence of 'good character' can have a legitimate role in the sentencing process; however, we observed numerous examples of problematic language being used, particularly when referring to character references. The use of character references and the language used in the context of sentencing for sexual assault and rape offences can be jarring, given the nature and seriousness of this offending. Describing a perpetrator as a 'good bloke' or as being a 'loving and kind father and friend' can be deeply distressing and retraumatising for victim survivors, particularly when said immediately following a description of the offending.

Sentencing options for sexual assault and rape are limited and contribute to inadequate sentences

An important principle that guided the review was that sentencing outcomes for sexual assault and rape offences should reflect the seriousness of these offences, including their impact on victims, while not resulting in unjust outcomes. We also recognise the importance of people serving a sentence in the community for a sexual offence having access to appropriate supervision.

Currently, there is a lack of flexibility in the mix and range of penalty options that negatively impacts the ability of sentences to meet these objectives.

Based on analysis of sentencing remarks, case law, stakeholder feedback and our SME interviews, the Council found evidence of the following problems:

- The exclusion of court ordered parole for sexual offences is contributing to the high use of suspended prison sentences for sexual assault and rape.
- Victim survivors are dissatisfied with the non-parole period that perpetrators are being ordered to serve before being eligible for parole.
- There are limited opportunities in custody for sex offender program engagement and completion prior to release or eligibility for release from custody.
- Current community-based orders lack flexibility and are limited in their ability to be tailored to individual circumstances.
- Some types of sentencing orders may not appropriately or adequately reflect the nature of the person's offending and its seriousness – for example, a fine may not reflect the nature of the infringement of human rights that sexual assault involves.

If implemented, many of the Council's previous recommendations made in our 2019 report on community-based sentencing orders, imprisonment and parole options[23] would address our concerns regarding the current lack of flexibility in sentencing and parole options and the impact this has on court sentencing practices. We remain of the view that expanding the range of penalty and parole options will lead to better tailored and appropriate sentencing outcomes consistent with principles of individualised justice.

23 Queensland Sentencing Advisory Council, *Community-based Sentencing Orders, Imprisonment and Parole Options: Final Report* (2019).

Sentencing guidance is outdated and accessibility to relevant information should be improved

The Council found during this review that there is a need for non-legislative forms of sentencing guidance, including sentencing information systems, benchbooks and case summaries, to be updated and other resources to be developed and made available to legal practitioners and judicial officers in support of improved sentencing practices.

Illustrative of the need for these resources, the Council reviewed a selection of sentencing submissions for rape offences and found a tendency by prosecutors and defence practitioners to rely on comparative cases involving the same type of rape conduct rather than focusing on other factors relevant to the assessment of offence seriousness. This suggests that prosecutors and sentencing courts are not aware of relevant Court of Appeal guidance and how they should be applied.

Some subject matter experts interviewed also raised concerns about a continued 'heavy reliance upon older cases that have a tendency to have much less serious penalties'.[24] This was substantiated by our review of a sample of sentencing submissions and remarks that found many of the case comparators relied on were dated and may not reflect contemporary sentencing practices or current community views of offence seriousness. A lack of relevant sentencing information and resources may be contributing to this.

Information provided to courts to inform sentencing decisions may be insufficient

The Council examined three specific aspects of the information provided to courts to inform sentencing: the role of professional medical, psychological and other professional reports; the use of pre-sentence reports ('PSR') and advice provided by Queensland Corrective Services officers; and the use of cultural reports and submissions.

The following are some of the problems identified by the Council:

- The availability of those with professional expertise regarding the drivers and impacts of sexual offending, including forensic psychiatrists and psychologists, is limited and there is currently insufficient funding and capacity to support the provision of expert psychiatric and psychological reports for all sentences.
- Preparing expert reports often causes delays, resulting in defendants spending a longer period of time on remand and matters taking longer, which means extended periods for victim survivors to get justice.
- PSRs prepared by Queensland Corrective Services are not often requested or made available, and may not address all important issues at sentence, including issues of risk and potential treatment options.
- Information provided by community justice groups (CJGs) (including cultural reports) is not routinely available in sexual violence matters and usually only at the Magistrates Courts level. The availability of this same type of information for people from other culturally and racially marginalised backgrounds is similarly limited.
- Judicial officers may not be provided with sufficient information to understand how the offending has impacted victim survivors, as the long-term impacts are often unknown at the time of

24 SME Interview 15.

sentence, few victim survivors have access to expert reports to document the harm or injury caused to them and/or they may not want the offending person to be aware of how the offending has impacted them by including this information in a victim impact statement.

- Risk-assessment tools may not be suitable for the Australian context or for assessing female or Aboriginal and Torres Strait Islander peoples.

The lack of information prior to sentence may limit the ability to ensure that the sentence, as structured, appropriately targets factors that might be important to reduce reoffending risks.

Many of these problems are exacerbated for Aboriginal and Torres Strait Islander peoples due to the impacts of systemic disadvantage and cultural issues, which may limit the ability of prosecutors and defence practitioners to put relevant information before the court.

Victim survivors want better communication in relation to sentencing

There is increasing recognition of the importance of the criminal justice system being trauma-informed and operating in a way that does not cause further harm to participants.

The criminal justice system can operate in a way that is not trauma-informed and does not meet the justice needs of victim survivors, impacting their recovery and resulting in re-traumatisation.

From a victim survivor perspective, we were told that there is a widespread lack of confidence in the criminal justice process, including with respect to the investigation and prosecution decision-making process and sentencing outcomes; this contributes to high attrition rates in proceedings for these offences.

Victim survivors, victim survivor support organisations and advocacy services, and some legal stakeholders shared concerns that the current system does not protect victim survivors, adequately hold perpetrators to account or meet community expectations. This is concerning, as victim survivors' experiences have the potential to undermine their confidence that the criminal justice system as a whole can reliably deliver justice for Queensland.

Under the Charter of Victims' Rights, victim survivors must be kept informed of the progress of the criminal prosecution of the offender and be treated with respect, courtesy, compassion and dignity throughout the criminal sentencing process. However, despite these agency obligations, we have found that many victim survivors of sexual assault and rape remain dissatisfied with the sufficiency of information provided to them about the sentencing process and outcomes.

Victim survivors and victim survivor support advocates reported dissatisfaction with the information they received both before and after sentencing. This included information about how mitigating factors relating to the person being sentenced may be relied on, the courtroom layout and the likely sentence outcome, and explanations of the actual sentencing outcome and its implications. Within this context, we were told that victim survivors should be provided with a copy of the sentencing transcript as a matter of course to enhance their understanding of the outcome, as well as increasing post-sentencing conference opportunities.

The circumstances in which this information is provided and how it is conveyed were equally important to victim survivors. Currently, there is a strong impost on victim survivors to source this information themselves, or to 'opt in' to receiving it, which is not reflective of trauma-informed practice.

These issues are compounded when a victim survivor is a child, a person with disability or an Aboriginal and Torres Strait Islander person, or is otherwise vulnerable or disadvantaged.

Victim survivors want to be better supported in relation to sentencing

Support services in Queensland are fragmented. While there are multiple agencies that can, and do, provide support for victim survivors, there is a fundamental lack of understanding across victim survivors, support advocates and legal practitioners regarding agency roles and responsibilities. This can lead to challenges for victim survivors seeking to navigate these support services.

There are also challenges with the delivery of existing services, including limited resourcing and accessibility. Victim survivors who live in rural, regional or remote areas experience a lack of support hubs, and travel arrangements impose additional practical and financial barriers to attending sentencing proceedings.

Ensuring clear information about support agencies and their respective roles and responsibilities, as well as the provision of consistent support throughout the entire criminal justice process, is critical to the sentencing experience of all victim survivors, but also particularly for those who experience intersecting forms of disadvantage, which may impact their justice needs.

Problems with the victim impact statement regime and recognition of victim harm at sentence

The victim impact statement regime ('VIS') can serve two important functions within the sentencing context. First, it provides the sentencing court with direct information from a victim survivor about the harm they have suffered as a consequence of the offending, to be considered when assessing its impact. Second, it can have a therapeutic benefit for a victim survivor by providing them with an opportunity to tell the court, in their own words, about the impact of the offending on them. However, interviews with victim survivors, support advocates and legal professionals (including prosecutors, defence lawyers, magistrates and judges) revealed clear problems with the operation of this regime in Queensland.

Some of the issues we have identified include:

- a lack of clarity about the purpose of providing a VIS, including whether it is predominantly intended to serve an instrumental or expressive purpose, with corresponding implications for how it should be relied upon within the sentence hearing (including with respect to its intended impact on the sentence outcome);
- disappointment and frustration with procedural rules, which can restrict the victim survivor's voice in their VIS, such as with respect to the form, admissible content, redaction and timeframes for providing a VIS;
- confusion regarding which support services provide this support service, with potential consequences for the experiences of victim survivors who want to be supported through this process;
- limited resources to assist victim survivors (and support advocates) to understand how to prepare a VIS, including how it should be structured, what the process involves, what it will be used for (the purpose) and when they should provide it to the prosecution service;

- concerns that, if a VIS is not provided, the harm caused to a victim survivor will not be properly considered in assessing the impact of the offending, and that the sentence will therefore not be as significant as if a VIS had been provided.

Despite the opportunity to provide a VIS, victim survivors and support advocates told us that victim survivors feel sidelined in sentencing proceedings, and believe the impact of the offending on them is not heard or properly understood by the court, thereby diminishing their satisfaction with the sentencing outcome. For example, the mother of one victim survivor with whom we met told us that although they had submitted a VIS, the judge 'barely read it. And he just didn't care.'[25]

A VIS is necessarily limited as it is a point-in-time statement. For this reason, it cannot fully convey the harm – or future harm – that may be experienced by the victim survivor. This challenge is exacerbated for victim survivors who are children, or who are particularly vulnerable.

Some of our subject matter expert interview participants agreed that there is not sufficient focus on the victim survivor and acknowledgement of their experience within the sentencing process.[26] They also recognised that victim survivors might be frustrated if they attend a sentence and hear 'ad nauseam about the offender's background and antecedents', but do not see their experience and harm being called out or properly recognised.[27]

Queensland sentencing data is limited, making research, monitoring and evaluation of sexual assault and rape sentencing difficult

In undertaking our review, the Council identified that there are significant limitations associated with the quality and quantity of criminal justice data and information relevant to sentencing of sexual violence offences.

The nature of the information captured by administrative systems is for operational, rather than research, purposes. The accuracy of the available information reflects how administrative information is structured, entered, maintained and extracted. As a result, it is difficult for the Council to understand:

- case progression and attrition;
- offender and offence characteristics;
- victim survivor characteristics (e.g. identifying child victim survivors); and
- reasons for decisions.

The Council found that there is also a lack of integration between relevant justice administrative data systems, which limits the ability to undertake assessments without significant time and resources being invested. These challenges were particularly noted in relation to both administrative data and sentencing transcripts.

25 Victim survivor interview 1 – parent of victim survivor.
26 SME Interviews 15, 17.
27 SME Interview 17.

The Council's recommendations to reform sentencing for sexual assault and rape offences

On the basis of the issues identified above, the Council recommends a range of reforms to improve sentencing practices for sexual assault and rape, and to enhance victim survivor experiences of the sentencing process.

New aggravating factor for offences against children under 18 years

To increase sentences for sexual assault and rape offences committed against children, we recommend that a new aggravating factor for offences against children under 18 years should be introduced to section 9 of the PSA (**Recommendation 1**). We consider that this the best way to explicitly acknowledge that a victim under 18 years is more vulnerable, and the perpetrator more culpable, is to require a court to treat as aggravating the fact that an offence of rape or sexual assault was committed in relation to a child.

This will simultaneously achieve multiple objectives by:

- giving symbolic recognition to the higher level of objective seriousness of sexual violence offences committed against children;
- providing a statutory basis for courts to uplift sentencing levels for sexual assault and rape offences committed against child victims;
- limiting sentencing complexity by adopting a model that allows a court to balance the fact that the victim survivor was a child with other relevant and important factors and considerations in an individual case consistent with the principle of individualised justice, preserving judicial discretion; and
- adopting an approach that aligns with, and is complementary to, other existing statutory factors and principles, including other factors that a court must treat as aggravating.

We recommended that this amendment be progressed in the context of a broader review of section 9 (**Recommendation 3**).

Victim harm should be recognised as a new sentencing purpose

To ensure that victim harm is acknowledged in the sentencing process, we recommend that amendments be made to the purposes of sentencing under section 9(1) of the PSA to include recognition of victim harm (**Recommendation 2**). This will enhance the visibility of the recognition of the harm caused to the victim for both the judiciary and the community at large, and respond to concerns of victim survivors that harm is not acknowledged sufficiently in the sentencing process.

We acknowledge that this goes beyond sentencing purposes that apply to sexual assault and rape offences, but consider this change justified given the importance of recognition of victim harm in imposing sentence.

Section 9 of the PSA should be reviewed

Due to the complexity, inconsistencies and inadequacies of section 9 of the PSA, section 9 should be reviewed (**Recommendation 3**).

Structure of the sexual assault offences should be reviewed

The structure of section 352 should be examined in the review underway of Chapter 22 (Offences against Morality) and Chapter 32 (Rape and Sexual Assaults) of the *Criminal Code* (Qld) in response to recommendation 42 of the Women's Safety and Justice Taskforce *Hear Her Voice – Report Two* (**Recommendation 4**).

Certain types of 'good character' evidence should be limited for sexual offences and courts should have discretion to give no weight to this factor

A sentencing court should be informed by the best available evidence. Subjective opinion evidence from lay persons (without a professional expertise to give opinion evidence, such as a treating psychiatrist) purely attesting to the perceived or observed personality traits of the person being sentenced should be scrutinised with greater rigour by a court when sentencing a person for sexual assault and rape.

The PSA should be amended so that, despite section 11, in determining the character of an offender being sentenced for a sexual offence committed by an adult and where section 9(6A) does not apply, unless it is relevant to assessing the person's prospects of rehabilitation or risks of reoffending, a court must not take into account:

- evidence in the form of character references;
- evidence of a person's standing in the community; or
- evidence of significant contributions made to the community by the offender.

This will make clear that the person's reputation, previous employment and other aspects of character commonly relied upon at sentence do not in any way diminish the seriousness of the person's actions and the harm they have caused to the victim survivor as a consequence of their offending.

A legislative change will further direct courts and practitioners to link the use of this evidence to specific sentencing purposes rather than taking it into account 'in a general sense'.

In addition, we recommended that courts should be given legislative discretion to not mitigate a person's sentence in circumstances where they are assessed as being of 'otherwise good character' based on character references, their standing in or their contributions to the community. This discretion should be exercised with regard to the nature and seriousness of the offence, including the physical, mental or emotional harm done to a victim and the vulnerability of the victim (**Recommendation 5**).

In presenting these recommendations, we acknowledge that there are other reviews underway, which are likely to make recommendations regarding 'good character' evidence in sentencing,[28] and recognise the benefits of adopting a nationally harmonised approach.

[28] Australian Law Reform Commission, *Justice Responses to Sexual Violence* (web page, 23 January 2024) <https://www.alrc.gov.au/inquiry/justice-responses-to-sexual-violence>; NSW Sentencing Council, *Good Character in Sentencing* (Consultation Paper, 17 September 2024) <https://sentencingcouncil.nsw.gov.au/our-work/current-projects/good-character-in-sentencing.html>.

Resources for courts and legal practitioners should be enhanced

There are opportunities for non-legislative forms of sentencing guidance to be enhanced, including benchbooks, other sentencing resources and resources to support trauma-informed practices to better respond to the needs of victim survivors (**Recommendations 6, 17, 18, 19** and **20**).

The development and enhancement of existing resources for prosecutors, defence practitioners and judicial officers is important to support these practice changes; this will ensure Court of Appeal guidance is more consistently applied, recent case law is relied upon to ensure submissions made on sentence reflect current sentencing practices, and sentencing hearings and remarks are conducted in a trauma-informed and culturally safe way.

Monitoring the impacts of these reforms

To assess whether sentencing levels have increased in response to these changes, the Council recommends that sentencing practices for sexual assault and rape be monitored within 5 years of the implementation of recommended reforms (**Recommendation 7**).

Reforms to community-based sentencing orders and parole options

Current restrictions on the availability and use of orders, such as the exclusion of sexual offences from eligibility for court ordered parole and the inability to impose a suspended imprisonment order in combination with a community-based order when sentencing for a single offence, risk people sentenced for a sexual offence not being subject to appropriate supervision and support as part of their sentence. This lack of flexibility negatively impacts the ability of current sentences imposed to meet the objective of community protection.

The Council recommends that the government respond to and implement recommendations we made in our *Community-based Sentencing Orders, Imprisonment and Parole Options: Final Report*, with appropriate funding provided to support their effective implementation (**Recommendation 8**).

Reforms to the current range of sentencing options available to courts aim to improve and expand upon the options judges and magistrates have to punish offenders 'in a way that is just in all the circumstances' and to meet other intended purposes of sentencing, including denunciation, community protection and rehabilitation.

Allowing prisoners on remand access to programs

The former Queensland Productivity Commission, in its 2019 *Inquiry into Imprisonment and Recidivism: Final Report*, recommended reforms to ensure prisoners on remand can access suitable programs and other activities likely to aid their rehabilitation (**Recommendation 9**).

While the Commission's recommendation was not specific to sexual offending, the Council supports this recommendation and further suggests such programs and interventions should be made available, where practicable, in multiple correctional centre locations and provide for continuation of programs and interventions post-sentence, either in custody or in the community.

Reforming the serious violent offences scheme

The issues identified in our previous review of the serious violent offences ('SVO') scheme continue to impact sentencing practices for offences subject to the scheme, including sexual assault and rape. These include that discretionary SVO declarations are rarely made for sexual violence offences due to a focus by the court on physical violence when considering whether to make a declaration and the mandatory aspect of the scheme applying downward pressure on sentences around the 10-year mark.

The Council recommends that the government respond to and implement the recommendations we made in our *The '80 per cent Rule': The Serious Violent Offences Scheme in the Penalties and Sentences Act 1992 (Qld): Final Report* (**Recommendation 10**). Implementing those reforms, including making the scheme wholly presumptive and allowing courts discretion to set the non-parole period to between 50 and 80 per cent of the head sentence, will provide opportunity for higher head sentences for sentences of 10 years or more, as courts can better recognise mitigating factors.

Improving access to professional, specialist and cultural reports to inform sentencing orders

Based on our research and consultations, and submissions made to the review, we have concluded that the information available to courts to inform sentence may not be sufficient in some cases and could be improved. The Council has made several recommendations to improve accessibility of reports by professionals and specialists and cultural submissions in support of improved sentencing practices for sexual offences (**Recommendations 11, 12 and 13**). Such reports and submissions should be available not only in relation to the person being sentenced but also to enable better understanding of the impacts of the offence and relevant considerations for victim survivors.

Enhancing communication with, and support for victim survivors to navigate the criminal justice system

Victim survivors do not feel like courts understand the harm caused by these offences, and confusion about sentencing outcomes was often expressed. The Council has made several recommendations designed to improve the experiences of victim survivors of sexual assault and rape, including trauma-informed and culturally safe communication and providing victim survivors with copies of their sentencing remarks (**Recommendations 14, 15, 17, 18, 19 and 20**).

We further recommend continuing to implement recommendations by the Women's Safety and Justice Taskforce to improve support for victim survivors of sexual assault and rape and the criminal justice system's capacity to respond to victims and perpetrators of sexual violence (**Recommendation 16**).

Enhancing understanding of sexual violence offending and its impact of victim survivors

It is important for victim survivors to have a voice within the sentence context and to have their experience validated by legal practitioners and the court. The primary mechanism for informing the court about the impact of sexual violence on a victim survivor is through the VIS.

There is strong dissatisfaction amongst victim survivors and members of the community with respect to the VIS regime. It became clear to the Council that the roles and responsibilities of different criminal justice agencies in relation to preparing VIS were poorly understood. It also became apparent to us that there are differing views on the purpose and use of VIS, and this impacts victim survivor satisfaction.

We have made several recommendations related to the VIS regime, including a holistic review of the regime for all offences (**Recommendation 21**), enhanced opportunities to encourage judicial acknowledgement of victim survivors and their VIS within the sentence hearing (**Recommendations 17 and 18**), clarifying agency roles and responsibilities to assist victim survivors to prepare a VIS (**Recommendation 22**) and amending section 179K(5) of the PSA to prescribe that a court must not draw any inference about the harm suffered by a victim survivor from the fact that a VIS has not been given to the court (**Recommendation 23**).

Review of guilty plea reductions

We consider that there is significant value in appropriately recognising a plea of guilty. However, the current approach may not be supporting the rights of victim survivors and may undermine victim survivor and community confidence in the justice system's ability to respond to serious offending.

We consider that these concerns are best achieved through a review to assess whether the guilty plea discounts are meeting their objectives (**Recommendation 24**). A review would need to consider the approach in other jurisdictions, whether any reforms raise issues of unfairness and whether they potentially impact the voluntariness of a plea and the ability of a person charged with an offence to make an informed decision.

Alternative and complementary justice approaches

Complementary and alternative approaches to traditional criminal justice system responses, such as restorative or transformative justice, may offer an opportunity to better respond to the various justice needs of victim survivors. A new adult restorative justice program is being developed and the Council recommended a range of features as they apply to sexual assault and rape offences (**Recommendation 25**).

The Council was mindful of the current Australian Law Reform Commission inquiry into justice responses to sexual violence, and recommended that the government explore alternative approaches to traditional criminal justice responses to sexual violence offences to provide victim survivors with alternative avenues for healing and recovery, which also are effective in promoting perpetrator accountability (**Recommendation 26**).

Improving the evidence base for sentencing reform in Queensland

The Council recommends the Government respond to and implement recommendations we made in our *Community-based Sentencing Orders, Imprisonment and Parole Options: Final Report* in relation to improving administrative data for suspended imprisonment sentences and the evaluation of the effectiveness of parole (**Recommendation 27**).

The Council has also recommended ways to improve the evidence to support ongoing research, monitoring and evaluation of sentencing related reforms, including to better understand case progression and attrition, characteristics of cases and participants, and accessing transcripts (**Recommendation 28**).

Overview of chapters of this report

PART A – Context of the review and Council approach

Chapter 1 discusses the background to this review, the offences of sexual assault and rape and the Council's approach and relevant information. It also discusses the terminology used in this report.

Chapter 2 explores the nature and extent of sexual violence in Queensland and Australia and its relevance to sentencing. This chapter examines the prevalence of sexual violence in Australia and Queensland, including for specific communities. It explores the reasons why people are not reporting sexual offences to police and what we know about high attrition rates for sexual violence offences in the criminal justice system. It considers the mistaken beliefs surrounding sexual violence held by some members of the community and how these influence the criminal justice system and sentencing of these offences.

Finally, it explains many of the reviews and inquiries into improving responses of the criminal justice system to sexual violence that have taken place over the last 10 years in Queensland, Australia and overseas. One of these reviews – the Women's Safety and Justice Taskforce's ('WSJT') *Hear Her Voice – Report Two* – is particularly relevant to the Council's current review.

Chapter 3 sets out the framework applied by the Council to assess adequacy and appropriateness of sentencing outcomes for sexual assault and rape and the fundamental principles guiding this review.

The Council's review was informed and guided by a framework for assessing adequacy and appropriateness, which required us to consider community views regarding offence seriousness and the purposes of sentencing, as well as broader considerations about what makes a sentence 'adequate' and 'appropriate'.

The Council developed 11 fundamental guiding principles that helped in creating and testing our key findings and recommendations. These 11 fundamental principles were drawn from:

- the Terms of Reference requirements;
- principles that have guided us in undertaking previous reviews;
- the WSJT's *Hear Her Voice – Report Two* and submissions made to that review; and
- views expressed by stakeholders in submissions to this review and during consultations.

Chapter 4 provides a high-level overview of the information sources used in this report, such as administrative data, sentencing remarks, submissions and consultation, interviews, legal research and commissioned research.

This chapter also sets out the methodologies used by the Council to undertake research for this review, such as thematic and content analyses of sentencing remarks for sexual assault and rape.

It provides an overview of the various information sources used in the report and includes discussion of gaps in existing evidence and the limitations that were encountered while building this evidence base, along with ways in which the Council attempted to overcome these limitations through other means of information-gathering. Where information was unable to be obtained, the Council acknowledges this.

PART B – Offence seriousness and adequacy of outcomes

Chapter 5 examines the importance of understanding and considering the community views of offence seriousness within the sentencing context. It provides an overview of previous research exploring community views about sentencing generally and for sexual offences, before considering the research commissioned by the Council to determine current community views in Queensland.

The chapter sets out consultation events and submissions made to our review, as well as interviews with victim survivors, highlighting the long-term harmful impacts that these offences can have as evidence of their seriousness. Concerns were raised by victim survivors and the services that support them that the harms caused, and their seriousness, are insufficiently recognised by courts in sentencing for these offences.

Chapter 6 considers the complex process undertaken by sentencing judges to assess offence seriousness when determining an appropriate sentence. This entails assessing the harm to the victim survivor and the offender's culpability.

The chapter sets out how courts currently assess offence seriousness in sexual assault and rape cases in Queensland and in other Australian and international jurisdictions, based on statutory and common law practices.

Chapter 7 presents the Council's findings from its assessment of whether current penalty types and current sentencing levels imposed on people convicted of sexual assault and rape appropriately reflect the seriousness of this offending.

This chapter sets out our assessments to the following criteria:

- community, consultation and Parliament views on offence seriousness;
- evidence of alignment between sentencing outcomes for sexual assault and rape and the community and Parliament's views of offence seriousness;
- how sentencing outcomes for sexual assault and rape compare with those for other offences;
- problems with the assessment of objective seriousness of sexual assault and rape offences;
- comparisons of sentencing outcomes with other jurisdictions; and
- evidence of alignment between penalty types and sentencing purposes.

PART C – Sentencing guidance

Chapter 8 examines the current approach in Queensland to the sentencing purposes, principles and factors under section 9 of the PSA, which provides courts with legislative guidance about how to approach sentencing for sexual assault and rape offences.

The chapter also considers other legislative forms of sentencing guidance in the PSA and in other jurisdictions in relation to sexual violence offences. This includes an overview of mandatory and presumptive sentencing schemes, the role of maximum penalties and stakeholders' views on these matters.

Chapter 9 examines the use of 'good character' evidence in sentencing for sexual offences, including the current approach to using this evidence in Queensland and in other jurisdictions, what we mean by 'good character' and how this evidence can be relevant to sentencing.

This chapter presents stakeholders' views about 'good character' evidence and contemporary research on the use of this evidence in sentencing sexual offences.

Chapter 10 considers other forms of sentencing guidance used by courts for sentencing sexual assault and rape offences including case law guidance on general sentencing principles and factors, sentencing 'ranges' and alternative approaches to sentencing guidance.

The chapter sets out the sentencing resources available to judicial officers and legal practitioners, such as benchbooks, sentencing manuals, practitioner guides, case summaries and schedules, and sentencing databases.

Part D – Sentencing options and processes

Chapter 11 examines the penalty and parole options in the PSA for offences of sexual assault and rape, whether they support adequate and appropriate sentencing outcomes by meeting the important purposes of sentencing. We also consider evidence about the effectiveness of different types of penalty options, what other jurisdictions do and past recommendations of the Council that are relevant to this review.

This chapter explores issues identified during this review in relation to suspended sentences of imprisonment, the setting of non-parole periods, availability of treatment programs for sexual offences, flexibility of current community-based orders and other issues such as the use of fines for sexual assault offences.

Chapter 12 considers the information available to courts to inform sentence enable proper consideration of the nature and circumstance of the offence, the personal circumstances of the person being sentenced, information about the types of interventions available to those in custody for members of the community and information that might reduce reoffending risk and the impacts of the offence/s on victim survivors.

In this chapter, we consider three specific aspects of the information provided to courts:

- the role of professional medical, psychological and other professional reports;
- the use of pre-sentence reports and advice; and
- the use of cultural reports and submissions.

Chapter 13 examines the impacts of sexual offences on victim survivors, their rights and role within the criminal justice system and their experiences engaging with the sentencing process.

We consider how current sentencing practices and processes operate in Queensland and other jurisdictions to respond to the rights and justice needs of victim survivors of sexual assault and rape, as well as relevant reforms currently underway. This chapter also sets out stakeholder views on issues impacting victim survivors' ability to navigate the criminal justice system.

Chapter 14 explores how the sentencing court acknowledges and recognises the impacts of sexual offences on victim survivors, including through consideration of a VIS.

The chapter sets out how Queensland sentencing courts receive evidence of the impacts of sexual offending on victim survivors, how the VIS regime operates in Queensland and other jurisdictions and what we know from earlier reviews of these processes. It also discusses stakeholder feedback on the operation of the VIS regime in Queensland, as well as how victim survivors (and the harm they have experienced) is being acknowledged within the sentencing court.

Chapter 15 considers other issues relevant to how courts sentence sexual assault and rape offences, including the reduction of sentence outcomes in recognition of a guilty plea, the difference between cumulative (one after the other) and concurrent (at the same time) sentences – particularly when there are multiple victims – and the impacts of language at sentence. These issues are relevant to sentencing of sexual assault and rape, but also have wider implications for sentencing of other offences.

Chapter 16 sets out alternative and complementary justice models, such as restorative and transformative justice, to better meet the justice needs of victim survivors.

This chapter considers current alternative justice models available in Queensland as well as models used in other jurisdictions. We also present our key finding and recommendations for reform to enable the use of restorative justice pathways for sexual assault and rape matters in Queensland.

PART E – Other considerations and enhancing the evidence base

Chapter 17 sets out the Council's assessment of compatibility with the HRA or disproportionate impact on Aboriginal and Torres Strait Islander persons, as well as any other issues under the PSA or other aspects of sentencing that are not part of a Council recommendation.

Chapter 18 examines some of the current gaps in the existing evidence base and the limitations that have impacted the Council's ability to fully understand current sentencing practices with respect to the offences of sexual assault and rape.

List of Key Findings

CHAPTER 6: COURTS' ASSESSMENT OF OFFENCE SERIOUSNESS	
1	**Rape and sexual assault are inherently violent and serious acts** Rape and indecent assaults are inherently violent and serious acts involving the exercise of dominion by one person over another person's body without their consent, in breach of the person's right to personal autonomy, bodily and sexual integrity and sexual identity. Engaging in unwanted sexual conduct involves a fundamental disregard of another person's dignity, right to equality, right to be free from violence and discrimination, right to be free from torture and cruel, inhuman or degrading treatment, and right to privacy. A lack of physical injury does not mean these offences have not caused substantial and ongoing harm, or that they should be treated as less serious than if physical injury had been caused. See **Recommendations 1 and 4.**
2	**Sexual offences against children are particularly serious** Due to the vulnerability of children, sexual offences committed against children are particularly serious, noting the inherently wrongful nature of the offending conduct and the profound ongoing harm these offences cause to children during their formative years. See **Recommendation 1.**
3	**The seriousness of rape should be assessed based on the circumstances of each case, not just penetration type** The seriousness of every rape offence must be determined based on the particular circumstances of each case. Sentences for rape should reflect that one form of sexual penetration is not inherently any more or less serious than another form of sexual penetration. See **Recommendations 18, 19 and 20**.
CHAPTER 7: ADEQUACY AND APPROPRIATENESS OF SENTENCING OUTCOMES	
4	**Penalties imposed for rape are not adequate** Penalties currently imposed on sentence for rape do not adequately reflect the seriousness of this form of offending and the purposes of sentencing, including punishment, denunciation and community protection – particularly as these relate to offences against children. *See* **Recommendations 1, 5, 6, 7, 8 and 10.**

5	**There is a potential problem with the structure of sexual assault** There is a potential problem with the current structure of the offence of sexual assault under section 352 of the *Criminal Code* (Qld), which impacts sentence outcomes, considering: • the breadth of conduct captured which ranges significantly in terms of both seriousness and the type of acts captured; • the anomalous treatment of fellatio performed by a perpetrator on a male victim as aggravated sexual assault, which has a 14-year maximum penalty, when compared with penile-oral rape, which has a maximum penalty of life imprisonment; and • the approach in some other jurisdictions, which separates acts involving self-penetration or being forced to penetrate another person as a separate offence. See **Recommendation 4**.
CHAPTER 8: LEGISLATIVE SENTENCING GUIDANCE	
6	**Legislative sentencing guidance is not adequate and requires enhancement** Existing forms of legislative sentencing guidance regarding principles and factors under the *Penalties and Sentences Act 1992* (Qld) are not adequate and require enhancement to: • reinforce that sexual violence offences committed against children are more serious due to the higher level of harm experienced by child victim survivors and the greater culpability of perpetrators in targeting a vulnerable victim; and • respond to issues identified in this report regarding the use of 'good character' evidence. See **Recommendations 1, 2 and 5.**
7	**Current sentencing purposes do not adequately recognise the harm caused to victim survivors** The current purposes of sentencing under section 9(1) of the *Penalties and Sentences Act 1992* (Qld), while broad, do not adequately recognise the need to hold the perpetrator accountable for harm done to the victim survivor and to promote in the perpetrator a sense of responsibility for, and acknowledgement of, that harm as an important aspect of sentencing. See **Recommendation 2**.
CHAPTER 9: EVIDENCE OF 'GOOD CHARACTER' IN SENTENCING FOR SEXUAL OFFENCES	
8	**There is a problem with certain types of 'good character' evidence** There is a problem with certain types of 'good character' evidence. Many victim survivors find the use of character references and comments made with respect to these references to be deeply distressing and retraumatising. See **Recommendation 5**.

CHAPTER 10: OTHER FORMS OF SENTENCING GUIDANCE	
9	**Non-legislative forms of sentencing guidance need to be updated and enhanced** Non-legislative forms of sentencing guidance need to be updated and enhanced. Agencies require appropriate resources to ensure these forms of guidance are updated on a regular basis and made more accessible. See **Recommendations 6.**
CHAPTER 11: PENALTY AND PAROLE OPTIONS (AND OTHER ORDERS)	
10	**Sentencing options available to courts in sentencing for rape and sexual assault need to be expanded** The current range of sentencing options available to the courts is inadequate and needs to be expanded to increase the options that judges and magistrates have to punish offenders in a way that is 'just in all the circumstances' and to meet other intended purposes of sentencing, including denunciation, community protection and rehabilitation. Current restrictions on the availability and use of orders, such as the exclusion of sexual offences from eligibility for court-ordered parole and the inability to impose a suspended imprisonment order in combination with a community-based order when sentencing for a single offence, puts people sentenced for a sexual offence at risk of not being subject to appropriate supervision and support as part of their sentence. This lack of flexibility impacts negatively on the ability of current sentences imposed to meet the objective of community protection. See **Recommendation 8**.
CHAPTER 12: INFORMATION AVAILABLE TO COURTS TO INFORM SENTENCE	
11	**Information available to courts to inform sentence may not be sufficient and could be improved** It is important that sentencing courts be provided with information to enable the proper consideration of the nature and circumstance of the offence, the personal circumstances of the person being sentenced and the impacts of the offence/s on victim survivors. There is a risk that judicial officers in Queensland are not being provided with sufficient information to inform the proper exercise of their sentencing discretion noting the following points: • Criminal justice agencies and legal services operate under significant time and resourcing pressures. • The availability of those with professional expertise regarding the drivers and impacts of sexual offending, including forensic psychiatrists and psychologists, is limited, and there is currently insufficient funding and capacity to support the provision of expert psychiatric and psychological reports for all sentences. • Pre-sentence reports prepared by Queensland Corrective Services are not often requested or made available, and may not address all important issues at sentence, including regarding issues of risk and potential treatment options. • Information provided by community justice groups (CJGs) (including cultural reports) is not routinely available in sexual violence matters, and usually only at the Magistrates Courts

level. The availability of this same type of information for people from other culturally and racially marginalised backgrounds is similarly limited.

- Judicial officers may not be provided with sufficient information to understand how the offending has impacted victim survivors, as the long-term impacts are often unknown at the time of sentence, few victim survivors have access to expert reports to document the harm or injury caused to them and/or they may not want the offending person to be aware of how the offending has impacted them by including this information in a victim impact statement.

These issues are exacerbated for Aboriginal and Torres Strait Islander persons due to the impacts of systemic disadvantage and cultural issues, which may limit the ability of prosecutors and defence practitioners to put relevant information before the court.

See **Recommendations 11, 12 and 13**.

CHAPTER 13: UNDERSTANDING VICTIM HARM AND JUSTICE NEEDS

12 **Trauma-informed practices which recognise the rights of victim survivors should be encouraged, while maintaining principles of fairness for the person being sentenced**

Current sentencing practices and processes can operate in a way that is anti-therapeutic for victim survivors of rape and sexual assault, and that results in victim survivors' retraumatisation. While the focus of sentencing is necessarily on the person who is being sentenced and ensuring that principles of fairness are maintained, it is important for the sentencing process to operate in a way that respects the rights and interests of victim survivors – including those outlined in the Charter of Victims' Rights – and seeks to minimise any risks of retraumatisation.

See **Recommendations 14, 16, 17, 18, 21, 22 and 23**.

13 **Enhanced and trauma-informed communication with victim survivors is needed**

The Charter of Victims' Rights outlines the rights that victim survivors have within the criminal justice system, including the right to be kept informed. Despite these rights, many victim survivors of rape and sexual assault are dissatisfied with the sufficiency of information provided to them regarding the sentencing process, as well as their experiences engaging with the criminal sentencing process.

Improving communication with victim survivors, as well as their interactions with the sentencing process, will have corresponding positive impacts upon their sentencing experience more broadly. This communication should include the provision of regular, timely, effective, consistent and accessible information surrounding the progress of the criminal prosecution (provided by the prosecution service), as well as information about support to navigate the criminal justice system process (provided by an independent, victim survivor support service).

Improving communication between justice agencies (including the Queensland Police Service, the Office of the Director of Public Prosecutions, and Queensland Corrective Services, where relevant) will also ensure that victim survivors are provided with the right information, when they need it.

See **Recommendations 14, 15 and 16.**

14 **Sentencing processes and support services should be enhanced to ensure they are culturally safe for victim survivors**

There is a risk that sentencing processes and support services for victim survivors of sexual assault and rape are not currently culturally safe for Aboriginal and Torres Strait Islander peoples and are not meeting the needs of other victim survivors, such as LGBTIQA+ people, people with disability and people from culturally and racially marginalised groups, with a corresponding impact on their willingness to engage with, and their experience of, the criminal justice/sentencing process.

See **Recommendations 14, 16, 17, 18, 19 and 20**.

CHAPTER 14: VICTIM IMPACT STATEMENTS AND RECOGNITION OF HARM AT SENTENCE

15 **Appropriate and trauma-informed language should be used in the courtroom to support appropriate sentencing practices**

The language used by judicial officers, defence practitioners and prosecutors in rape and sexual assault sentence proceedings impacts how sentences are understood and viewed by victim survivors, perpetrators and the wider community.

Using appropriate and trauma-informed language in sentencing is essential to addressing long-standing systemic issues within the community relating to the understanding of sexual violence offences and the harm they cause. It is also an important aspect of ensuring sentences are adequate and appropriate.

Using inappropriate language that is not trauma-informed may:

- minimise the harm experienced by victim survivors;
- retraumatise victim survivors, impacting their long-term recovery;
- unfairly shift blame for the offending onto victim survivors; and
- minimise acknowledgment of the wrongfulness of the person's actions, thereby undermining the sentencing purpose of denunciation.

Language that is not trauma-informed or that is inappropriate may influence, or be perceived to influence, the way a judicial officer determines the seriousness of the offence for the purposes of sentencing and may retraumatise the victim survivor by appearing to minimise the seriousness of the rape or sexual assault.

It is critical that all justice agencies use trauma-informed language within the sentencing context, as language used by:

- legal practitioners and within professional expert reports may impact the language used by judicial officers during proceedings;
- judicial officers can impact both the person being sentenced and the victim survivor;
- the Court of Appeal (or accepted without comment) sets precedents for how sexual violence is understood and approached in future criminal proceedings.

See **Recommendations 17, 18, 19 and 20.**

16	**Victim impact statements require improvement within the sentencing process** There is strong dissatisfaction among victim survivors and members of the community with respect to the victim impact statement regime. This dissatisfaction permeates all aspects of the process, including with respect to its purpose, content, form of presentation, arrangements for cross-examination, timeframes and degree of acknowledgement of the victim survivor and the harm they have suffered by the sentencing court: • Agency roles and responsibilities regarding information and support for victim survivors of rape and sexual assault offences in the preparation of a victim impact statement are unclear, meaning victim survivors may not be provided with sufficient support when preparing a statement, and the information conveyed to the courts may be of limited utility. • There is a pervasive lack of understanding of the purpose and use of victim impact statements in sentencing, which means stakeholders hold different (often unmet) expectations with respect to how a victim impact statement should be used. • Victim survivors are dissatisfied with the process of redacting or 'content editing' victim impact statements by the prosecution service prior to sentence. The way this information must be provided to the court may not meet victim survivors' needs. • Victim survivors may not be offered an opportunity to provide a statement prior to sentence due to concerns about this causing delays in the proceedings and matters being finalised. • Victim survivors are often dissatisfied with the degree of acknowledgement by the sentencing court of the harm they have suffered as a consequence of the offending (as outlined in their victim impact statement). See **Recommendations 21, 22 and 23**.
CHAPTER 15: OTHER ISSUES RELEVANT TO SENTENCE	
17	**Sentencing reductions for a guilty plea are important and should continue, but there may be benefits in reviewing current practice** There is value in courts continuing to have the ability to recognise the benefit of a plea of guilty in sentencing for offences of rape and sexual assault, such as through a reduction in the sentence that might otherwise have been imposed, or the fixing of an earlier parole eligibility date. The extent of any such discount, however, will always depend on the individual facts and circumstances of the case, including the context and circumstances in which the person's plea was entered and its timing. The current approach in Queensland and other jurisdictions is not consistent. It is critical that the way a guilty plea is reflected in a sentence for rape and sexual assault achieves a proper balance between the benefits to the criminal justice system, ensuring just and appropriate punishment and promoting public confidence. See **Recommendation 24**.
18	**No legislative changes are required to the current approach to concurrent and cumulative sentencing for multiple victim survivors of sexual violence** No additional guidance is needed regarding the ordering of cumulative sentences when sentencing for sexual assault and rape offences involving multiple victim survivors.

CHAPTER 16: ALTERNATIVE AND COMPLEMENTARY JUSTICE MODELS	
19	**Complementary and alternative approaches to traditional criminal justice processes may offer opportunities to better respond to victim survivors' justice needs and should be explored** Complementary and alternative approaches to traditional criminal justice system responses, such as restorative or transformative justice, may offer an opportunity to better respond to the various justice needs of victim survivors. Provided victim survivors wish to participate, and these processes are appropriately managed, they may encourage healing and recovery within a safe environment that encourages perpetrators to take responsibility for their actions and enables victim survivors to have their voice heard and their experiences acknowledged and validated. See **Recommendations 25 and 26**.
CHAPTER 18: IMPROVING THE EVIDENCE BASE FOR SENTENCING REFORM IN QUEENSLAND	
20	**Sentencing data and information in Queensland is limited and can be enhanced** Sentencing information in Queensland is limited by both the quality of data available and a lack of integration between relevant justice administrative data systems. It is critical that Queensland takes a cohesive, whole-of-government approach to improving the quality of information being captured and shared by all relevant agencies. It is important to build the evidence base upon which reform decisions are made, which includes designing and implementing evaluation and monitoring frameworks alongside any reforms to enable agencies to monitor the impact and evaluate the success of the reforms, and whether further adjustments are required. See **Recommendations 27 and 28.**

List of Recommendations

CHAPTER 8: LEGISLATIVE SENTENCING GUIDANCE	
1	**Sentencing guidance reforms – new aggravating factor for offences against children under 18 years** The Attorney-General and Minister for Justice progress amendments to section 9 of the *Penalties and Sentences Act 1992* (Qld) to require a court to treat the fact an offence of rape or sexual assault was committed in relation to a child as aggravating. Such amendments should be progressed in the context of a broader review of section 9 (see **Recommendation 3**).
2	**Recognition of victim harm in the sentencing purposes** The Attorney-General and Minister for Justice progress amendments to section 9(1) of the *Penalties and Sentences Act 1992* (Qld) to include recognition of the harm done to victim survivors. Such amendments should be progressed in the context of a broader review of section 9 (see **Recommendation 3**).
3	**Review of section 9 of the *Penalties and Sentences Act 1992* (Qld)** The Attorney-General and Minister for Justice ask the Council, the Department of Justice or another appropriate entity to undertake a review of the principles and factors set out in section 9 of the *Penalties and Sentences Act 1992* (Qld) to ensure section 9 and related provisions of the Act provide a clear and coherent sentencing framework for courts and to promote community understanding of sentencing.
4	**Structure of the offence of sexual assault (Criminal Code (Qld) s 352)** The Attorney-General and Minister for Justice continue the review of Chapter 22 (Offences Against Morality) and Chapter 32 (Rape and Sexual Assaults) of the *Criminal Code* (Qld) in response to recommendation 42 of the Women's Safety and Justice Taskforce, *Hear Her Voice – Report Two: Women and Girls' Experiences Across the Criminal Justice System* (2022). The review should further include consideration of whether: • the structure of conduct captured within section 352(1) is too broad and should instead be structured in a way that better distinguishes different forms of non-aggravated sexual assault with the potential for graduated penalties to be applied; • the conduct under section 352(2) is appropriately categorised as a lesser form of aggravated offending, particularly with respect to male victims of what would otherwise constitute rape if the victim were forced to perform the same act (fellatio) on the perpetrator; and • conduct in section 352(3) involving self-penetration or being forced to penetrate another person should constitute a separate offence.

CHAPTER 9: EVIDENCE OF 'GOOD CHARACTER' IN SENTENCING FOR SEXUAL OFFENCES

5 Reforms to the use of 'good character' evidence

The Attorney-General and Minister for Justice progress amendments to the *Penalties and Sentences Act 1992* (Qld) to qualify the current position under the Act as to the treatment of 'good character' evidence.

Amendments should provide that, despite section 11 of the *Penalties and Sentences Act 1992* (Qld), in determining the character of an offender being sentenced for a sexual offence committed by an adult and where section 9(6A) does not apply, a court must not take into account:

- evidence in the form of character references;
- evidence of a person's standing in the community; or
- evidence of significant contributions made to the community by the offender

unless such evidence is relevant to assessing the person's prospects of rehabilitation or risks of reoffending (which is of direct relevance to sentencing purposes and factors listed under section 9(1) of the *Penalties and Sentences Act 1992* (Qld)).

In addition, courts should be provided with an express legislative discretion not to mitigate the sentence for the person's 'otherwise good character' based on character references, standing or contributions to the community. This discretion should be exercised having regard to the nature and seriousness of the offence, including the physical, mental or emotional harm done to a victim and the vulnerability of the victim.

CHAPTER 10: OTHER FORMS OF SENTENCING GUIDANCE

6 Resources for courts and legal practitioners

6.1 The Department of Justice consult with the Chief Justice and other Heads of Jurisdiction to allocate resources to support judicial officers and legal practitioners in sentencing for sexual assault and rape offences, and for other sexual violence offences.

The department also should explore alternative options for the development of resources for use by legal practitioners in consultation with relevant legal professional bodies, criminal justice agencies and victim survivor legal and support services.

Any resources developed might identify principles to be applied drawn from Queensland case law as well as relevant statements made by the High Court of Australia, and links to any useful resources – such as research relating to the impacts of childhood sexual abuse developed as part of the *Bugmy Bar Book*. Specific information relevant to the sentencing of offences against children, Aboriginal and Torres Strait Islander peoples and those from other culturally and racially marginalised groups, people with a mental illness or cognitive impairment (as victims and offenders), LGBTQIA+ people and people with disabilities should be included in any resources developed.

6.2 The Queensland Government ensures the Office of the Director of Public Prosecutions and Legal Aid Queensland are appropriately funded and resourced to ensure that relevant sentencing information and resources, such as the Appeal Register maintained by the Office of the Director of Public Prosecutions, are maintained and are able to be updated on a regular basis.

	The Department of Justice should consult with Legal Aid Queensland and the Office of the Director of Public Prosecutions regarding what additional funding is required to make this information publicly accessible so it can be used by other legal practitioners and legal and policy decision-makers, as well as by researchers and other professionals [see, for example, the Comparative Sentencing Tables published by the WA Office of the Director of Public Prosecutions Sentencing (www.wa.gov.au) and information maintained by the NSW Public Defenders Office Resources (nsw.gov.au)]. See also **Recommendation 28** regarding QSIS enhancements.
7	**Monitoring the impacts of the recommended reforms** The Attorney-General and Minister for Justice ask the Council, or other appropriate entity, to monitor and report on court sentencing practices for rape and sexual assault within 5 years of implementation of the recommended reforms to assess whether sentencing levels have increased in response to these changes, relevant Court of Appeal and High Court statements and community views about the seriousness of this form of offending. This review should consider: • whether sentencing levels for offences of rape committed against children have increased relative to offences committed against adults, including for digital–vaginal, digital–anal and penile–oral rape assessed against the penile–vaginal and penile–anal rape of an adult; • the extent to which sentencing practices are continuing to 'compartmentalise' rape conduct rather than assess offence seriousness based on the individual circumstances of the case; and • sentencing levels for rapes occurring in an intimate partner or family relationship relative to those committed by strangers or acquaintances.
CHAPTER 11: PENALTY AND PAROLE OPTIONS (AND OTHER ORDERS)	
8	**Reforms to community-based sentencing orders and parole options** The Queensland Government should respond to and implement recommendations made by the Council in its 2019 *Community-based Sentencing Orders, Imprisonment and Parole Options: Final Report*, with appropriate funding provided to support their effective implementation, in particular: a) Recommendation 9: The introduction of a new intermediate sanction – a 'community correction order' ('CCO') – which can be tailored through the conditions imposed to meet the various purposes of sentencing, while also responding to the individual factors contributing to offending. b) Recommendations 17 and 37: Allowing courts to combine a suspended prison sentence with a CCO when sentencing a person for a single offence, and until such time as the CCO is fully operational, allowing a court to combine a suspended prison sentence with a probation order or community service order when sentencing a person for a single offence. c) Recommendations 47 and 48: Establishing a dual discretion to set either a parole eligibility date or a parole release date when sentencing a person to 3 years' imprisonment 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. d) Recommendation 51: Subject to implementation of the Council's proposed reforms to community-based sentencing orders and parole, and the outcomes of a recommended review of the effectiveness of parole, the removal of parole for sentences of imprisonment of 6 months or less, with some legislated exceptions.
9	**Access to programs for prisoners on remand** The Queensland Government respond to and implement recommendation 17 of the Queensland Productivity Commission's 2019 *Inquiry into Imprisonment and Recidivism: Final Report* to ensure that prisoners on remand, including those charged with a sexual violence offence, are able to access suitable programs and other activities likely to aid their rehabilitation. Such programs should be made available, where practicable, in multiple correctional centre locations and provide for continuation of programs and interventions post-sentence either in custody or in the community.
10	**Reforms to Serious Violent Offences Scheme** The Queensland Government respond to and implement recommendations made by the Council in its final report on the operation and efficacy of the serious violent offences scheme — *The '80 Per Cent Rule': The Serious Violent Offences Scheme in the Penalties and Sentences Act 1992 (Qld): Final Report* including: a) The current serious violent offence scheme be replaced with a fully presumptive scheme to be retitled as the 'serious offences scheme' that requires a court to make a declaration when a person is sentenced to a term of imprisonment of more than 5 years for a listed offence unless the court determines it is in the interests of justice not to do so. b) Once a declaration is made, to require parole eligibility to be set within a specified range between 50–80 per cent of the head sentence.
CHAPTER 12: INFORMATION AVAILABLE TO COURTS TO INFORM SENTENCE	
11	**Legal Aid funding and guidelines in support of the preparation of specialist reports** The Department of Justice consult with Legal Aid Queensland, other legal stakeholders and professional associations representing the interests of forensic psychologist and psychiatrists as a matter of priority to review the adequacy of funding available in support of the preparation of specialist reports for defendants charged with a sexual violence offence and current funding guidelines.
12	**Court-ordered professional reports and advice** The Department of Justice, in consultation with the Heads of Jurisdiction, explore alternative models of professional advice to inform sentence. This investigation might include, for example, consideration of current arrangements for court-ordered reports and advice and the adequacy of this in supporting the court to both understand factors associated with a person's offending, as well as psychological and emotional harm caused to victim survivors.

13	**Cultural reports** Queensland Courts actively explore alternative models for the provision of cultural advice to courts in the case of sexual offences, such as rape and sexual assault, including through the engagement of professional report writers, consistent with the current model being trialled through the Australian Research Council-funded project on Indigenous Justice Reports. Consideration should be given not only to the preparation and use of these reports for defendants from an Aboriginal or Torres Strait Islander background or other cultural background, but also separate reports for victim survivors, to better articulate the harm caused and the broader impacts of the person's offending on them.
CHAPTER 13: UNDERSTANDING VICTIM HARM AND JUSTICE NEEDS	
14	**Office of the Director of Public Prosecutions and Queensland Police Service – improved communication with victim survivors of rape and sexual assault** Consistent with the rights recognised under the Charter of Victims' Rights – including the right to be kept informed, and to be treated with respect, courtesy, compassion and dignity throughout the criminal sentencing process – that relevant criminal justice agencies should provide victim survivors with regular, timely, effective, consistent and accessible information delivered in a trauma-informed way throughout the criminal justice process. This should include information regarding the progress of criminal proceedings and the sentencing process, as well as greater support navigating the criminal justice system process, such as with the assistance of a Victim Survivor Navigator. To ensure that this process is trauma-informed, victim survivors should have personal agency to decide how much information and support they would like to receive from justice agencies. Noting that the role of the Office of the Director of Public Prosecutions ('ODPP') and the Queensland Police Service ('QPS') does not currently extend to delivering therapeutic support to victim survivors, the ODPP and QPS should continue to review current communication practices, processes and training, and referral pathways, as required (including in support of promoting victims' rights recognised in the Charter of Victims' Rights) to ensure regular and effective communication occurs with victim survivors of rape and sexual assault. This should include an ongoing commitment to keeping victim survivors informed of key events (unless they have asked not to be kept informed), as well as the identification of roles and responsibilities of justice agencies, and consideration of improved communication processes between them (such as between the QPS, the ODPP and Queensland Corrective Services, where relevant) to address current gaps in the provision of consistent information.
15	**Sentencing remarks for victim survivors** The Department of Justice, in consultation with the Heads of Jurisdiction, consider processes to support the provision of sentencing remarks for matters involving rape (and possibly sexual assault) to victim survivors as a matter of course within a reasonable period after sentence to enhance their understanding of the sentencing process and outcome.

16 **Improving support for victim survivors of rape and sexual assault and the criminal justice system's capacity to respond to victim survivors and perpetrators of sexual violence**

The Queensland Government continues to commit funding and resources in support of the implementation of the following recommendations of the Women's Safety and Justice Taskforce *Hear Her Voice – Report Two: Women and Girls' Experiences Across the Criminal Justice System* (2022):

- Recommendations 5 and 96: The Queensland Police Service develop initiatives focused on improving its cultural capability, as well as its ability to respond to sexual violence cases.
- Recommendation 6: The Queensland Police Service improve the translation and interpretation services it uses for First Nations peoples.
- Recommendations 9 and 64: The Queensland Government develop and pilot a statewide professional victim advocate service, and the planned evaluation of this model, including consideration of whether there is a need for funded legal representation for victim survivors of sexual violence during criminal justice processes.
- Recommendation 11: The Queensland Government co-design, fund and implement a victim-centric, trauma-informed service model that responds to sexual violence.
- Recommendation 13: The Queensland Government embed a trauma-informed system of safe pathways for victim survivors of sexual violence across the sexual assault and criminal justice systems.
- Recommendation 19: The Queensland Government review the Charter of Victims' Rights in the *Victims of Crime Assistance Act 2009* and consider whether additional rights should be recognised or if existing rights should be expanded. Ideally, this review would be undertaken by the Victims' Commissioner (Recommendation 18).
- Recommendation 45: The Office of the Director of Public Prosecutions and the Queensland Police Service review, update and publish the memorandum of understanding relating to the investigation and prosecution of sexual violence cases.
- Recommendation 51: The Office of the Director of Public Prosecutions develop and implement a cultural capability plan to improve the cultural capability of staff.
- Recommendation 95: The Queensland Police Service develop a gender-responsive and trauma-informed approach for responding to women and girls in the criminal justice system.
- Recommendation 121: The Department of Justice undertake a review of the Murri Court model to consider how it can be strengthened and improved.

CHAPTER 14: VICTIM IMPACT STATEMENTS AND RECOGNITION OF HARM AT SENTENCE	
17	**Resources to assist the courts to respond to the needs of victim survivors of rape and sexual assault within the courtroom** The Department of Justice, in consultation with the Heads of Jurisdiction, and with reference to work being led by the Judicial College of Victoria, support the development and provision of practical information for courts about responding to the needs and interests of victim survivors of rape and sexual assault in criminal proceedings, including preferred ways to acknowledge victim survivors and the harm they have experienced.
18	**Resources and professional development for judicial officers** Until such time as a Queensland Judicial Commission is established, the Queensland Government ensure appropriate funding and resources are provided to Queensland Courts to enable judicial officers to continue to participate in national judicial officer training programs focused on sexual violence and in support of the development of Queensland-based sentencing resources (see also **Recommendation 6.1**).
19	**Resources for prosecutors** The Office of the Director of Public Prosecutions and the Queensland Police Service review guidance and training materials to ensure that prosecutors are employing trauma-informed practices, and that the language being used in the context of the prosecution of rape and sexual assault matters continues to promote recognition of the objective seriousness of this form of offending and the significant impacts it has on victim survivors.
20	**Resources for defence practitioners** The Queensland Government consider making appropriate funding or resources available to Legal Aid Queensland, the Queensland Law Society and the Queensland Bar Association to enable similar resources and training to be made available to defence practitioners with respect to the importance of employing trauma-informed practices and language in the context of submissions made on sentence.
21	**Comprehensive review of the victim impact statement regime** The Department of Justice or other appropriate entity undertake a comprehensive review of the victim impact statement regime under the *Penalties and Sentences Act 1992* (Qld), including with respect to the purpose of providing a victim impact statement, the content, form of presentation, arrangements for cross-examination, timeframes and degree of acknowledgement by the sentencing court of the victim survivor and the harm they have suffered as a result of the offending – ensuring that victim survivors who do not provide information about the specific harm caused to them, or who are limited in their ability to do so (including child victims), are not disadvantaged at sentence. This should include consideration of trauma-informed practice.

22	**Clarification surrounding the roles and responsibilities of agencies with respect to the preparation of victim impact statements** As a matter of priority, the Department of Justice or other appropriate entity, such as the Office of the Victims' Commissioner, undertake work to map agency roles and responsibilities with respect to victim impact statements and to make this information available to all relevant agencies and services with a view to promoting better understanding and identification of current gaps in service provision. On completion of this work, existing resources and information for victim survivors should be updated, or new resources developed, to provide clear advice to victim survivors about how to seek support when writing their victim impact statement and what can be included.
23	**Amendment to section 179K(5) of the *Penalties and Sentences Act 1992* (Qld)** The Queensland Government amend section 179K(5) of the *Penalties and Sentences Act 1992* (Qld) to ensure a court does not draw any inference about whether the offence had little or no harm caused to the victim survivor from the fact that a victim impact statement was not given.
CHAPTER 15: OTHER ISSUES RELEVANT TO SENTENCE	
24	**Review of guilty plea discounts** The Attorney-General and Minister for Justice consider initiating a review of the current sentencing practice with respect to guilty plea discounts as this applies in Queensland and whether it is meeting its objectives. Such a review should consider the approaches in other Australian and international jurisdictions and any evidence about the impacts of these models (for example, regarding impacts on plea rates, victim survivor satisfaction and/or rates of reoffending) while noting the importance of retaining a Queensland-based approach, given differences as to relevant legislative frameworks and legal contexts.
CHAPTER 16: ALTERNATIVE AND COMPLEMENTARY JUSTICE MODELS	
25	**Adult restorative justice program** The new legislative framework and pilot adult restorative justice program, once established, should incorporate the following features as it applies to sexual assault and rape offences: a) Restorative justice processes should be available at any stage of the criminal justice process, but should be victim-centred and prioritise the needs and interests of victim survivors while also responding to the needs of defendants. b) Assuming a new legislative framework is established, a legislative model, such as exists under the *Crimes (Restorative Justice) Act 2004* (ACT), should be considered to allow for any outcomes of pre-sentence restorative justice processes to be taken into account at sentence.

c) At sentence, a court should not be permitted to take into account the fact that the person chose not to take part, or not to continue to take part, in a restorative justice process for the offence [see s 34(1)(h) of *Crimes (Sentencing) Act 2005* (ACT)].

d) Flexibility should be provided regarding the mode of delivery – for example, personal attendance at a conference, the exchange of letters, mediated communications between the complainant and the perpetrator or other suitable process.

e) Principles such as those that apply in New Zealand to restorative justice for sexual offences, and recommended by the Victorian Law Reform Commission in its report on improving the justice system response to sexual offences, should be developed to guide practice.

f) As recommended by the Women's Safety and Justice Taskforce in its report *Hear Her Voice - Report Two: Women and Girls' Experiences Across the Criminal Justice System* (2022) (recommendation 91), the legislative framework for adult restorative justice in Queensland should be co-designed with people with lived experience, Aboriginal and Torres Strait Islander peoples, and service and legal system stakeholders, adopting a victim-centric approach. Such framework should:

    i) articulate overarching principles for the use of restorative justice in adult criminal cases, with particular principles and safeguards for its use in relation to sexual offences and domestic and family violence-related offences;

    ii) set out operational processes, including a clear framework for referrals and suitability assessment processes set out how restorative justice interacts with the criminal justice system;

    iii) establish criteria and processes to assess the qualifications, expertise and suitability of convenors and provide for their functions and powers;

    iv) consider the diverse needs of victim survivors, including First Nations victim survivors, and how best to structure the framework to meet individual needs;

    v) provide adequate protections and safeguards for participants, underpinned by a gender-sensitive and trauma-informed approach.

26 Alternative and complementary justice approaches

Taking into account any outcomes of the Australian Law Reform Commission's current inquiry into justice responses to sexual violence, the Queensland Government consider exploring the merits and appropriate resourcing arrangements in support of alternative approaches to traditional criminal justice system responses to sexual violence offences to provide victim survivors with alternative avenues for healing and recovery, which also are effective in promoting perpetrator accountability.

Such approaches should be viewed as supplementary to existing criminal justice system responses and be victim survivor centred. They might include, for example, victim-centred approaches, including victim navigator schemes, victim survivor hubs, community-based restorative justice programs and transformative justice approaches.

CHAPTER 18: IMPROVING THE EVIDENCE BASE FOR SENTENCING REFORM IN QUEENSLAND

27 **Improved administrative data surrounding suspended imprisonment sentences, and the evaluation of the effectiveness of parole**

The Queensland Government consider and implement the following recommendations made by the Council with respect to data and research in the Council's 2019 *Community-based Sentencing Orders, Imprisonment and Parole Options: Final Report*:

- Recommendation 36: Improved administrative data capture relating to suspended imprisonment orders sentence to support reporting on breaches of orders and orders made on breach;
- Recommendation 49: An evaluation of the effectiveness of court ordered parole and Board ordered parole in Queensland, including an assessment of recidivism and completion rates.

28 **Improving the evidence base for sentencing reform**

In support of improving the evidence base for sentencing reform, the effective administration of justice and promoting community understanding of sentencing, the Queensland Government appropriately fund and prioritise work to ensure:

- **28.1**: The administrative systems used by Queensland Courts are updated to ensure each charge indicted in the higher courts is linked to the originating charge(s) (if any) that were committed in the lower courts. Consideration should be given to the digitisation of the transmission sheets that are attached to indictments as a mechanism for implementing this change.
- **28.2**: Work is led by the Queensland Police Service in conjunction with other criminal justice agencies, to ensure that any changes made to a Single Person Identifier (SPI) through merges, splits or other modifications is made available to downstream agencies – for example, via a concordance mapping – to allow for more accurate tracking of individuals through the criminal justice system.
- **28.3**: Data collection processes of criminal justice agencies are improved to capture enhanced information about the demographics of and nature of any relationship between the parties, the types of information being relied upon at sentence, and information to enable better understanding of the effectiveness of sentencing and sentence types.
- **28.4**: Access to sentencing remarks for the general public is enhanced, including through the publication of District Court remarks for rape and sexual assault, and access is facilitated for the purpose of research.
- **28.5**: Access to lower court transcripts and sentencing submission transcripts (for both the higher and lower courts), is improved for the purpose of research.
- **28.6**: The functionality of the current Queensland Sentencing Information System (QSIS) is updated and enhanced, including through enhanced search and display functions (with consideration of earlier versions).

PART A:
Context of the review and Council approach

Contents

PART A: Context of the review and Council approach

List of Figures

List of Tables

Chapter 1 – Introduction

1.1 Background

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

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

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

In July 2024, in response to a request made by us, the Attorney-General granted a 3-month extension to the reporting date for both parts of the reference to 16 December 2024 for Part 1 and to 31 December 2025 for Part 2.

The referral of sentencing practices for sexual assault and rape offences to the Council followed the delivery by the Women's Safety and Justice Taskforce ('WSJT') of its second report, *Hear Her Voice – Report Two: Women and Girls' Experiences Across the Criminal Justice System ('Hear Her Voice, Report Two')* in July 2022.[1] In that report, the Taskforce, chaired by the Honourable Margaret McMurdo AC, made 188 recommendations intended to improve Queensland's criminal justice system for women and girls as victim survivors of sexual violence, or charged with or convicted of a criminal offence.[2] Sentencing practices were not specifically examined as part of this earlier inquiry.

1.2 About this report

This report presents our findings and recommendations in response to Part 1 of the Terms of Reference on sentencing practices for sexual assault and rape offences.

Some findings are presented as 'key findings' to the Attorney-General, given their importance. These findings are highlighted throughout this report.

1.3 The Terms of Reference

In undertaking this part of the review, we were guided by the Terms of Reference (at **Appendix 1**).

We were asked to consider the need to protect victims of sexual assault and rape offences and to hold offenders to account, concerns that penalties currently imposed on sentences for sexual assault and rape offences may not always meet the Queensland community's expectations and the need to maintain judicial discretion to impose a just and appropriate sentence as well as to promote public confidence in the criminal justice system.

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1 See Women's Safety and Justice Taskforce, 'About the Women's Safety and Justice Taskforce' *About us* (web page) <https://www.womenstaskforce.qld.gov.au/about-us>; Terms of Reference: Taskforce on Coercive Control and Women's Experience in the Criminal Justice System <https://www.justice.qld.gov.au/__data/assets/pdf_file/0010/672706/womens-safety-justice-taskforce-tor.pdf>.

2 Women's Safety Justice Taskforce, *Hear Her Voice, Report Two: Women and Girls' Experiences Across the Criminal Justice System* (2022).

We were asked to:

- examine the penalties currently imposed for sexual assault and rape offences under the PSA and review sentencing practices;
- determine whether the penalties imposed adequately reflect community views about the seriousness of sexual assault and rape offences and the sentencing purposes of just punishment, denunciation and community protection;
- identify any trends or anomalies that occur in sentencing for these offences;
- assess whether the existing sentencing purposes and factors set out in the PSA are adequate for the purposes of sentencing for these offences and identify whether any additional legislative guidance is required;
- identify and report on any changes to the law or other changes needed to ensure appropriate sentences are imposed for sexual assault and rape offences;
- advise the Attorney-General on options for reform to the current penalty and sentencing framework to ensure it provides an appropriate response to this type of offending; and
- advise on other matters relevant to this reference.[3]

In a supplementary request made in September by the Attorney-General, we were also asked to consider the use of good character evidence in sentencing for all sexual offences and, if appropriate, recommendations for reform.[4]

Some aspects of the justice system's response to sexual violence offending were outside the scope of our review and were therefore not examined. These include:

- charging and prosecution practices, including plea negotiations, and conviction court processes, including how sexual violence trials are managed;
- penalties imposed on sentence for children sentenced under the *Youth Justice Act 1992* (Qld);
- sentencing outcomes and practices for other sexual violence offences, including sexual offences specifically committed against children;
- the sentencing of Commonwealth offences under the *Crimes Act 1914* (Cth);
- how people charged with sexual violence offences are dealt with under the *Mental Health Act 2000* (Qld);
- the operation of the *Dangerous Prisoners (Sexual Offenders) Act 2003* (Qld) ('DPSOA'), which operates as a post-sentence scheme; and
- the *Child Protection (Offender Reporting and Offender Prohibition Order) Act 2004* (Qld) ('CPOROPOA'),[5] which requires particular offenders who commit sexual or other serious offences against children to keep police informed of their whereabouts and other personal details after they are sentenced for a set period of time.

3 Appendix 1, Terms of Reference, 3.
4 Letter from Yvette D'Ath MP, former Attorney-General and Minister for Justice, Minister for the Prevention of Domestic and Family Violence to the Ann Lyons AM, Chair, Queensland Sentencing Advisory Council, 25 September 2024.
5 This scheme was recently reviewed by the Queensland Crime and Corruption Commission: see Crime and Corruption Commission, *Protecting the Lives and Sexual Safety of Children – Review of the Child Protection (Offender Reporting and Offender Prohibition Order) Act 2004 – Report* (2023) <https://www.ccc.qld.gov.au/publications/CPOROPO-Act-review-2023>.

Several of these matters have been the focus of separate inquiries or have been identified for future investigation.

Of particular significance to our review, the WSJT undertook a comprehensive review of the criminal justice system's response to sexual violence and made 188 recommendations to government to improve criminal justice system responses. More information can be found in the WSJT *Hear Her Voice*, *Report Two* and in the government response to that report.[6]

In response to a recommendation made by the Taskforce in its first report in 2022, the Queensland Government agreed to invite the Legal Affairs and Safety Committee to consider reviewing and investigating, the operation of the DPSOA.[7]

The Queensland Crime and Corruption Commission completed a legislative review of the CPOROPOA in 2023.[8] The Commission's report is available on its website.

1.4 The Council's role and purpose

The current review has engaged several aspects of the Council's statutory functions, including to:

- advise the Attorney-General on matters relating to sentencing if asked to do so;
- give information to the community to enhance knowledge and understanding of sentencing;
- research matters about sentencing and publish the outcomes of this research; and
- obtain the community's views on sentencing.[9]

The Council's broader purpose is to inform, engage and advise the community and government about sentencing in Queensland. Through this purpose, we aim to promote just sentencing and community understanding.

1.5 Offences of rape and sexual assault in Queensland

We were asked to examine sentencing practices for two sexual offences only: sexual assault and rape.[10]

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

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6 Queensland Government, *Queensland Government Response to the Report of the Queensland Women's Safety and Justice Taskforce: Hear Her Voice – Report Two: Women and Girls' Experiences Across the Criminal Justice (November 2022)* <https://www.publications.qld.gov.au/ckan-publications-attachments-prod/resources/a0705c73-62bd-4263-ab2c-694e5735d058/qg-response-wsjtaskforce-report2.pdf?ETag=de17c1d3a721cd33689800bb204b14f5>.

7 See Queensland Government, *Queensland Government Response to the Report of the Queensland Women's Safety and Justice Taskforce: Hear Her Voice – Report One: Addressing Coercive Control and Domestic and Family Violence in Queensland* (Report No 1, 10 May 2022) 24–5, response to rec 72 <https://www.publications.qld.gov.au/dataset/3212af28-07f4-47cf-a349-d59bb737f06e/resource/84bb739b-4922-4098-8d70-a5a483d2f019/download/qg-response-wsjtaskforce-report1.pdf>.>.

8 Crime and Corruption Commission Queensland, *Protecting the Lives of Children and Their Sexual Safety: Review of the Child Protection (Offender Reporting and Offender Prohibition Order) Act 2004–Report* (June 2023).

9 *Penalties and Sentences Act 1992* (Qld) s 199(1).

10 The Council acknowledges that there are many different sexual violence offences that can be charged in addition to, or instead of, these two offences, depending on the type of conduct and circumstances involved, including the age of the victim. These other offences have not been considered specifically by the Council in this review.

1.5.1 Rape

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

- the person engages in penile intercourse with the other person;[11]
- the person penetrates the vulva, vagina, or anus of another person with a thing or part of the body that is not a penis;[12] or
- the person penetrates the mouth of the other person with the person's penis.[13]

The maximum penalty for rape is **life imprisonment**.[14]

1.5.2 Sexual assault

The offence of sexual assault is established in section 352 of the *Criminal Code* (Qld). It involves different forms of unwanted sexual behaviour, done without the person's consent (agreement).[15]

One type of sexual assault involves a person unlawfully and indecently assaulting another person.[16] For conduct to be 'indecent', it must have a sexual connotation or motivation.[17] It can include unwanted kissing and inappropriate sexual touching.

Sexual assault can also include forcing another person to commit an act of gross indecency, or making a person see an act of gross indecency[18] – for example, a person masturbating in front of another person.

There are 'circumstances of aggravation'[19] that are treated as more serious forms of sexual assault and carry higher maximum penalties. In this report, we refer to offences with these circumstances of aggravation as 'aggravated sexual assault'.

The maximum penalty is:

Life imprisonment:

- if the person committing the offence is (or pretends to be) armed with a dangerous or offensive weapon, or is in company;[20]
- if the indecent assault involves the person who is assaulted penetrating the offender's vagina, vulva or anus to any extent with a thing or part of the person's body that is not a penis;[21] or

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11 *Criminal Code Act 1899* (Qld) sch 1, s 349(2)(a) ('*Criminal Code* (Qld)'). The words 'engages in penile intercourse with' replaced 'has carnal knowledge with or of' on the coming into force of section 17 of the *Domestic and Family Violence Protection (Combating Coercive Control) and Other Legislation Amendment Act 2003* (Qld).
12 *Criminal Code* (Qld) (n 11) s 349(2)(b).
13 Ibid s 349(2)(c).
14 Ibid s 349(1).
15 Ibid s 352(1)(a). Note that this provision does not expressly prescribe consent to be an element of the offence of sexual assault. However, assault is an element of the offence and is defined in section 245 as being 'without the other's consent'. See also s 347.
16 Ibid s 352(1)(a).
17 *R v McBride* [2008] QCA 412, [20]; *R v Jones* (2011) 209 A Crim R 379 [29]–[32]. See also *R v BAS* [2005] QCA 97 [16] citing *R v Harkin* (1989) 38 A Crim R 296 [301].
18 *Criminal Code* (Qld) (n 11) s 352(1)(b).
19 For the definition of a circumstance of aggravation, see ibid s 1.
20 Ibid s 352(3)(a)
21 Ibid s 352(3)(b).

- if an act of gross indecency is done by the person procured (recruited, enticed or forced) by the offender and includes the person who is procured penetrating the vagina, vulva or anus of the person who is procured or another person, with a thing or body part (other than a penis).[22]

14 years' imprisonment:

- if the indecent assault or act or gross indecency includes bringing into contact any part of the genitalia or the anus of a person with any part of the mouth of a person.[23]

10 years' imprisonment:

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

1.6 The Council's approach

1.6.1 Council leadership

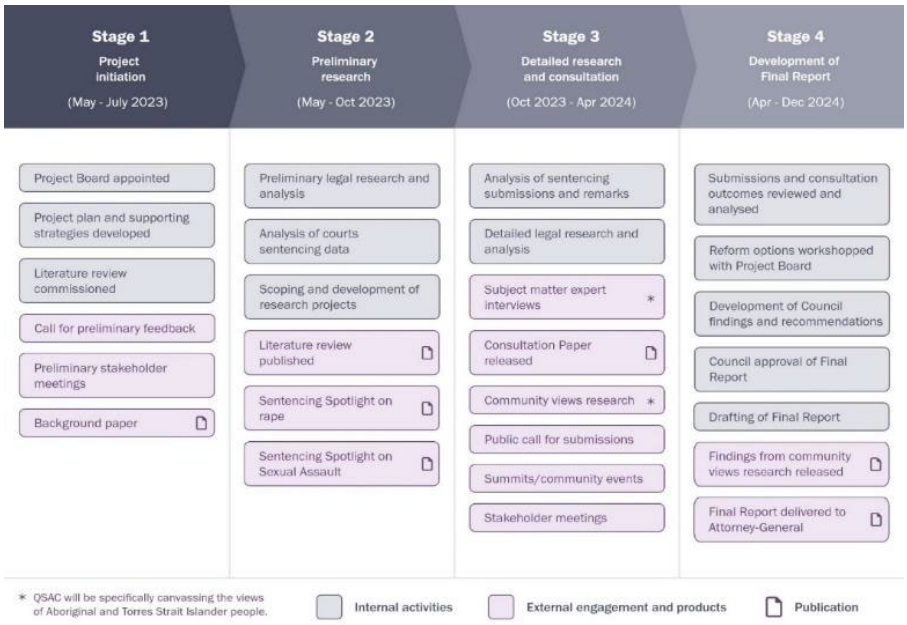
The Hon Ann Lyons AM was appointed as Council Chair in October 2023, following the retirement of John Robertson as Chair.

The Council appointed a Project Board to provide strategic oversight of and direction for the review and to explore issues identified throughout the review in detail. The Project Board was led by Professor Elena Marchetti, the Council's Deputy Chair. Members of the Project Board are listed in **Appendix 2.**

1.6.2 Review stages

Key stages of the review are shown below in Figure 1.1.

Figure 1.1: Key stages of the review



These key stages are described in more detail in our Background Paper.

22 Ibid s 352(3)(c).
23 Ibid s 352(2).

1.6.3 What informed the development of this report?

The development of this report has been informed by:

- research undertaken by the Council, including analysis of relevant data, case law and legislation;
- a literature review prepared by the Griffith Criminology Institute and other reviews of relevant evidence commissioned by the Council;
- submissions made to the review during the initial stage of the review and in response to our Consultation Paper — *Sentencing of Sexual Assault and Rape: The Ripple Effect: Issues and Questions* (see **Appendix 3**);
- individual meetings with stakeholders, victim survivors of sexual assault and rape and their family members, two in-person consultation events in Brisbane and Cairns attended by over 100 participants and two online forums with community members and stakeholders across Queensland (see **Appendix 3**);
- the University of the Sunshine Coast's research exploring community views about the seriousness of sexual assault and rape offences and the relevance of sentencing purposes and factors;
- findings from 26 subject matter expert interviews with professionals involved in the sentencing process, including prosecutors, defence practitioners and judicial officers, to better understand the current approach to sentencing for sexual assault and rape offences; and
- contributions made by the Council's Aboriginal and Torres Strait Islander Advisory Panel, Practitioner Consultative Forum and Research Consultative Forum (see **Appendix 3**).

1.6.4 Development of the Council's key findings and recommendations

In this report, the Council has made 20 key findings and 28 recommendations to improve sentencing practices for sexual assault and rape offences.

- **Key findings** are high-level conclusions of the Council in response to the issues raised by the Terms of Reference.
- **Recommendations** propose an action the Council considers necessary to address an issue raised within a key finding.

1.7 Data we used

The Council has based its analysis on the following data sources:

- administrative data collected by Court Services Queensland on the characteristics of offenders and sentencing outcomes for those sentenced for sexual assault and rape offences, as well as variations made on breach of a suspended prison sentence;
- information provided by the Queensland Police Service ('QPS') and the Office of the Director of Public Prosecutions ('DPP') about victim survivors and the nature of the conduct involved for sexual assault offences sentenced from July 2022 to June 2023 and rape offences sentenced from July 2000 to June 2003;
- administrative data held by Queensland Corrective Services relating to parole eligibility dates and time served prior to release on parole.

The courts data is presented in relation to the most serious offence ('MSO') for which a person was sentenced on a particular day unless otherwise specified. The determination of which sentence is the 'most serious' is ascertained using predetermined data flags developed by the Queensland Government Statistician's Office ('QGSO') to identify the offence receiving the most serious penalty. For more information on the limitations and exclusions relating to the data analysed, see **Chapter 4**.

1.8 Other research

To better understand court sentencing practices, we undertook an extensive qualitative analysis of sentencing remarks and sentencing submissions of cases involving rape and sexual assault finalised between July 2020 and June 2023. The study sample consisted of 150 sentencing remarks, with 75 drawn from rape cases and 75 from sexual assault cases using a randomised stratified sample.

As stated above, we also interviewed members of the judiciary, legal representatives and public prosecutors as part of our subject matter expert interviews research. These interviews are referenced in a deidentified form in this report.

More information about our approach to this research can be found in **Chapter 4**.

1.9 Language in this report

We recognise that the language we use when describing sexual offences and offending is important. In this report:

- **Sexual violence** is a broad term we use to mean any unwanted acts of a sexual nature perpetrated by one person against another person. The focus of the report is on two offences involving the use of sexual violence: rape and sexual assault.
- **Victim survivors and people who have experienced sexual violence** are used to mean those people who have had (or are alleged to have had) the act of sexual violence committed against them.[24] In the context of criminal proceedings, the term 'victim' refers to the person alleged by the prosecution to be a victim (often referred to as the 'complainant').[25] Many individuals who have experienced sexual violence prefer the term 'victim survivor' or 'survivor' rather than 'victim',[26] while some people do not identify with any of these terms. We acknowledge that the experience of crime victimisation does not define who a person is.[27]
- **Sentenced people/people who have committed sexual violence** are generally used in place of 'offenders' or 'prisoners' unless these terms are used in legislation. This recognises that terms such as 'prisoner' and 'offender' can perpetuate stigma[28] and a false dichotomy between people who have been a victim of crime and those who commit crime, as discussed in **Chapter 2**. We sometimes also use 'perpetrator' or 'alleged perpetrator'.

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24 We note that different legal definitions of who is a victim are adopted for specific purposes; some of these definitions are broader than those used for the purposes of this report. See, for example, *Victims of Crime Assistance Act 2009* (Qld) s 5.

25 The term 'complainant' is the person in respect of whom a criminal offence is alleged to have been committed. This term is commonly used in Queensland, including in legislation.

26 See, e.g., Oona Brooks and Michele Burman, 'Reporting Rape: Victim Perspectives on Advocacy and Support in the Criminal Justice Process' (2017) 17(2) *Criminology and Criminal Justice* 209, cited in Rhiannon Davies and Lorana Bartels, *The Use of Victim Impact Statements in Sentencing for Sexual Offences: Stories of Strength* (Routledge, London, 2021) 14–15.

27 See especially Victorian Law Reform Commission, *Improving Justice System Responses to Sexual Offences* (Report, September 2021) 7, which makes this same point.

28 Legislative Council Legal and Social Issues Committee, *Inquiry into Victoria's Criminal Justice System: Volume 2* (2022) 575, citing Victorian Aboriginal Legal Service, *Submission 139*, 254.

Chapter 2 – Nature and extent of sexual violence and relevance to sentencing

2.1 Introduction

In this chapter, we highlight the contextual issues impacting the sentencing of sexual assault and rape offences. While some of these contextual issues are outside the scope of this review, it is important to understand the offence of sexual assault and rape in the context of the broader criminal justice system.

We know that only a small proportion of sexual offences are reported to police in the first instance, and an even smaller proportion of those offences go on to be prosecuted, convicted and sentenced. We also know sexual violence can cause significant short- and long-term harm to victim survivors, and that it is experienced in different ways, and at higher rates, by people living within some communities and people experiencing disadvantage.

As part of this review, the Council prepared a **Consultation Paper: Background**, which explored the nature and context of sexual violence offending in more detail.

This chapter highlights what we know about the prevalence of sexual violence in Australia and Queensland, including for specific communities. It explores the reasons why people are not reporting sexual offences to police and what we know about high attrition rates for sexual violence offences in the criminal justice system. It also considers the mistaken beliefs surrounding sexual violence held by some members of the community and how these influence the criminal justice system and sentencing of these offences.

Finally, this chapter explains many of the reviews and inquiries into improving responses of the criminal justice system to sexual violence that have taken place over the last 10 years in Queensland, Australia and overseas. One of these reviews is particularly relevant to the Council's current review, the Women's Safety and Justice Taskforce's ('WSJT') *Hear Her Voice – Report Two: Women and Girls' Experiences Across the Criminal Justice System* (*'Hear Her Voice, Report Two'*).[1]

2.1.1 Sexual violence is serious, pervasive and gendered

Sexual violence is 'a major national health and welfare issue in Australia'.[2] It can have significant and lifelong physical and mental health and wellbeing impacts for both victim survivors and perpetrators.[3] Sexual violence can result in physical harm, poorer health, depression and anxiety, substance misuse disorders, economic insecurity, reduced capacity to study, poorer language skills and reduced trust in

1 Women's Safety and Justice Taskforce, *Hear Her Voice–Report Two: Women and Girls' Experiences Across the Criminal Justice System* (2022) ('*Hear Her Voice – Report Two*').

2 Australian Institute of Health and Welfare, 'FDSV Summary', *Family Domestic and Sexual Violence* (web page, 27 November 2024) <https://www.aihw.gov.au/family-domestic-and-sexual-violence/resources/fdsv-summary>

3 For more information see Queensland Sentencing Advisory Council, *Sentencing of Sexual Assault and Rape: The Ripple Effect – Consultation Paper: Background* (March 2024) section 4.4.3, 44–6.

people and/or relationships.[4] Not only is the direct victim survivor deeply affected, but the impacts of sexual violence ripple out across families, communities and society.[5]

While sexual violence affects people of all genders, ages, cultural and ethnic backgrounds, and sexual orientations, the majority of victims are female and many are children.[6]

National and Queensland figures reflect that reporting rates are increasing, with women and girls more likely to be victim survivors.

The Australian Bureau of Statistics ('ABS') *2021–22 Personal Safety Survey* ('PSS') estimates that 2.8 million people aged 18 years or over had experienced sexual violence since the age of 15,[7] including 2.2 million women (representing 22% of all women aged 18 or over) and 582,400 men (6.1%).[8]

The ABS found that 1 in 5 women had experienced sexual violence since the age of 15, and 1 in 16 men had experienced sexual violence since the age of 15.[9] This research also found that, compared with Australian men, Australian women are about 4 times more likely to experience sexual violence[10] and more than 8 times more likely to experience sexual violence by a partner.[11]

National victims of crime data shows an increase in reporting rates over time.[12] In 2022, women and girls had more than 5 times the victimisation rate of men and boys.[13] More than one-third (39%) of all recorded sexual assaults in 2023 were domestic and family violence related.[14]

Similar to national rates, in Queensland sexual violence offences reported to the Queensland Police Service ('QPS') have also increased over recent years.[15] In 2023–24, over one-third of sexual violence offences reported to QPS were for rape and attempted rape (37.2%, n=3,608), with the remaining two-thirds (62.8%, n=6,097) of reports made for other sexual offences.[16] Sexual offences accounted for

4 Judy Cashmore and Rita Shackel, 'The long-term effects of child sexual abuse' (Child Family Community Australia Paper No 11, Australian Institute of Family Studies, January 2013) 2; Natalie Townsend et al, *A Life Course Approach to Determining the Prevalence and Impact of Sexual Violence in Australia: Findings from the Australian Longitudinal Study of Women's Health*, (Research Report No 14, ANROWS, 2022).

5 Commonwealth Government Department of Social Services, *National Plan to End Violence Against Women and Children 2022–2032* (2022) 41 ('*National Plan 2022–2032*').

6 Emma Fulu et al, *Why Do Some Men Use Violence Against Women and How Can We Prevent It? Quantitative Findings from the United Nations Multi-Country Study on Men and Violence in Asia and the Pacific* (Bangkok: UNDP, UNFP, UN Women and UNV, 2013); Australian Bureau of Statistics, *2021–22 Personal Safety Survey* (15 March 2023) ('*PSS 2021–22*').

7 Sexual violence is measured by combining experiences of sexual assault and sexual threat. Sexual assault is an act of a sexual nature carried out against a person's will through the use of physical force, or intimidation or coercion, including any attempts to do this. This includes offences such as rape, attempted rape, aggravated sexual assault (assault with a weapon), indecent assault, forced sexual activity that did not end in penetration and any attempts to force a person into sexual activity. Sexual threat is any threat of a sexual nature that was made face-to-face, and that the person targeted believed was able and likely to be carried out.

8 *PSS 2021-22* (n 6) Table 1.1. The PSS estimates information about populations of interest using survey responses and a person weighting approach. For more information on this approach see *The Australian Bureau of Statistics Personal Safety Survey: User Guide* <https://www.abs.gov.au/statistics/detailed-methodology-information/concepts-sources-methods/personal-safety-survey-user-guide/2021-22#:~:text=The%20survey%20collected%20information%20from,abuse%20by%20a%20cohabiting%20partner>.

9 *PSS 2021–22* (n 6) and Australian Bureau of Statistics, *Personal Safety Survey 2016* (8 November 2017).

10 Christine Coumarelos et al, *Attitudes Matter: The 2021 National Community Attitudes towards Violence Against Women Survey (NCAS), Findings for Australia* (Research Report 14, ANROWS, 2023) 31.

11 Ibid.

12 Australian Bureau of Statistics, *Recorded Crime - Victims 2023* (27 June 2024) ('*ABS Victims 2023*'). Recorded means offences that may have been reported by a victim, witness or other person, or detected by police. The sexual assault definition is based on ANZSOC classification 0311 and 0312).

13 A total of 206 victims per 100,000 females compared with 39 victims per 100,000 males: see Australian Bureau of Statistics, *Recorded Crime - Victims 2022* (29 June 2023) ('*ABS Victims 2022*').

14 A total of 14,059 victims: see ibid.

15 Queensland Police Service, *Queensland Crime Statistics* (web page) <https://mypolice.qld.gov.au/queensland-crime-statistics>. Sexual offences include rape, sexual assault and other sexual offences.

16 Ibid: Sexual offences other than rape/attempted rape includes indecent treatment of children, incest, indecent assault, bestiality, wilful obscene exposure and other sexual offences.

11.8 per cent of all QPS recorded victims in 2022–23.[17] Female victim survivors aged 19 years and younger were most commonly the victims (42.7%, n=3,732).[18] Offences against male victims are also most commonly reported for the 19 years and younger age group (n=733).[19]

2.1.2 Sexual violence is predominantly committed by men and boys

Just as women and girls are overwhelmingly the victims of sexual violence, men and boys are overwhelmingly the perpetrators.[20]

The 2021–22 PSS found that the overwhelming majority of women who had experienced sexual violence since the age of 15 reported that it had been perpetrated by a male person (99.3%, n=2,187,800).[21] For men who had experienced sexual violence since the age of 15, over half reported that the offending was committed by a male perpetrator (58.7%, n=341,700).[22]

In Queensland in 2022–23, of the approximately 3300 reported sexual violence offenders, 95.6 per cent were male (n=3156).[23] Women and girls accounted for less than 5 per cent of reported sexual violence offenders in 2022–23 (n=144). Offender demographics, including gender breakdown, for sentenced cases of rape and sexual assault in Queensland are discussed further in **Appendix 4**.

The reasons why some men commit acts of sexual violence while others do not are multifaceted and complex. Research suggests that sexual violence offending is driven by both micro and macro risk factors at the individual and relationship, organisational and community, system and institutional, and societal levels.[24]

For more information about the drivers of and risk factors associated with sexual violence offending, see Chapter 4, section 4.3 of the **Consultation Paper: Background**.

2.1.3 Sexual violence is experienced in different ways

Sexual violence occurs across a broad range of different relationships and locations:

- **Sexual violence is often perpetrated by someone known to the victim survivor.**[25] This may be a current or former intimate partner, parents, siblings, friends or colleagues.[26] The Royal Commission into Institutional Responses to Child Sexual Abuse found sexual violence also occurs

17 Queensland Government Statistician's Office, Queensland Treasury, *Crime Report, Queensland, 2022–23* (Report, 2024) 76, Table 61 ('*QGSO Crime Report*').
18 Ibid 78.
19 Ibid.
20 Fulu et al (n 6); *PSS 2021–22 (*n 6); *QGSO Crime Report* (n 17) 48, Table 49.
21 *PSS 2021–22* (n 6) *Sexual Violence (female experiences in PSS)* Table 1.1. Where a person experienced sexual violence by both a male and a female, they were counted separately for each. Some 52,300 women (2.4%) reported experiencing sexual violence by both a male and a female.
22 Of the 341,700 reporting a male perpetrator, 48,200 (14.1%) involved both a male and female perpetrator: *PSS 2021–22* (n 6). *PSS National prevalence and time series data download, Table 1.1 (Persons aged 18 years and over, experiences since and before the age of 15).*
23 *QGSO Crime Report* (n 17) 48. These figures included child offenders aged 10–17 years, which are not within the scope of our review.
24 Michael Flood et al, *Who Uses Domestic, Family, and Sexual Violence, How, and Why? The State of Knowledge Report on Violence Perpetration* (Queensland University of Technology, 2022) 7.
25 The PSS defines boyfriend or date as a relationship that 'may have different levels of commitment and involvement that does not involve living together. For example, this will include persons who have had one date only, regular dating with no sexual involvement or a serious sexual or emotional relationship. Includes both current boyfriend and ex-boyfriend. Excludes de facto relationships.'
26 Australian Institute of Health and Welfare, *Sexual Assault in Australia* (Infocus Report, August 2020) 8–9 ('*Sexual Assault in Australia*').

in institutions, with offences predominantly committed by someone known to the victim survivor, or someone in a position of trust and/or power or authority.[27]

- **Sexual violence may happen in private and public spaces.** It is a common misconception that sexual violence usually happens in public and is committed by strangers. In fact, sexual violence offending mostly occurs in private locations, such as within someone's home.[28]
- **Sexual violence may happen once or many times.** For child sexual abuse and domestic and family violence survivors, sexual violence may happen over a long period. Research shows that victim survivors may experience sexual violence many times in their life by different people.[29]
- **Sexual violence can occur together with other forms of violence.** For example, physical and emotional abuse may occur together with sexual offending. This is particularly prevalent for domestic and family violence offences.
- **Sexual violence can take many forms.** This review is examining the sentencing of rape and sexual assault offences only. However, sexual violence can involve a variety of both contact and non-contact offences, including technology-facilitated offences such as the possession and distribution of child exploitation material. Sometimes these offences are committed alone or together with in-person, physical sexual violence. All forms of sexual violence can cause serious harm.

2.1.4 Sexual violence is experienced at higher rates by some communities

Sexual violence is experienced at higher rates by some people. The impacts of sexual violence may be exacerbated in certain settings and where it intersects with other forms of disadvantage and discrimination, such as sexism, racism, ageism and ableism.[30] Sexual violence may also be less visible and less understood for some marginalised groups in the community.[31] There is also limited publicly available data surrounding the prevalence of sexual violence within these communities. Some of those communities are discussed below.

Aboriginal and Torres Strait Islander peoples

While limited published data is available, research findings show Aboriginal and Torres Strait Islander peoples are around 3.5 times more likely to have been victims of sexual assault (including rape and other sexual offences) compared with non-Indigenous Australians.[32] In 2022–23 in Queensland, according to sexual violence offences reported to police, Aboriginal and Torres Strait Islander women and girls were 2.5 times more likely to be victims of rape than non-Indigenous women and girls, and Aboriginal and Torres Strait Islander men and boys were more than 4.5 times more likely to be victims of rape than non-Indigenous men and boys.[33] Aboriginal and Torres Strait Islander women were almost twice as likely to

27 Royal Commission into Institutional Responses to Child Sexual Abuse, *Final Report Volume 2: Nature and Cause* (2017) 34 ('*Royal Commission on Child Sexual Abuse Final Report Vol 2*').
28 PSS *2021–22* (n 6) *Violence (Female Experiences in PSS) – Incident Characteristics*; Australian Bureau of Statistics, *Sexual Violence 2021-22* (23 August 2023)
29 Mary Stathopoulos, *Sexual Revictimisation: Individual, Interpersonal and Contextual Factors*, (Research Summary, Australian Centre for the Study of Sexual Assault, Australian Institute of Family Studies, May 2014) 1–5.
30 For more information on intersectionality, see Diversity Council Australia, *Culturally and Racially Marginalised Women in Leadership: A Framework for (Intersectional) Organisational Actions*, (Factsheet, 2023) <https://www.dca.org.au/wp-content/uploads/2023/09/carm_women_infographic_intersectionality_explained_final.pdf>.
31 *National Plan 2022–2032* (n 5) 41.
32 Australian Institute of Health and Welfare, *Family, Domestic and Sexual Violence in Australia* (Report, 2018).
33 Queensland Government Statistician's Office analysis of Queensland Police Service unpublished data, extracted in September 2023.

be victims of non-aggravated sexual assault[34] than non-Indigenous women[35] and Aboriginal and Torres Strait Islander men were slightly more likely to be victims of non-aggravated sexual assault than non-Indigenous men.[36]

In 2022, for Aboriginal and Torres Strait Islander victims of sexual assault (including rape and other sexual offences) nationally, just under half were recorded as domestic and family violence related (40–48%).[37]

The ongoing impact of colonialisation, dispossession, forced child removal and intergenerational trauma shapes the rate of sexual violence experienced by Aboriginal and Torres Strait Islander people. Aboriginal and Torres Strait Islander women and girls are especially vulnerable to sexual violence,[38] and much of the violence experienced by Aboriginal and Torres Strait Islander women and girls is less visible than violence against non-Indigenous women and girls.[39] This means that the true rate of sexual victimisation among Aboriginal and Torres Strait Islander women and girls is likely to be much higher than is suggested by rates based on reported sexual violence incidents.

Violence against Aboriginal and Torres Strait Islander peoples, including sexual violence, is perpetrated by people of all cultural backgrounds, in many different contexts and settings.[40] A 2001 NSW study found that in over a quarter of sexual assault and sexual assault against children offences where the victim was Aboriginal and Torres Strait Islander, the alleged perpetrator was non-Indigenous.[41]

Children and young people

Prevalence data and information about children's experiences of sexual violence is difficult to obtain due to the sensitivities of the subject and high rates of under-reporting. The most reliable data on reported cases of sexual violence is from administrative sources such as police, child protection services and hospitals.

All children can be affected by sexual violence; however, a higher number of girls report experiencing it. The 2021–22 PSS found one in 10 women and one in 28 men reported having experienced childhood sexual abuse.[42]

In Queensland in 2022–23, of all victim survivors who reported a sexual offence to police, one in 2 were aged 19 years or younger, with 42.7 per cent of female victim survivors aged 19 years and younger

34 Australian Standard Offence Classification (Queensland Extension) subgroup category 03121 'non-aggravated sexual assault'.

35 Queensland Government Statistician's Office analysis of Queensland Police Service unpublished data, extracted in September 2023.

36 Ibid.

37 *ABS Victims 2022* (n 13).

38 *Hear Her Voice– Report Two* (n 1) vol 1, 43, citing *Sexual Assault in Australia* (n 26) 3.

39 Trishima Mitra-Kahn, Carolyn Newbigin and Sophie Hardefeldt, *Invisible Women, Invisible Violence: Understanding and Improving Data on the Experiences of Domestic and Family Violence and Sexual Assault for Diverse Groups Women* (Landscapes State of Knowledge Paper, Issue No DD01, ANROWS, December 2016) 12, 19–20.

40 Our Watch, 'Challenging Misconceptions About Violence Against Aboriginal and Torres Strait Islander Women' (web page) <https://action.ourwatch.org.au/resource/challenging-misconceptions-about-violence-against-aboriginal-and-torres-strait-islander-women>.

41 Jacqueline Fitzgerald and Don Weatherburn, *Aboriginal Victimisation and Offending: The Picture from Police Records, Crime and Justice Statistics* (Issue Paper No 17, NSW Bureau of Crime Statistics and Research, December 2001) 3. See also findings from qualitative research with similar findings: Monique Keel, *Family Violence and Sexual Assault in Indigenous communities: 'Walking the Talk'* (Briefing Paper, Australian Centre for the Study of Sexual, 4 September 2004) 6, citing Edie Carter, *Aboriginal Women Speak Out* (Adelaide Rape Crisis Centre, 1987).

42 *PSS 2021–22* (n 6), 'Childhood Abuse'. Because the PSS asks adult respondents about their experience of sexual abuse before the age of 15, this is not an estimate of the current prevalence of child sexual abuse. See also Australian Institute of Family Studies, *The Prevalence of Child Abuse and Neglect* (Police and Practice Paper, April 2017) <https://aifs.gov.au/resources/policy-and-practice-papers/prevalence-child-abuse-and-neglect>. See also *Royal Commission on Child Sexual Abuse Final Report Vol 2* (n 26) 69; Antonia Quadara et al, *Conceptualising the Prevention of Child Sexual Abuse* (Australian Institute of Family Studies, Canberra, 2015) 2.

(n=3,732).[43] Male victim survivors were also most commonly in the 19 years and younger age group (56.9%, n=733).[44]

People with disability

People with a disability are more likely to have experienced sexual violence than people without a disability. The 2016 PSS reported that 21 per cent of people with a disability reported experiencing sexual violence from the age of 15 years, compared with 10 per cent of people without a disability.[45]

While all women are at higher risk of sexual violence than men, women with disability are nearly twice as likely to be sexually assaulted than women without disability (29% compared with 15%).[46] Research shows since the age of 15 years, almost half of 'women with psychological intellectual disability (45%) have experienced sexual assault compared to 29 per cent of all women with a disability'.[47] Men with disability are also 2.6 times more likely to report an incident of sexual violence over their lifetime compared with men without disability.[48]

Data on some population cohorts with disability is limited, and even less is known about their experiences of sexual violence.[49] Data for some communities with disability include:

Aboriginal and Torres Strait Islander people with disability:[50]

- Over one-third of the Aboriginal and Torres Strait Islander population have a disability (38%).
- More than one in 5 Aboriginal and Torres Strait Islander children have a disability. Almost one-quarter (23.8%) of all Aboriginal and Torres Strait Islander peoples with disability are children.
- There are more Aboriginal and Torres Strait Islander boys with disability than girls (26% and 18% of all Aboriginal and Torres Strait Islander children respectively).

Children with disability:[51]

- Of Australian children, 8.2 per cent have a disability. This accounts for around 10 per cent of all people with a disability in Australia.
- Of children with a disability, the majority are boys (61%).
- Around 5 per cent of children in Australia have a 'profound or severe' disability (around 29% of Aboriginal and Torres Strait Islander children with disability have a 'profound or severe' disability).[52]

The Royal Commission into Violence Abuse, Neglect and Exploitation of People with Disability observed that there were limitations to the reliable data on people with disability and specific forms of violence.

43 *QGSO Crime Report* (n 17) 78, Figure 33.
44 Ibid 78, Figure 33.
45 Centre of Research Excellence in Disability and Health, *Nature and Extent of Violence, Abuse, Neglect and Exploitation Against People with Disability in Australia: Research Report* (Report, March 2021) 9.
46 Royal Commission into Violence, Abuse, Neglect and Exploitation of People with Disability, *Nature and Extent of Violence, Abuse, Neglect and Exploitation: Final Report Volume 3* (2023), 116 (‘*Royal Commission on Disability Final Report*’).
47 Centre of Research Excellence in Disability and Health (n 45) 14. The data was on prevalence of women’s experiences of violence by impairment type and type of violence. Researchers considered all forms of disability, and specific forms of impairment – sensory/speech, physical, psychological and cognitive.
48 Ibid 10.
49 *Royal Commission on Disability Final Report* (n 46) 84–6, 134.
50 Centre of Research Excellence in Disability and Health, *Research Report* (n 45) 43–8.
51 Ibid 29.
52 Ibid 44.

The Royal Commission noted that no publicly available or reliable data was available on the experiences of sexual violence for some people with disability.[53]

People from culturally and racially marginalised groups

People who experience cultural and racial marginalisation ('CARM')[54] can also experience higher rates of sexual violence; however, it is difficult to measure how many people are impacted, 'given the great variations in lived experience and socio-demographics' of CARM populations.[55]

Some research also utilises the term 'CALD', meaning culturally and linguistically diverse, to describe communities (or people from those communities), for whom English is not the main language or whose cultural norms differ from the wider community.[56] In this chapter, the term CALD appears where sources have used this instead of CARM.

We know refugees and asylum seekers have been exposed to many forms of violence, including 'persecution, political imprisonment, torture, sexual exploitation and mass trauma or genocide'.[57] Some people from CALD backgrounds may be vulnerable due to temporary and dependent visa status, language barriers and/or lack of community support and networks. These factors may increase their risk of exposure to sexual violence and heighten barriers to seeking help.[58]

LGBTQIA+ people

The data indicates that people who identify as LGBTQIA+ are significantly more likely to experience sexual violence.[59] These experiences are less visible because sexual violence is often 'understood as heterosexual violence'.[60]

A 2018 survey conducted in Australia with transgender and gender-diverse individuals found that over half of participants reported experiencing sexual violence coercion (53.3%).[61] This was a rate of nearly 4 times higher than found in the general Australian public (13.3%). Of those who reported experiencing

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53 Ibid 85. The Royal Commission noted some data is available on experiences of physical violence, and that the most reliable data source on experiences of violence (the PSS) does not collect information specifically on various population cohorts discussed in this chapter.

54 CARM means 'people who are not white' – research shows this group experiences racial marginalisation. This includes people who are Black, Brown, Asian, or any other non-white group, who face marginalisation due to their race. The term "culturally" is added because these people may *also* face discrimination due to their culture or background - e.g., a woman who is a Muslim migrant from South Sudan may face discrimination because of her race and her religion and cultural background.' Diversity Council Australia, 'Culturally and Racially Marginalised (CARM) Women in Leadership' (Web Page, 6 September 2023) <https://www.dca.org.au/research/culturally-and-racially-marginalised-carm-women-in-leadership>. Previously, the term was CALD, standing for culturally and linguistically diverse. This has been criticised as 'fail[ing] to comprehensively address issues of racism and marginalisation'. See Jessica Bahr, 'CALD: Why some say this label is failing Australians', *SBS News* (Web Page, 29 April 2023) <https://www.sbs.com.au/news/article/hopelessly-inadequate-why-some-say-this-label-is-failing-australians/i0be0ywsd>.

55 Trishima Mitra-Kahn et al. *Invisible Women, Invisible Violence: Understanding and Improving Data on the Experiences of Domestic and Family Violence and Sexual Assault for Diverse Groups of Women: State of Knowledge Paper* (ANROWS, 2016) 25.

56 Australian Law Reform Commission, *Equality, Capacity and Disability in Commonwealth Laws* (November 2014) 244 [8.6].

57 Michael Salter et al, *"A Deep Wound Under My Heart": Constructions of Complex Trauma and Implications for Women's Wellbeing and Safety from Violence*, Research Report (ANROWS, May 2020) 19.

58 Australian Institute of Health and Welfare, 'People from culturally and linguistically diverse backgrounds' (Web Page, September 2024) <https://www.aihw.gov.au/family-domestic-and-sexual-violence/population-groups/cald>.

59 *Sexual Assault in Australia* (n 26) 3.

60 Monica Campo and Sarah Tayton, *Intimate Partner Violence in Lesbian, Gay, Bisexual, Trans, Intersex and Queer Communities: Key Issues*, Child Family Community Australia Practitioner Resource (Australian Institute of Family Studies, December 2015) 1–2.

61 D Callander et al. *The 2018 Australian Trans and Gender Diverse Sexual Health Survey: Report of Findings* (The Kirby Institute, UNSW, Sydney, 2019) 10.

sexual violence, over two-thirds said they had experienced it multiple times (69.6%).[62] Again, this was a much higher rate that among a general sample of people in Australia (45.4%).[63]

A more recent study of LGBTQ+ people's experiences and perceptions of sexual violence found that 82 per cent of participants had previously had sex with a person because they felt they could not say no, and 80 per cent had done so when they did not want to.[64] Over one-third of respondents had experienced someone having sex with them when they were unconscious or asleep.[65]

A 2014 study with 255 transgender Australians found 11.9 per cent of participants 'reported experiencing sexual assault, attempted rape and/or rape'.[66]

An ANROWS study into CALD trans women's experiences of sexual violence conducted a survey to compare sexual violence experiences of CALD trans women, non-CALD trans women and cisgender (people whose gender identity matches the sex assigned to them at birth), LBQ and heterosexual women. Researchers found over two-thirds of cisgender[67] and CALD trans women[68] and half of the non-CALD trans women (50%) reported experiencing a sexual assault since the age of 16.[69] Researchers concluded that 'sexual violence is an endemic problem for trans women of colour living in Australia, as it is for every group of women'.[70]

People in the custodial system

Research into incarcerated people's experiences as victim survivors of sexual violence is limited. Assaults in custody are often under-reported, making data collection difficult. However, national data for 2022 found that about one in 50 people released from prison reported that they had been sexually assaulted by another person in custody.[71]

Studies show incarcerated women have experienced higher rates of sexual victimisation across their life-course than non-incarcerated women,[72] with some studies suggesting that up to 80 per cent of women in custody had a history of sexual victimisation and trauma.[73] Sisters Inside Inc. told us that the organisation's recent research into female prisoner experiences in Queensland found almost 9 in 10 women had been sexually abused in their lifetime (89%) and 'up to 85 per cent had experienced

62 Ibid.
63 Ibid
64 Eloise Layar et al., *LGBTQ+ People's Experiences and Perceptions of Sexual Violence*, Research Summary Report (2022) 15.
65 Ibid.
66 Shaez Mortimer, Anastasia Powell and Larissa Sandy, '"Typical scripts" and their silences: Exploring myths about sexual violence and LGBTQ people from the perspectives of support workers (2019) 31(3) *Current Issues in Criminal Justice* 335, citing Crystal Boza and Kathryn Nicholson Perry, 'Gender-related victimisation, perceived social support, and predictors of depression among transgender Australians' (2014) 15(1) *International Journal of Transgenderism* 35.
67 N=825, 66% hetero and n = 573, 66% LBQ (lesbian, bisexual and queer): Jane M. Ussher et al., *Crossing the Line: Lived Experience of Sexual Violence Among Trans Women of Colour from Culturally and Linguistically Diverse (CALD) Backgrounds in Australia* (ANROWS, June 2020) 131.
68 N=18, 66%: ibid.
69 Ibid.
70 Ibid 156.
71 This data was self-reported and likely to be an under-estimate of the true number of sexual assaults in prison. See Australian Institute of Health and Welfare, *The Health of People in Australia's Prisons 2022* (2023) 23.
72 Victorian Law Reform Commission, *Improving Justice System Response to Sexual Offences Final Report* (2021) 23 ('*Improving Justice Responses*'); Mary Stathopoulos et al, *Addressing Women's Victimisation Histories in Custodial Settings* (Australian Institute of Family Studies, December 2012) 1–5 ('*Addressing Women's Victimisation Histories*'), 16; Mary Stathopoulos and Antonia Quadara, *Women as Offenders, Women as Victims: The Role of Corrections in Supporting Women with Histories of Sexual Abuse* (Women's Advisory Council of Corrective Services NSW, 2014) 13–14.
73 Stathopoulos et al, *Addressing Women's Victimisation Histories* (n 72) 16.

childhood sexual abuse (with 37% of those reporting having been abused before the age of 5)'.[74] In their preliminary submission, Sisters Inside advised the Council that 'the great majority of currently or formerly incarcerated women (various statistics between 70%–90%) have been a victim to sexual assault and sexual violence, and almost all have experienced some other form of interpersonal violence'.[75]

There is also some evidence to suggest that transgender people experience higher rates of sexual violence in custody. Due to 'inconsistent definitions', the true number of transgender people in custody in Australia is unknown.[76] Research on transgender people's experiences of sexual violence in prison is limited, however, international research suggests that they are at 'higher risks of…sexual assault whilst in prison', with some reporting 'daily experiences of sexual coercion and psychological distress'.[77] One Australian study involved interviews with 7 transgender women incarcerated in NSW.[78] For the 5 participants in male prisons, being a trans woman meant 'unwanted sexual advances from other prisoners were a recurrent part of the prison experience', and '[t]wo participants spoke of being violently raped and three described witnessing the rape of another prisoner or narrowly escaping this fate themselves'.[79]

2.2 Sexual violence is poorly understood

Confused and mistaken community views of sexual violence are widespread.[80] Misconceptions about what sexual violence is, when and how it happens and how to respond if someone discloses sexual violence all contribute to low reporting and high attrition rates in the criminal justice system.

Nationwide research indicates:

- Over one-third of Australians (34%) believe it is common for sexual assault accusations to be used as a way to get back at men.[81]
- Around one-quarter of Australians (24%) think women who say they were raped had led the man on and then had regrets.[82]
- Around one in 10 Australians think that if a woman is raped while drunk or affected by drugs, she is at least partly responsible.[83]
- Around a quarter of Australians (25%) believe that when a man is very sexually aroused, he may not realise that a woman doesn't want to have sex.[84]
- Around one in 10 Australians (14%) believe many allegations of sexual assault made by women are false.[85]

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74 Debbie Kilroy, 'Women in prison in Australia', . <https://www.njca.com.au/wp-content/uploads/2023/03/Kilroy-Debbie-Women-in-Prison-in-Australia-paper.pdf>.
75 Preliminary Submission 28 (Sisters Inside Inc) 2.
76 Sam Lynch and Lorana Bartels, 'Transgender prisoners in Australia: An examination of the issues' (2017) 19 *Flinders Law Journal* 190.
77 Ibid 192 citing, Association for the Prevention of Torture, *LGBTI Persons Deprived of Their Liberty: A Framework for Preventive Monitoring* (Penal Reform International, 2013).
78 Mandy Wilson et al, ''You're a woman, a convenience, a cat, a poof, a thing, an idiot': Transgender women negotiating sexual experiences in men's prisons in Australia' (2017) 20(3) *Sexualities* 380.
79 Ibid 388.
80 *Improving Justice System Response* (n 72) 36.
81 Christine Coumarelos et al, *Attitudes Matter: The 2021 National Community Attitudes Towards Violence Against Women Survey (NCAS), Summary for Australia* (ANROWS Research Report, 2023) 139 Figure 6-5.
82 Ibid.
83 Ibid 143, Figure 6-6.
84 Ibid.
85 Ibid. 139, Figure 6-5. This question was only asked to one-quarter of the sample.

These and other misconceptions can discourage victim survivors from reporting the offence to police out of fear and stigma. If these misconceptions are held by decision-makers in the criminal justice system, such as police and prosecutors, they may influence decisions about whether to charge and/or progress a case through the criminal justice system. If the matter proceeds to trial by jury, the jurors' attitudes and beliefs may influence their decision-making.

2.2.1 Rape myths

Prejudicial beliefs and attitudes that 'serve to deny, downplay or justify sexual violence' are sometimes referred to as rape myths.[86] Such beliefs can be broadly divided into 4 categories:[87]

> **Beliefs that blame the victim survivor**, such as the belief that people who get voluntarily intoxicated are at least partly responsible for their rape, that is the [victim survivor] did not scream, fight or get injured, then it is not rape or that it is not rape if the complainer fails to sufficiently communicate her lack of consent to the accused.
>
> **Beliefs that cause doubt on allegations**, such as the belief that false allegations due to revenge or regret are common or that any delay in reporting rape is suspicious.
>
> **Beliefs that excuse the accused**, such as the belief that male sexuality is uncontrollable once 'ignited', or that women often send mixed signals about their willingness to engage in sexual activity.
>
> **Beliefs about what 'real rape' looks like**, such as the belief that rape only occurs between strangers in public places, that it is always accompanied by violence or that male rape only occurs between gay men.[88]

These misconceptions matter because they form culturally embedded narratives of what people expect sexual violence offences and perpetrators to look like and, in particular, how victim survivors are expected to look and act.[89] For example, mock jury research suggests jurors expect victim survivors to 'react in distress after the attack and at all times when recounting it, and therefore, complainants who are unemotional when testifying may not be seen as credible'.[90] Research has also found judges and police investigators believe emotional victims are more credible.[91] This may not reflect reality, as a victim survivor can be numb during questioning or have improved coping mechanisms due to counselling.[92] A New Zealand jury study found that jurors believed 'victims who are "good" - not drunk, not promiscuous and so on' were 'more likely to be truthful'.[93] Similarly, jurors 'made explicit comments about complainants' clothing, allegedly flirtatious behaviour, intoxication, lifestyle, prior sexual behaviour leading up [to] the alleged offence, as suggesting that the victim was at least partly to blame'.[94]

When offences, perpetrators and victim survivors do not adhere to this ideal perception it may impact how fact-finders in the criminal justice system make their decisions and contribute to dissatisfaction with outcomes for victims of sexual violence.

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86 Heiki Gerger et al, 'The acceptance of modern myths about sexual aggression scale: development and validation in German and English' (2007) 33(5) *Aggressive Behaviour* 422, 423.
87 Fiona Leverick, 'What do we know about rape myths and juror decision making?' (2020) 24(3) *The International Journal of Evidence & Proof* 255, 256.
88 Ibid 257.
89 Yvette Tinsley, Claire Baylis and Warren Young, '"I think she's learnt her lesson": Juror use of cultural misconceptions in sexual violence trials' (2022) 52(2) *Victoria University of Wellington Law Review* 463, 464.
90 Ibid 466–7.
91 See research referred to in Patrick Tidmarsh and Gemma Hamilton, *Misconceptions of Sexual Crimes Against Adult Victims: Barriers to Justice* (Australian Institute of Criminology, 2020) 6 ('*Misconceptions of Sexual Crimes*').
92 Ibid.
93 Tinsley, Baylis and Young (n 89) 475.
94 Ibid 476.

2.3 Barriers to reporting and attrition in the criminal justice system

The figures discussed throughout this report on sentenced cases, trends and outcomes are only a proportion of sexual violence offences perpetrated in Queensland and Australia. Even though experiencing sexual violence is common, it is one of the most under-reported crimes, with research showing 'incidents of rape, sexual offences and child sexual abuse are significantly under-reported, under-prosecuted and under-convicted'.[95] Encouragingly, the rate of reporting sexual violence offences to police has increased in Australia, with a 30-year high recorded in 2023.[96] However, despite this increase in reporting, there has not been a substantial change to attrition rates.[97]

This section briefly explores the reasons why someone might not report sexual violence and why attrition rates remain high.

2.3.1 Why victim survivors find it difficult to report sexual violence to police

In contrast to other crimes, victim survivors of sexual violence 'face an agonising choice with regard to disclosure and police reporting. It is a process and a "choice" fraught with challenges, barriers and difficulties not encountered' in other crime types.[98]

There are many barriers to victim survivors reporting sexual offences. They include:

- not recognising their experience as sexual assault or believing it was not serious enough to report;[99]
- fear that they will not be believed;[100]
- shock, confusion, guilt or shame about the offence; [101]
- fear of the perpetrator;[102]
- unsupportive community attitudes about women, racism and rape myth acceptance;[103]
- lack of trust in the justice system or authorities, including from past experiences of harm and criminalisation;[104]

95 Australian Institute of Family Studies and Victorian Police, *Challenging Misconceptions About Sexual Offending: Creating an Evidence-based Resource for Police and Legal Practitioners* (2017) 2 (‘*Challenging Misconceptions*’).
96 *PSS 2021–22* (n 6).
97 See, for example, findings reported in Jacqueline Fitzgerald, 'The attrition of sexual offences from the New South Wales criminal justice system', (NSW Bureau of Crime Statistics and Research Crime and Justice Bulletin, January 2006); Bridget Gilbert, 'Attrition of Sexual Assaults from the New South Wales Criminal Justice System' (Bureau Brief No 170, NSW Bureau of Crime and Justice Statistics, May 2024) ('*Attrition of Sexual Assaults in NSW 2024 report*').
98 S Caroline Taylor and Leigh Gassner, 'Stemming the flow: Challenges for policing adult sexual assault with regard to attrition rates and under-reporting of sexual offences' (2010) 11(3) *Police Practice and Research* 241.
99 KPMG & RMIT University's Centre for Innovative Justice, *'This is My Story. It's Your Case, but It's My Story'. Interview Study: Exploring Justice System Experiences of Complainants in Sexual Offence Matters* (Research Report, NSW Department of Communities and Justices, NSW Bureau of Crime Statistics and Research, July 2023) 12–17 (*"This is my story"*).
100 Australian Institute of Family Studies and Victoria Police, *Challenging Misconceptions* (n 95) 3.
101 Victorian Law Reform Commission, *Improving Justice System Response to Sexual Offences* (n 72) 23 26.
102 Commission of Inquiry into Queensland Police Service responses to domestic and family violence, *A Call for Change* (Final Report, 2022) 50 ('*A Call for Change*'). The Commission of Inquiry into Police conducted a victim survivor survey. Of the proportion who responded to a question about barriers to reporting, the most common response was ‘fear of how the other party would react' (20.62% of respondents). See also *"This is my story'* (n 99) 12–17.
103 *Hear Her Voice – Report Two* (n 1). Victim survivors in a Queensland study shared how rape myths impacted the way they were treated by friends and families, as well as how a jury views a complainant’s testimony: Heather Douglas, *Prosecution of Rape and Sexual Assault in Queensland: Report on a Pilot Study* (2017) 19.
104 *Improving Justice System Response* (n 72) 23–7. See also *'This is my story'* (n 99) 12–17.

- consequences of reporting, including loss of familial relationships, loss of housing and community, potential safety concerns or loss of their Australian visa;[105]
- difficulty identifying sexual violence;[106]
- concerns about the justice system process;[107] and
- not wanting a criminal justice outcome – for example children may fear reporting a parent.[108]

There are additional difficulties to reporting offences to police for certain groups 'who have had previous negative or violent experiences with the police and who lack access to services'.[109] These include (but are not restricted to) Aboriginal and Torres Strait Islander peoples, people from CARM groups (previously referred to as CALD), LGBTQIA+ communities, people in custody, sex workers, those living in rural areas and people with disabilities.[110]

It is also very common for victim survivors to delay disclosure of and/or reporting sexual violence, particularly if they were a child at the time.[111] Similarly, victim survivors who experience sexual violence from a known perpetrator are more likely to delay seeking assistance compared with those who experience sexual offences by a stranger.[112]

In light of these barriers, only a small percentage of sexual violence offences are reported to police.[113] Some studies suggest as few as 13 per cent of sexual violence incidents are reported to police by females.[114]

The PSS asked why victim survivors did not report the most recent incident of sexual assault. The most common responses were that the victim survivor:

- felt they could deal with it themselves (33.5%);
- did not regard it as a serious offence (32.8%);
- felt ashamed or embarrassed (31.1%); and
- did not believe police would be able to do anything (28.5%).[115]

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105 Particularly for Aboriginal and Torres Strait Islander peoples, people from culturally and linguistically diverse backgrounds, people with a cognitive or intellectual disability, older women and LGBTIQA+ peoples: *Hear Her Voice – Report Two* (n 1) 100–1, 103.

106 Ibid 101–3.

107 *Challenging Misconceptions* (n 95) 3.

108 *Improving Justice Responses* (n 72) 28.

109 Georgina Heydon at al, 'Alternative Reporting Options for Sexual Assault: Perspectives of Victim-Survivors, Australian Institute of Criminology' (Trends & Issues in Crime and Criminal Justice No. 678, Australian Institute of Technology, November 2023) 3.

110 Ibid 3; Taylor and Gassner (n 98) 241–2.

111 For example, victim survivors who spoke to the Royal Commission into Institutional Responses to Child Sexual Abuse 'took on average 23.9 years to tell someone about the abuse, and men often took longer than women (the average for females was 20.6 years and for males was 25.6 years): Royal Commission into Institutional Responses to Child Sexual Abuse, *Final Report Volume 4: Identifying and Disclosing Child Sexual Abuse* (Report, 2017) 9 (‘*Royal Commission on Child Sexual Abuse Final Report Vol 4’*).

112 *Challenging Misconceptions* (n 95) 4.

113 Fitzgerald (n 97) 2.

114 *Hear Her Voice, Report Two* (n 1) 44; Kathleen Daly and Brigitte Bouhours, 'Rape and attrition in the legal process: A comparative analysis of five countries' (2010) 39 *Crime and Justice: A Review of Research* 565, 609. The PSS 2021–22 found that 9 in 10 women who had experienced sexual assault by a male did not report the most recent incident to the police (92%): Australian Bureau of Statistics, *Sexual Violence, 2021–22* (23 August 2023).

115 Australian Bureau of Statistics, *Sexual Violence, 2021–22* (23 August 2023). Note that participants could give more than one reason.

2.3.2 Why attrition rates continue to remain high

Attrition refers to the number of incidents that do not progress or drop out of the criminal justice system from the time they are reported to police. Despite more victim survivors reporting offences to authorities, attrition of sexual violence cases during each stage of the criminal justice process remains high and conviction rates remain low.[116] The WSJ Taskforce expressed concern in its second report that attrition rates have remained high in Queensland.[117]

Research into understanding attrition rates indicates that this is a complex issue, and it is often difficult to accurately measure the rate of attrition in sexual violence matters.[118]

Factors that may impact sexual offences progressing through the criminal justice system include:

- **Criminal trials are often traumatic experiences that are unlikely to result in a conviction.**[119] The criminal justice process can retraumatise and psychologically harm victim survivors. An actual or anticipated negative experience can deter people from reporting or induce them to withdraw their complaint.[120]
- **Sexual offences can be difficult to prove beyond reasonable doubt.**[121] The nature of these offences often makes it difficult to satisfy the evidentiary thresholds required for criminal convictions. Sexual violence often occurs without any witnesses and with limited or no physical evidence.[122]
- **Community and jury misconceptions around sexual violence.** Some studies suggest that jurors are more influenced by their own attitudes to rape than by the evidence at trial.[123]

The Council is not aware of any Queensland attrition studies.[124] In **Chapter 18** we explain why the analysis of attrition through the criminal justice system in Queensland in challenging and could not be done by the Council.

The Council has considered attrition studies from other jurisdictions to provide insights and learnings for Queensland but notes that there are jurisdictional differences that limit the application of findings to Queensland – for example, differences between offence and consent definitions and therefore evidentiary standards, and differences in police investigative practices.

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116 *Misconceptions of Sexual Crimes* (n 91) 1.
117 *Hear Her Voice Report Two* (n 1) 147.
118 Australian Law Reform Commission, *Family Violence - A National Legal Response* (Final Report 114, October 2010) 1187 [26.13] referring to Denise Lievore, *Prosecutorial Decisions in Adult Sexual Assault Cases: An Australian Study* (prepared for the Office of the Status of Women, 2004); Denise Lievore, *Non-Reporting and Hidden Recording of Sexual Assault: An International Review* (prepared for the Commonwealth Office of the Status of Women, 2003); Bree Cook, Fiona David and Anna Grant, 'Sexual Violence in Australia' (*Australian Institute of Criminology Research and Public Policy Series* No. 36, 2001); Australian Institute of Family Studies, Submission FV 222, 2 July 2010; Fadwa Al-Yaman, Mieke Van Doeland and Michelle Wallis, *Family Violence Among Aboriginal and Torres Strait Islander Peoples* (prepared for the AIHW, 2006).
119 *Hear Her Voice, Report Two* (n 1).
120 Sarah Bright et al, *Attrition of Sexual Offence Incidents Through the Criminal Justice System* (2021) 9 ('*Attrition of Sexual Offences*').
121 The Queensland Law Reform Commission reviewed 135 rape and sexual assault trials in 2018 and found that almost two-thirds were discharged (64%, n=87) and one-third resulted in a conviction (36%, n=48): Queensland Law Reform Commission, *Review of Consent Laws and the Excuse of Mistake of Fact: Report 78* (Final Report, June 2020) 31 ('*Review of Consent*').
122 *Improving Justice Responses* (n 72) 10.
123 See, for example, Leverick, 'What do we know about rape myths?' (n 87) 255; James Chalmers, Fiona Leverick and Vanessa E Munro, 'The Provenance of What is Proven: Exploring (Mock) Jury Deliberations in Scottish Rape Trials' (2021) 48(2) Journal of Law and Society; *Misconceptions of Sexual Crimes* (n 93); Natalie Taylor, 'Juror Attitudes and Biases in Sexual Assault Cases' (Trends & Issues in Crime and Criminal Justice No. 344, Australian Institute of Criminology, August 2007) 4–5.
124 A study of the proportion of reported sexual violence cases that do not progress through the justice system to a conviction.

This section will briefly consider the 3 key stages in the criminal justice process and why attrition may occur in each stage.

Police investigation and charging stage is the highest point of attrition

Police are the entry point to the criminal justice system. Following a victim survivor reporting a sexual offence, police may commence an investigation. During this stage, police investigate the reported crime, gather evidence, attempt to identify the offender and, if identified, decide whether to charge them.

Studies consistently show most sexual offences 'do not progress further in the criminal justice system beyond the police report'.[125] A 2024 NSW study found that this was the greatest point of attrition, with only 15 per cent of matters reported to police resulting in criminal proceedings; for the remaining 85 per cent, no legal action was taken.[126] This was higher than a 2006 NSW study, which found 'more than 80 per cent of sexual offences reported to police' did not result in criminal proceedings.[127] An earlier Victorian study reached similar conclusions, with 75 per cent of reported incidents not progressing past the police investigation stage.[128] A 2021 UK Government review found that only 1.6 per cent of rapes reported to police resulted in a person being charged.[129]

There are many reasons why a case may not progress following a reported sexual violence offence, including:

- police are unable to identify or locate a suspect;
- a victim withdraws their complaint; or
- police decide not to prosecute.[130]

Victim survivors can choose to continue progressing an investigation (and prosecution) or withdraw their complaint. There are many reasons why a victim survivor may decide to do this, including concerns that going through the criminal justice system process will be too distressing and/or its potential negative impact on their health and wellbeing, a desire to 'move on' from the event, privacy concerns about their personal records being accessed and a lack of support from friends, family and employers.[131] Research into withdrawn rape complaints also found that victim survivors often withdrew from the process 'due to time delays and a lack of clarity about whether their case would proceed or not'.[132] It must not be overlooked that victim survivors may be pressured or coerced to withdraw a complaint, including by police and prosecutors.[133]

125 *Attrition of Sexual Assaults in NSW 2024 report* (n 97) 12. See also Victorian Crime Statistics Agency, *Attrition of Sexual Offence Incidents Through the Criminal Justice System* (2021) 16.
126 *Attrition of Sexual Assaults in NSW 2024 report* (n 97) 1.
127 Fitzgerald (n 97) 11.
128 Victorian Crime Statistics Agency, *Attrition of Sexual Offence Incidents Through the Criminal Justice System* (2021) 16 ('Attrition of Sexual Offences').
129 UK Government (Ministry of Justice) *End to End Review of the Criminal Justice System Response to Rape* (2021) iii ('*End to End Review*').
130 Daly and Bouhours (n 114) 609.
131 These findings are from analysis of the Essex Rape and Sexual Assault Partnership dataset. Reasons for withdrawing were analysed in 521 complaints: Office of the Victims' Commissioner for England and Wales, *VC Analysis of Victims' Reasons for Withdrawing Sexual Offence Complaints* (August 2019) 3 and 5.
132 Melanie Heenan and Suellen Murray, *Study of Reported Rapes in Victoria 2000–2003: Summary Research Report* (2006).
133 Denise Lievore, *No Longer Silent: A Study of Women's Help-Seeking Decisions and Service Responses to Sexual Assault* (A report prepared for the Australian Institute of Criminology for the Australian Government's Office for Women, June 2005), 46.

Criminal proceedings stage is affected by prospects of a conviction

There is little research on attrition during this stage and in relation to the reasons why cases are discontinued. A recent NSW study on attrition rates found that 2 out of 5 people who were initially charged with a sexual offence had that charge either withdrawn by the prosecution, dismissed due to mental health concerns, or 'otherwise' disposed of.[134] This was the second greatest point of attrition in the study.[135]

Prosecuting services are required to assess cases for their conviction prospects and whether a prosecution is in the public interest.[136] Studies suggest that certain types of cases are more likely to progress to criminal proceedings because the probability of success is higher. Common factors in sexual violence matters which were prosecuted include:

- evidence of physical injuries to the victim;
- explicit verbal or physical expression of non-consent;
- the occurrence of additional physical violence;
- independent/additional evidence linking defendant to the crime;
- where the defendant was a stranger; and
- where the matter was reported to police earlier rather than later.[137]

This means certain types of perpetrators, victims and scenarios are reinforced by the nature of criminal proceedings, with many perpetuating rape myths (refer to section 2.2.1 above). Expert testimony to the 2023 Commonwealth parliamentary inquiry into consent laws commented on prosecutor decision-making, with one legal practitioner noting that:

> Typically, victims who get through that very narrow funnel to actually have their perpetrator stand trial are typically young, stereotypically good looking, white, well and wealthy. They are the deserving victim. That is who goes before our courts … [W]hat we don't see is Aboriginal women's complaints, if Aboriginal women even choose to report to police.[138]

Court hearing stage and final outcomes

The final stage of the criminal justice process, where attrition rates remain high, is the court phase. Compared with many other offences, sexual violence matters are more likely to go to trial.[139] This means the defendant's guilt will be determined by either a jury or a judge alone trial.

In Queensland, for rape and sexual assault offences where the victim is over 12 years of age, prosecutors need to prove there was no consent, which means in many cases that the focus will be on the complainant. As noted earlier, these cases are often challenging to prove beyond reasonable doubt because 'sexual violence is an interpersonal harm that is often committed in private, with no witnesses

134 *Attrition of Sexual Assaults in NSW 2024 report* (n 97).
135 Ibid.
136 Office of the Director of Public Prosecution, Draft *Director's Guidelines 2022* as at 30 June 2022 ('*Director's Guidelines*') Guideline 4, 2–8. The public interest test has 2 components: (1) is there sufficient evidence to proceed with the prosecution; and (2) does the public interest require a prosecution.
137 Taylor (n 123) 2; Fitzgerald (n 97) 11.
138 Karen Iles, Director and Principal Solicitor, Violet Co Legal and Consulting, Committee Hansard, Canberra, 25 July 2023, 40–1 to Legal and Constitutional Affairs References Committee, *Current and Proposed Sexual Consent Laws in Australia* (Report, September 2023) 40 ('*Sexual Consent Laws in Australia*').
139 See Appendix 4, section 1.5.2 for plea characteristics of rape and sexual assault in Queensland.

or physical trace',[140] and defendants have a right of silence and do not need to give evidence. For these reasons, sexual offences trials are 'more likely to be more distressing and invasive for complainants'.[141] Given the 'complexity of community thinking and values around sexual behaviour', jurors may find it challenging to reach the evidentiary threshold for guilt.[142] Research suggests juror attitudes about sexual violence may influence 'their judgments about the credibility of the complainant and the guilt of the accused',[143] with one study arguing there is '*overwhelming* evidence that rape myths affect the way in which jurors evaluate evidence in rape cases'.[144]

The 2024 NSW study found that only a very small percentage of matters reported to the NSW Police Force in 2018–19 resulted in a criminal conviction:

- 8 per cent for a contemporary child sexual assault incident;
- 7 per cent for a historic child sexual assault incident;
- 6 per cent for an adult sexual assault.[145]

The study also found of the people who were prosecuted, fewer than half (41%) were convicted of at least one sexual assault or related offence.[146] Conviction rates differed depending on the type of incident, with the highest rate for child sexual assault matters (44% for historic child sexual assaults and 43% for contemporary child sexual assaults) compared with adult sexual assault (38%).[147] The lower conviction rates for adult sexual assaults was suggested as potentially attributable to 'the fact that consent is only considered relevant in adult sexual offence cases, therefore the burden of proof is heightened for these cases'.[148] These findings are consistent with similar studies.[149]

2.4 Systemic CJS reviews and inquiries into sexual violence

In the last decade there have been numerous inquiries and reviews in Australia and overseas on reforming sexual violence legislation and improving criminal justice system responses to sexual violence offences. These reviews have considered many of the issues discussed in this chapter and made recommendations to address them.

- **The Royal Commission into Institutional Responses to Child Sexual Abuse** was a pivotal inquiry into child sexual abuse that has significantly impacted the way these offences are responded to by the criminal justice system; its final report was released in December 2017.[150]
- The **WSJT** was a significant inquiry into the barriers faced by Queensland women and girls accessing the criminal justice system, both as victims and as defendants, particularly in relation to sexual violence. In July 2022, the Taskforce made 188 recommendations in *Hear Her Voice*,

140 *Improving Justice Responses* (n 72) 10.
141 Ibid 414.
142 Tidmarsh and Hamilton (n 91) 2.
143 Taylor (n 123) 2.
144 Leverick (n 87) 255 (emphasis in original).
145 *Attrition of Sexual Assaults in NSW 2024 report* (n 97) 16.
146 Ibid 13.
147 Ibid.
148 Ibid 16.
149 Fitzgerald (n 97) 4. See also similar finding in New Zealand: New Zealand Government (Ministry of Justice), *Progression and Attrition of Reported Sexual Violence Victimisations in the Criminal Justice System: Victimisations reported April 2017–March 2023* (August 2023) 2
150 Royal Commission into Institutional Responses to Child Sexual Abuse, *Final Report* (Report 2017).

Report Two' and the Queensland Government is currently implementing the majority of those recommendations.[151]

- **Reviews of consent laws:** Over the last 2 years, the Australian Capital Territory ('ACT'),[152] NSW,[153] Queensland,[154] Tasmania[155] and Victoria[156] have amended their sexual consent laws. With the exception of Tasmania, those amendments were made following reviews on consent laws for sexual violence offences.[157] All these reviews also made recommendations on ways to improve the criminal justice system response to sexual violence. There have also been Tasmania's Commission of Inquiry into the Tasmanian Government's Response to Child Sexual Abuse in Institutional Settings[158] and the Commonwealth Senate's Legal and Constitutional Affairs References Committee review into current and proposed sexual consent laws in Australia.[159] The Western Australian Law Reform Commission into criminal justice system responses to sexual offending (including consent) was completed in November 2023.[160]

Some of the recommendations from these national, state and territory reviews include:

- funding for ongoing public education about sexual violence to address common misconceptions and understanding consent laws;[161]
- establishing a restorative justice scheme for sexual violence;[162]
- introducing new jury directions to address misconceptions about sexual violence;[163]
- funding an education program on reforms to the criminal justice system for judges, prosecutors, criminal defence lawyers and police;[164]
- establishing an independent body to prevent and reduce sexual violence and support victim survivors;[165]

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151 For more information about the Taskforce report and recommendations related to this review, see Queensland Sentencing Advisory Council, *Background Paper 1 – Review of Sentencing for Sexual Assault and Rape Offences: About the Terms of Reference – Part 1* (September 2023). How the Council is taking the WSJ Taskforce review (and others) into account to ensure consistency with previous positions and recommendations, is set out in section 3.3.11.

152 *Crimes (Consent) Amendment Act 2022* (ACT).

153 *Crimes Legislation Amendment (Sexual Consent Reforms) Act 2021* (NSW).

154 *Criminal Code (Consent and Mistake of Fact) and Other Legislation Amendment Act 2021* (Qld) implemented recommendations made by the Queensland Law Reform Commission from *Review of Consent* (n 121). The Women's Safety and Justice Taskforce, *Hear Her Voice Report Two* (n 1) made further recommendations to the definition of consent (rec 43). This was supported by the government, with a commitment to legislate an affirmative model of consent. This work is underway.

155 The definition of consent was amended to add stealthing: *Criminal Code Amendment Act 2022* (Tas).

156 *Justice Legislation Amendment (Sexual Offences and Other Matters) Act 2022* (Vic).

157 *Review of Consent* (n 121) and *Hear Her Voice Report Two* (n 1); New South Wales Law Reform Commission, *Consent in Relation to Sexual Offences: Report 148* (September 2020) ('*Consent in Relation to Sexual Offences')*; The Sexual Assault Prevention and Response Steering Committee, *Listen. Take Action to Prevent, Believe and Heal* (December 2021) ('*Listen. Take Action*') and *Improving Justice Responses* (n 72).

158 *Commission of Inquiry into the Tasmanian Government's Response to Child Sexual Abuse in Institutional Settings* (Report, August 2023) ('*Tasmanian Commission of Inquiry*').

159 *Sexual Consent Laws in Australia* (n 138).

160 Law Reform Commission of Western Australia, *Final Report—Project 113: Sexual Offences* (2024).

161 *Hear Her Voice Report Two* (n 1) rec 1, 11; *Improving Justice Responses* (n 72) rec 1, xxix; *Consent in Relation to Sexual Offences* (n 157) recommendation 10.4 xx; *Listen. Take Action* (n 93) recs 2, 19, 43, 74.

162 *Improving Justice Responses* (n 72) recs 28–36, xxxiv-xxxv; *Listen. Take Action* (n 93) rec 13, 63; *Hear Her Voice Report Two* (*n 38)* recs 90–2, 23; *Sexual Consent Laws in Australia* (n 138) rec 9, viii.

163 *Improving Justice Responses* (n 72) rec 78, xli; *Consent in Relation to Sexual Offences* (n 157) recs 8.1, 8.3–8.7, xvii-xviii; *Hear Her Voice Report Two* (n 38) rec 77, 22; Tasmania Commission of Inquiry, rec 16.15, 159; *Sexual Consent Laws in Australia* (n 138) rec 12, viii–ix.

164 *Improving Justice Responses* (n 72) rec 69, xl; *Consent in Relation to Sexual Offences* (n 157) rec 10.2, xx; *Listen. Take Action* (n 157) recs 16–17, 69–70; *Hear Her Voice Report Two* recs 28, 33 and 68, 15–21; Tasmania Commission of Inquiry, recs 16.8, 16.16 and 16.18, 156, 160–1; *Sexual Consent Laws in Australia* (n 138) rec 10, ix.

165 *Improving Justice Responses,* rec 90, xliii; *Hear Her Voice – Report Two* (n 1) rec 15, 14.

- legislative reform to prevent some penalty options being available for sexual offences (e.g. Intensive Correction Orders and suspended prison sentences);[166]
- consideration of a rebuttable presumption in sentencing for sexual offending that the offending caused certain harms for the victim survivor; and[167]
- developing a sexual assault bench book.[168]

The Council is mindful that there are also reviews in progress:

- The **Western Australian Office of the Commissioner for Victims of Crime** is reviewing victim survivor experiences of the criminal justice system.
- The **South Australian Government** is also reviewing sexual consent laws and released a Discussion Paper in December 2023.[169]
- The **Australian Law Reform Commission** was issued with Terms of Reference in January 2024. This review will examine justice responses to sexual violence.[170] In conjunction with this review, the Commonwealth Government has established a Lived Experience Expert Advisory Group to inform this work.[171]
- The **NSW Sentencing Council** is reviewing evidence of 'good character' in all sentencing proceedings.[172]

Several reviews to improve the criminal justice response to rape in the last 10 years have been completed overseas in the United Kingdom,[173] Northern Ireland,[174] Scotland,[175] New Zealand[176] and Canada.[177] Similar recommendations have been made to improve the criminal justice response for sexual offending.

166 *Listen. Take Action* (n 157) rec 23(c), 80.
167 Ibid rec 23(g), 80. s
168 *Hear Her Voice Report Two* (n 1) rec 73, 22; *Listen. Take Action* (n 157) rec 18, 70; *Sexual Consent Laws in Australia* (n 138) rec 11, viii.
169 Attorney-General's Department (SA), *Review of Sexual Consent Laws in South Australia: Discussion Paper* (December 2023).
170 Australian Law Reform Commission, 'Terms of Reference' *Justice Responses to Sexual Violence* (web page, 23 January 2024) <https://www.alrc.gov.au/inquiry/justice-responses-to-sexual-violence/terms-of-reference>.
171 The Hon Mark Dreyfus KC MP, Attorney-General 'National roundtable on justice responses to sexual violence' (Media Release, 23 August 2023) <https://www.markdreyfus.com/media/media-releases/national-roundtable-on-justice-responses-to-sexual-violence-mark-dreyfus-kc-mp/>.
172 NSW Sentencing Advisory Council, Good character in sentencing (web page, 10 July 2024) <https://sentencingcouncil.nsw.gov.au/our-work/current-projects/good-character-in-sentencing.html>.
173 UK Government (Ministry of Justice), *End to End Review of the Criminal Justice System Response to Rape* (Report, June 2021) iii ('*End to End Review*').
174 Sir John Gillen, *Report into the Law and Procedures in Serious Sexual Offences in Northern Ireland: Part 1* (2019) ('*The Gillen Report*').
175 Scottish Courts and Tribunals Service*, Improving the Management of Sexual Offence Cases: Final Report from the Lord Justice Clerk's Review Group* (Report, March 2021) ('*The Dorrian Review*').
176 New Zealand Law Commission, *The Justice Response to Victims of Sexual Violence: Criminal Trials and Alternative Processes: Report 136* (December 2015) ('*Justice Response to Victims of Sexual Violence*').
177 Coordinating Committee of Senior Officials Working Group on Access to Justice for Adult Victims of Sexual Assault, *Reporting, Investigating and Prosecuting Sexual Assaults Committed Against Adults - Challenges and Promising Practices in Enhancing Access to Justice for Victims* (Report, December 2018).

Chapter 3 – The Council's approach to the review

3.1 Introduction

The Council was asked to 'determine whether penalties currently imposed on sentence under the *Penalties and Sentences Act 1992* (Qld) [('PSA')] for sexual assault and rape offences *adequately reflect* community views about the seriousness of this form of offending and the sentencing purposes of just punishment, denunciation and community protection'.[1] We were also required to advise on 'options for reform to the current penalty and sentencing framework to ensure it provides an *appropriate response* to this type of offending' and whether any legislative or other changes are required.[2]

The Council's review was informed and guided by a framework for assessing adequacy and appropriateness, which required the Council to consider community views regarding offence seriousness and the purposes of sentencing, as well as broader considerations about what makes a sentence 'adequate' and 'appropriate'.

The Council also developed 11 fundamental guiding principles that helped the Council in developing and testing our key findings and recommendations. These 11 fundamental principles were drawn from:

- we were asked to consider in response to the Terms of Reference (see **Appendix 1)**;
- principles that have guided us in undertaking previous reviews;[3]
- the Women's Safety and Justice Taskforce's *Hear Her Voice – Report Two: Women and Girls' Experiences Across the Criminal Justice System*[4] and submissions made to that review; and
- views expressed by stakeholders in submissions to this review and during consultations.

This chapter sets out the Council's framework which was used to guide our consideration of whether sentencing for rape and sexual assault offences is adequate and appropriate, as well as the 11 fundamental principles which were relied upon when developing the key findings and recommendations.

1 Appendix 1, Terms of Reference (emphasis added).
2 Ibid (emphasis added).
3 Queensland Sentencing Advisory Council, *The '80 per cent Rule': The Serious Violent Offences Scheme in the Penalties and Sentences Act 1992 (Qld) (*Report, 2022) (*'The '80 per cent Rule*'); and Queensland Sentencing Advisory Council *Community-Based Sentencing Orders, Imprisonment and Parole Options* (Report, 2019) (*'Community-Based Sentencing Orders, Imprisonment and Parole Options*').
4 Women's Safety and Justice Taskforce, *Hear Her Voice– Report Two: Women and Girls' Experiences Across the Criminal Justice System* (2022) (*'Hear Her Voice Report Two*').

3.2 Council's approach to assessing adequacy and appropriateness

3.2.1 Background

Identifying criteria against which the adequacy or appropriateness of sentences for sexual assault and rape can be assessed is challenging.

Unless legislation fixes a mandatory penalty, 'the discretionary nature of the judgment means there is no single sentence that is just in all the circumstances'[5] or an 'objectively correct sentence'.[6] As the High Court recognised in *Wong v The Queen*:[7]

> There are many conflicting and contradictory elements which bear upon sentencing an offender … the task of the sentencer is to take account of all the relevant factors and arrive at a single result which takes due account of them all. That is what is meant by saying that the task is to arrive at an 'instinctive synthesis'. This expression is used, not as might be supposed, to cloak the task of the sentencer in some mystery, but to make plain that the sentencer is called on to reach a single sentence which … balances many different and conflicting features.[8]

In exercising discretionary judgment in setting the sentence, courts do not approach the task in an overly structured or mathematical way:

> At best, experienced judges will agree on a range of sentences that reasonably fit all the circumstances of the case. There is no magical number for any particular crime when a discretionary sentence has to be imposed.[9]

Even an agreement to accept a plea to a lesser charge and 'an expectation that he or she would be sentenced consistently with current sentencing practices' (e.g. sexual assault rather than rape)[10] 'cannot affect the duty of either the sentencing judge or a court of criminal appeal to impose a sentence which appears to the court, acting solely in the public interest, to be just in all of the circumstances'.[11]

Sentencing courts have a wide discretion, yet 'must take into account all relevant considerations (and only relevant considerations)',[12] including legislation and case law.

It can be inferred that the sentencing discretion has 'miscarried' when the sentence is clearly unjust, being 'manifestly excessive' or 'manifestly inadequate'.[13] Such sentences, which an appeal court can set aside, are those falling 'outside the *range* of sentences which could have been imposed if proper principles had been applied'.[14]

It is evident that the intention in referring this matter to the Council was to look beyond the question of legal adequacy. In particular, the Terms of Reference refer to the community expectation that penalties for sexual assault and rape are 'appropriately reflective of the nature and seriousness' of sexual violence and require the Council to determine whether penalties adequately reflect those views and the purposes of just punishment, denunciation and community protection.

The Council therefore determined that the assessment of whether the current sentencing framework provides an appropriate response to this type of offending required the Council to consider not only the

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5 *Director of Public Prosecutions (Vic) v Dalgliesh (a pseudonym)* (2017) 262 CLR 428, 434 [7] (Kiefel CJ, Bell and Keane JJ) ('*Dalgliesh*').
6 *Markarian v The Queen* (2005) 228 CLR 357, 384 [66] (McHugh J).
7 (2001) 207 CLR 584.
8 *Wong v The Queen* (2001) 207 CLR 584, 611–2 [74]–[76] (Gaudron, Gummow and Hayne JJ) (footnotes omitted).
9 *Markarian v The Queen* (2005) 228 CLR 357, 384 [65] (McHugh J).
10 *Dalgliesh* (n 5) 448–9 [63] (Kiefel CJ, Bell and Keane JJ)
11 Ibid 449 [66] (Kiefel CJ, Bell and Keane JJ) citing *Malvaso v The Queen* (1989) 168 CLR 227, 233; *Barbaro v The Queen* (2014) 253 CLR 58, 72–4 [34]–[39] (French CJ, Hayne, Kiefel and Bell JJ).
12 *Markarian v The Queen* (2005) 228 CLR 357, 371 [27] (Gleeson CJ, Gummow, Hayne and Callinan JJ).
13 *Dalgliesh* (n 5) 434 [7] (Kiefel CJ, Bell and Keane JJ).
14 *Barbaro v The Queen* (2014) 253 CLR 58, 70 [26] (French CJ, Hayne, Kiefel and Bell JJ) (emphasis in original).

penalty outcome, but also community views about the relative seriousness of this form of offending, the important purposes of sentencing and the way in which sentences are determined and expressed.

3.2.2 Overview of the framework for assessing adequacy and appropriateness

The measures used to assess adequacy and appropriateness are summarised in **Table 3.1** and discussed below.

The Council was informed by its previous approach to assessing the adequacy and appropriateness of sentencing practices for manslaughter during its earlier review of sentencing criminal offences arising from the death of a child. Consistent with this earlier method, the Council adopted a mixed methods approach to responding to the question of adequacy and appropriateness in the current review, considering both qualitative and quantitative evidence.

Table 3.1: Criteria for assessing appropriateness and adequacy of sentencing for sexual assault and rape offences

Measure	Method of assessment
Evidence of misalignment between current sentencing practices and community and stakeholder views	
1. Evidence from informed and structured consultation of community views on sentencing/seriousness of sexual assault and rape offences	Qualitative • Community views research • Consultation events and meetings • Consultation paper submissions • Academic research
2. Evidence of Parliament's views on the seriousness of sexual assault and rape	Quantitative • Maximum penalties • Mandatory sentencing schemes Qualitative • Legislative reforms for these offences, and sexual offences more broadly • Case law analysis
3. Evidence of alignment between sentencing outcomes and the community's and Parliament's views of offence seriousness	Quantitative • Data analysis Qualitative • Community views research • Consultation events and meetings • Consultation paper submissions
4. Evidence of alignment between sentencing outcomes and the purposes of sentencing	Quantitative • Data analysis Qualitative • Community views research • Consultation events and meetings • Consultation paper submissions • Academic research
5. Evidence of Court of Appeal and/or s 222 District Court judgment statements or questioning of whether current sentencing levels, outcomes or guidance for sexual assault and/or rape are adequate and whether practices change following statements or questioning	Qualitative • Sentencing remarks and submissions analysis • Case law analysis
6. Evidence of sentencing outcomes for sexual assault and rape offences in comparison with other offence types of similar assessed levels of seriousness	Quantitative • Data analysis Qualitative • Community views research • Case law analysis

Measure	Method of assessment
Evidence of inconsistencies or problems with the current approach to sentencing	
7. Evidence of the weight given to aggravating and mitigating factors	Qualitative • Community views research • Sentencing remarks and submissions analysis • Case law analysis • Subject matter expert interviews
8. Evidence of the categorisation of the objective seriousness of sexual assault and rape offences	Qualitative • Community views research • Consultation paper submissions • Sentencing remarks and submissions analysis • Case law analysis • Subject matter expert interviews
9. Evidence of the treatment of victim survivors of sexual assault and rape in the sentencing process	Qualitative • Consultation events and meetings • Consultation paper submissions • Sentencing remarks and submissions analysis • Case law analysis • Subject matter expert interviews
10. Evidence of adequacy of information to inform sentencing of sexual assault and rape offences	Qualitative • Consultation events and meetings • Consultation paper submissions • Case law analysis • Subject matter expert interviews • Sentencing remarks and submissions analysis
11. Evidence of the impact of systemic disadvantage on Aboriginal and Torres Strait Islander peoples, and human rights considerations pursuant to the *Human Rights Act 2019* (Qld)	Quantitative • Data analysis Qualitative • Consultation events and meetings • Consultation paper submissions • Case law analysis • Subject matter expert interviews • Sentencing remarks and submissions analysis
Evidence of inconsistency of approach with other jurisdictions	
12. Evidence of the approach taken in other jurisdictions to sentencing for sexual assault and rape	Qualitative • Analysis of appeal decisions and recent cases • Analysis of effective or promising alternative sentencing practices

Criteria 1–6: Evidence of misalignment between current sentencing practices and community and stakeholder views

The Council applied 6 criteria to identify whether there are any apparent misalignments between current sentencing practices and outcomes for rape and sexual assault, as well as community and stakeholder views. Each criterion drew on different sources of information and evidence:

- **Criterion 1** involved an analysis of current community views of offence seriousness and expectations about sentencing outcomes for sexual assault and rape offences. While it is well understood that community expectations alone should not drive sentencing outcomes, these views formed an important evidence base for the Council in considering the adequacy of current sentencing outcomes for sexual assault and rape.
- **Criterion 2** considered the maximum penalties that are currently applied to sexual assault and rape as an indication of Parliament's views (and therefore those of the Queensland community) about the seriousness of this conduct, as well as in relation to other sexual and non-sexual offences. We also explored relevant legislative reforms made by Parliament impacting the sentencing of sexual assault, rape and other sexual offences under changes made to the PSA and what these reforms were intended to achieve.
- **Criterion 3** involved a comparison of current sentencing trends and outcomes for rape and sexual assault (including median sentences) with the views of the community and Parliament about the seriousness of these offences. Community members were asked to rank cases regarding their relative seriousness; these rankings were then matched to actual sentencing outcomes to determine whether there was alignment. Outcomes were separately analysed by victim age for sentences involving rape to determine whether the findings remained consistent, or if sentencing outcomes were higher where the victim was a child.
- **Criterion 4** involved an assessment of whether there was any disparity between current sentencing practices for sexual assault and rape, with the views of the community regarding the most important purposes of sentencing indicative of their appropriateness.
- **Criterion 5** involved a review of relevant Court of Appeal and District Court appeals from the Magistrates Courts to determine whether members of the Queensland judiciary had provided any authoritative statements or broader guidance surrounding the adequacy of current sentencing levels or outcomes for sexual assault and rape, or any other aspects of sentencing practices considered to be in need of reform.
- **Criterion 6** involved a comparison of sentencing outcomes for rape and sexual assault with other sexual and non-sexual offences (comparator offences) to consider how rape and sexual assault offences are sentenced in comparison with other offences in Queensland, as well as how seriously the comparator offences are viewed by the broader community.

Criteria 7–11: Evidence of inconsistencies or problems with the current approach to sentencing

- **Criterion 7** involved a consideration of the weight given to aggravating and mitigating factors at sentence through an analysis of sentencing remarks for rape and sexual assault offences. The Council considered whether different sentencing factors should be weighed differently, or whether additional legislative guidance was required, having regard to the views of relevant

justice stakeholders, victim survivors, victim support and advocacy groups and members of the broader community.

- **Criterion 8** involved a review of current sentencing outcomes to determine whether there was any misalignment between the objective seriousness of rape or sexual assault offences and how the court categorises and sentences these offences. In doing so, the Council had regard to how the courts treat the objective seriousness of categories of offending in these offences, including: different types of penetrative conduct for offences of rape; offences of sexual violence committed against children; conduct constituting sexual assault; and gendered approaches to non-consensual acts of oral sex.
- **Criterion 9** involved a detailed exploration of how victim survivors of rape and sexual assault are treated throughout the sentencing process and during the sentencing hearing, and whether there is a need for reforms to improve their experiences within the sentencing context.
- **Criterion 10** considered the current nature and quality of information available to the courts to inform sentencing decisions and whether these are sufficient. This information can be in the form of a victim impact statement, psychological, medical and other specialist reports, pre-sentence reports, cultural submissions and reports, and submissions made by the prosecution and defence, as well as accessible via sentencing information systems.
- **Criterion 11** involved an assessment of the systemic disadvantage experienced by Aboriginal and Torres Strait Islander peoples and relevant human rights considerations to inform the consideration of whether current sentencing outcomes and practices are appropriate or are in need of reform.

Criterion 12: Evidence of inconsistency of approach with other jurisdictions

- **Criterion 12** involved comparing the approach to sentencing sexual assault and rape offences in Queensland with that taken in other Australian and select international jurisdictions. The Council considered Court of Appeal jurisprudence in other jurisdictions to identify relevant commentary on adequacy and appropriateness. We also considered prior research that has endeavoured to undertake a more detailed quantitative cross-jurisdictional comparisons of sentencing outcomes, noting that these findings are limited due to the complexities involved in undertaking such a comparison.

3.3 Fundamental principles guiding this review

3.3.1 Principle 1: Reforms to sentencing laws should be evidence-based with a view to promoting public confidence

As for previous reviews, the Council has based its findings and recommendations on the evidence available to us.

Relevant sources of evidence have included:

- reports published by other research and law reform bodies;
- a literature review commissioned for this review,[15] and literature reviews produced for previous reviews;[16]
- our analysis of relevant data and sentencing practices;
- consultation with stakeholders, including victim survivors of sexual assault and rape;
- research on community views of offence seriousness and the most important purposes of sentencing;[17] and
- academic research and reports.

Some questions asked in our consultation paper have not resulted in a recommendation being made, while in other cases we have recommended that further investigation or a separate review is required. The reasons for this include that the evidence in support of reform is inadequate in some important respect, there is a lack of stakeholder support, or the proposed reform would have implications beyond sentencing for sexual assault and rape.

In a limited number of cases, we have concluded that reforms should be made, although this change will apply to the sentencing of other offences. This decision has been reached based on the strength of the evidence in support of reform taking into account stakeholder views.

For example, we have recommended that the current sentencing purposes under section 9(1) of the PSA should be amended to include recognition of victim harm (**Recommendation 2**). This responds to significant feedback from victim survivors and support and advocacy services that victims do not feel as if the harm caused to them is sufficiently recognised and acknowledged. This is discussed in more detail in **Chapter 8** and **Chapter 14**.

During the preliminary stage of our review, we invited feedback on what approach the Council should take in responding to the Terms of Reference. In some cases, the approach that stakeholders suggested we adopt was not possible due to the timeframes for completion of the review and other research challenges.

For example, Legal Aid Queensland suggested the Council undertake 'a longitudinal qualitative analysis of sentencing proceedings relating to rape and sexual assault' charges to gain a richer understanding of factors relevant to sentence and how these are taken into account.[18] We have instead drawn on a sample of sentencing remarks and submissions to explore these issues.

ATSILS recommended that the Council consider whether there 'is … evidence from past sentencing practices that routinely (and unaddressed by appeals) demonstrates factors … have either been given

15 Lacey Schaefer et al, *Sentencing Practices for Sexual Assault and Rape Offences* (Final Report, prepared for the Queensland Sentencing Advisory Council by Griffith University, 2024) ('*Griffith University Literature Review*').

16 In particular: Karen Gelb, Nigel Stobbs and Russell Hogg, *Community-based Sentencing Orders and Parole: A Review of Literature and Evaluations Across Jurisdictions* (prepared for the Queensland Sentencing Advisory Council by Queensland University of Technology, 2019); and Andrew Day, Stuart Ross and Katherine McLachlan, *The Effectiveness of Minimum Non-Parole Period Schemes for Serious Violent, Sexual and Drug Offenders and Evidence-Based Approaches to Community Protection, Deterrence, and Rehabilitation* (Report, University of Melbourne, August 2021) ('*University of Melbourne Literature Review*').

17 Dominique Moritz, Ashley Pearson and Dale Mitchell, *Community Views on Rape and Sexual Assault Sentencing: Final Report* (Prepared for the Queensland Sentencing Advisory Council by the Sexual Violence Research and Prevention Unit, University of the Sunshine Coast, June 2024) See chapter 5 of this report for more information.

18 Preliminary Submission 16 (Legal Aid Queensland) 1–2.

undue/insufficient weight or have been disregarded, or that irrelevant factors have been considered', which 'has led to an unjust sentence being imposed'.[19] We have taken this recommended approach for a select range of sentencing factors identified by stakeholders as being of particular concern, such as the use of 'good character' evidence, although a comprehensive review has not been possible.

Victim survivor support services emphasised the importance of the criminal justice system being 'viewed in its entirety, particularly given the systemic issues and multiple barriers to achieving justice outcomes' when assessing the adequacy of current sentencing responses.[20]

We acknowledge that sentencing is only one part of a broader response to sexual violence. Barriers to reporting and the successful prosecution of sexual violence cases are discussed in **Chapter 2**. In addition to recommending reforms to sentencing, we explore a potential role for alternative justice approaches in **Chapter 16**.

3.3.2 Principle 2: Sentencing decisions should accord with the purposes of sentencing as outlined in section 9(1) of the *Penalties and Sentences Act 1992* (Qld)

It is important that sentencing decisions under any Queensland sentencing scheme remain consistent with the purposes of sentencing, which are intended to provide judicial officers with sufficient guidance and discretion to impose a just sentence in all the circumstances.

As outlined in section 9(1) of the PSA, the purposes of sentencing are:

- **punishment:** 'to punish the offender to an extent or in a way that is just in all the circumstances';
- **rehabilitation:** 'to provide conditions in the court's order that the court considers will help the offender to be rehabilitated';
- **deterrence (specific and general):** 'to deter the offender or other persons from committing the same or a similar offence';
- **denunciation:** 'to make it clear that the community, acting through the court, denounces the sort of conduct in which the offender was involved';
- **community protection:** 'to protect the Queensland community from the offender'; or
- a **combination** of 2 or more of the purposes listed above.

The application of these purposes has been critical to the Council in considering whether the sentencing scheme for offences of rape and sexual assault is adequate and appropriate or in need of reform.

The important purposes of sentencing for these sexual violence offences, including punishment, rehabilitation, denunciation and community protection, have been particularly relevant to our assessment of the types of sentencing orders commonly made for these offences and any opportunities to improve the current structure of these orders.

19 Preliminary Submission 7 (Aboriginal and Torres Strait Islander Legal Service) 2–3 [3].
20 Preliminary submission 21 (Women's Legal Service Queensland) 1. See also Preliminary submission 20 (North Queensland Women's Legal Service) and Preliminary submission 10 (Queensland Indigenous Family Violence Legal Service).

3.3.3 Principle 3: Sentencing outcomes for sexual assault and rape offences should reflect the seriousness of these offences, including their impact on victims, while not resulting in unjust outcomes

The imposition of a just sentence is crucial to ensure that those who commit sexual violence against others are held to account for their actions and to protect members of the community from sexual violence.

It is important for the criminal justice system to ensure that sentences properly reflect the seriousness of the offending behaviour, as well as the harm caused to victims. The common law principle of proportionality[21] recognises that this assessment of offence seriousness includes not just an assessment of the person's culpability for the offence, but also the degree of harm caused by the offending.[22]

In support of the principle of proportionality, the PSA requires a court to have regard to the nature of the offence and how serious it was, including any physical, mental or emotional harm done to a victim.[23] Where the offence involves physical harm caused to another person, or involved the use or attempted use of violence, the court must have primary regard to factors including 'the personal circumstances of any victim of the offence'.[24] The impact of the offence on a child victim is also a primary sentencing consideration for rape committed against a child under 16 years.[25]

The Council acknowledges that offences of sexual assault and rape cause significant and long-lasting physical, emotional and psychological trauma to victim survivors and the wider community, and have broader consequences for the general community.

'Rape is an intensely personal crime' which affects victim survivors in a multitude of ways, not just as a consequence of the 'physical invasion of their person and security but also from the more intangible loss of their rights and freedoms'.[26] The impact of these offences on victim survivors has been recognised by the High Court of Australia, which has indicated that 'current sentencing practices with respect to sexual offences may be seen to depart from past practices by reason, inter alia, of changes in understanding of the long-term harm done to the victim'.[27]

We discuss our views about the seriousness of rape and sexual assault further in **Chapter 6**. Several recommendations are directed at ensuring that the seriousness of this offending is appropriately acknowledged and recognised.

3.3.4 Principle 4: People serving sentences in the community for a sexual offence should have appropriate supervision

There is a significant body of evidence supporting the use of supervision to reduce the risks of sexual offenders reoffending,[28] while unconditional release is associated with increased recidivism.[29]

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21 *Veen v The Queen [No 2]* (1988) 164 CLR 465 ('*Veen*').
22 Arie Freiberg, *Fox & Frieberg's Sentencing: State and Federal Law in Victoria* (Thomson Reuters, 2014) 239–40.
23 *Penalties and Sentences Act 1992* (Qld) s 9(2)(c)(i) ('PSA'). This includes harm mentioned in information relating to the victim given to the court, such as in the form of a victim impact statement: see Part 10B.
24 Ibid s 9(3)(c).
25 Ibid s 9(6)(a). Applies to all sexual offences of a sexual nautre where the victim is a child under 16 years.
26 Judicial College of Victoria, *Victorian Sentencing Manual* (4th ed, 2023) 335, citing *R v Mason* [2001] VSCA 62 [8].
27 *R v Kilic* (2016) 259 CLR 256, 266–7 [21] (Bell, Gageler, Keane, Nettle and Gordon JJ).
28 See *Griffith University Literature Review* (n 15). The effectiveness of supervision, however, relies on adherence to best practice.
29 Ibid 50, citing Smallbone and McHugh (2010).

The time spent under community supervision also may make a difference to risks of reoffending, although this can depend on the quality of supervision and treatment delivered.[30]

Supervised release for prisoners works by providing a 'transition period that aids reintegration, particularly in ways that support the formation of a prosocial identity and skill development'.[31]

The Queensland Parole System Review ('QPSR') pointed to evidence suggesting that parole 'has a beneficial impact on recidivism, at least in the short term'. [32] Paroled prisoners are less likely to reoffend than prisoners released without parole.[33] Consistent with the existing evidence, the QPSR found that 'it is more risky to have a short period of parole' than a longer one.[34]

A literature review prepared for the Council reached a similar conclusion to the QPSR: 'more and not less time on parole would allow time to engage in rehabilitative programs' to reduce risk of reoffending, build strengths and take steps towards desistance.[35]

Research published by the NSW Bureau of Crime Statistics and Research in 2022 similarly found that parolees are substantially less likely to reoffend than prisoners released unconditionally – and this is particularly the case for those assessed as being at higher risk of reoffending.[36]

Of potential concern, the sentencing trends discussed in detail in **Appendix 4** show that, for rape, there has been increasing use of partially suspended imprisonment sentences in place of imprisonment with parole. They also show greater use of wholly suspended prison sentences for sexual assault. Unlike imprisonment with parole, or community-based orders such as probation, suspended sentences of imprisonment do not involve a supervisory component.

The Council's recommendations regarding changes to sentencing and parole options are discussed in **Chapter 11**.

3.3.5 Principle 5: Sentencing inconsistencies, anomalies and complexities should be minimised

The Terms of Reference ask the Council to 'identify any trends or anomalies that occur in sentencing for sexual assault and rape offences'.[37]

30 Ibid 50.
31 Ibid 52.
32 Walter Sofronoff KC, *Queensland Parole System Review: Final Report* (Report, 2016) 38 [140], 2 [11], 38 [139] ('*Queensland Parole System Review*').
33 Ibid 1 [7] citing Wan Wai-Yin et al, *Parole Supervision and Reoffending* (Trends and Issues in Crime and Criminal Justice No 485, Australian Institute of Criminology, 2014) 1.
34 *Queensland Parole System Review* (n 32) 7 [46]. The comment was made in the context of provisions requiring some people convicted of an offence to serve 80 per cent of their prison term before being eligible for release on parole, such as in the case of those subject to an SVO declaration.
35 *University of Melbourne Literature Review* (n 16) 13–14, 22.
36 Evarn J. Ooi and Joanna Wang, 'The effect of parole supervision on recidivism' (2022) 245 *Crime and Justice Bulletin* ('*The Effect of Parole Supervision on Recidivism*'). This research found that for the marginal parolee, being released to parole reduces the likelihood of reconviction within 12 months of release by 10 percentage points (a decrease of 17.5 per cent); reduces the likelihood of committing a personal, property or serious drug offence within 12 months of release by 10.3 percentage points (a decrease of 24 per cent); and reduces the likelihood of being re-imprisoned within 12 months of release by 5 percentage points (a decrease of 18.2 per cent). These reductions in recidivism were statistically significant and generally persisted 24 months after release from prison.
37 Appendix 1, Terms of Reference, 2.

In undertaking previous reviews, the Council has highlighted the benefits of removing anomalies and minimising the complexity of sentencing and parole laws. These benefits include:

- promoting greater certainty and clarity about how the law is to be applied and supporting the fair and consistent application of the law;[38]
- reducing the risk of error (and any appeals required to correct such errors);
- reducing the length of sentencing proceedings; and
- ensuring that courts are not unnecessarily constrained by legislation in making orders that respond to the individual circumstances of the case, thereby promoting the principle of individualised justice.[39]

During this review, the Council identified several examples of inconsistencies, anomalies and complexities with the sentencing of sexual assault and rape, including regarding:

- current sentencing practices for rape and sexual assault committed against child victims, which are inconsistent with community views of offence seriousness (see **Chapter 7**);
- the treatment by sentencing courts of 'good character' evidence, including personal references; this includes the extent to which this evidence is referred to, how it is described, its perceived relevance, and the weight this evidence is given (see **Chapter 9**);[40]
- inconsistent approaches to whether indecent assaults charged as sexual assaults are determined to have 'involved the use of … violence against another person' for the purposes of section 9(2A) of the PSA, which displaces the usual sentencing principles of imprisonment as a sentence of last resort and that a sentence that allows the offender to stay in the community is preferable (see **Chapter 8**);
- the length and complexity of section 9 of the PSA, which may make it difficult for courts to ensure they consider all matters they are required to and to be clear about the principles that should be applied in a given case (see **Chapter 8**);
- the inconsistent treatment of sexual offences committed against children under section 9 of the PSA based on victim age – for example, a sentence of actual imprisonment must be ordered for an offence of a sexual nature committed against a child under 16 years unless there are exceptional circumstances, while the same requirement does not apply to an offence of a sexual nature (including sexual assault and rape) committed against a child aged 16 or 17 years (see **Chapter 8**);

38 Fairness and 'reasonable consistency' have been recognised as important elements of the administration of the criminal justice system: *Wong v The Queen (*2001) 207 CLR 584, 591 [6] (Gleeson CJ). In *Hili v The Queen* (2010) 242 CLR 520, the High Court noted '[t]he consistency that is sought [through the administration of the criminal justice system] is consistency in the application of the relevant legal principles': 535 [49] (French CJ, Gummow, Hayne, Crennan, Kiefel and Bell JJ).

39 *The '80 per cent Rule'* (n 3); *Community-based Sentencing Orders, Imprisonment and Parole Options* (n 3). As to the principle of individualised justice, see *Elias v The Queen* 248 CLR 483, 494–5 [27].

40 Submission 14 (Your Reference Ain't Relevant); Submission 27 (Name withheld); Submission 18 (RASARA); Submission 19 (Basic Rights Queensland); Submission 22, Chapter 1 (TASC Legal and Social Services); Submission 24 (QSAN); Submission 25 (Respect Inc and Scarlet Alliance); Submission 15 (Fighters Against Child Abuse Australia) 10; Submission 23 (Legal Aid Queensland); Preliminary submission 23 (Full Stop Australia).

- the categorisation of certain forms of sexual penetration falling within the offence of rape as more serious than other forms of penetration, contrary to statements made by the Queensland Court of Appeal cautioning against this (see **Chapters 6** and **7**);
- the treatment of fellatio performed on a victim as aggravated sexual assault, which would constitute rape if the person to whom the act was done without their consent was instead the perpetrator, which also is inconsistent with the approach in some other Australian jurisdictions (see **Chapter 7**);
- the ability to ensure that a person whose prison sentence is suspended is supervised as part of their sentence only if the court is sentencing a person for more than one offence (see **Chapter 11**);
- the unintended consequence of excluding sexual violence offences from being eligible for court-ordered parole,[41] being the increasing use of suspended prison sentences to achieve certainty of release, meaning people are not subject to parole supervision (see **Chapter 11**).

These issues are explored in more detail in the following chapters of this report.

3.3.6 Principle 6: Reforms should take into account likely impacts on the disproportionate representation of Aboriginal and Torres Strait Islander peoples in the criminal justice system

The Terms of Reference ask the Council to advise on the impact of any recommendations on the disproportionate representation of Aboriginal and Torres Strait Islander people in the criminal justice system.

The Council is committed to improving its awareness and understanding about the impact of sentencing on Aboriginal and Torres Strait Islander peoples, including identifying and addressing the drivers of disproportionate representation. To support this aim, the Council established the Aboriginal and Torres Strait Islander Advisory Panel, consults with a range of stakeholders providing sentencing support to Aboriginal and Torres Strait Islander communities, ensures all its research includes socio-demographic findings and publishes targeted research on disproportionate representation.

In Queensland, Aboriginal and Torres Strait Islander peoples are disproportionately represented across all parts of the criminal justice system. This is a result of a range of complex current and historical factors, including the ongoing impact of colonisation, and structural and institutional discrimination that continues to impact the lives of Aboriginal and Torres Strait Islander people. Generally, Aboriginal and Torres Strait Islander peoples are more likely to be sentenced for offences involving acts intended to cause injury, unlawful entry, public order and offences against justice and government.[42]

As discussed in **Appendix 4**, Aboriginal and Torres Strait Islander peoples are disproportionately represented among those sentenced for rape and sexual assault. Although Aboriginal and Torres Strait Islander peoples represent approximately 4.6 per cent of Queensland's population (aged 10 years and over), they accounted for almost a quarter of people sentenced for sexual assault (20.5%) and rape (23.3%) over the 18-year data period.[43]

41 PSA (n 23) s 160D.
42 Klaire Somoray, Samuel Jeffs and Anne Edwards, *Connecting the Dots: The Sentencing of Aboriginal and Torres Strait Islander Peoples in Queensland* (Sentencing Profile, Queensland Sentencing Advisory Council, 2021) 22–4.
43 This data relates to adults sentenced only. For this reason, it is different to the information contained in our *Sentencing Spotlights*.

As discussed in **Chapter 2**, the Council recognises that Aboriginal and Torres Strait Islander peoples are also disproportionately represented as victim survivors of sexual violence offences.

The potential impacts of our recommendations on Aboriginal and Torres Strait Islander persons are discussed throughout this report.

3.3.7 Principle 7: The circumstances of each person being sentenced, the victim survivor and the offence are varied so judicial discretion in the sentencing process is fundamentally important

The Terms of Reference explicitly recognise 'the importance of judicial discretion in the sentencing process'.[44]

The Council recognises that the circumstances of each offender, victim survivor and offence are infinitely varied. For this reason, sentencing approaches that promote individualised justice applied within a framework of broad judicial discretion are generally more likely to support positive outcomes than a 'one size fits all' or 'one size fits most' approach.[45]

In previous reports, we have raised concerns about the potential for mandatory sentences to constrain available sentencing options, lead to anomalies and unintended consequences in sentencing, and cause inconsistency in sentencing.[46] For this reason, the Council's position has been that, in accordance with the evidence, mandatory sentencing does not work either in achieving the purposes of sentencing in the Act or in reducing recidivism.[47] This is because, as a matter of principle, it assumes that every offence and every offender are the same.

As with previous reports, the Council has endeavoured to balance many competing interests and views when developing its recommendations. The importance of preserving judicial discretion to ensure that sentences under the reformed scheme are just in all the circumstances[48] has been central to the Council's decision-making. At the same time, we have been concerned to ensure that the impact of serious offences on victim survivors is given adequate and appropriate recognition, thereby promoting community confidence.

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44 Appendix 1, Terms of Reference, 1.

45 See *University of Melbourne Literature Review* (n 16) 12–13.

46 See, for example *'The '80 per cent Rule'* (n 3).

47 See, for instance, Queensland Law Society, *Mandatory Sentencing Laws Policy Position* (4 April 2014), 3: 'The evidence against mandatory sentencing shows there is a lack of cogent and persuasive data to demonstrate that mandatory sentences provide a deterrent effect. A review of empirical evidence by the Sentencing Advisory Council (Victoria) found that the threat of imprisonment generates a small general deterrent effect; however, increases in the severity of penalties, such as increasing the length of terms of imprisonment, do not produce a corresponding increase in deterrence. Research regarding specific deterrence shows that imprisonment has, at best, no effect on the rate of reoffending and often results in a greater rate of recidivism', citing Sentencing Advisory Council (Victoria) *Does Imprisonment Deter? A review of the Evidence* (Sentencing Matters, April 2011) 2. See also Law Council of Australia, *Policy Discussion Paper on Mandatory Sentencing* (May 2014) 13–15.

48 The Court of Appeal has recognised that this purpose is 'the paramount objective of sentencing': *R v Randall* [2019] QCA 25 [37].

3.3.8 Principle 8: Sentencing orders should be administered in a way that satisfies the intended purpose or purposes of the sentence. Services delivered under them, including programs and treatment, should be adequately funded and available across Queensland, both in custody and in the community.

The sentencing orders of courts must be properly administered to satisfy the intended purposes of each order and facilitate a fair and just sentencing regime that protects community safety.[49]

Both the Queensland Productivity Commission in its inquiry into imprisonment and recidivism[50] and the QPSR[51] highlighted funding and resourcing challenges faced by the Queensland criminal justice system and made recommendations designed to improve the management of offenders. Recommendations made by the QPSR included several that are relevant to the current review, including:

- the introduction of a dedicated case management system that begins assessment preparing a prisoner for parole at the time of entry, and the involvement of the person's future case manager in the management of the prisoner before he or she is released from custody (QPSR Recommendations 12 and 15);
- the establishment of an adequately resourced body to evaluate risk assessments, training and interventions used by Queensland Corrective Services ('QCS') (QPSR Recommendation 11);
- an increase in the number and diversity of rehabilitation programs and training and education opportunities available to prisoners, and a greater variety of rehabilitation programs to address the specific and complex needs of women and Aboriginal and Torres Strait Islander offenders, and increased availability of these programs (QPSR Recommendations 17 and 18);
- a review of resourcing of prison and community forensic mental health services (QPSR Recommendation 24);
- the delivery and design of new rehabilitation programs specifically designed for Aboriginal and Torres Strait Islander people by Aboriginal and Torres Strait Islander peoples (QPSR Recommendation 27);
- expanded re-entry services to ensure that all prisoners have access to these services (QPSR Recommendation 33).

QCS has been implementing the recommendations of the QPSR, including those centred around increasing rehabilitation opportunities for prisoners. In 2021–22, QCS finalised 'closure or completion of 89 supported or supported-in-principle recommendations'. That work included:

> The strengthening of laws protecting victims of crime, the expansion of end-to-end case management and the introduction of real-time notifications and enhanced domestic and family violence order information sharing with our justice system partners.
>
> The QPSR is the foundation for reforms which will enhance the safety of all Queenslanders through modern, sustainable and evidence-based corrective services. A key artifact of this work is the End-to-End Offender Management Framework, which was launched on 1 July 2021. The framework supports QCS' vision of safer communities and fewer victims of crime by 2030.[52]

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49 Australian Law Reform Commission, *Pathways to Justice – An Inquiry into the Incarceration Rate of Aboriginal and Torres Strait Islander Peoples, Final Report* (Report No 133, 2017).
50 Queensland Productivity Commission, *Inquiry into Imprisonment and Recidivism: Final Report* (Report, 2019).
51 *Queensland Parole System Review* (n 32).
52 Queensland Corrective Service, *Annual Report 2021–22* (2022) 1.

In its 2022–23 Annual Report, QCS advised that the QPSR recommendations had been transitioned to 'business-as-usual' operations.[53]

In relation to treatment programs specifically targeted at sex offenders, the 2022–23 Annual Report, stated that QCS had adopted 'a trilogy approach which includes the preparation, intervention and maintenance programs' offered to men in custody and under community supervision.[54] It advised:

> Participant selection is determined by sexual offending risk. A high intensity program of approximately 350 hours is available for high-risk sexual offenders with a moderate intensity, culturally specific and adapted program for cognitively impaired participants also available.
>
> … To improve outcomes for First Nations men, QCS contracted the University of the Sunshine Coast to develop Strong Solid Spirit program which was piloted during 2022–23.[55]

QCS reported that, 'In the 2022–23 financial year, there were a combined 407 completions of sexual offending programs in custody and in community corrections.'[56] A further '165 sexual offenders … were …. offered individual intervention, safety planning or assessment to address sexual offending in circumstances where they could not access group-based treatment'.[57]

Following the successful piloting of the First Nations sexual offending program Strong and Solid Spirit, this program is now being offered at the Lotus Glen Correctional Centre and is intended to be evaluated once 'an adequate sample of completers is available'.[58]

The management of sexual violence offenders – both in custody and in the community – is highly relevant when considering reform options for the current penalty and sentencing framework for this type of offending. Research has shown that '[s]ex offender treatment programs, especially those delivered in the community, have a small but significant effect on reducing sexual offence recidivism'.[59] The QPSR found that assessment for sexual offending risk and treatment need[60] was only administered to prisoners who were 'sentenced to a period of custody in excess of 12 months'.[61] This is because of the time required to complete a preparatory and moderate intensity sexual offending program, which the majority of sexual offenders will be required to do.

As with previous reviews, the Council is of the view that services and programs delivered to offenders under sentence – and particularly those convicted of sexual assault and rape –should be:

- adequately funded as far as practicable, and universally available across Queensland;
- regularly evaluated with adherence to best practice standards; and
- appropriately targeted and tailored to meet the individual needs of offenders taking into account factors such as the offender's age, gender, cultural background, mental health issues and any cognitive impairments they might have.

53 Queensland Corrective Service, *Annual Report 2022–23* (2023) 3.
54 Ibid 21.
55 Ibid.
56 Ibid.
57 Ibid.
58 Ibid 18.
59 Karen Gelb, *Recidivism of Sex Offenders Research Paper* (Prepared for the Victorian Sentencing Advisory Council, January 2007) vii.
60 Three actuarial assessment tools are used to do this: the Static-99R, STABLE-2007 and ACUTE-2007.
61 *Queensland Parole System Review* (n 32) 120 [603].

3.3.9 Principle 9: Sentencing decisions for sexual assault and rape should be informed by the best available evidence of a person's risk of reoffending

This principle recognises that the most appropriate sentencing options are those that not only reflect the seriousness of the offending (including any harm to a victim), but also allow the court to satisfy all the relevant purposes of sentencing.

Sentencing options must also be structured to allow them to be administered in a way that seeks to minimise the risks of reoffending and subsequent costs of that offending to victims and the broader community. This can include decisions made by a court about whether or not to suspend a sentence of imprisonment and, where a term of imprisonment is ordered, whether to set a parole eligibility date and if so, at what point in the sentence it should be fixed. A court will often consider in making these decisions, the amount of time (if any) the person should spend under supervision to reduce their risks of reoffending.

The Council considers it important for a sentencing court to have access to the best available information, including information about any risks a person might pose to specific individuals, classes of people or the broader community, while acknowledging that making an assessment of risk is problematic.[62] In particular, it is important to acknowledge the limitations of risk and treatment instruments when used for Aboriginal and Torres Strait Islander peoples or minority groups in custody (such as women), as these tools may not always be suitable.[63]

Further, assessing risk levels posed by different types of sex offenders requires an accurate understanding of the seriousness and scope of the person's offending, as well as the offender's personal history and antecedents. The Council is aware that a criminal history may not contain a complete or accurate history of offending, particularly in relation to sexual violence offences, which are often subject to under-reporting.

It is therefore important that information about a person's risk, where available, is considered alongside other information presented about the person's individual circumstances to assist the court in arriving at an appropriate sentence. This includes cultural reports and advice that may be made available to a court when sentencing an Aboriginal and Torres Strait Islander person, as provided for under the PSA.[64] These reports may include information about the 'offender's relationship to the offender's community' and 'any cultural considerations' that a court must consider.[65] The use of cultural reports is explored in **Chapter 12**.

We further acknowledge that often there is only limited information available to a court at sentencing about the future level of risk an offender poses to the community at the time of sentence. Typically, a court is reliant on expert reports prepared and submitted by the sentenced person's legal representatives regarding the level of risk that person poses. Although a court may order that a pre-sentence report ('PSR')

62 For a discussion of these problems, see *University of Melbourne Literature Review* (n 16) 3–4; Complex Adult Victim Sex Offender Management Review Panel, *Advice on the Legislative and Governance Models under the Serious Sex Offenders (Detention and Supervision) Act 2009 (Vic)* (2015) 15–16 [1.59]–[1.65].
63 *University of Melbourne Literature Review* (n 16) 3–4.
64 PSA (n 23) s 9(2)(p).
65 Ibid ss 9(2)(p)(i)–(ii).

be prepared by QCS,[66] or request a psychological report, this is less common,[67] and limited funding is available to the courts to do so.

The limited availability of PSRs may be remedied through the implementation of the Women's Safety and Justice Taskforce's recommendation that: 'Queensland Corrective Services develop and implement a plan for the sustainable expansion of court advisory services across Queensland to support greater use of pre-sentence reports.'[68] In 2022, the Queensland Government gave its support in principle for this recommendation,[69] and work on this expansion of these services has commenced.[70]

While the Council supports the alternative models of professional advice being explored (discussed in **Chapter 12**), we acknowledge requiring such advice to be made available in all cases would have significant resourcing implications. We are also concerned about the potential for court delays, which would be contrary to the interests of victim survivors.

3.3.10 Principle 10: Any reforms should aim to be compatible with the rights protected and promoted under the *Human Rights Act 2019* (Qld) or be reasonably and demonstrably justifiable as to limitations

Under the *Human Rights Act 2019* (Qld) ('HRA'), human rights limitations must be justified as a proportionate way of achieving the purpose of legislation, provided there is evidence that it is the least-restrictive option.

The imposition of higher penalties based on an assessment of offence seriousness, and future risk of reoffending, likely engages several human rights protected in the HRA, including:

- the right to equality;
- the right to liberty and security;
- the right to a fair hearing; and
- protection from cruel, inhuman or degrading treatment.

Section 13(2) of the HRA sets out criteria for deciding whether a limit on a right is reasonable and justified including:

- the nature of the human right involved;
- the nature of the purpose of the limitation (including whether it is consistent with a free and democratic society based on human dignity, equality and freedom);

66 Ibid s 15 provides for a court to receive any information that it considers appropriate to enable it to arrive at the appropriate sentence, including a pre-sentence report ordered by a court to be prepared by Corrective Services in accordance with section 344 of the *Corrective Services Act 2006* (Qld).

67 See Queensland Corrective Services ('QCS') Submission No 11 to Queensland Sentencing Advisory Council, *Community-Based Sentencing Orders, Imprisonment and Parole Options Review* (n 3) 10. QCS noted between July 2016 and June 2018, QCS conducted 1,446 PSRs (verbal and written reports) across the state. Over the same period 50,036 admissions for new community-based orders were received by QCS, indicating only a small percentage of offenders (2.9%) have pre-sentence reports ('PSRs') requested by the courts prior to sentencing to community-based orders. This does not include the number of admissions to custody and, on this basis, the proportion of offenders for whom a PSR is ordered can be assumed to be even smaller. In contrast to some other jurisdictions, such as Victoria, Queensland does not have a dedicated statewide court advisory service.

68 *Hear Her Voice Report Two* (n 4) rec 130.

69 Queensland Government, *Queensland Government Response to the Report of the Queensland Women's Safety and Justice Taskforce, Hear Her Voice - Report Two: Women and Girls' Experiences Across the Criminal Justice System* (2022) 8, 40 ('*Queensland Government Response to Hear Her Voice, Report Two*').

70 Queensland Government, *Women's Safety and Justice Reform Annual Report 2022–23* (May 2023) 7.

- the relationship between the proposed limitation and its purpose (including whether the limitation helps to achieve the purpose);
- whether there are any less-restrictive and reasonably available ways to achieve the purpose;
- the importance of the purpose of the limitation;
- the importance of preserving the human right, taking into account the nature and extent of the limitation on the human right; and
- the balance between these matters.

The 2023 Parliamentary Inquiry into support provided to victims of crime made 14 recommendations, including that, as part of its review of the HRA, consideration be given to 'whether recognition of victims' rights under the Charter of Victims' Rights in the *Victims of Crime Assistance Act 2009* should be incorporated'.[71] The Queensland Government supported this recommendation.[72]

As part of the current review the Council is required to consider the compatibility of legislative provisions in the PSA and any recommendations it makes with rights protected under the HRA. These issues are considered throughout this report.

3.3.11 Principle 11: The Council will, as far as possible, ensure consistency with previous positions and recommendations

As noted by the Council in its Background Papers for this review, there have been numerous reviews and inquiries in relation to the current Terms of Reference. With regard to Part 1 of this review – the sentencing of sexual assault and rape – these include:

- the Women's Safety and Justice Taskforce Reports One and Two;[73]
- the Legal Affairs and Safety Committee's Inquiry into Support provided to Victims of Crime[74]
- the Council's previous reports following its review of:
  - the serious violent offences ('SVO') scheme under Part 9A of the PSA;[75]
  - community-based sentencing orders, imprisonment and parole options.[76]

The Council is mindful that substantial reform is taking place in relation to sexual violence broadly, including sexual assault and rape. With that in mind, the Council has endeavoured to ensure consistency with its own previous positions and recommendations and, where possible, sought to align these with recommendations already made and/or supported.

During its most recent review of the SVO scheme, the Council determined that there are categories of offences that cause serious harm to individuals and the wider community, and may therefore require the courts to place greater weight on the principles of punishment, denunciation and community protection in order to deliver a just sentence. Offences of rape and aggravated sexual assault were regarded by the

71 Legal Affairs and Safety Committee, Queensland Government, *Inquiry into Support provided to Victims of Crime* (Report No. 48, 57th Parliament, May 2023), rec 3 (*'Inquiry into Support to Victims*'). The Charter of Victims' Rights used to be a schedule to the *Victims of Crime Assistance Act 2009* (Qld). It is now in the *Victims' Commissioner and Sexual Violence Review Board Act 2024* (Qld) sch 1.
72 *Inquiry into Support to Victims* (n 71) 4 (response to rec 3).
73 Women's Safety and Justice Taskforce, *Hear Her Voice: Report One - Addressing Coercive Control and Domestic and Family Violence in Queensland* (2021); *Hear Her Voice Report Two* (n 4).
74 *Inquiry into Support to Victims* (n 71).
75 *The '80 per cent Rule'* (n 3).
76 *Community-Based Sentencing Orders, Imprisonment and Parole Options* (n 3).

Council as falling within this category and recommended for retention in the new reformed scheme.[77] This is discussed further in **Chapter 11**.

[77] The Council recommended that sexual assault with a circumstance of aggravation be included in the new scheme (*Criminal Code Act 1899* (Qld), sch 1, ss 352(2)–(3)): *The '80 per cent Rule'* (n 3).

Chapter 4 – Information sources used in this report

4.1 Introduction

The Council gathered information from a wide range of sources to build an evidence base that could then be used to reach conclusions about the way sentencing is operating for the offences of rape and sexual assault in Queensland.

The sources included consultation with and submissions received from stakeholders, quantitative analysis of administrative datasets, qualitative thematic and content analysis of sentencing remark transcripts, case law analysis, cross-jurisdictional legal analysis, one-on-one interviews with victim survivors, legal stakeholders, and victim survivor advocate and support organisations, a commissioned research project that gathered community views of sentencing and a commissioned literature review to inform the Council's work.

This chapter provides an overview of the various information sources used in the report and includes discussion of gaps in existing evidence and the limitations that were encountered while building this evidence base, along with ways by which the Council attempted to overcome these limitations through other means of information-gathering. Where information was unable to be obtained, the Council acknowledges this.

4.2 Administrative data sources

To build the evidence base for the research undertaken, administrative data was requested from three core criminal justice agencies: Court Services Queensland ('Queensland courts'), the Queensland Police Service ('QPS') and Queensland Corrective Services ('QCS').

4.2.1 Queensland courts data

The quantitative sentencing information used by the Council was obtained from the administrative data systems used by the Department of Justice (' DoJ') to manage the courts. The primary case management system used for managing cases within the courts is known as the Queensland Wide Inter-linked Courts ('QWIC'). Additionally, the Court of Appeal Management System ('CAMS') is used to case manage appeals from higher courts. From these administrative systems, three separate but distinct sources of sentencing-related information were obtained by the Council.

Courts database

Court Services Queensland extracts case finalisation data from the QWIC system and provides them, under a Memorandum of Understanding, to the Queensland Government Statistician's Office ('QGSO'), where the data is compiled into the 'courts database' and standardised indicators are applied, for national reporting purposes.

QGSO provides the courts database to the Council on an annual basis. This dataset contains information about the characteristics of people who have been sentenced in Queensland and information about the sentencing outcomes ordered by courts.

Data used in this report was extracted in September 2023 and covers an 18-year period (from July 2005 to June 2023) unless stated otherwise.

The analysis presented of the sentencing outcomes from the courts database is generally presented in relation to the most serious offence ('MSO') for which a defendant was sentenced on a particular day. The MSO is calculated by QGSO and is defined as the offence which received the most serious sentence, as ranked by the Sentence Type Classification used by the Australian Bureau of Statistics ('ABS').[1]

The analysis in this report includes cases sentenced between July 2005 to June 2023, where the case involved a charge of rape[2] or sexual assault.[3] Cases involving child defendants sentenced under the *Youth Justice Act 1992* (Qld) are not included in this analysis.

Significant amendments made in 2000 to the *Criminal Code* (Qld) impacted both rape and sexual assault. Those amendments included changes to the definition of both offences, and each offence was renumbered in the *Criminal Code* (Qld). Offences charged under the former sections have therefore been excluded from this analysis.

When analysing sentencing lengths and calculating statistics, such as averages, 'life' sentences have been excluded from these calculations. This is because a person who is subject to a life sentence will never be free of supervision, and the custodial portion of their sentence is dependent upon the point at which (post eligibility) the person applies for and is granted parole. The sentence length and custodial portion are therefore unable to be empirically quantified. For this reason, life sentences have been reported separately.

To assist with comparative analysis across jurisdictions, some of the analysis reported groups offences into broader categories. These are based on the Australian Standard Offence Classification (Queensland Extension) ('QASOC').

The courts database data presented in this report differs slightly from that reported in the Council's *Sentencing Spotlight on Rape.*[4] This is due to differences in the data inclusions:

- In places, this report separates combined prison-probation orders from imprisonment orders, whereas all imprisonment orders were presented together in the *Sentencing Spotlight*. This means that results referring to imprisonment orders may differ between these reports.
- People sentenced as children were excluded from this analysis but included in the *Sentencing Spotlight*. This means some total calculations will differ between these reports.

The analysis of the quantitative sentencing outcome information we present in this report is predominantly descriptive. Many factors that impact sentencing are not able to be accounted for in presenting this data. These factors include:

- the type of conduct involved, its relative seriousness, and the context in which it occurred;

1 Australian Bureau of Statistics, *Criminal Courts, Australia methodology, 2022–23.*
2 *Criminal Code Act 1899* (Qld), sch 1 s 349.
3 Ibid s 352.
4 Queensland Sentencing Advisory Council, *Sentencing Spotlight on Rape* (2023, v 2).

- whether the court sentencing event involved a single offence, multiple counts of the same offence, or multiple offences against the same or multiple victim survivors;
- the prior criminal history (if any) of the person being sentenced;
- whether the person pleaded guilty or was found guilty following a trial;
- any time the person spent in pre-sentence custody and whether this time was declared by the court as time served under the sentence;[5]
- whether the offence was committed when the person was a child, in which case the court must consider the sentence that might have been imposed had the person been sentenced as a child;[6] and
- any impact because of responding to the COVID-19 pandemic.

Supplementary courts data

In order to assess the effectiveness of suspended prison sentences as an order type for these offences, the Council required data in relation to the operational period of suspended prison sentences imposed, whether formal breach action was initiated and, if so, what action the court took on finding the breach proven (for example, whether the sentence was activated in full or in part, or the operational period of the order extended).

This information was not available in the standardised courts database extract from QGSO, so the Council obtained the additional data from courts directly, through the QWIC data system. The selected period for this additional data related to January 2009 to June 2023.

Unfortunately, due to limitations in the administrative data available, we were unable to obtain information regarding the context of what prompted the formal breach action. However, this analysis provided some insight into the effectiveness of suspended prison sentences. The findings from this analysis are discussed in **Appendix 4** and **Chapter 11**.

Higher courts appeals data

Sentencing details based on the information available in the courts database obtained from QGSO generally relate to the original, or 'first instance', judgment involving the offences sentenced. Information relating to any appeals and their outcomes may not be included in the courts database data. As a result, all reporting of sentencing outcomes from the courts database data relates to first-instance sentencing outcomes.

To understand the volume of cases sentenced at first instance for rape that may be subsequently appealed, particularly on sentence, further data was requested from courts from CAMS. For all sentenced rape cases finalised in 2018–19, a review of CAMS was undertaken to determine whether any appeal had been lodged and, if so, what the outcome of that appeal was (if available). The findings of this analysis are discussed in **Appendix 4.**

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5 See *Penalties and Sentences Act 1992* (Qld) s 159A ('PSA'). If a person is sentenced to a term of imprisonment, there is a legislative presumption that any time spent in pre-sentence custody be declared as time served under the sentence, but a court still has discretion to make a different order. If a person is sentenced to a wholly suspended prison sentence, this time cannot be declared. If pre-sentence custody is not declared as time served, the court can take this into account in other ways, such as by reducing the head sentence that might otherwise have been imposed and/or making a different type of sentencing order.

6 Prescribed by the *Youth Justice Act 1992* (Qld) s 144.

4.2.2 Queensland Police Service data

When files are initially lodged by QPS in the lower courts, an automatic transfer takes place and metadata such as QPS identifiers and other data (including victim survivor age and gender) are usually transferred into the courts administration system.

When matters are committed to the higher courts, much of the data from the originating file is not carried over to the higher court matter. This is particularly the case where matters that are initially charged as one offence category (e.g. rape) are downgraded through plea negotiation, or through a lesser charge being proved in court (e.g. sexual assault). Furthermore, any subsequent changes made to QPS system after the initial lodgement are not transferred to the courts.

As a result, only limited information about victim survivors is recorded in QWIC; to supplement the court data, the Council requested missing data from QPS administrative data system, QPRIME.

The Council undertook a data-matching exercise with QPS to link court records over the full 18-year data period to crime records within QPRIME, to better identify the characteristics of victim survivors (for example, Aboriginal and Torres Strait Islander status, ethnicity), as well as to obtain information about the victim–offender relationship.

Unfortunately, while individual offenders are generally able to be linked throughout the criminal justice sector through the use of the QPRIME Single Person Identifier, it is more challenging to link specific charges, especially where an offender has been charged with multiple counts of the same offence, or where a single offender has offended against multiple victim survivors, or where there is a difference between the final sentenced charge and the originating charge as recorded by QPS.

It was also evident that, similar to the courts administrative data, the QPRIME system was also missing demographic information for many victim survivors of these offences.

Furthermore, it was found that neither the courts nor QPS collect structured administrative data on the circumstances of a person's offending in a way that can easily be analysed. No structured data is available on the type of conduct that constituted a sexual assault – for example, if the sexual assault involved touching, did this touching occur over clothes, or under clothes, did the offender touch the victim survivor, or was the victim survivor forced to touch the offender, what type of body part was touched, or other relevant aspects.

To overcome this limitation and to gather information about victim survivor characteristics, and the nature and context of the offending, the Council undertook a content analysis of sentencing remarks for a smaller subset of cases, to extract this information where it was mentioned by a sentencing judge.

This process was labour intensive, as each sentencing remark transcript must be reviewed individually to extract the relevant information. In several cases in this sample, however, the relevant details were not available from either sentencing remarks or sentencing submission transcripts. For these cases, details were requested from QPS in the first instance, then supplemented by information held by the Office of the Director of Public Prosecutions ('DPP') where possible.

This content analysis is discussed in more detail in section 4.3.1 below.

4.2.3 Queensland Corrective Services data

To understand the outcomes of persons sentenced to imprisonment orders that required subsequent release on parole, the Council obtained administrative data from the QCS as held in its IOMS database,

about parole eligibility, parole applications and outcomes, discharge date (where applicable) and parole breaches (where applicable).

The Council provided QCS with a list of all people sentenced to imprisonment for rape (MSO) who had an identified parole eligibility date in the courts database, of between 1 July 2021 and 30 June 2023. After data matching and cleaning, parole data was analysed for 162 prisoners. The results of this analysis are presented in **Chapter 11** of this report.

A similar process was undertaken for all people sentenced to imprisonment for sexual assault (MSO); however, due to the small number of eligible cases in the resulting dataset (n=27) insufficient data existed to undertake an analysis.

4.2.4 Administrative data analysis notes and limitations

All administrative data was analysed using SAS (version 8.3), R (version 4.3.1) and SQL.

The administrative data systems used across the Queensland criminal justice system are generally concerned with capturing information to fulfil operational objectives. As such, much of the information sought by the Council about offenders and victim survivors, as well as the context of the offending, is generally not captured in a structured or consistent way.

As the Council has noted previously,[7] the 2008 Review of the Civil and Criminal Justice System in Queensland highlighted the lack of reliable, comprehensive data in the criminal justice system.[8] The review noted that:

> Reliable, up to date, accurate and accessible data is the life blood of an effective criminal justice system. It allows decision makers at all levels to make evidence-based decisions; it challenges entrenched beliefs and perceptions, and it provides a foundation to secure funding. Such a system is dependent on effective information technology support.[9]

Similarly, the 2019 Inquiry into Imprisonment and Recidivism undertaken by the Queensland Productivity Commission noted that:

> Access to high-quality information supports good decision-making at both a policy level and a service delivery level. Robust and timely data, modelling and program evaluation, combined with best practice policy processes, allow the government to improve performance.
>
> High-quality information systems support a better understanding of the experience of offenders inside and outside of the criminal justice system. Further, data systems that straddle the criminal justice agencies can enable system-wide analysis.[10]

Considerations regarding monitoring the impact of reforms over time and improving the evidence base are discussed in more detail in **Chapters 10 and 18**.

Caution therefore should be used when interpreting the data and associated analysis presented based on administrative data, particularly due to the following:

- The data obtained from Queensland courts, QPS and QCS was derived from their administrative systems, which are designed for operational, rather than research, purposes. The accuracy of

7 Queensland Sentencing Advisory Council, *Community-based Sentencing, Imprisonment and Parole Options: Final Report* (Report, 2019) 446.
8 Martin Moynihan, *Review of the Civil and Criminal Justice System in Queensland* (Report, 2009) 20, expanded on in section 10.6.
9 Ibid 105.
10 Queensland Productivity Commission, *Inquiry into Imprisonment and Recidivism: Final Report* (Report, 2020) 105.

information presented reflects how administrative information is structured, entered, maintained, and extracted from the source systems.

- All the administrative databases are 'live' systems, and are continually updated as more information is entered into the system. Data presented is valid at the date extracted.
- Agencies operate using different ICT systems, and any information recorded by one agency is not linked to information in other systems.
- Administrative data are not validated in the context of the legal framework, leading to inaccuracies in the underlying datasets.

4.2.5 Supplementary data sources

As part of the Council's research, we sought to understand and quantify the attrition of sexual assault and rape matters through the criminal justice system.

The analysis of attrition through the criminal justice system is, however, challenging as systems like QPRIME (QPS), QWIC (Queensland courts), and IOMS (QCS) have been developed independently with different purposes, data standards and structure.

While each individual is assigned a unique identifier by QPS, and this identifier flows through to each criminal justice agency, making it possible to link individuals through each system, this linking does not provide information at the level of granularity required for attrition analysis as each agency collects data on, and reports counts of, different metrics that are not directly comparable.

The attrition analysis included in the Council's consultation paper reported relevant figures from the ABS. The Personal Safety Survey ('PSS') was used to estimate the prevalence of sexual violence in the community, along with percentages of unreported cases. The PSS is a self-reported survey carried out across a random sample of the population; therefore, while the results are indicative of the scale of the problem of sexual violence in the community the figures are not exact and cannot explicitly be verified. Data on cases proceeded by the police and matters finalised in courts were taken from the Sexual Assault – Perpetrators report; the data in these reports are compiled based on administrative data provided to the ABS from the relevant government agencies and contains many of the same limitations on courts and police data as discussed elsewhere in this chapter.

4.3 Sentencing remark transcripts

Sentencing remark transcripts provide an important record of what was said in court during the sentencing hearing. A sentencing remark is a statement made by a judicial officer in court when delivering a sentence. These sentencing remarks can contain valuable information about what happened during the offence and rich information about the defendant and the victim survivor, and provide the ability to analyse what judicial officers say when explaining the reason for making a particular sentencing order.

The Council undertook both a content analysis and a thematic analysis of samples of sentencing remark transcripts to assist it to better understand Queensland sentencing practices for the offences of rape and sexual assault.

How transcripts were obtained

Where available, the Council obtained sentencing remarks from the Queensland Sentencing Information Service ('QSIS'), an online collection of higher court sentencing remark transcripts that are freely available to eligible users.

Transcripts from the lower courts are not available on QSIS and are generally not transcribed. Some higher court matters were also unavailable on the QSIS platform. Where the transcript was not available, it had to be requested and obtained by the Council via QTranscripts – an online platform for requesting transcripts of court proceedings.

As all rape matters were sentenced in the higher courts, sentencing remarks were obtained from QSIS, where available. For sexual assault matters, about two-thirds of the cases of interest were sentenced in the Magistrates Courts. These transcripts had to be requested via QTranscripts.

For a small number of matters, an audio recording of court proceedings was obtained from QTranscripts instead of a transcript. A transcript was then generated from the audio files using Whisper, a general-purpose speech recognition model developed by OpenAI. A member of the Council Secretariat then listened to each audio file to verify the accuracy and correct any errors in the generated transcripts prior to analysis taking place.

For some cases, there were insufficient details included in the sentencing remarks to extract all the information required. This may happen in situations where it is not expressly stated whether the victim survivor was a child or an adult, where it is unclear whether the victim survivor knew the perpetrator, or where the court transcript had only limited details about the conduct that constituted the offence.

To address this gap, supplementary information was obtained from transcripts of sentencing submissions and through requests to the QPS and Office of the Director of Public Prosecutions ('ODPP'). This information was used to fill the gaps and provide insights into the relationships between defendants and victim survivors, as well as contextual information about victimisation.

The QPS provided information obtained from a Court Brief (also called a QP9), which contains details about the alleged charge. The ODPP provided a Statements of Facts for each case – this statement contains a summary of the offending and the circumstances within which the offence occurred, which is agreed between the prosecution and defence and is used to properly inform the judge in exercising their sentencing discretion.

4.3.1 Content analysis of sentencing remarks

As noted above, the administrative data obtained by the Council for this review had some gaps, which limited the types of analysis that could be done. Specifically, the administrative datasets did not contain information about the type of conduct involved in the commission of a rape offence (for example, the type of penetration that occurred) or a sexual assault offence (for example, whether indecent touching occurred over clothes or on skin). In addition, there was limited and incomplete information collected about victim survivors (for example, whether the victim survivor was a child, or whether the perpetrator was known to the victim survivor).

A content analysis of sentencing remarks was undertaken to overcome these shortcomings. Content analysis is a research method used to identify patterns, themes of meanings within qualitative data. It involves systematically recording the presence of certain words, themes, or concepts within unstructured text.

For this analysis, information about the victim survivor's relationship with the offender, the victim survivor's age and the type of conduct involved in the commission of the offence was extracted from court transcripts and recorded in an Excel spreadsheet.

Sampling methodology

The content analysis of a large volume of cases is a time-consuming, manual process. Due to resourcing constraints, it was not possible for the Council to conduct a content analysis of every case involving a charge of rape or sexual assault over the full 18-year data period. Instead, a subset of cases was selected for this analysis.

Cases sentenced in the most recent years were selected for inclusion in this content analysis, to ensure that the analysis captured the most recent court practices and was not skewed by older matters when sentencing practices may have been different.

The courts database (as described in section 4.2.1) was used to identify all cases involving a rape or sexual assault charge as the most serious offence that was sentenced in Queensland courts and was used as the basis for selecting cases to analyse.

For cases involving a charge of sexual assault, all cases that were sentenced in 2022–23 where the sexual assault charge was the MSO were included in the analysis, including cases sentenced in either the higher courts or the lower court. A total of 187 cases were identified for coding and analysis.[11]

There were fewer cases sentenced where rape was the MSO compared with sexual assault. As such, the sample for rape was drawn over a 3-year data period. For cases involving a charge of rape, all cases sentenced from 2020–21 to 2022–23 where the rape charge was the MSO were included in the analysis. A total of 403 cases were coded and analysed.[12]

Coding the sample

The sentencing remark transcripts obtained were manually reviewed to extract structured information including:

- the victim survivor’s age;
- the victim survivor’s relationship with the offender; and
- the type of conduct involved in the commission of the rape or sexual assault offence.

The age of the victim survivor was coded into two categories, ‘Adult’ and ‘Child’, and was based on whether the victim survivor was under the age of 18 at the time of the offence. For child victim survivors, the child's age was further coded into categories of '12 or under', '13 to 15' and '16 to 17'. However, due to the small number of cases sentenced in each of these categories, this led to sample sizes that were

11 Initially, 188 cases were identified in the courts database as involving a charge of sexual assault as the MSO in 2022–23. However, one case was excluded as it did not meet the inclusion criteria — the MSO had been mislabelled in the administrative court dataset and a review of the transcript of court proceedings showed that the MSO was not a sexual assault but was rather a charge of ‘assault with intent to commit rape’.

12 Initially, 404 cases were identified in the courts database as involving a charge of rape as the MSO between 2020–21 and 2022–23. However, one case was excluded as it did not meet the inclusion criteria — the MSO had been mislabelled in the administrative court dataset and a review of the transcript of court proceedings showed that the MSO charge was originally a charge of rape when the court proceedings commenced; however, the defendant pleaded guilty to a lesser charge of sexual assault and was not sentenced for a charge of rape.

too small for quantitative analysis. As such, the analysis of this data was limited to the broader categories of 'Adult' and 'Child'.

Relationship information was coded according to a coding frame developed based on the classification used by the ABS in the PSS 2021–22.[13] This was a two-tiered classification, which first classified perpetrators into four broad categories as listed below, and then further disaggregated each category into sub-categories:

- partner;
- family;
- other known person; and
- stranger.

Due to the different nature of the offences, the type of conduct involved in the commission of the offence was coded separately for rape offences and sexual assault offences.

For cases involving a charge of rape, the type of conduct was coded into the following seven distinct categories based on the type of penetration that occurred:

- penile-vaginal;
- penile-anal;
- oral;[14]
- digital-vaginal;
- digital-anal;
- object; and
- body part.[15]

For cases involving a charge of sexual assault, the type of conduct was coded into multi-tier classification to cover the wide range of behaviours in these cases – that is, whether the offence involved touching and, if so, whether the touching was of genitals or another body part, and whether the touching occurred on skin or over clothing.

A single case may contain multiple charges of rape or sexual assault. For this analysis, to avoid counting a single case multiple times where it involved multiple charges of the same offence or where there were different types of conduct, only one type of conduct was included in the analysis for each case.

For both offences, the type of conduct was coded based on the charge that received that most serious penalty (the MSO). That is, if a person was sentenced for more than one count of rape or sexual assault, then only the charge that received the most serious penalty was coded. If more than one charge resulted in the same penalty, or if the MSO charge involved multiple types of conduct, then the conduct to be analysed was selected based on the following criteria:

- For rape cases, the conduct was selected based on the type of penetration in the following order:
    - penile;

13 Australian Bureau of Statistics, *Personal Safety Survey: User guide, 2021-22* (User guide, 2022).
14 Oral rape comprised penile-mouth penetration, tongue(lingual)-vaginal penetration and tongue(lingual)-anal penetration.
15 Body part included penetration by the person's whole hand or fist.

    - digital;
    - oral.

- For sexual assault cases, the conduct was selected based on the following criteria:
    - cases that involved genitals were selected over those that involved other body parts;
    - cases that involved on-skin contact selected over conduct that occurred over clothing.

For the purpose of this coding, genitals include a penis or vulva and do not include the groin, pubis or anus.

Analysis and results

Please see **Appendix 4** for the findings from this project.

4.3.2 Thematic analysis of sentencing remarks

The Council undertook a thematic analysis of a sample of sentencing remark transcripts to better understand Queensland sentencing practices for the offences of rape and sexual assault.

Sampling methodology

A stratified random sample was drawn from the population of rape and sexual assault cases that were sentenced over 3 years from July 2020 to June 2023. In total, over this 3-year period, 404 cases were identified where the MSO was rape[16] and 505 cases were identified where the MSO was sexual assault.

A sample of 150 cases was drawn, with half of the transcripts involving rape (n=75) and the other half involving sexual assault (n=75). The sample was stratified to ensure that it was representative of the population of cases sentenced for these offences. The sample was stratified by sentencing outcome and geographical location. Cases involving sexual assault were further stratified by court level, as approximately half of the sample was sentenced in the District Court, and the other half in the Magistrates Courts. This was not necessary for rape as there were no cases sentenced for rape in the Magistrates Courts.

Tables 4.1 and 4.2 outline the number of cases to be included from each stratum (i.e. the quota).

[16] A manual review of court transcripts identified that in one of these 404 cases involving a charge of rape (MSO), the defendant had pleaded guilty to a lesser charge of sexual assault and had not been convicted or sentenced for rape. This reduces the size of the population from N=404 to N=403. This was not known at the time the random sampling took place for this thematic analysis. A similar sampling was undertaken for a descriptive content analysis of sentencing remarks in this sampling methodology, the revised population of N=403 cases was used.

Table 4.1: Thematic sample quota of sentencing remarks for cases involving rape 2020–21 to 2022–23

Sentencing outcome [17]	Court location: Major cities Population = 249	Court location: Regional/remote Population = 167	Quota total
Imprisonment (more than 5 years) Population = 190	Quota: 19 Population: 106 (25.7%)	Quota: 15 Population 84 (20.6%)	**34**
Imprisonment (5 years or less) Population = 226	Quota: 26 Population: 143 (34.3%)	Quota: 15 Population: 83 (19.4%)	**41**
Quota total:	**45**	**30**	**75**

Table 4.2: Thematic sample quota of sentencing remarks for cases involving sexual assault 2020–21 to 2022–23

Court level and sentencing outcome	Court location: Major cities Population = 333	Court location: Regional/remote Population = 177	Quota total
Higher courts			
Custodial Population = 172	Quota: 17 Population: 114 (22.4%)	Quota: 9 Population: 58 (11.4%)	**26**
Non-Custodial Population = 41	Quota: 4 Population: 27 (5.3%)	Quota: 2 Population: 14 (2.7%)	**6**
Lower courts			
Custodial Population = 160	Quota: 13 Population: 91 (17.8%)	Quota: 10 Population: 69 (13.5%)	**23**
Non-Custodial Population = 137	Quota: 15 Population: 101 (19.8%)	Quota: 5 Population: 36 (7.1%)	**20**
Quota total	**49**	**26**	**75**

Cases were randomly selected from the population until the quota for each stratum was met, with an even distribution of cases selected across each year (n=25 per year) for both offences.

Comparison of sample to overall case population

We compared the sample of rape and sexual assault cases used for the thematic analysis, the sample of cases in the sentencing remarks analysis and the population of rape and sexual assault cases over the

17 The population used to determine the strata contained 416 cases and included historical offences that were committed prior to the reforms to the rape offence introduced in 2000. As these offences were deemed out of scope for this review, those cases were removed from the overall population to give a total of 404 cases. One case was removed as the person was sentenced for sexual assault, reducing the final population to 403 cases. Rape offences that received non-custodial sentences or a life sentence were treated as outliers in the sample. They were not included in the thematic sample but were coded as part of the larger content analysis, the results of which are presented in Appendix 5.

3-year period to determine whether the characteristics of each of the samples closely mirrored the characteristics of the broader population. This type of comparison helps to provide confidence that the sample is representative of the broader population and also helps to ensure that any conclusions drawn from this study are valid for the general population of cases sentenced and are not skewed by any unusual or rare instances.

Separate analyses were undertaken for the sexual assault sample and the rape sample. For sexual assault, 75 cases were included in the sentencing remarks sample. Of these, 56 cases were included in the qualitative thematic analysis. These two groups were compared with the remaining population of sexual assault cases sentenced over the 3-year period (n=430).

For the rape sentencing remarks sample, during the descriptive content coding two cases were identified as having involved an historical offence that was committed prior to the year 2000. These cases were removed from the sample, bringing the total number of rape cases in the sample to n=73, as compared with the remaining population of rape cases over the 3-year period (n=331). Of the 73 cases in the sentencing remarks sample, 54 were included in the qualitative thematic analysis.

Table 4.3 shows the demographic characteristics of each sample compared to the remaining cases in the population. For both offences, there were no statistically significant differences found in demographics.

Table 4.3: Comparison of the full thematic sample of sentencing remarks with population attributes

	Rape cases				Sexual assault cases			
Attribute	**Thematic analysis sample**	**Sentencing remarks sample**	**All other cases**		**Thematic analysis sample**	**Sentencing remarks sample**	**All other cases**	
Sample size	54	73	331		56	75	430	
Men	96.3%	97.3%	99.1%	18	100.0%	100.0%	97.9%	19
Aboriginal and Torres Strait Islander peoples	18.5%	17.8%	17.2%	20	19.6%	17.3%	20.7%	21
Average age at offence	41.2 years	41.1 years	38.8 years	22	42.0 years	41.0 years	39.7 years	23

For the cases involving rape, there were no statistically significant differences in the proportion of custodial sentences in the sentencing remarks sample compared with the rest of the population.[24] Similarly, there were no statistically significant differences in median custodial sentence length.[25]

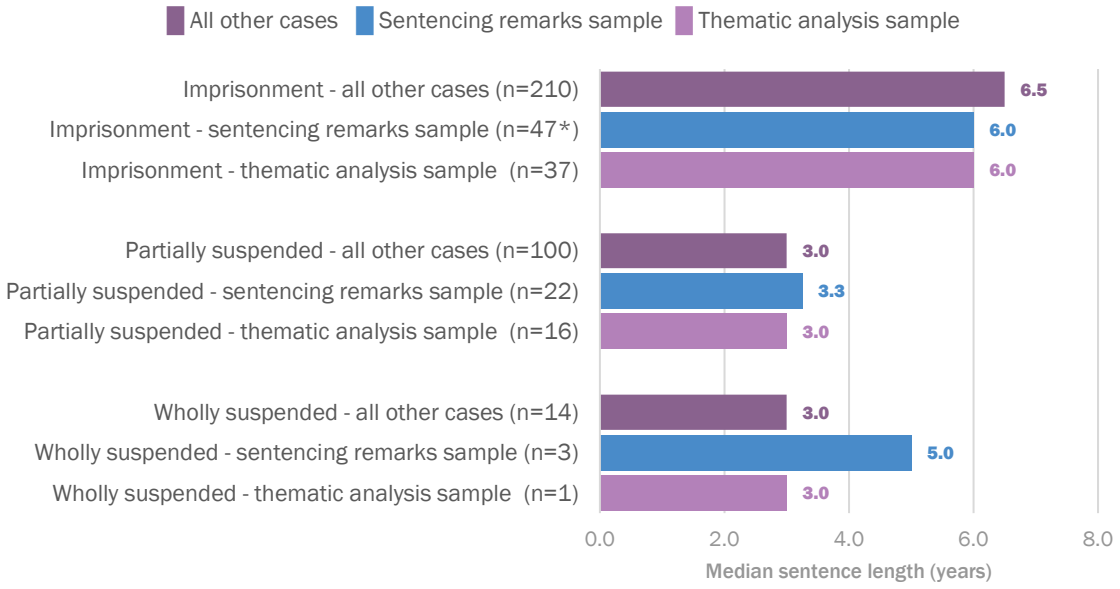
The proportion of custodial sentences in the sentencing remarks sample (imprisonment: 65.8%, partially suspended prison sentence: 30.1%, wholly suspended prison sentence: 4.1%) was similar to the proportion across the remaining cases (imprisonment: 64.8%, partially suspended prison sentence: 30.9%, wholly suspended prison sentence: 4.3%). The sample included in the thematic analysis was also

18 Pearson's chi-square test: $\chi 2(1) = 1.65$, $p = .1997$, V=-0.06.
19 Pearson's chi-square test: $\chi 2(1) = 1.60$, $p = .2062$, V=0.05.
20 Pearson's chi-square test: $\chi 2(2) = 0.23$, $p = .8900$, V=0.02.
21 Pearson's chi-square test: $\chi 2(1) = 0.45$, $p = .5031$, V=-0.03.
22 Independent groups t-test: $t(402) = -1.29$, $p = .1961$, $r = 0.03$ (equal variances assumed).
23 Independent groups t-test: $t(503) = -0.68$, $p = .4946$, $r = 0.064$ (equal variances assumed).
24 Pearson's chi-square test: $\chi 2(1) = 1.57$, $p = .2101$, V=0.06.
25 Wilcoxon rank-sum test: Ws= 13948.0, z= -0.69 p=, r=-0.02

similar (imprisonment: 68.5%, partially suspended prison sentence: 29.6%, wholly suspended prison sentence: 1.9%).

Figure 4.1 shows the median sentence length for the qualitative sample, the study sample, and the remaining cases in the population.

Figure 4.1: Median sentence length for rape cases by sample status

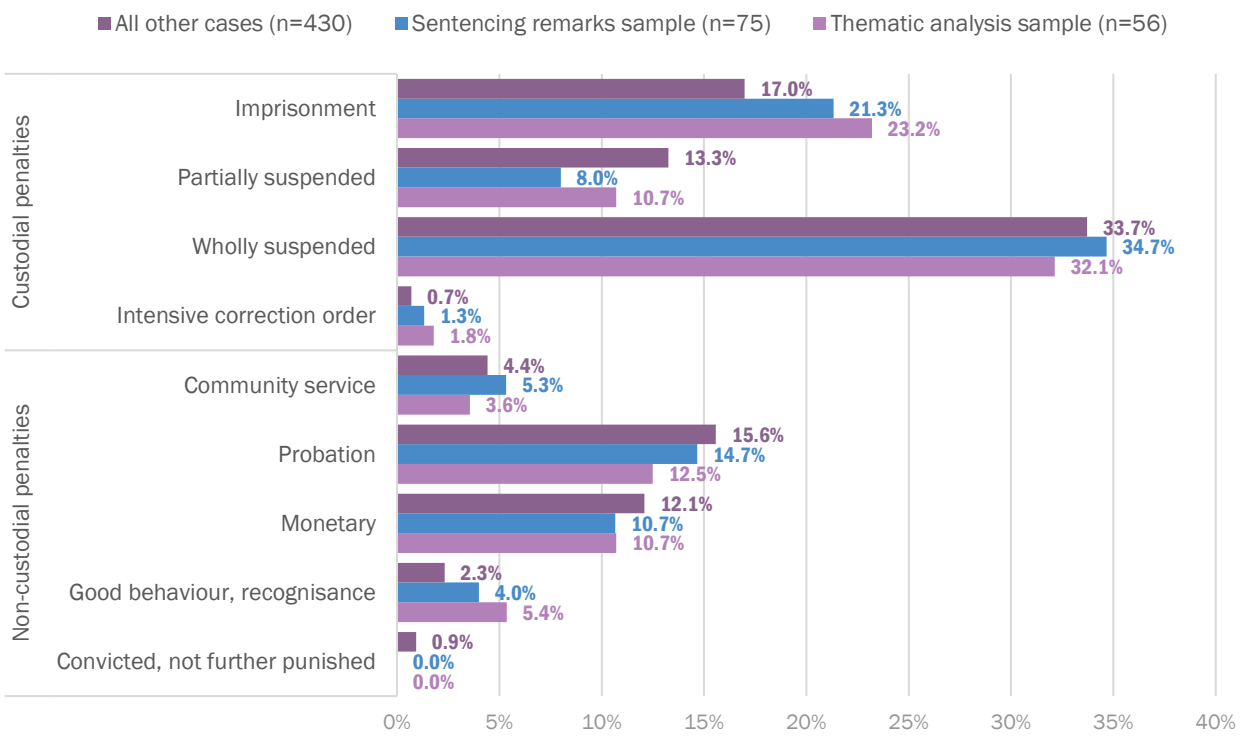


* excludes 1 life sentence

For the cases involving sexual assault, there were similarly no differences in the proportion of cases that received a custodial order between the thematic analysis sample (67.9%), sentencing remarks sample (65.3%) or all other cases (64.7%). The median length of custodial sentences ordered was 9.0 months for both the sentencing remarks sample and all other sexual assault cases and 9.2 months for the thematic analysis sample.

Figure 4.2 shows that there was no difference in penalty types between the thematic analysis sample, the sentencing remarks sample, and the remaining cases.

Figure 4.2: Penalty type for sexual assault cases by sample status



Development of a codebook

In qualitative research, a codebook is a tool that helps researchers sort through large amounts of text and identify common themes and patterns in a consistent way. Using a codebook, lengthy text from court transcripts was able to be organised into 'themes' that could be analysed systematically.

To generate a codebook, a smaller sample of 60 transcripts of sentencing remarks from the higher courts were selected for review. This sample included a random distribution of cases involving the offences of both rape and sexual assault. The coding took an inductive thematic approach – that is, reading through the sentencing remarks and identifying themes that emerged when reading the text.

The codebook was generated using an iterative data-driven approach using the work of DeCuir-Gunby et al[26] as a guide. This process involves using a five-step process to generate data-driven codes that reduce the raw information into smaller sub-sets, identify sub-sample themes, compare themes across sub-samples, create codes and determine reliability of codes.

One researcher reviewed this sample of 60 sentencing remark transcripts to create a preliminary codebook. After the initial codes or 'themes' were developed, four other team members undertook a review of the codebook to confirm consensus.[27]

It was important that the coding reflected the legal framework under the *Penalties and Sentences Act 1992* (Qld) ('PSA') in which judicial sentencing remarks and sentencing submissions are grounded.

26 Jessica T DeCuir-Gunby et al, 'Developing and using a codebook for the analysis of interview data: An example from a professional development research project' (2011) 23(2) *Field Methods* 136.

27 We note the difference in our approach from our guide material in that DeCuir-Gunby and colleagues met for a total of 36 hours during the development of the codebook whereas, due to availability, this occurred towards the end of our process.

Additionally, the developed coding needed to be mindful of the elements of the offences as set out in the *Criminal Code* (Qld), as these were likely to inform the language used by the judiciary when constructing a sentencing remark.

In line with these considerations, an a priori approach was taken to further refine the preliminary codebook to ensure the initial codes either reflected these legal frameworks, both in language and intent/meaning, or expanded the iterative coding.

Two different researchers then reviewed the iterative coding alongside the relevant legislation and applied more detail to the existing coding to better reflect the legal constructs/language present in the guiding legislation. In some instances, the original codes were subsumed by the expanded codes.

To ensure agreed interpretation of coding, once the primary coder had finished coding the first 10 sentencing remarks, two additional team members conducted an independent coding of those 10 sentencing remarks to check for agreement of the coding.

Descriptive and thematic coding and analysis

The NVivo 12 software application was used to record and analyse all coding of the data. NVivo is a program designed to assist researchers to manage and analyse qualitative data; it is particularly useful for analysing unstructured data such as court transcripts.

The sentencing remarks were coded and analysed both descriptively and thematically.

Descriptive coding and analysis

Descriptive content coding occurred for all 150 cases in the sample.

Descriptive coding and the associated analysis focused on quantifying and categorising various attributes of each case, without delving deeply into interpreting the underlying themes or meanings. For each case, we coded and analysed structured information from the transcript, including attributes about the defendant (e.g. demographic information), attributes about the victim survivor (e.g. whether they knew the defendant), attributes about the case (e.g. the location of the courthouse) and attributes about the sentence (e.g. the type of penalty ordered).

This descriptive data allowed for analysis to be broken down by various factors – for example, to allow for comparative analysis to check whether particular themes were more common in a particular location, or for a particular type of defendant.

The 'case classification' feature of NVivo was used to record descriptive data about each case.

Thematic coding and analysis

Qualitative thematic coding was also undertaken on the sample; however, not all cases in the full sample were qualitatively coded and included in the final thematic analysis.

Qualitative coding was undertaken until saturation was reached. Saturation is important in qualitative research as it is a common indication of the rigor and quality of the research conducted.[28] The approach to saturation taken in this research involved 'inductive thematic saturation', where the primary researcher found no further codes or themes emerging from the coding, deeming saturation had been reached.[29]

28 Benjamin Saunders et al, 'Saturation in qualitative research: Exploring its conceptualization and operationalization' (2018) 52(4) *Quality & Quantity* 1893.
29 Ibid 1897.

Qualitative coding of the sentencing remark transcripts was completed for 72.0 per cent (54/75) of the sample rape cases and 74.7 per cent (56/75) of the sample of the sexual assault cases. In total, 110 cases were included in the final sample for the thematic analysis.

As a thematic approach was adopted in the development of the codebook, a similar approach was utilised for the analysis of the sentencing remarks, following the guidance in Braun and Clarke[30] as set out below:

Phase 1: Familiarising yourself with the data.

The coding researcher will immerse themselves in the sample data generated from the sampling protocol detailed above. This process will likely involve reading the data multiple times.

Phase 2: Generating initial codes.

Initial codes for this project were already developed during the process of developing the codebook. However, these will be confirmed in the analysis phase and any new codes will be added to the codebook.

Phase 3: Searching for themes.

After all of the sample data has been coded, the researcher will search for any emerging themes in the data relevant to the areas of interest dictated by the Terms of Reference.

Phase 4: Reviewing themes.

After areas of interest are identified these will be reviewed and discussed with the wider team. Codes within themes will also be reviewed and refined to ensure they fit a coherent pattern and "belong together".

Phase 5: Defining and naming themes.

In this phase we will look at the identified themes more critically, determining what is interesting about them in relation to the key issues surrounding sexual assault and rape.

Phase 6: Producing the report.

A detailed description of the themes in the context of the terms of reference will be prepared.

4.3.3 Limitations of sentencing remarks as a data source

The Council acknowledges the limitations associated with analysing sentencing remarks, particularly when undertaking thematic analyses.

Sentencing remarks present only certain facts of the case, the sentence imposed and often the reasons,[31] in a way that appears neutral.[32] What judges and magistrates say in their remarks does not necessarily reflect all the factors considered in determining the sentence. How a factor is expressed may not reflect the true influence of the court's attitude towards it.[33]

It has also been recognised that, in delivering their remarks, judicial officers may need to 'satisfy a range of often contradictory purposes and audiences' (e.g. victim survivors, the person being sentenced, prosecution and defence lawyers, other judicial officers, the appeal court and the media),[34] and not be aware of all the relevant factors and considerations that have influenced their decision-making.[35] This may influence what factors are expressly mentioned.

30 Virginia Braun and Victoria Clarke, 'Using thematic analysis in psychology' (2006) 3(2) *Research in Psychology* 77.
31 PSA (n 5) s 10. Only in the case of imprisonment, including suspended imprisonment.
32 Ronit Dinovitzer, 'The myth of rapists and other normal men: The impact of psychiatric considerations on the sentencing of sexual assault offenders' (1997) 12 (Spring) *Canadian Journal of Law and Society* 147, 169.
33 Ibid.
34 See Cyrus Tata, *Sentencing: A Social Process – Re-thinking Research and Policy* (Palgrave Macmillan, 2020) ch 3, 69; ch 7, 147.
35 See, for example, Jeffrey J Rachlinski, *Judging the Judiciary by the Numbers: Empirical Research on Judges* (2017).

The 'instinctive synthesis' approach to sentencing[36] is another reason why it is not possible to quantify with precision the extent or weight given to specific purposes and factors and their relevance. The weight or otherwise of these individual purposes or factors can only be estimated.

While sentencing remarks may not always reflect the complete thought process of a judicial officer, they are the best resource available to communicate the logic, reasons, factors and purposes that influenced the decision.[37]

Our approach

The type and level of information and detail provided in the sentencing remarks examined varied by judicial officer and often by court level, making them an inconsistent source of data. Nevertheless, as part of a mixed-methods research design, sentencing remarks supplement purely data-driven analyses, providing a rich source of additional information on the context of rape and sexual assault offences.

For the purposes of our analysis, factors were only coded when the judge specifically commented on the circumstances of the offending. For example, if the sentencing remarks did not mention that an offence was committed in a private residence, this does not mean that the offence was not committed in a private residence but simply that these circumstances of offending were not expressly mentioned during sentencing.

In **Chapter 9**, the Council discusses its findings from a review of 'good character' evidence in sentences for sexual assault and rape. This review considered whether a specific 'good character' element was present, and the weight given – that is, whether there was 'a lot of weight'; 'a little weight'; neutral (no identifiable weight given or weight not apparent) or no weight, where it was expressly stated 'no weight given' (i.e. because of s 9(6A) of the PSA or the person was not considered to be of 'otherwise good character').

For the 'good character' coding, it was not possible, given time and resourcing constraints, to undertake cross-coding.[38]

Access to transcripts

Criminal defence lawyers, prosecutors and judges require access to sources of case comparators – that is, a way to find and locate previous cases that are similar to any matter presently before a court. The ability to locate previous comparable sentences helps to ensure consistency in sentencing. The Council notes that there is an apparent lack of information-sharing across agencies and potential duplication of effort as individual agencies keep and maintain separate internal databases of comparable cases.

The QSIS was developed as a comprehensive collection of higher court sentencing remark transcripts that would be available to legal officers. However, recent shortcoming of QSIS, including significant functional and content issues, have hindered the ability for practitioners and judicial officers to identify sentencing trends and have led to further reliance on in-house databases.

As part of this review, the Council relied upon the QSIS database as a source of higher court transcripts required to undertake qualitative and quantitative analysis of sentencing remarks. Due to a recent

36 *Markarian v The Queen* (2005) 228 CLR 357, 388–90 [76]–[83] (McHugh J).
37 Katherine J McLachlan, 'Trauma-informed sentencing: How South Australian sentencing judges use information about defendants' child sexual abuse victimization and subsequent trauma' (2023) *Journal of Child Sexual Abuse* 485.
38 In other sentencing remark research, cross-coding has been used to reduce subjectivity and bias: see Kate Warner et al, 'Comparing legal and lay assessments of relevant sentencing factors for sex offences in Australia' (2021) 45 *Criminal Law Journal* 57.

redesign of QSIS, the search functionality was not fit for purpose and the Council could not locate required transcripts on the service. Instead, reliance was placed on administrative courts data to identify relevant matters and use that list as a starting point to locate transcripts on QSIS.

The Council found that a significant number of transcripts were not available on QSIS. This was partially due to processing delays and partially due to the collection being incomplete. The lack of functionality in the QSIS database, coupled with gaps in the collection, posed a significant barrier to the Council's review.

Transcripts from the lower courts are generally not transcribed and are not available on QSIS. These had to be requested and obtained by the Council at cost and incurred time delays to the review. Transcripts not otherwise available in QSIS must be requested individually via QTranscripts, which is time intensive when many transcripts are required. See **Chapter 18** for a further discussion.

4.4 Submissions and consultation

A full list of submissions and consultation sessions and meetings is provided at **Appendix 3**.

4.4.1 Submissions

The Council received 28 preliminary submissions from stakeholders and members of the public in response to its call for submissions regarding issues relevant to both sexual violence offences and offences committed within a domestic violence setting (both aspects of the review). These submissions informed the Council's early consideration of the key issues raised by this review and the development of the Council's Consultation Paper.

The Council subsequently invited submissions in response to its Consultation Paper, released in March 2024. The *Consultation Paper: Issues and Questions* posed 25 targeted questions for stakeholders and members of the community to consider. We received 35 submissions in response to our Consultation Paper. These submissions assisted the Council in considering our position and informed the development of our recommendations. They are referenced throughout this report.

Preliminary submissions[39] and submissions in response to our Consultation Paper[40] made in a non-confidential capacity have been published on our website.

4.4.2 Consultation events

The Council held a series of in-person and online consultation events to facilitate meaningful and informative discussions on issues relevant to the review and to encourage written submissions in response to our Consultation Paper.

The Council held 2 in-person consultative events in Brisbane and Cairns, with more than 100 attendees across both events. These events were facilitated by members of the Council and attended by legal and justice representatives, academics and members of victim survivor support and advocacy groups. Hosting forums in both a regional location and Brisbane enabled more stakeholders to attend these events in person, consistent with the Council's objective of broadening the reach of our consultation processes and hearing as from a diverse range of stakeholders.

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39 See 'Sentencing sexual and domestic violence', *Queensland Sentencing Advisory Council* (web page) https://www.sentencingcouncil.qld.gov.au/projects/sentencing-sexual-and-domestic-violence>.

40 See 'Sentencing sexual violence', *Queensland Sentencing Advisory Council* (web page) <https://www.sentencingcouncil.qld.gov.au/projects/sentencing-sexual-and-domestic-violence/sentencing-sexual-violence>.

The Council held 2 online consultation events which were open to all members of the community and were attended by 29 people. These online events were facilitated by members of the Council and the Secretariat and offered an opportunity for all Queenslanders – including those living in rural, regional, and remote areas of the state – to participate directly in these discussions.

Attendees were divided into groups of between 5 and 10 people and assigned a facilitator to lead the discussions. The facilitator posed key questions to each group and invited feedback from, and discussions between, attendees. With their consent, the views of attendees were recorded by a member of the Secretariat without identifying the speaker, and subsequently coded into a thematic summary, which informed the consideration of the Council's recommendations and formal views.

4.4.3 Stakeholder meetings

The Council also met throughout the review with members of our Aboriginal and Torres Strait Islander Advisory Panel. The purpose of these discussions was to share key findings, seek the Panel's views on draft reform proposals and invite the Panel to share its perspectives on the impacts of the current criminal justice system and sentencing practices on Aboriginal Torres Strait Islander people charged with a sexual violence offence or who are victim survivors of sexual offending.

We also held individual meetings with the Council's Practitioner Stakeholder Forum, the ODPP, QCS, the Queensland Law Society's Criminal Law Committee, and other professional and representative bodies, including the Australian Psychological Society's College of Forensic Psychologists and the Family Responsibilities Commission.

4.5 Interviews

4.5.1 Interviews with legal stakeholders

The Council initiated a qualitative interview project with legal subject matter experts to gather information about the current approach to sentencing for rape and sexual assault offence and related matters between November 2023 to February 2024. A total of 26 interviews were held with members of the judiciary, legal representatives (including from private defence, Legal Aid Queensland, Aboriginal and Torres Strait Islander Legal Service practitioners and public prosecutors from QPS and the DPP). They are referenced through this report.

Interviews were conducted as qualitative, semi-structured one-on-one interviews. An interview guide was prepared for each group of interview partners. Provided there was consent, the interviews were audio-recorded and transcribed. Interviews were coded to identify the main themes. An experienced interviewer conducted the interviews. The interview guide is available at **Appendix 8**.

4.5.2 Interviews with victim survivor support and advocacy organisations

Similar to the interviews conducted with legal stakeholders, the Council undertook qualitative interviews with workers at victim survivor support and advocacy organisations to gather information about their experience of supporting victim survivors through the sentencing process, in particular.

These interviews were conducted between March and June 2024, with some occurring one-on-one and others occurring in a group format. In total, eight victim survivor support and advocacy workers were interviewed.

The interviews with support and advocacy workers followed the same methodology as the interviews with legal stakeholders outlined above. The interview guide is available at **Appendix 8.**

4.5.3 Interviews with victim survivors

In partnership with victim survivor support and advocacy organisations, the Council initiated a qualitative interview project with victim survivors of sexual assault and rape to gather information about their experience of the sentencing process.

These interviews were conducted using a trauma-informed approach, ensuring the victim survivor had adequate support before, during and following the interview. A total of 7 interviews were held between March and September 2024.

Interviews were conducted in a qualitative, semi-structured way. An interview guide was prepared and provided there was consent, the interviews were audio-recorded and transcribed. Interviews were coded to identify the main themes. An experienced interviewer conducted the interviews. The interview guide is available at **Appendix 8.**

4.6 Legal research

4.6.1 Case law analysis

To inform its understanding of the current approach to sentencing for rape and sexual assault and any trends or anomalies in the sentencing of these offences, as required by the Terms of Reference, the Council undertook a comprehensive case law analysis, with a focus on Court of Appeal jurisprudence and appeals to the District Court under section 222 of the *Justice Act 1886* (Qld).

The Council used the Queensland case law databases of Queensland Judgments, the Supreme Court Library of Queensland and QSIS to identify relevant Queensland case law. We used a range of search terms, including 'rape', 'sexual assault', 'indecent assault', '349 Criminal Code', '352 Criminal Code' and 'sentence'. We also identified cases through Queensland criminal law and sentencing publications, such as *Carter's Criminal Law of Queensland*,[41] *the Queensland Sentencing Manual*[42] and *Indictable Offences Queensland*.[43]

Interstate and international case law was identified using JADE, Westlaw, Lexis Nexis, relevant court websites and case law databases (e.g. NSW Caselaw), searches across the Commonwealth Law Reports, and relevant sentencing manuals and benchbooks. We also identified additional cases through submissions made to the review, information shared with the Council by state and territory justice agencies and meetings with legal stakeholders.

4.6.2 Sentencing submission analysis

The Council was interested in understanding what case law practitioners use in submissions and the way submissions were being made for digital and oral rape where the victim was a child or an adult. We wanted to know whether practitioners were applying recent Court of Appeal decisions affirming the principle that penetrative conduct should not be 'compartmentalised' in terms of relative offence

41 Soraya Ryan et al, *Carter's Criminal Law of Queensland* (online) (LexisNexis Butterworths, November 2024).
42 John Robertson and Geraldine Mackenzie, *Queensland Sentencing Manual* (online) (Thomas Routers, November 2024).
43 Brendan Butler and Saul Holt, *Butler and Holt's Indictable Offences Queensland* (online) (Thomson Reuters (Professional) Australia Limited).

seriousness when recommending appropriate sentencing ranges[44] and, in the case of child victims, the decision of *R v Stable (a pseudonym)*[45] which recognised the Queensland Parliament's intention that sexual offences against children should be treated more seriously and that sentences should have increased following amendments in 2003 and 2010 to that effect.

The Council reviewed 24 audio recordings of sentencing hearings from the District Court in 2022–23 for digital-vaginal and oral rape of both children and adults.

We coded the submissions made by prosecution and defence on penalty type, range and any case authorities or comparative sentencing decisions tendered in support. We also coded for whether a victim impact statement was given and how this was discussed.

Given time and resourcing constraints, only a small sample of sentencing submissions were reviewed, and it was not possible to undertake cross-coding.

Despite these limitations, the review provides a useful indication of how and what kind of comparable cases are used and the discussion around the type of conduct.

The findings of this analysis are discussed in **Chapter 6.**

4.6.3 Cross-jurisdictional legal analysis

The Council was asked to examine relevant offence, penalty and sentencing provisions in other Australian and international jurisdictions.

To facilitate this, in addition to undertaking its own review of relevant provisions, the Council wrote to key contacts in Australia and internationally from departments of justice and attorneys-general, prosecution services, legal aid commissions and sentencing councils, seeking their assistance in responding to a series of questions regarding sentencing of sexual assault and rape (or their equivalent offences).

From those responses and a desktop review, comprehensive analysis of the relevant offences, penalties and sentencing provisions was compiled for the following jurisdictions:

- Australian Capital Territory
- Commonwealth of Australia
- New South Wales
- Northern Territory
- Tasmania
- Victoria
- Western Australia
- Canada
- England and Wales
- New Zealand
- Scotland.

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44 *R v RBG* [2022] QCA 143 and *R v Wallace* [2023] QCA 22, 5 [13] (*Bowskill* CJ) endorsing remarks made in *R v Wark* [2008] QCA 172 by McMurdo P (at [2]), Mackenzie AJA (at [13]–[14]) and Cullinane J (at [36]) also referring to remarks by Dalton JA in *RBG* at [4] referring to *R v Smith* [2020] QCA 23 at [34]–[37] per Morrison J. Similar remarks were also made by Dalton JA in her dissenting judgment.

45 *R v Stable (a pseudonym)* [2020] QCA 270.

4.7 Commissioned research

4.7.1 Literature review

The Council engaged a team of researchers from the Griffith Criminology Institute to prepare a review of the available literature relevant to the sentencing of rape and sexual assault offences. The research team carried out a Rapid Evidence Assessment (REA) to find and synthesise relevant literature. This involved targeted literature searches to generate lists of potential references. The list of potential references was loaded into DistillerSR, a web-based reference management system. The DAISY rank feature was used to screen the references. The DAISY rank is an 'AI' machine learning tool. The researchers manually screened the first few hundred studies, which trained the AI model on the types of studies to screen. The AI model was then used to held screen the remaining ~15,000 articles. The remaining lists were manually reviewed, coded and synthesised by the researchers before being incorporated into a final report.[46]

Research summary

Effectiveness of sentencing measures

- Imprisonment is theorised to reduce recidivism through deterrence, incapacitation and treatment, but studies on the impact of imprisonment on sexual offenders' recidivism yield inconsistent results.[47]
- Community supervision for offenders can be effective under some circumstances, with some studies showing lower recidivism rates compared to imprisonment, especially when accompanied by quality treatment and post-release supervision.[48]
- Best practices in community supervision align with the risk-need-responsivity (RNR) model, emphasising tailored interventions based on the assessment of risk and criminogenic needs, addressing the underlying causes of offending.[49]
- There are gaps in the available evidence regarding the sentencing of individuals convicted of sexual offences, as the research team did not identify any research that evaluated the effectiveness of many standard penalties (e.g. suspended prison sentences, probation), and many existing evaluations have significant methodological limitations affecting the interpretation of findings.[50]
- Research did not find sufficient evidence to assess the effectiveness of monetary penalties, including fines and legal fees, in preventing crime or deterring reoffences, particularly in cases of sexual violence. Some studies suggest that the impact of fines on recidivism varies depending on factors such as the nature of the offence, socioeconomic status and the size of the fine relative to the offender's financial capacity. There is some evidence that these sentencing measures disadvantage those from lower socioeconomic backgrounds.[51]
- Research findings regularly reveal that treatment for sex offenders can be highly effective.[52]

46 Lacey Schaefer et al, *Sentencing Practices for Sexual Assault and Rape Offences* (Final Report, prepared for the Queensland Sentencing Advisory Council by Griffith University, 2024) 114–15.
47 Ibid 46.
48 Ibid.
49 Ibid.
50 Ibid.
51 Ibid 53–4.
52 Ibid 65.

- Restorative justice practices may hold promise as a novel approach to the sentencing of individuals who have committed sexual offences. Evaluation results on the impact of such practices on reoffending are very slim, although there is broader evidence that some victim survivors are supportive of restorative justice.[53]
- The Circles of Support and Accountability ('COSA') program, designed to aid high-risk sexual offenders transitioning back into society, has demonstrated effectiveness in reducing reoffending rates.[54]

Victim survivor perceptions on the sentencing of sexual offences

- Victim survivors of sexual violence are often dissatisfied with the sentencing process and outcomes, especially when they feel unheard.[55]
- Some studies show that victim survivors are not wed to specific sentences in many instances, but rather seek to have their perspectives accounted for during sentencing.[56]
- Victim survivors who observed their impact statement being read before the court expressed greater satisfaction with the sentence handed down.[57]
- Victim survivors of sexual assault indicated that their perspectives should be considered at sentencing but strongly believed that the type and severity of the sentence should be the sole responsibility of the judge.[58]
- The suggested lengths of imprisonment provided by victim survivors in an Australian study were very close to the actual sentences handed down by judges.[59]
- Victim survivors express mixed views regarding the best timing and function of restorative justice in cases of sexual violence, although most felt that conferencing should occur post-sentencing.[60]

Community perceptions of the sentencing of sexual offences

- The research identified that the public considers many of the same factors as judges when considering sentencing, such as culpability and harm.[61]
- Studies reveal that members of the community prescribe sentences that are largely consistent with those handed down by courts.[62]
- The literature reviewed identified that the public initially lean towards punitive measures but become less inclined to do so when given more information on crime and justice issues.[63]

53 Ibid 66–7.
54 Ibid 71–2.
55 Ibid 86.
56 Ibid 87.
57 Ibid.
58 Ibid.
59 Ibid.
60 Ibid.
61 Ibid 100.
62 Ibid.
63 Ibid.

Evidence limitations

The authors of the literature review noted the following limitations in the evidence base:[64]

Studies on victim survivors' views:

- Many studies were affected by selection bias, due to a low reporting rate of sexual offences generally, but also as research on victim survivors of crime necessitates a requirement for individuals to elect to participate in research.
- Research on victim survivors was also affected by recall bias, where victim survivors who have suffered a traumatic event may have difficulty in providing an accurate retelling of the event. Small sample sizes of much of the prior research limits the generalisability of findings.
- Social desirability bias may occur when researching sensitive topics such as sexual violence.

Studies on community views:

- Community views are nuanced, and more sophisticated research methods are required to tease out appropriate findings.
- Many studies relied on samples of convenience, limiting the generalisability of findings, selection bias, and an overreliance on students.
- Many studies were point-in-time surveys and did not provide longitudinal trends or the depth of information available from qualitative methods.[65]

4.7.2 Community perspectives on sentencing for rape and sexual assault

The Council engaged a team of researchers from the Sexual Violence Research and Prevention Unit at the University of the Sunshine Coast ('UniSC') to carry out research on the views of the community on the importance of sentencing purposes and the seriousness of rape and sexual assault offences. The researchers conducted 19 focus groups with a total of 89 participants. The focus groups were carried out in-person at the Sunshine Coast, Brisbane, Cairns and Goondiwindi, as well as online to capture views from community members who were located in more regional areas or otherwise were unable to attend in person.[66]

The researchers only selected participants who were over the age of 18, permanently resident in Queensland and able to speak conversational English. Anyone who had previously been accused or convicted of rape or a sexual assault offence was excluded from the research.[67] Victim survivors were invited to participate and comprised 40 per cent of the participants.[68] The majority of the participants were women (74%)[69] and a small number identified as Aboriginal or Torres Strait Islander people (16%).[70]

Participants in the focus groups completed an activity using vignettes based on real Queensland judgments, which contained information about aggravating and mitigating factors and information about the victim survivor. Participants were asked to rate the importance of each of the sentencing purposes

64 Ibid 95–7.
65 Ibid 114–15.
66 Dominique Moritz, Ashley Pearson and Dale Mitchell, *Community Views on Rape and Sexual Assault Sentencing: Final Report* (Prepared for the Queensland Sentencing Advisory Council by the Sexual Violence Research and Prevention Unit, University of the Sunshine Coast, June 2024) 11 ('*UniSC Final Report*').
67 Ibid
68 Ibid 12.
69 Ibid 11.
70 Ibid 12.

on a Likert scale of 1 to 5. The activity was followed by a group discussion to gather reasoning for the participant responses.[71]

To determine how seriously the participants viewed sexual offences, 14 short fictional scenarios were developed for consideration. These scenarios described basic details of the offence such as age, body parts involved and relationship between the perpetrator and victim survivor. They depicted a range of sexual and non-sexual offences. These scenarios were then paired with each other to create 26 combinations that were presented to participants for them to rank the most serious of the offences in each pair. Sexual offences were paired with other sexual offences and non-sexual offences, and a discussion was held after the participants had finished ranking the pairs to gather reasoning for the participant responses.[72]

Findings from this research are discussed throughout the report.

Limitations

The researchers noted the following limitations of this study:[73]

- Challenges in registration and recruitment was noted as a limitation. There was attrition from those who initially registered for focus groups to those who actually attended, primarily due to registrants not meeting the inclusion criteria or failing to attend (particular for male participants). The recruitment of male participants was particularly challenging; however, the researchers noted that this may be a reflection of low male participation in sexual violence programs generally.
- Due to lower-than-expected participation rates, the original strategy of organising focus groups according to 4 profiles (female general/victim survivor, male general/victim survivor) had to be changed.
- Scheduling of focus groups was impeded by an adverse weather event (cyclone and flooding) and there was a need to convert to online engagement, which introduced connectivity and technological issues.
- One of the online focus groups had to be cancelled as one of the registrants had forwarded the registration details on to others who had not registered. This circumvention of the registration process meant it was not possible to confirm the inclusion criteria for all participants attending, and the focus group did not proceed.
- To avoid confusion, the vignette scenarios used gendered language, which meant the scenarios did not reflect the non-binary community.
- Due to short timeframes for this project, there was limited ability to develop cultural relationships with First Nations Peoples. Only one targeted First Nations focus group was held and the members were all male. In total, 16 per cent of the participants in this project identified as Aboriginal or Torres Strait Islander (n=14).

71 Ibid 15.
72 Ibid.
73 Ibid 40–2.

4.7.3 Queensland Crime Harm Index

In 2017, the QPS commissioned the Griffith Criminology Institute to research the harm caused by crime and to develop a crime harm index.[74] As part of this reference, the Council requested that the Griffith University Criminology Institute prepare and publish an updated working paper on the development of this Queensland Crime Harm Index. In March 2024, this updated paper was published on the Griffith University website.[75]

The key output of this project was a weighted crime harm ranking of 33 broad crimes, as ranked from community perceptions of the harm caused by each crime. The top 10 offences in order of the perception of harm caused to the Queensland public were:[76]

1. murder;
2. child sexual abuse;
3. rape;
4. terrorism;
5. child physical abuse causing physical injury;
6. sexual assault other than rape;
7. death caused by dangerous driving;
8. grievous bodily harm (physical assault resulting in permanent injury);
9. domestic violence; and
10. drug trafficking.

The community views to develop the index were collected via a survey conducted in 2017 with a random selection of 2,000 Queensland residents aged 18+ years. Data were collected via Computer Assisted Telephone Interviewing (CATI), during which participants were asked about their perceptions of the harm caused by various crimes, as well as their perceptions of safety in their neighbourhood, their experience of crime and police priorities.[77]

The survey aimed to determine how the public viewed the harm caused by various offences. Participants were asked a series of questions about a range of crimes and were required to indicate how harmful they considered the crime to be to victim survivors, their families and the community. Response categories for each crime ranged from 0 to 100, with 0 indicating participants believed the crime 'causes no harm at all' to victim survivors, their families, and the community, while 100 indicates participants believed the crime 'causes the most extreme harm possible' to victim survivors, their families, and the community. A higher crime harm score is taken to indicate that the public perceives the crime as more harmful.[78] Thirty-three crimes were presented to the participants in a random order for them to rank. A weighted crime harm score was then calculated.[79]

Findings from this research are discussed throughout the report.

74 Kristina Murphy, 'What do communities care about: Outcomes from the Queensland Crime Harm Survey' (Conference Paper, QPS-Griffith University Future of Policing Symposium, 7 August 2019).
75 Janet Ransley and Kristina Murphy, *Working Paper on the Development of the Queensland Crime Harm Index* (Griffith Criminology Institute Paper Series, March 2024).
76 Ibid 37.
77 Ibid 16.
78 Ibid 28.
79 For a detailed description of how the weighted score was calculated, see ibid 33.

Limitations

The survey was designed to obtain a quantitative measurement of how harmful the public viewed a range of offences to be. The survey did not aim to gain any qualitative information regarding the participants' reasoning for these rankings.

PART B: Offence seriousness and adequacy of outcomes

Chapter 5

Community and stakeholder views of sentencing sexual assault and rape

Chapter 6

Courts' assessment of offence seriousness

Chapter 7

Adequacy and appropriateness of sentencing outcomes

Contents

PART B: Offence seriousness and adequacy of outcomes

List of Figures

List of Tables

Chapter 5 – Community and stakeholder views of sentencing sexual assault and rape

5.1 Introduction

The Terms of Reference require the Council to consider whether current penalties imposed for rape and sexual assault offences are aligned with community views about the seriousness of these offences. In addition, the Council must also expressly refer to:

- commentary expressing that penalties currently imposed on sentences for sexual assault and rape offences may not always meet the Queensland community's expectations;
- the general expectation of the Queensland community that penalties imposed on offenders convicted of … sexual assault and rape offences are appropriately reflective of the nature and seriousness of … sexual violence; and
- the need to promote public confidence in the criminal justice system.[1]

This chapter provides an overview of research into public opinion about offence seriousness and sentencing levels, and the findings from research commissioned by the Council to examine Queenslanders' views about the seriousness of rape and sexual assault offences. It also explores views expressed to the Council during consultations, submissions and interviews on seriousness and whether sentences for sexual assault and rape are appropriate and adequate.

5.2 How community views informed this review

Community attitudes about the seriousness of offences can be a valuable indicator of how sentencing courts should treat these offences. While community members may hold a range of views on the seriousness of different offences, community attitudes as a whole can be objectively measured and thus serve to 'function as a source of information on offence seriousness'.[2]

Research has found that public opinion can have a legitimate role to play in sentencing; however, it should not determine sentencing outcomes. Judicial discretion must be maintained and only informed public opinion should influence sentencing and policy.[3]

Research into public opinions and sentencing of sexual offences has consistently found that the public are punitive in their views towards sexual offenders and generally consider sentences given to offenders too lenient. This suggests a misalignment between community and judicial views about adequate sentences for sexual offences.

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1 See Appendix 1, Terms of Reference.
2 Sentencing Advisory Council (Victoria), *Community Attitudes to Offence Seriousness* (Final Report, 2012) 9 ('*Community Attitudes to Offence Seriousness* report').
3 Kate Warner et al, 'Measuring Jurors' Views on Sentencing: Results from the Second Australian Jury Sentencing Study' (2017) 19(2) *Punishment and Society* 181.

In order for the Council to assess the appropriateness and adequacy of sentencing outcomes for rape and sexual assault, we needed to understand community views of the seriousness of these offences. The Council commissioned the Sexual Violence Research and Prevention Unit at the University of the Sunshine Coast ('UniSC') to explore community views about sentencing sexual assault and rape offences. The Council also commissioned the Griffith University Criminology Institute to prepare and publish an updated working paper on their Crime Harm Index, which provides a measure of the perceived harm caused by an offence relative to other offences. The methodologies of these studies can be found in **Chapter 4**.

This research suggests the Queensland community regards sexual offences against children as more serious than sexual offences committed against an adult. The only offence that both studies ranked more seriously than sexual offences against a child was murder. Participants in the UniSC research identified that the level of harm experienced by the victim survivor, the circumstances of the offending and the culpability of the perpetrator for the suffering inflicted all contribute to offence seriousness.

These findings informed the Council's conclusions about the seriousness of rape and sexual assault offences in **Chapter 6**.

The community views evidence presented in this chapter, in combination with other evidence gathered as part of this review, have been an important aspect of assessing the 'adequacy' and 'appropriateness' of current sentencing outcomes in **Chapter 7**.

5.3 Public opinion on sentencing

There has been increasing domestic and international research and inquiry into public opinion about sentencing and the role that public opinion should play.[4] Australian-based research has also increased due to the establishment of sentencing councils in New South Wales, Queensland, South Australia, Tasmania and Victoria.[5] Consistent growth in this body of research is also linked to community interest in the sentencing of high-profile cases, typically as a result of media reporting and subsequent community commentary.[6]

Researchers have found that public opinion has a legitimate role to play in sentencing, noting that '[c]ourts have acknowledged that concern with maintaining public confidence in the administration of justice means that courts cannot dismiss public opinion as having no relevance'.[7]

The Queensland Court of Appeal has said that while '[p]ublic clamour about a particular case has to be ignored by a sentencing judge', on the basis that 'it is not a reliable indicator of legitimate public expectations of the system of justice or of anything else relevant to sentencing',

> community attitudes, standards and expectations are things that a sentencing judge must somehow take into account because, in general, sentences are supposed to reflect a community's values. That is one reason why 'denunciation' is a factor in sentencing.[8]

4 United Kingdom, House of Commons Justice Committee, *Public Opinion and Understanding of Sentencing: Tenth Report of Session 2022-23* (2023) ('*Public Opinion and Understanding of Sentencing* report'); Kate Warner, 'Sentencing Review 2009–2010' (2010) 34 *Criminal Law Journal* 385, 395; Julian V. Roberts and Michael J. Hough, *Understanding Public Attitudes to Criminal Justice* (Open University Press, 2005), 68–9.
5 Warner, 'Sentencing Review 2009–2010' (n 4) 97–9.
6 Roberts and Hough (n 4) 68–9.
7 Warner, 'Sentencing Review 2009–2010' (n 4) 395.
8 *R v O'Sullivan; Ex parte A-G (Qld)* [2019] QR 196, [101] ('*O'Sullivan*').

The Court, referring to earlier statements made by the High Court in *Markarian v The Queen*[9] ('*Markarian*'), said:

> Public responses to sentencing, although not entitled to influence any particular case, have a legitimate impact upon the democratic legislative process. Judges are aware that, if they consistently impose sentences that are too lenient or too severe, they risk undermining public confidence in the administration of justice and invite legislative interference in the exercise of judicial discretion. For the sake of criminal justice generally, judges attempt to impose sentences that accord with legitimate community expectations.[10]

In this context, '[b]eing sensitive to the community's attitude about a particular kind of offence is part of the exercise of judicial discretion'.[11] This does not extend, however, to the consideration of the appropriate sentence in an individual case.[12]

Consistent with statements made by the High Court, research has identified 3 important factors when considering how much, or in what ways, public opinion should inform sentencing:

- First, while public opinion is relevant to sentencing, it should not determine sentencing outcomes in individual cases.
- Second, maintaining judicial discretion is critical to enabling the imposition of a just and appropriate sentence in any individual case. Every case is different, and courts should sentence on the basis of the facts associated with an individual case.
- Third, only informed public opinion should influence sentencing and policy development.[13]

The third aspect is particularly important, given that research suggests people's perceptions of seriousness and sentencing are often based on incorrect information or misconceptions.[14] For example, public perceptions that sentencing is 'lenient' are typically associated with misunderstandings of the sentencing process and with limited information about specific cases. However, that 'perception is often dispelled when individuals are provided with the factors and circumstances of a specific case'.[15] Research has observed that the penalty options that can be imposed for particular offences and the role that sentencing can realistically assume in reducing or controlling overall crime often differs from what communities assume or expect.[16] This is particularly so with cases subject to extensive media coverage that may evoke public outrage.

Collectively, research has found that inviting the public 'in' and promoting positive and informed public opinion is worthy of investment.[17] Criminal justice systems without public confidence lack legitimacy and can be functionally compromised by persistent misconceptions, under-reporting of offences, limited cooperation and distorted perceptions of crime and criminal justice.[18]

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9 *Markarian v The Queen* (2005) 228 CLR 35 ('*Markarian*').
10 *O'Sullivan* (n 8) [102] citing *Markarian* (n 9) 389 [82] (McHugh J).
11 Ibid [103].
12 Ibid [201].
13 Warner et al (n 3) 181.
14 Nigel Stobbs, Geraldine Mackenzie and Karen Gelb, 'Sentencing and public confidence in Australia: The dynamics and foci of small group deliberations' (2014) 48(2) *Australian and New Zealand Journal of Criminology* 219, 221–2; Roberts and Hough (n 4) 74.
15 *Public Opinion and Understanding of Sentencing* report (n 4) 2.
16 Roberts and Hough (n 4) 69.
17 Warner et al (n 3) 180; Kate Warner et al, 'Are Judges Out of Touch?' (2014) 25(3) *Current Issues in Criminal Justice* 729, 730.
18 Sentencing Advisory Council (Victoria), *More Myths and Misconceptions* (2008) 2, 5–6 ('*More Myths and Misconceptions*'); Warner et al, 'Are Judges Out of Touch?' (n 17) 738–9.

5.3.1 Key themes from public opinion research

National and international research that has explored public views of sentencing has identified three clear themes. These themes are prominent when people are asked to respond to abstract questions about their perceptions of sentencing and the courts, without any associated information.[19]

First, several studies have found that when responding to a general opinion poll, the overwhelming majority of people consider that sentences are too lenient and that judges are 'out of touch' – factors that influence perceptions of sentencing and the criminal justice system more broadly.[20]

> On the whole, this research highlights that members of the public overestimate the seriousness of a crime and have limited understanding of the sentencing process, but overwhelmingly consider sentencing to be excessively lenient. Yet, paradoxically, when provided with case scenarios and asked to suggest appropriate sentences, people are more likely to suggest sentences that closely align to actual sentences, indicating the need for greater public awareness-raising about sentencing practices.[21]

Second, as noted above, there are misconceptions about the criminal justice system that affect opinions of sentencing, the courts and judicial officers. A Victorian Sentencing Advisory Council ('VSAC') paper that reviewed relevant public opinion research concluded that public perceptions about crime and criminal justice are the 'strongest predictors of punitiveness'.[22] It noted that these attitudes are underpinned by inaccurate beliefs about the criminal justice system.[23] Confidence in the courts was found to have 'immediate relevance to perceptions of sentencing severity' as 'people who report that sentences are too lenient have significantly less positive views of sentencers'.[24]

Representative research in the United Kingdom revealed 'a rather negative public image of judges'[25] compared with other professions. This research further found that, 'relative to other branches of the criminal justice system, such as police, the courts do not fare well in terms of public performance ratings'.[26] The vast majority of respondents in this study believed courts respected the rights of an accused (a factor they rated to be the least important function), yet were not as effective in securing convictions (rated the most important function) or imposing the right sentence (rated the second most important function).[27] This research finding has been replicated in other jurisdictions.

Third, research has also identified that public awareness of courts and sentencing is limited.[28] A lack of awareness of, and less positive opinions about, crime, courts, sentencing, criminal justice systems and judicial officers, have been detected in Australian, American, Canadian and UK research.[29] Research reveals that as people become more informed, they report less-punitive views on crime, sentencing and offenders.[30] VSAC has noted:

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19 *More Myths and Misconceptions* (n 18) 1–2, 4; Warner et al 'Are Judges Out of Touch?' (n 17) 738–9.
20 *Public Opinion and Understanding of Sentencing* report (n 4) Chapter 3; Susan Reid et al. *Public Perceptions of Sentencing For Causing Death by Driving Offences* for the Scottish Sentencing Council (2021) 4; *More Myths and Misconceptions* (n 18) 2, 4; Stobbs, Mackenzie and Gelb (n 14) 219–21; Warner et al (n 3) 181; Warner et al, 'Are Judges Out of Touch?' (n 17) 729.
21 Oona Brooks-Hay et al. *Victim-Survivor Views and Experiences of Sentencing for Rape and Other Sexual Offences for the Scottish Sentencing Council* (2024) 9.
22 *More Myths and Misconceptions* (n 18) 3.
23 Ibid.
24 Ibid.
25 Roberts and Hough (n 4) 74.
26 Ibid 70.
27 Ibid 70–71.
28 Roberts and Hough (n 4) 69–70.
29 *More Myths and Misconceptions* (n 18) 3–6; *Public Opinion and Understanding of Sentencing* report (n 4) 36–40.
30 Stobbs, Mackenzie and Gelb (n 14) 219–21; *More Myths and Misconceptions* (n 18) 6–8.

> There is now a significant body of research that shows that, when the public is provided more information on a given case (similar to the kind of information available to a judge in court), judicial sentences and public sentences are very similar.[31]

A well-known series of Australian projects exploring community attitudes to sentencing, known collectively as 'The Australian Jury Projects', explored jurors' views of sentencing and areas of commonality or departures from actual sentencing practices.[32] These are discussed in more detail in section 5.3.2

The second study undertaken as part of this research in Victoria ('the Victorian Jury Sentencing Study') found that when informed of the situational and contextual factors of individual cases, the 'views of judges and jurors are much more closely aligned than mass public opinion surveys would suggest'.[33]

Targeted and multidimensional research has attempted to redress the limitations of previous 'off the top of the head' polling questions in gauging public opinion and the factors that influence these views.[34] At an aggregate level, research now shows that 'although public attitudes can be complex, contradictory and dependent upon question wording, people are generally much less punitive than is often thought'.[35] This shows the importance of informed public opinion as a basis for developing responsive public policy.[36]

The Victorian Jury Sentencing Study used a mixed-methods approach[37] to support previous juror-focused research conducted in Tasmania. The study found that the majority of jurors indicated that sentences were appropriate when provided with more detailed information about the facts of the case, and that people will consider the individual circumstances of cases when provided with sufficient information.[38] In addition, the jury studies confirm that as knowledge about the criminal justice system and the individual facts of a case increases, people self-report less-punitive attitudes about sentencing and reflect more supportive opinions of judges and the courts.

5.3.2 Research about sexual violence sentencing

Research into public opinions and sentencing of sexual offences consistently suggests members of the public are punitive in their views towards sexual offenders and consider sentences given to offenders are too lenient and that, consequently, there is a gap between the public and, for example, judges in terms of views of appropriate sentences.[39]

Some studies suggest public views of appropriate sentencing levels for sexual offences are based on 'stereotypical and sensationalist views of sexual offending', which are often informed by the media.[40]

The literature review prepared for the Council identified the following key themes arising from research on community attitudes to sentencing for sexual offences:

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31 *More Myths and Misconceptions* (n 18) 7.
32 For more information, see 'The Jury Projects', *University of Tasmania* (web page) <https://www.utas.edu.au/law/research/the-jury-projects>.
33 Warner et al (n 3) 180.
34 *More Myths and Misconceptions* (n 18) 4; Stobbs, Mackenzie and Gelb (n 14) 222–4; Warner et al (n 3) 198.
35 *More Myths and Misconceptions* (n 18) 8.
36 Warner et al (n 3) 181–2.
37 Ibid 183–4.
38 Ibid 181; Kate Warner et al, 'Why Sentence? Comparing the Views of Jurors, Judges and the Legislature on the Purposes of Sentencing in Victoria, Australia' (2017) 19(1) *Criminology and Criminal Justice* 26.
39 Carol McNaughton et al. *Attitudes to Sentencing Sexual Offences* (Centre for Gender and Violence Research, University of Bristol for the Sentencing Council of England and Wales, 2012) 15.
40 Ibid.

- 'Public perceptions about sentencing for sexual offences are multifaceted, frequently representing a balance between punishment, rehabilitation, and community protection.
- Public views on sentencing are influenced by individual demographics, personal experiences, and the circumstances of the offence' including views about the causes of sexual offending.[41]

The review authors concluded that much of the research reviewed 'suffers from serious methodological limitations that influence the interpretation of findings'.[42]

These limitations aside, the review authors reported the following key findings:

- Research shows that the public considers many of the same factors as judges when considering sentencing, such as culpability and harm.
- Studies reveal that members of the community prescribe sentences that are largely consistent with those handed down by courts.
- Research findings demonstrate that the public is frequently punitive in the abstract but become less so when faced with specifics about crime and justice.
- Australian public opinion research about sentencing in cases of sexual violence appears largely consistent with the results obtained in studies performed in other countries and contexts.
- Many studies find that the public supports compulsory treatment for perpetrators of sexual violence although they also express scepticism regarding offenders' capacity to change.[43]

Exploring Australian-based research only, the authors concluded:

> Collectively, research on public perceptions of sentencing for sexual offences in Australia reveals that rape myths (i.e. misconceptions about sexual violence) influence people's judgments about the seriousness of sexual offending and the most appropriate sentences in those cases. At the same time, however, the public's opinions on sentencing tend to consider many of the same factors deliberated by courts. While the community sometimes expresses that sentences are too lenient, members of the public often recommend sentences that are roughly similar to (or even more lenient than) the sentences handed down by magistrates and judges. Overall, these findings highlight the complex nature of public perceptions of sentencing for sexual offences.[44]

The Victorian Jury Sentencing Study found 'the gap between the jurors' and judges' sentences widened for certain offence types; specifically, while 50% of jurors suggested more lenient sentences than the judge, this reduced to 36% in cases of child sexual assault wherein the victim is younger than 12'.[45]

A subsequent national study, which had as its focus the perspectives of jurors in sexual offence trials, found 'the majority of jurors believed the sentence was very or fairly appropriate'.[46] Both empanelled jurors and unempanelled jurors in the national study were less likely to see the sentence as appropriate (very or fairly) for sex offences against children than for sex offence against adults (84% vs 97% for empanelled jurors, and 75% vs 81% for unempanelled jurors).[47]

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41 Lacey Schaefer et al, *Sentencing Practices for Sexual Assault and Rape Offences* (Literature Review prepared by Griffith University for the Queensland Sentencing Advisory Council, 2024) ('*Griffith University Literature Review*') 100.
42 Ibid.
43 Ibid 100–1.
44 Ibid 104.
45 Ibid citing Warner, Davis, Spiranovic, Cockburn, & Freiberg (2017).
46 Ibid citing Kate Warner, Lorana Bartels and Karen Gelb, 'Jurisdictional Differences in Sentencing Practice: Insights from the National Jury Sentencing Study' (2022) 34(3) *Judicial Officers Bulletin* 27; Kate Warner et al, 'Comparing Legal and Lay Assessments of Relevant Sentencing Factors for Sex Offences in Australia' (2021a) 45(1) *Criminal Law Journal* 57; Kate Warner et al, 'Public Perspectives on Judges' Reasons for Sentence' (2021b) 95(9*) Australian Law Journal* 685.
47 Warner et al (2021b) (n 46) 689.

Victorian research

Research undertaken by VSAC into community views on offence seriousness found sexual offences against young children were viewed by the community as among the 'most serious'.[48] This research, which involved the hosting of community panels across metropolitan and regional Victoria as well as an online forum, found that the age of the victim, the relationship of trust, the physical aspects of the offending and the harms done to child victims of sexual offences were long-lasting and severe, and that these were relevant factors that underpinned the seriousness of such offending.[49] For many participants, the nature of the physical behaviour involved (including whether it involved a penetrative act or not) was not viewed as determinative of offence seriousness 'because the primary nature of the harm involved was psychological, stemming from the sexual abuse and invasion of the child's integrity'.[50]

In the case of sexual offences against adults, this study found:

> The close ranking of rape and attempted rape shows the offender's intention to rape was highly influential in participants' rankings as both a harm and a culpability factor. Many participants saw the culpability and the harms flowing from both offences to be the same, despite that in the attempted rape, sexual penetration did not occur. The substantially lower ranking of indecent assault, where there was no intention to rape, shows these factors had a strong combined effect on the judgment of seriousness.[51]

The Victorian research used a methodology involving short case vignettes being presented to participants. For example:

- The indecent assault was described as the perpetrator approaching the victim on a crowded street and, fully clothed, 'deliberately rubbing his genitals against her bottom', with the defendant running away when the victim pushed him away.
- The rape case was described as a defendant approaching the victim on the street with a knife, forcing her into an alleyway and raping her (penetration type not specified).
- The description of the sexual penetration with a child under 12 was of the perpetrator having 'sexual intercourse' with an 8-year-old girl in her house while her parents were in another room.[52]

A similar methodology was adopted by UniSC for the research that has informed our current review (findings discussed in section 5.4.1).

The Australian Jury Projects

The Victorian Jury Sentencing Study undertaken as part of the Australian Jury Projects explored several aspects of sentencing, including jurors' views about the weight that should be given to aggravating and mitigating factors and the importance of these factors.[53] This study involved 124 trials with 987 participants.

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48 *Community Attitudes to Offence Seriousness* report (n 2) 49, 55–8.
49 Ibid 55.
50 Ibid 57.
51 Ibid 35.
52 Ibid 76.
53 Warner et al (n 3).

This research found that jurors generally attributed 'a lot of weight' to aggravating factors, but either 'no weight at all' or only 'a little weight' to mitigating factors.[54] Significantly more weight was given to aggravating factors than mitigating factors and the effect size was large.[55]

The finding that there is a tendency for community members to place more weight on aggravating factors, and attribute limited weight to mitigating factors is consistent with an earlier study undertaken in England and Wales commissioned by the Sentencing Advisory Panel, although noting methodological differences.[56] The finding also aligns with a later study undertaken for the Scottish Sentencing Council, which found that victim survivors were concerned that perpetrators could manipulate the system by using mitigating circumstances in support of receiving a lenient sentence.[57] Members of the public and survivors of sexual violence also thought more weight should be placed in sentencing on the seriousness of the offence and the impact on victim survivors.[58]

Aggravating factors that jurors in the Victorian Jury Sentencing Study identified as those to which the judge should attribute significant weight in sentencing in cases where these factors arose included that:

- the person abused a position of trust or power (73% of participants);
- the injury, harm or loss caused was substantial (72% of participants);
- the offending was planned or organised (61% of participants);
- the victim was vulnerable (58% of participants); and
- the person being sentenced had prior convictions (53% of participants – which increased to 76.5% where the person had relevant prior convictions).[59]

When informed of the sentence, a majority (87%) considered it either 'very appropriate' (55%) or 'fairly appropriate' (32%), which the authors concluded 'shows that in terms of relative severity the views of judges and jurors are much more closely aligned than mass public opinion surveys would suggest'.[60] However, this was not the case for sexual offences against children under 12 years, with only 36 per cent considering the sentence 'very appropriate' compared with 53 per cent for other types of sexual offences, or 54.8 per cent overall.[61]

A later national study focusing on sex offence cases and including the views of non-jurors as well as jurors across all Australian states and territories compared legal and lay assessment of relevant sentencing factors. This study found the three most commonly arising aggravating factors, which also showed a high degree of concordance between judges and jurors' assessment that this factor should attract 'a lot of weight', were:

- the extent of emotional injury (81% of judges and 85% of jurors);
- victim vulnerability (71% of judges and 88% of jurors); and

54 Ibid 191–2.
55 Ibid 192.
56 Ibid 196 referring to Julian V Roberts and Mike Hough, 'Exploring Public Attitudes to Sentencing Factors in England and Wales' in Julian Roberts and Mike Hough, *Mitigation and Aggravation at Sentencing* (Cambridge University Press, 2011) 183.
57 Hannah Biggs et al, *Public Perceptions of Sentencing in Scotland* (July 2021) 18.
58 Ibid 2.
59 Warner et al (n 3) 191–3 and Figure 4.
60 Ibid 193.
61 Ibid 194.

- abuse of power or position of trust (85% of judges and 96% of jurors).[62]

These three factors, together with the case involving more than one victim (81% of judges and 89% of jurors), were given the most weight as aggravating features.[63]

When the categories of 'a lot of weight' and 'a little weight' were combined, the researchers who led this study reported that 'the similarities between judges and jurors were even more striking'.[64]

There were some differences with judges, with jurors more likely to give 'a lot of weight' to all aggravating factors and to give 'a lot of weight' to 'prior convictions', 'offender on bail, parole or probation' and 'extent of physical injury'.[65]

Additional aggravating factors (in addition to those specified) were only identified by one-fifth of jurors, of which the most commonly occurring were age disparity, no remorse and a plea of not guilty.[66]

The authors of this study conclude:

- 'there is considerable alignment between the public and judges with respect to sentencing factors';
- '[j]udges and lay people give more weight to aggravating factors than mitigating factors and are agreed about the most important aggravating factors';
- differences between legal and lay assessments: 'highlight the need for judges to ensure that they clearly explain the rationale for the law's approach to the relevant factor, in order to improve public understanding of sentencing and to help deflect public criticism'.[67]

5.4 Council's research into community views

5.4.1 The University of the Sunshine Coast's community views research and findings

The Council commissioned research conducted by the UniSC to examine community views about sentencing sexual assault and rape offences.

This research explored:

- what the community thought were the most important sentencing purposes for rape and sexual assault offences;
- how the community regarded the seriousness of different types of rape and sexual assault offences; and
- how they ranked the seriousness of these offences in relation to other serious offences.

All participants were Queensland residents. Over one-third of participants in this study identified as being either a direct victim survivor or an immediate family member of a victim survivor of rape or a sexual

62 Warner et al (2021a) (n 46) 62–3 and Table 1.
63 Ibid.
64 Ibid 63.
65 Ibid.
66 Ibid 65. The authors suggest: 'It is noteworthy that some jurors considered that a plea of not guilty and absence of remorse should be aggravating. Neither is a legally recognised aggravating factor. Absence of remorse was frequently mentioned by judges (in 59% of cases); in most cases it was coded as a neutral factor, although the judge appeared to treat this factor as aggravating in 15% of cases'.
67 Ibid 73–4.

assault offence. For information about the methodology adopted and limitations of this research, see **Chapter 4**.

High-level findings are discussed below, and the full UniSC findings are presented in a separate report.[68]

Community views on sentencing purposes

The UniSC research explored the community's views of the most important purposes of sentencing to help the Council determine whether their views align with the courts' assessment of these purposes.

Researchers found that without exposure to contextual information about a case, offence type influences community views on sentencing purposes.

Sexual assault

When asked what the most important sentencing purposes were for sexual assault (described as touching a person's breast without consent), participants identified denunciation (31.6%), deterrence (25.0%) and punishment (28.9%).

However, when presented with a specific case scenario, participants' views changed, with participants overwhelmingly considering community protection to be the most important sentencing purpose (53.9%), followed by punishment (24.7%) and then, to a lesser extent, denunciation (9.0%).

The scenario used was based on *R v Kane, Ex parte Attorney-General (Qld)*.[69] Participants were told that the perpetrator was a stranger who grabbed the adult victim on her way to a train station. He carried her to a secluded area and touched her breasts, undid the top button of her pants and pressed his finger against her anus. He only desisted when a passer-by heard the victim crying and shouting for help. He pleaded guilty and had a criminal history involving robbing a petrol station with a replica gun (but it had been a while ago) and he had problems with alcohol.

The Court of Appeal, in allowing the appeal against sentence, agreed with submissions made on behalf of the Attorney-General that 'in the circumstances of the subject offence' and taking into account the respondent's prior history, which included the use of violence, 'community protection and denunciation warranted a significant penalty'.[70] The Court substituted for the original sentence of 18 months' imprisonment a sentence of 3 years' imprisonment, suspended after the respondent served 282 days (served in its entirety as pre-sentence custody).

Comparing the Court of Appeal's views with community members' views about the most important purposes of sentencing in this case, there is clear alignment between these views.

Rape

For rape (described as having penetrative sexual intercourse with a person without consent), community members initially ranked the most important sentencing purposes as being punishment (50.7%), followed by community protection (35.6%) and (albeit to a far lesser extent) denunciation (8.2%).

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68 See Dominique Moritz, Ashley Pearson and Dale Mitchell, *Community Views on Rape and Sexual Assault Sentencing: Final Report* (Prepared for the Queensland Sentencing Advisory Council by the Sexual Violence Research and Prevention Unit, University of the Sunshine Coast, June 2024) ('*UniSC Final Report*').

69 [2022] QCA 242.

70 Ibid [27].

When presented with a specific case scenario (based on a District Court judgment of *R v DJT)*,[71] this shifted to an almost equal ranking of the purposes of rehabilitation (25.6%), punishment and community protection (23.1% each) and denunciation (at 21.8%).

Participants were advised that the perpetrator and victim had been in a relationship for 2 years, and there was a protection order against the perpetrator which prevented him from being with her within 12 hours of drinking alcohol. One morning she woke and saw he had been drinking. He started engaging in sexual activity with her, but she said 'no' several times. He ignored her, wrapped his arm around her so she could not move and forced his penis into her vagina for around 3 minutes until he ejaculated (one count of rape).

A few days later, she was in bed unwell. He put his hands inside her pyjamas and touched her on the vulva. She said, 'stop', 'no', 'get your hands off me' and 'don't touch me' several times. He continued to touch her.[72] Both offences were committed in breach of the protection order.[73] She contacted the police the next day. He pleaded guilty. He had a 5-year criminal history for other offences from a previous domestic relationship. That included being sentenced for not following the conditions of a domestic violence order in respect of the victim. He had a good work history as a registered nurse but was deregistered due to alcohol dependence. A factor contributing to this was suggested to be his exposure to stress as a nurse. At the time of sentence, he had engaged in counselling for his mental health issues and had taken steps to address his alcohol dependence.

The judge sentenced him to 5 years' imprisonment for the rape offence, suspended after 20 months in prison. The judge referred to general deterrence as being 'an important feature of the sentence' to

> send a message to other men, that if you engage in sexual intercourse without a woman's consent, irrespective of your relationship with her and irrespective of your motivations and irrespective of your claims to love her, that that amounts to rape and will result in condign punishment.[74]

The sentencing judge also referred to the sentence needing to deter him from reoffending and, in an implied way, to the importance of rehabilitation by reference made to the need for him to access courses available in custody to assist him to overcome his issues with alcohol dependence and his mental health issues.[75]

Denunciation was expressed in terms of the requirement that the sentence 'also reflect the community's condemnation of violence committed towards women, sexual violence committed towards woman in the context of a domestic relationship'.[76]

Considered together, this may suggest that the sentencing judge placed slightly more weight than community members on the importance of deterrence, and less emphasis on the need for community protection. However, the need for community protection is addressed through the nature of the sentence itself, being one of 5 years' imprisonment, suspended after the perpetrator had served 20 months with an operational period of 5 years (during which time he would be at risk of having the suspended prison sentence activated). Given the focus of the sentencing judge in their remarks on the need for him to address issues associated with his mental health issues and alcohol dependence while in custody, this

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71 [2023] QDCSR 93.
72 1 count of sexual assault.
73 2 counts of contravention of a domestic violence order.
74 [2023] QDCSR 93, 4.
75 Ibid 4–5.
76 Ibid 4.

also speaks to community protection through rehabilitation. The role of sentencing purposes is discussed in **Chapter 8**.

Community views of offence seriousness

Participants identified that the level of harm experienced by the victim survivor, the circumstances of the offending and the culpability of the perpetrator for the suffering inflicted all contributed to offence seriousness. When considering the seriousness of sexual offences, researchers found participants identified two significant considerations:

1. Long-term psychological harm needs special consideration at sentencing for sexual assault and rape offences.[77]
2. The perpetrator's relationship to the victim survivor is a complex culpability factor in determining seriousness.

Focus group participants regarded the 'cumulative effectives of physical, emotional and psychological harm suffered by victim survivors of rape and sexual assault offences as significant for determining seriousness'.[78] Participants emphasised in discussions the potential for these offences to affect 'every aspect' of a victim survivor's life. Some participants thought the criminal justice system did not adequately consider psychological harm 'due to the difficulty in measuring it, and particularly because the extent of the harm might not be known at the time of sentencing.'[79]

Focus group participants thought the nature of the relationship (or lack of one) between the perpetrator and the victim survivor 'was significant in determining seriousness and had a bearing on the severity of the harm done to the victim-survivor.'[80] Overall, participants concluded that a stranger or unknown perpetrator was more serious than known perpetrators, such as intimate partners or friends. However, this view was tempered by the fact that participants regarded perpetrators who offended against a known victim survivor as being more culpable 'due to the breach of trust that occurred in addition to the sexual offence.'[81] The community 'strongly condemned the use of positions of power and trust as a means of offending, such as power dynamics occurring in familial relationships, teacher-student and employer-employee relationships.'[82] The community saw breaches of trust in familial relationships as the 'most serious' form of offending.[83]

In addition to those findings, participants also identified contextual factors, which increased the seriousness of these offences:

- 'Sexual offences against children are more serious than similar sexual offences against adults.'

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77 The findings were reported across all participants, including victim survivors, which may have impacted these views. See, for example, McNaughton et al (n 39) who report a difference between the views of members of the public who tended to have 'monolith views about the type of harm the offence may have on victims' and focused on the 'immediate details and aftermath' of the offence, rather than on long-term harm. In contrast, victim survivors of sexual offences (including parents/guardians of those aged under 16 years) pointed to both short- and long-term impacts of this offending, as well as secondary effects such as the ability to work or study, to forge new relationships and maintain positive relationships with friends and family: ibid 51–2.

78 *UniSC Final Report* (n 68) 5.

79 Ibid.

80 Ibid.

81 Ibid.

82 Ibid.

83 Ibid.

- 'Non-sexual offences involving potential lethality were ranked more seriously than sexual offences, except for child sexual offences.'
- 'The nature of sexual acts affected how offence seriousness was determined.'[84]

Participants overwhelmingly thought sexual offending against children was more serious than similar sexual offences against adults. Focus group members cited children's 'greater vulnerability, lack of understanding or coping mechanisms, and the longevity of the harm' as the primary reasons why child sexual abuse is more serious.[85] One participant drew attention to the long-term harm, stating 'that child has now been changed forever … All of their trajectory now in life has been f----d because of that one act that person did for their gratification. And that is immeasurable to me.'[86]

Focus group members 'weighed the finality of ending life or potentially ending life, with the lifetime of trauma and ongoing suffering which sexual violence victim survivors experience'.[87] In general, the community considered intentionally killing a person as the most heinous behaviour due to the finality of the harm.[88] Many participants found ranking murder and rape very difficult. For participants who ranked rape as more serious than murder, 'the nature and condition of ongoing trauma or suffering' was assessed 'as being more serious than ending a life'.[89]

Non-sexual offences involving potential lethality (risk of death) (such as grievous bodily harm and strangulation) 'were ranked as approximately equivalent in seriousness as high-level sexual offences' against adults 'such as multiple party rape, while sexual offending against child victim-survivors emerged as more serious than potentially lethal offences'.[90]

The type of penetration (i.e. digital, penile, tongue) and where that penetration occurred (mouth, vulva/vagina, anus) impacted how participants viewed the seriousness of these offences. Participants considered the 'size of the penetrating instrument, the pain associated with the site of penetration, and the potential consequences of penetration (e.g. pregnancy or infection) when determining seriousness'.[91] Generally, community members thought penetration by a penis was more serious than penetration by fingers or an object, while penetration of a person's mouth was viewed as less serious than penetration of a vagina or anus. However, when considering children, participants placed more weight on the harm and culpability factors than on the type of penetration.[92]

The apparent disconnect between the community's assessment of offence seriousness and sentencing practices is explored in **Chapter 7**.

5.4.2 Griffith University's Crime Harm Index

Another approach to gauging community views of offence seriousness is to focus on the perceived harm caused by an offence relative to other offences.

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84 Ibid 6.
85 Ibid.
86 Ibid 31 quoting FG7.
87 Ibid 36.
88 Ibid
89 Ibid.
90 Ibid 6.
91 Ibid.
92 Ibid 38.

The Griffith Crime Harm Index, developed with the support of the Queensland Police Service, measured community members' views of how much harm specific types of offences cause to victims, their families, or the community.[93] As part of our review, the Council requested that the Griffith University Criminology Institute ('GCI') prepare and publish an updated working paper on the development of this Queensland Crime Harm Index.

GCI asked survey participants to rate 33 broad crimes based on the harm that they caused to the community. The focus of the research was on a range of offences, and did not focus on rape or sexual assault in particular.

Participants ranked child sexual abuse just above murder, followed by rape and child physical abuse causing physical injury. Sexual assault other than rape was ranked 8th in terms of seriousness, just above grievous bodily harm and drug trafficking (ranked 9th and 10th respectively), but below domestic violence, terrorism offences and death caused by dangerous driving (ranked 5th, 6th and 7th in terms of harm caused). Burglary, which was included in the UniSC's research discussed above, was ranked 19th in terms of perceived harmfulness.

The findings from the Queensland Crime Harm Survey found that child sexual abuse is ranked as the most harmful crime type, and public nuisance offences as least harmful.

The initial ranking presented mean and median survey results, but this approach does not account for the degree of community consensus on different offence types. Community consensus is an important consideration, as the ranking for some offences may vary based on the age or gender of the survey participant. To address this, the researchers used the survey results to calculate how much the score for the offences varied between groups; this "variance" was then subtracted from the survey results to give a weighted score. When community consensus was considered, the weighted crime harm index resulted in a slight reordering of the rankings, with murder being rated as the most harmful, followed by child sexual abuse. This was due to murder being ranked consistently as a highly serious offence by the participants, but there being some slight variation in how serious the participants ranked child sexual offences as being.

For more information about this research please see **Chapter 4**.

5.4.3 What we can conclude from this research

The two projects discussed above examined Queensland community views on crime harm and the seriousness of these offences. Despite differences in methodology and aims, the results of the two projects were highly consistent.

The two studies are complementary in that the Crime Harm index was a large-scale quantitative survey with 2,000 participants, which has gathered robust rankings on how harmful the public rates a selection of crimes, while the study from UniSC was a qualitative study that offers context on why the public regards certain offences as more serious than others. Due to the differences in aims and methodology the results are not directly comparable; however, the two most relevant findings from the Council's review were consistent across both studies, lending confidence to the conclusions of each.

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93 Janet Ransley and Kristina Murphy, *Working Paper on the Development of the Queensland Crime Harm Index* (March 2024).

In relation to the purposes of sentencing, the UniSC research identified 3 key themes:

- 'Community protection is linked to the perceived dangerousness of a perpetrator.'[94]
- 'Denunciation has value when responding to family and domestic violence.'[95]
- 'Punishment is favoured in circumstances involving a vulnerable victim survivor or where the offending made the community vulnerable.'[96]

The UniSC research suggests the community's view on sentencing purposes is dependent on the circumstances of the individual offence. That is, the views of participants were different when they were asked to consider the importance of sentencing purposes for the offence of rape generally, compared with when they were provided more contextual information about a specific case of rape (or sexual assault).[97] This finding was supported by the literature review, which found that in general the public tends to lean towards punitive measures but becomes less so when given more information.[98]

Both studies highlighted the seriousness of sexual offences committed against children. In both studies, sexual offences against children were viewed as more serious than sexual offences committed against an adult. In their seriousness rankings, the team from UniSC found that the digital rape of a child ranked as the second most serious offence, but the digital rape of an adult was ranked tenth.[99] The GCI study found that child sexual abuse was ranked as the second most serious offence (weighted score mean: 94.48) ahead of the rape of an adult which was ranked third (93.98).[100] The sexual assault of an adult (which was not rape) was ranked sixth.[101]

The UniSC focus groups offered some context regarding why the community may feel this way, with many participants advocating for a harsher punishment for those who committed offences against children due to their inherent vulnerability:

> [Children] are the most vulnerable and they should have the highest levels of protection purely because they don't have any way of helping themselves.[102]

The projects both found that the only offence more serious than child sexual offences was murder.

In the UniSC study, over three-quarters of focus group participants (77%) rated murder as more serious than a sexual offence committed against a child,[103] and 70 per cent rated murder as more serious than a rape of an adult involving multiple perpetrators.[104]

The Queensland Crime Harm index rated murder as the most serious offence (weighted score mean: 94.85) followed by child sexual abuse (weighted score mean: 94.48) and rape (weighted score mean: 93.98).[105]

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94 *UniSC Final Report* (n 68) 20.
95 Ibid 22.
96 Ibid 24.
97 Ibid 17.
98 *Griffith University Literature Review* (n 41) 101.
99 Dominique Moritz, Ashley Pearson and Dale Mitchell, *Community Views of Rape and Sexual Assault Sentencing: Supplementary Materials* (Prepared for the Queensland Sentencing Advisory Council by the Sexual Violence Research and Prevention Unit, University of the Sunshine Coast, June 2024) 66 ('*UniSC Report Supplementary Materials*').
100 Ransley and Murphy (n 93) 37.
101 Ibid.
102 *UniSC Report Supplementary Materials* (n 99) 24.
103 Ibid 39.
104 Ibid 36
105 Ransley and Murphy (n 93) 16.

The UniSC report again offered context regarding why the community may have chosen to rank murder as more serious than child sex offences and other sexual offences. In most cases, the participants highlighted the finality of murder as the reasoning for their ranking. The participants felt that in sexual offences there was hope that the victim survivor could overcome their trauma and live their life, but in murder cases this was clearly not an option, with focus group participants commenting:

> Again, for me, it's with Dustin and Violet [murder scenario], you extinguish all hope. There's nothing left. Where at every other scenario, you hope there's some resilience and you know at least there's hope. But when you get to the point where that person's gone forever, there's no hope at all. I think that's where, for me, that has to be the worst-case scenario.[106]

> I think murder is the most serious crime. I mean, you can't go back from that. The highest level of violence is to take someone's life … well, the person can't come back. She's dead. So, this other person, yes, she was assaulted, raped terribly, but she's still alive.[107]

> Even though I'm feeling very conflicted because I genuinely think there's probably more harm within that [the gang rapes of Veronica]. But I guess, in my moral code I have to honour life. In a view of hope, I guess, for the world, in my head I couldn't devalue someone's life being taken.[108]

The literature review commissioned by the Council was well placed to provide additional support for the conclusions of the UniSC study discussed in section 5.3.2. In 2010, the Bureau of Crime Statistics and Research ('BOCSAR') developed two measures of offence seriousness,[109] which found murder was consistently ranked as the most serious offence; however, while child sexual abuse and aggravated sexual assault were ranked highly on one measure, they were not on the other.[110]

The UniSC study found that the views of victim survivors of sexual offences were not different from those of the general public,[111] which may be supported by the finding in the literature that victim survivors have differing opinions on sentencing, and they do not necessarily advocate for a specific sentence in many cases.[112] For example, researchers found victim survivor perspectives on the purposes of sentencing mirrored general participant responses. However, they also found victim survivors viewed sexual offending responses more strategically and valued primary prevention strategies above secondary prevention strategies.[113] The UniSC study found offences that involved the sexual assault or rape of a stranger were viewed as particularly serious by the community.[114] In a paired comparison, 84 per cent of participants thought rape by a stranger was more serious than rape by the victim survivor's partner.[115] Focus group participants explained this choice:

> I feel like their ability to … deal with the impacts of being sexually assaulted is going to be worse for the stranger victim because now they're going to more likely be hypervigilant or difficulty trusting any new man that they meet or whatever.[116]

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106 *UniSC Report Supplementary Materials* (n 99) 39 The names in the scenarios presented to victims were changed by the researchers see Chapter 4 for the methodology of the USC study.
107 Ibid 36.
108 Ibid. The names in the scenarios presented to victims were changed by the researchers see Chapter 4 for the methodology of the USC study.
109 Median Sentencing Ranking was constructed by identifying the median sentence actually imposed in each Australian Standard Offence Classification (ASOC) group and Median Statutory Maximum Ranking was constructed by reference to the median statutory maximum penalty among offences in each ASOC group.
110 Ian MacKinnell et al. 'Measuring Offence Seriousness' *BOCSAR Crime and Justice Bulletin* (August 2010) 9.
111 *UniSC Final Report* (n 68) 17.
112 *Griffith University Literature Review* (n 41) 87.
113 Ibid 25–7.
114 *UniSC Final Report* (n 68) 44.
115 *UniSC Report Supplementary Materials* (n 99) 27.
116 Ibid.

> For some reason within these scenarios, it came for me as to familiar and unfamiliar. If the perpetrator was familiar to them. For me, husband versus stranger sort of thing was a big part of where I went to. And you feel conflicted because every incident is wrong. But I guess at least if they're a familiar person to them, hopefully the trauma that they experience won't be as severe as a stranger that you've never met.[117]

Some support for this finding was present in the literature review, which found that research participants were more lenient when the victim survivor and perpetrator were known to each other[118] and that public perceptions of sentencing were highly influenced by rape myths.[119]

As discussed in **Chapter 7**, the nature of sexual penetration was relevant to offence seriousness, with participants viewing penile penetration as more serious than other forms of penetration.[120]

However, this view did not apply when the victim survivor was a child,[121] with 88 per cent of participants regarding the digital rape of a child as more serious than the vaginal rape of an adult[122] and almost all participants regarding the digital rape of a child as more serious than the anal rape of an adult (99%).[123] It is important to note that the penile rape of a child was not one of the scenarios presented to the participants for comparison. These findings align with the Crime Harm Index, given child sexual abuse was ranked more highly than rape.

5.5 Consultation views

As discussed in **Chapter 4**, another source of community views on which we have relied in reaching our findings and developing our recommendations is views expressed by stakeholders and community members who participated in our in-person consultation events in Brisbane and Cairns, and at our two online consultation sessions, and who made submissions.

The views of people with lived experience of rape and sexual assault have also provided us with a critical source of information in seeking to better understand the impacts of these offences, victim-survivor experiences of the criminal justice and sentencing process, and views about how the current approach to sentencing might be improved.

In this section, we briefly explore views expressed regarding assessments of offence seriousness, and appropriateness and adequacy of sentencing sexual assault and rape, by participants at our consultation events, as well as in submissions and interviews with victim survivors and support services.

5.5.1 Views on seriousness

Consultation views

At our consultation events, while a diverse range of views existed about current sentencing practices, there was agreement among all participants that rape and sexual assault are both serious forms of offending and sentencing responses should reflect their seriousness.

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117 Ibid.
118 *Griffith University Literature Review* (n 41) 09 citing a study by Brocke, Göldenitz, Holling, and Bilsky.
119 Ibid 102.
120 *UniSC Final Report* (n 68) 44.
121 Ibid.
122 *UniSC Report Supplementary Material* (n 99) 26.
123 Ibid 29.

Many participants referred to the importance of recognising the significant and long-term harm caused by these forms of offending.[124] It was acknowledged that many victims consider that the sentence given is not reflective of the harm they have suffered or the seriousness of these offences.[125] Reflecting the views of many participants representing the views of victim survivors, it was commented that 'the lifelong trauma for victim survivors in contrast to finite sentences for the offender can be hard to rationalise'.[126]

Submission views

Similar views were expressed in submissions, with the Queensland Sexual Assault Network ('QSAN') commenting that 'sexual violence is a more serious crime than people realise', pointing to the 'detrimental impacts across a person's life including their social life, mental health, health in general, relationships, education and financially and alcohol and drug use and wellbeing in general.'[127]

Submissions by victim survivors and support and advocacy stakeholders generally considered that sentences for rape and sexual assault were too low and did not align with community expectations.[128] This was based primarily on the sentence not adequately reflecting the harm caused by sexual violence offences.[129] DVConnect stated that '[t]he intimacy of this crime and the societal norms that surround it make this crime greater than its physical impacts.'[130] QSAN thought sentencing for sexual violence must increase to ensure outcomes 'better reflect community standards and the objective gravity and the moral culpability of the offending.'[131]

There was a strong view that sentencing was not adequate where the victim was a child,[132] with Your Reference Ain't Relevant Campaign stating that 'there is a persistent gap between community expectations and sentencing outcomes for sexual violence offences'.[133] Fighters Against Child Abuse Australia ('FACAA') thought '[n]o victim-survivor will ever feel that there is an adequate sentence for rape' because they are not sentenced near the maximum penalty of life imprisonment, so they were 'nowhere near the public expectation nor are they just, considering the lifelong impact felt by the victim-survivors.'[134]

Legal stakeholders agreed that rape and sexual assault offences involve 'crimes of a very serious nature'.[135] However, they were generally of the view that current sentencing practices provide evidence that the 'seriousness of this type of offending is recognised by sentencing courts' already.[136] As discussed in our Consultation Paper, Legal Aid Queensland ('LAQ') acknowledged that the context and factual circumstances involved in offences of sexual assault and rape vary significantly, as do the personal circumstances of those sentenced for these types of offences.[137]

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124 Online Consultation Event, 3 April 2024.
125 Cairns Consultation Event, 21 March 2024.
126 Brisbane Consultation Event, 11 March 2024.
127 Submission 24 (QSAN) 2.
128 Submission 1 (Name withheld) 1; Submission 14 (Your Reference Ain't Relevant Campaign) 1; Submission 15 (FACAA) 5; Submission 20 (DVConnect) 4; Submission 22 Chapter 1 (TASC Legal and Social Justice) 3–4, 6; Submission 24 (QSAN) 8 –9; Submission 27 (Name withheld) .
129 Submission 15 (FACAA); Submission 20 (DVConnect); Submission 24 (QSAN).
130 Submission 20 (DV Connect) 4.
131 Submission 24 (QSAN) 12.
132 Submission 1 (Name withheld); Submission 14 (Your Reference Ain't Relevant Campaign); Submission 24 (QSAN); Submission 27 (Name withheld).
133 Submission 14 (Your Reference Ain't Relevant Campaign).
134 Submission 15 (FACAA) 5.
135 Submission 28 (ATSILS) 4.
136 Submission 23 (Legal Aid Queensland) 18.
137 Ibid 16.

Consultation with victim survivors

The Council consulted with victim survivors about their views of seriousness.

> Because it's a serious crime (Victim Survivor Interview 1)

When discussing whether she thought the court had understood the harm to her daughter, the mother of a victim survivor told the Council:

> I felt like we were the ones being sentenced, not him…It was quickly mentioned that it has done harm to [my daughter] and her family… [But] not really acknowledging how it has changed our life forever. (Victim Survivor Interview 1 – Parent)

Another victim survivor reflected on whether the court process (including trial) understood the harm she had experienced:

> I feel as though the DPP and the lead detective understood. I felt the defendant's lawyer like didn't give a care at all. Didn't give a f–k basically. Basically, about the trauma I had, they just wanted to win. (Victim Survivor Interview 5)

For many victim survivors, punishment and community protection were the most important sentencing purposes for rape and sexual assault offences, given their seriousness and that offenders should be subject to ongoing supervision:

> I, 100%, think punishment would be the second thing, but I want to protect everyone else who this could happen to because I know how it's affected me, and it can go so much worse in so many different ways. And I'm lucky that – I'm not lucky that this ever happened, but I'm lucky that I got a better way with the way it went down. (Victim Survivor Interview 1 – Parent)

> Punishment, because they should be punished for what they've done. Because as victims, we suffer for the rest of our lives. (Victim Survivor Interview 2)

> Punishment, deterrence and community protection … [community supervision is necessary because] there is a risk of harm to the victim and to other people due to the possibility of reoffending. (Victim Survivor Interview 6)

5.5.2 Views on appropriateness and adequacy

Consultation views

Participants at our consultation events generally agreed that there was 'no simple answer' to assessing whether current sentencing practices are appropriate and adequate. There was a view that sentencing should be individualised and what is 'adequate' will depend on the individual person and circumstances. It is 'case specific'.[138]

Some participants were strongly of the view that current sentencing levels are too low and must increase.[139] Some participants suggested that average sentencing levels being significantly lower than the maximum penalty may contribute to the community's perception that sentences are inadequate.[140]

Procedural justice was seen as just as important a part of the criminal justice response as the sentencing outcome. Some participants considered that how prepared victim survivors are for the sentence and the support they receive, rather than 'the final number/result', might form part of a victim survivor's

138 Online Consultation Forum, 16 April 2024.
139 Cairns Consultation Event, 21 March 2024.
140 Ibid.

assessment of whether a sentence is adequate.[141] Connected to this was the need for a sentence to acknowledge the hurt/pain caused by the offending and for the sentence to deliver punishment as well as deterrence.[142] From a victim survivor perspective, it is important to feel they have been heard and that the sentence imposed by the court reflects that the judge has recognised the lifelong and multiple impacts of the offending.[143]

The type of penalty influenced views about whether a sentence is adequate. Several participants at both the Cairns and Brisbane events thought suspended prison sentences were an inappropriate penalty for these offences. They did not think suspended prison sentences supported rehabilitation, given the lack of supervision conditions attached and the inability of Queensland Corrective Services ('QCS') to compel people on a suspended prison sentences to participate in treatment and other interventions.[144] There was support to extend court-ordered parole to sexual offences and this was viewed as a better alternative than partially suspended prison sentences[145] and probation, enabling QCS to more effectively manage a person's risks.[146]

Submission views

Submission views were similarly varied regarding whether current sentencing practices were adequate, and the ways current practices could be improved. While many victim survivor support and advocacy services submitted, based on their experiences, that sentencing levels should increase, legal stakeholders generally viewed sentencing levels as appropriate, although they identified several improvements that could be made to the range of sentencing and parole options available to a court.

DVConnect told us that victim survivors are of the view that current sentences ‘do not’ ‘adequately denounce the crime’; there was concern that ‘the inappropriateness of the sentencing deters victim/survivors from engaging in the criminal justice system’.[147] A victim survivor submitted to the Council that, '[i]mposing the penalty at the highest level that deters the perpetrators behaviour' should be the priority.[148]

The proportion of the sentence required to be served in custody was another issue pointed to by QSAN as giving rise to victim survivor dissatisfaction, particularly in the context of the existence of the SVO scheme (discussed in **Chapter 11**); it was felt that only a 'fraction of serious violent [offences] are declared.'[149] Where the person receives a custodial sentence but is released shortly following conviction, QSAN told us 'many survivors have reported feeling like this is a betrayal of the courts and that no real sentence was given to the offender'.[150] A submission made by academics from the QUT School of Justice jointly with researchers from the Bravehearts Foundation advised that, based on their research, victim survivors of sexual violence supported perpetrators receiving rehabilitative interventions such as parole supervision and psychological support to address their offending behaviour 'so that they do not harm others', but only if the person 'had already served an appropriate custodial sentence'.[151]

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141 Online Consultation Forum, 16 April 2024.
142 Brisbane Consultation Event, 11 March 2024.
143 Online Consultation Event, 3 April 2024.
144 Brisbane Consultation Event, 11 March 2024; Cairns Consultation Event, 21 March 2024.
145 Ibid.
146 Brisbane Consultation Event, 11 March 2024.
147 Submission 20 (DVConnect) 5.
148 Submission 27 (Name withheld) 1.
149 Submission 24 (QSAN) 9.
150 Preliminary Submission 5 (Queensland Sexual Assault Network) 1.
151 Submission 12 (QUT - School of Justice) 4.

Similar to consultation views, several victim survivors and support and advocacy organisations raised concerns about the use of options such as suspended prison sentences, seeing them as an inappropriate response given the extent of harm caused by these offences. For example, QSAN, noting the increasingly common use of suspended imprisonment orders, advised that it had received feedback from victim survivors that these sentences 'do not adequately reflect the level of fear, the financial cost, the trauma experienced, and the years of counselling and trauma work required to recover from acts of sexual assault and rape and to be able to fully participate in the community'.[152]

In contrast to views that sentences were inadequate, many legal stakeholders and community and legal research and advocacy organisations told us that they generally considered sentences imposed for rape and sexual assault reflected the seriousness of these offences. LAQ thought it would be 'an extremely rare case where an adult offender was sentenced to a suspended prison sentence for penile/vaginal rape, especially where there was not some concurrent supervisory order made'.[153]

LAQ and the Youth Advocacy Centre ('YAC') both emphasised the importance of information to 'better inform courts about an offender and improve the court's ability to impose an appropriate sentence'.[154] Concerns were raised that any increase in penalties might disincentivise guilty pleas, meaning more cases would be taken to trial reducing rates of conviction.[155]

ATSILS was among those that raised concern that 'punitive measures … do not, in isolation, address the root causes of offending' and that '[i]mproving community safety necessitates an approach that also prioritises the rehabilitation of the individual', meaning they will be less likely to reoffend.[156]

Sisters Inside, the Justice Reform Initiative and the Uniting Church in Australia (Queensland Synod) were among those supporting exploration of alternative justice responses to better meet the needs of victim survivors while holding perpetrators to account.[157]

Consultation with victim survivors

The Council consulted with victim survivors about their views of adequacy and appropriateness. Generally, the victim survivors we spoke to thought sentences for sexual assault and rape were not adequate.

When asked whether sentencing of sexual assault and rape was appropriate, victim survivors told the Council:

> No, all sentencing and parole periods are a joke … sexual or child abuse offences should carry a mandatory sentence in prison and longer parole periods. (Victim Survivor (Rape) Interview 6)

> No, I don't think he's serving enough time for what he's done to me. But, I mean, I probably will never accept that any amount of time would be enough. (Victim Survivor (Rape) Interview 2)

For one victim survivor, the non-parole period and future release were of great concern:

> I'm now going to forever be thinking in 10 years' time, he could be walking the street and I will be back to where I was, where I won't be able to just live my life like I do now. (Victim Survivor (Rape) Interview 2)

152 Submission 24 (QSAN) 9.
153 Submission 23 (Legal Aid Queensland) 17.
154 Ibid 21–2; 27–9; Submission 30 (Youth Advocacy Centre) 8.
155 Submission 23 (Legal Aid Queensland) 18.
156 Submission 28 (ATSILS) 4.
157 Submission 13 (Justice Reform Initiative); Submission 16 (Uniting Church in Australia, Queensland Synod); Submission 32 (Sisters Inside Inc).

One survivor compared the impact of court ordered licence disqualification and sentencing for sexual violence in circumstances where the perpetrator had received a wholly suspended prison sentence:

> My neighbour lost his driving licence for speeding and talking on his phone. He lost his licence for 10 months. He had to move. It impacts him being able to take his kid to school. It impacts so many aspects of his life. I feel like he's been more affected than the perpetrator of sexual violence. (Victim Survivor (Sexual Assault) Interview 7)

One mother reflected on the process going through the criminal justice system and how the outcome did not reflect the seriousness of what was done to her daughters:

> But I know that my girls, through that outcome, didn't feel like they had any real justice in any sense. And they were compelled to do, you know, come up with what they wanted to see happen. They had to do all the work, they had to put all these processes in place, and these are teenage girls … and they were put through … and I understand that the court system is very rough, you know, for women to go through for these things. But … this felt very, it was like … it didn't feel like it was a real outcome in any sense of justice for the girls, or him feeling any real consequence or having any real effect on his life, or … to take any seriousness out of what had happened. I guess I'm trying to say that it didn't seem to be taken, you know, the outcome didn't reflect the seriousness of what he had done to those girls. (Victim Survivor Parent (Rape) Interview 3)

Chapter 6 – Courts' assessment of offence seriousness

6.1 Introduction

The Terms of Reference require the Council to 'review sentencing practices' for sexual assault and rape and to advise whether the penalties currently imposed adequately reflect community views about the *seriousness* of this form of offending.[1] This involves a consideration of how 'seriousness' is understood by both the community and courts when imposing a sentence.

In this chapter, we explore the courts' assessment of the circumstances and gravity (seriousness) of rape and sexual assault offending. We analyse how courts currently assess offence seriousness in rape and sexual assault cases in Queensland and in other Australian and international jurisdictions, as well as presenting our own views of offence seriousness.

In presenting our findings, we consider evidence obtained from sentencing remarks and interviews with legal experts, which assisted us to better understand how offence seriousness is determined and assessed.

The Council's key findings on current problems with the approach to assessing offence seriousness are based on our extensive research and consultations.

6.2 Understanding offence seriousness

Offence seriousness is generally viewed as comprising 2 key components:

- the harm caused by the person's conduct or what was intended to be caused or foreseen to be caused by that conduct; and
- the culpability of the person who has committed the offence.[2]

As culpability and/or harm increase, so generally does the seriousness of the offence.

Some factors are aggravating, meaning they increase the seriousness of the offending, because they result in both a higher level of harm and indicate the person sentenced has a higher level of culpability. This is the case, for example, for sexual violence offending where the perpetrator is in a position of trust in relation to the victim survivor or the victim survivor is vulnerable, such as due to their age or disability.[3]

Both aspects of harm and culpability (or 'blameworthiness') are recognised in section 9 of the *Penalties and Sentences Act 1992* (Qld) ('PSA') as important matters to which a court must have regard in

1 Appendix 1, Terms of Reference.
2 Andrew von Hirsch and Andrew Ashworth, *Proportionate Sentencing: Exploring the Principles* (Oxford University Press, 2005) 144.
3 For more information on what factors increase a person's vulnerability to becoming a victim survivor of sexual violence, see Chapter 2.

sentencing.[4] We explore the principles set out in section 9 of the PSA, and their application to offences of sexual assault and rape are discussed briefly in section 6.3.1 and in more detail in **Chapter 8**.

6.2.1 Harm and wrongfulness

Harm is understood as 'the degree of injury done or risked by the act'.[5] Generally, 'offence seriousness is considered to increase with the level of harm caused' or risked.[6]

In assessing the seriousness of rape and other forms of sexual offending, it is not just the physical or psychological harm caused that makes these offences serious; it is also the *nature* of the wrong done to the victim survivor:[7]

> That most fundamental element of wrongdoing in rape, which differentiates rape from (most) assaults and gives rape a separate theme from the family of assault crimes, is the *sheer use* of the person raped, whether that is how the rapist saw what he was doing or otherwise.[8]

People who commit the offence of rape 'wrong their victims by non-consensual objectification of them'[9] — and the same is true for acts of sexual assault.

As a general rule, the most serious types of harm are considered to be those that involve the violation of a victim's physical integrity, such as death, serious injury and interference with sexual and bodily integrity.

For rape and other types of serious sexual offending, the rights and interests of the victim survivor are significantly impacted. The assessment of offence seriousness and harm is viewed as necessarily linked to the sexual nature of these offences:

> The fundamental interests violated by sexual attacks are autonomy and choice in sexual matters. It is not just that victims are wronged by the invasion of their right to respect for private life, of which sexual autonomy is a central feature. The distinctly sexual element brings in other values and disvalues – self-expression, intimacy, shared relationships; shame, humiliation, exploitation and objectification – which are often crucial to understanding the effects of sexual victimization.[10]

In addition to the immediate physical and mental harm caused by the perpetrator, sexual offences can have very serious consequences for victim survivors. These include mental health impacts (such as depression, post-traumatic stress disorder and suicidality), alcohol and substance misuse, antisocial behaviours, parenting difficulties, sexual revictimisation and sexual dysfunction.[11] When the victim survivor is a child, the harm is likely to be more 'profound and broad-ranging' because of 'the detrimental impacts that trauma can have on the biological, social and psychological development of a child'.[12]

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4 *Penalties and Sentences Act 1992* (Qld) ss 9(2)(c)–(d) ('PSA').
5 Andrew von Hirsch, 'Commensurability and Crime Prevention: Evaluating Formal Sentencing Structures and Their Rationale' (1983) 74(1) *Journal of Criminal Law and Criminology* 209, 214.
6 Victorian Sentencing Advisory Council, *Community Attitudes to Offence Seriousness* (Final Report, 2012) 5.
7 See John Gardner and Stephen Shute, 'The Wrongness of Rape' in Jeremy Horder (ed), *Oxford Essays in Jurisprudence, Fourth Series* (2000).
8 Ibid 32 (emphasis in original).
9 Ibid.
10 Andrew Ashworth, *Sentencing and Criminal Justice* (5th ed, Cambridge University Press, 2010) 134.
11 Victorian Sentencing Advisory Council, *Sentencing of Offenders: Sexual Penetration with a Child Under 12* (Final Report, 2016) 1, citing, Kathleen Kendell-Tackett et al, 'Impact of Sexual Abuse on Children: A Review and Synthesis of Recent Empirical Studies' (1993) 113 *Psychological Bulletin* 164.
12 Royal Commission into Institutional Responses to Child Sexual Abuse, *Final Report Volume 3: Impacts* (Report, 2017) 11. Child sexual abuse is associated with diagnoses of lifetime major depressive disorder, alcohol use disorder, generalised anxiety disorder and post-traumatic stress disorder ('PTSD'). When compared to people with no experience of

In ranking harms caused by different types of offences and their relative seriousness, various methods have been advocated.[13] One such approach, known as the 'living standards' approach, seeks to rank the harm caused by offences with reference to the effect of the 'typical' case on the living standard of victims.[14]

Applying a 'living standard' approach, rape ranks among the most serious of offences based on harm because it involves violation of 3 out of 4 important interests (humiliation and degrading treatment, the deprivation of privacy and autonomy and threat to physical integrity), with the typical effect on the victim being 'at the level of minimal wellbeing' (the second lowest level of wellbeing just above subsistence).[15]

Sexual assault may be viewed as equally as harmful as rape in some cases, depending on the degree to which relevant interests are violated, or less harmful on the basis of the victim survivor being able to maintain an adequate level of comfort and dignity.

We consider court views of harm and offence seriousness in the following sections of this chapter.

6.2.2 Culpability

Culpability is the other important aspect of assessing offence seriousness. Culpability refers to 'the factors of intent, motive and circumstance that bear on the actor's blameworthiness'[16] and goes beyond a person's legal responsibility for the offending.[17] It impacts the assessment of harm in that '[t]he consequences that should be considered in gauging the harmfulness of an act should be those that can fairly be attributed to the actor's choice'.[18]

As with harm, offence seriousness tends to increase with the increased culpability of an offender.

An intentional act with knowledge of the consequences or likely consequences is generally viewed as more blameworthy than a reckless or negligent one, and there are degrees of culpability within these different categories. For example, a premeditated intentional act is generally viewed as involving a higher level of culpability than an act that is committed on the spur of the moment.

There are also other situational and personal factors that are relevant to this assessment. For example, if the person suffers from a mental illness or intellectual impairment, this can be taken into account in assessing the person's level of culpability.[19] Age is another factor of relevance, as a young person may be less likely to understand the consequences of their actions and to act impulsively.[20]

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maltreatment, those who had experienced childhood sexual abuse were twice as likely to have a severe alcohol disorder, almost twice as likely to have PTSD, around 1.6 times more likely to have generalised anxiety disorder, major depressive disorder or moderate alcohol disorder, and around 1.3 times as likely to have mild alcohol use disorder: 'Child Sexual Abuse', *Australian Institute of Health and Welfare* (web page) <https://www.aihw.gov.au/family-domestic-and-sexual-violence/types-of-violence/child-sexual-abuse#impacts>.

13 For a summary of these different approaches, see Queensland Sentencing Advisory Council, *The '80 per cent Rule': The Serious Violent Offences Scheme in the Penalties and Sentences Act 1992 (Qld) – Final Report: Appendices* (May 2022) Appendix 17, 'Crime Harm Indexes'.

14 This model was developed by Andrew von Hirsch and Nils Jareborg. See Andrew von Hirsch and Nils Jareborg, 'Gauging Criminal Harm: A Living Standard Analysis' (1991) 11 *Oxford Journal of Legal Studies* 1.

15 Ashworth (n 10) 134.

16 von Hirsch (n 5) 214.

17 *R v Yarwood* (2011) 220 A Crim R 497, [34] ('*Yarwood*') citing *R v Verdins* (2007) 16 VR 269 ('*Verdins*').

18 Ashworth (n 10) 134.

19 In Queensland, the relevant principles that apply when sentencing a person with a mental illness are set out in *Yarwood*. (n 17). This case adopts principles set down in the earlier Victorian decisions of *R v Tsiaras* [1996] 1 VR 398 ('*Tsiaras*') and *Verdins* (n 17), commonly referred to as 'the Verdins principles'.

20 Ashworth (n 10) 390; Geraldine Mackenzie and Nigel Stobb, *Principles of Sentencing* (Federation Press, 2010) 81.

Some offences can be viewed very clearly through an escalating scale of culpability; however, rape and sexual assault offences incorporate different levels of culpability within the one offence. For example, rape can involve varying levels of culpability with respect to the perpetrator's awareness of, or thought given to, whether the other person is not consenting or might not be consenting. Despite this, culpability 'will usually be high [for rape] because the offender will know perfectly well what is being done'.[21]

6.3 How Queensland courts determine offence seriousness

6.3.1 Statutory guidance on assessing seriousness

The legislative framework within which offence seriousness is considered highlights the complexity of the criminal law and sentencing. This section briefly considers how both the PSA and the way offences are established in the *Criminal Code* (Qld), guide courts' assessments of seriousness.

For more information on the factors that guide sentencing in these matters, and the Council's recommendations for reform, see **Chapter 8**.

Assessing the nature and seriousness of the offence

Section 9 of the PSA requires a judge to assess the nature and seriousness of the offence when determining an appropriate sentence.[22]

'Harm' is described in section 9 in terms of 'any physical, mental or emotional harm done to the victim'.[23] 'Serious harm' is defined as 'any detrimental effect of a serious nature on a person's emotional, physical or psychological wellbeing, whether temporary or permanent',[24] although this definition applies mainly for the purposes of determining whether a person can be declared convicted of a serious violent offence under the serious violent offences scheme (discussed in **Chapter 11**).[25]

Children aged under 16 in the context of sexual offending are recognised as an inherently vulnerable group by the PSA.[26] For sexual offences committed against children under 16 years, section 9(6) of the PSA directs a court to have primary regard to factors including:

- the effect of the offence on the child;
- the age of the child; and
- the nature of the offence, including, for example, any physical harm or the threat of physical harm to the child or another.[27]

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21 Ashworth (n 10) 134 referencing Sentencing Advisory Panel, *Sexual Offences Act 2003* (UK).
22 PSA (n 4) s 9(2)(c).
23 Ibid s 9(2)(c)(i).
24 Ibid s 4.
25 Ibid s 161B(4). This is one of the criteria than can make a person eligible for a declaration even the offence for which they are being sentenced is not a schedule 1 offence, or (for any offence) if the person is sentenced to less than 5 years' imprisonment. The person must have been convicted on indictment for a court to make a declaration. See further Chapter 11.
26 Ibid ss 9(4)–(7AA).
27 Ibid ss 9(6)(a)–(c).

For offences of violence, including rape, or resulting in physical harm, section 9(3) also requires courts to have regard to, as primary sentencing considerations:

- the personal circumstances of any victim of the offence;
- the circumstances of the offence, including the death of or any injury to a member of the public or any loss or damage resulting from the offence.[28]

Culpability is described in terms of 'the extent to which the offender is to blame for an offence'[29] and 'any damage, injury or loss'[30] they caused (with the latter also relevant to assessing harm).

Statutory aggravating factors

The PSA directs sentencing courts to treat certain factors as 'aggravating', meaning the offence must generally be treated as being more serious.

Statutory aggravating factors include factors relating to the person being sentenced,[31] the offence being a domestic violence offence,[32] a person's prior criminal history (taking into account its nature, relevance and time since the conviction)[33] and the offence having been committed while the victim was at work.[34] In some cases, these do not apply if a court decides it is not reasonable to treat these as aggravating because of the exceptional circumstances involved.[35]

Special factors also apply when sentencing a person for sexual offences against a child under 16 years.[36]

Common law (case law) guidance on aggravating factors is discussed in section 6.3.2.

Maximum penalties are an indication of how seriously Parliament and the community view an offence

The maximum penalty for an offence is another factor to which a court must have regard in sentencing and guides the court's assessment of offence seriousness.[37] The maximum penalty is a representation of Parliament's (and therefore the community's) view of how serious an offence is relative to other offences. The maximum penalty Parliament sets 'is intended for cases falling within the worst category of cases for which the penalty is prescribed'.[38] The High Court has said that

> careful attention to maximum penalties will almost always be required, first because the legislature has legislated for them; secondly, because they invite comparison between the worst possible case and the case before the court at the time; and thirdly, because in that regard they do provide, taken and balanced with all of the other relevant factors, a yardstick.[39]

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28 Ibid ss 9(3)(c)–(d).
29 Ibid s 9(2)(d).
30 Ibid s 9(2)(e).
31 Ibid s 9(2)(g).
32 Ibid s 9(10A). This applies unless the court considers it is not reasonable due to the exceptional circumstances of the case. For the definition of a 'domestic violence offence', see *Criminal Code Act 1899* (Qld) sch 1 ('*Criminal Code* (Qld)') s 1.
33 PSA (n 4) s 9(10), however the weight given depends on the nature of the previous conviction and its relevance to the current offence and the time elapsed since the conviction.
34 Ibid s 9(10F).
35 Ibid ss 9(10A), (10F).
36 Ibid s 9(6).
37 Ibid
38 *Ibbs v The Queen* (1987) 163 CLR 447, 451–2 ('*Ibbs*').
39 *Markarian v The Queen* (2005) 228 CLR 357, 372 [31] ('*Markarian*').

> Both the nature of the crime and the circumstances of the criminal are considered in determining whether the case is of the worst type.[40]

Rape and aggravated sexual assault charged under section 352(3) of the *Criminal Code* (Qld) carry a maximum penalty of life imprisonment, meaning these offences are viewed as being among the most serious forms of criminal offending. The lower maximum penalties of 10 years for non-aggravated sexual assaults and 14 years for aggravated sexual assaults charged under section 352(2) mean this conduct is still viewed as very serious, but not as serious as rape and other aggravated forms of sexual assault.

6.3.2 Common law guidance on assessing seriousness

In Chapter 7 of the **Consultation Paper: Background**, we presented a comprehensive analysis of key Court of Appeal judgments in sentencing principles in relation to sexual assault and rape offences.

This section provides a brief overview of key themes and issues identified through the review that are particularly relevant to either rape and/or sexual assault offences.

Aggravating factors in case law

Queensland case law has determined several aggravating factors that generally increase the seriousness of sexual violence offending. In no particular order and without being exhaustive, these include:

- victim survivor particularly vulnerable due to age[41] and/or disability;[42]
- offence committed in a public place;[43]
- premeditation or planning;[44]
- offence involved additional use of violence[45] or a weapon;[46]
- abuse of position of trust;[47]
- multiple or successive instances of offending;[48]
- the offence was committed 'in company';[49]

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40 *R v Kilic* (2016) 259 CLR 256 [18] (Bell, Gageler, Keane, Nettle and Gordon JJ) ('*Kilic*').

41 'Rape on an aged and unwell woman': *R v Rosenberger; Ex parte Attorney-General (Qld)* [1994] QCA 488 (Fitzgerald P and Pincus JA and Lee J agreeing).

42 *R v Thompson* [2021] QCA 29, 13 [45] (Williams J and Philippides JA agreeing); *R v CCT* [2021] QCA 278 [241] (Applegarth J, Sofronoff P and McMurdo JA agreeing) ('*CCT*').

43 *R v Basic* (2000) 115 A Crim R ('*Basic*'); *R v Kahu* [2006] QCA 413 ('*Kahu*'); *R v Dowden* [2010] QCA 125; *R v Purcell* [2010] QCA 285; *R v Benjamin* (2012) 224 A Crim R ('*Benjamin*'); *R v Williams; Ex parte Attorney-General* [2014] QCA 326.

44 *R v Griinke* [1992] 1 Qd R 196; *R v AAH & AAG* [2009] QCA ('*AAH & AAG*'); *R v Hussein & Hussein* [2006] QCA 411 ('*Hussein & Hussein*').

45 *R v K* [1993] QCA 425 10 (Davies JA and Thomas J); *Benjamin* (n 43); *R v SDM* [2021] QCA 135, 6 [21] (Mullins JA, Fraser JA and Henry J agreeing) ('*SDM*'); *R v Newman* [2007] QCA 198, 8 [44] (Williams JA and White J agreeing) ('*Newman*').

46 *R v Stirling* [1996] QCA 342. It is a circumstance of aggravation for sexual assault: *Criminal Code* (Qld) s 352(3)(a).

47 *R v WBM* [2020] QCA 107 (Applegarth J with Fraser and Mullins JJA agreeing) ('*WBM*'), citing *R v BBP* [2009] QCA 114 ('*BBP*').

48 *R v Colless* [2010] QCA 26 [17] (Chief Justice, Holmes and Muir JJA) ('*Colless*'); *R v VN* [2023] QCA 220 ('*VN*'); *R v RAC* [2008] QCA 185; *R v KAC* [2010] QCA 39; *R v RBD* [2020] QCA 136; *R v Brown; ex parte Attorney-General* (Qld) [2016] QCA 156; *R v SDR* [2022] QCA 93.

49 *R v AAH & AAG* (n 44); *R v Wano; Ex parte Attorney-General (Qld)* [2018] QCA 117; *R v Hussein & Hussein* (n 44); *R v KU; ex parte Attorney-General (Qld) (No 2)* [2008] QCA 154. It is a circumstance of aggravation for sexual assault: *Criminal Code* (Qld) s 352(3)(a).

- more than one victim survivor;
- location and/or or context of the offence – for example, committed in the context of a burglary;[50]
- victim survivor became pregnant to, and/or had a baby fathered by the offender;[51] and
- risk of and actual transmission of disease.[52]

Victim survivor vulnerability is an important consideration

The circumstances of the victim survivor are very important in determining the seriousness of any offence. This includes consideration of the victim's vulnerability. The Court of Appeal has recognised that sexual violence offending against vulnerable victim survivors is particularly serious, which can elevate the seriousness of the offending. This is because it may increase the harm caused to the victim survivor and the perpetrator's culpability because they targeted a vulnerable person.

A victim survivor may be vulnerable for a range of reasons, including due to their personal circumstances and/or the situation they are in during the course of the offending. Some cohorts are vulnerable due to their higher risk of experiencing sexual violence (without being exhaustive):

- women;[53]
- children;[54]
- Aboriginal or Torres Strait Islander peoples;[55]
- a person with a disability;[56]
- a person from a culturally or linguistically diverse background;[57]
- a person who is asleep or unconscious when the offending occurs.[58]

These considerations apply to both sexual assault and rape offences.

The next section examines Court of Appeal commentary on particular issues identified in this review for sexual assault and rape.

Rape offence case law

All forms of penetration are serious

Rape is defined to involve different types of penetration without consent and the same maximum penalty applies regardless of penetration type.[59]

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50 For example, an offence committed during a burglary, see *R v Ponting* [2022] QCA 83; *R v Gesler* [2016] QCA 311. For example, victim survivor is taken to an isolated place, see *AAH & AAG* (n 44); *R v Hussein & Hussein* (n 44).

51 *R v MBY* [2014] QCA 17, [75] (Morrison JA, Muir JA and Daubney J agreeing) ('*MBY*'); *DPP (Vic) v Dalgliesh (a Pseudonym)* (2017) 262 CLR 428, 436 [20], 438 [26], 443 [36] (Kiefel CL, Bell and Keane JJ) ('*Dalgliesh*').

52 *R v Heckendorf* [2017] QCA 59, [31] (McMurdo JA) (Fraser JA, Mullins J agreeing) ('*Heckendorf*'); *R v Robinson* [2007] QCA 349 [29] ('*Robinson*'); *R v Porter* [2008] QCA 203 [29]; *R v Lawrence* [2002] QCA 526, 16 (McMurdo P, Helman and Philippides JJ agreeing).

53 See, eg, *R v Daniel [1998] 1 Qd R 499,* 515–16 ('*Daniel*').

54 See Ibid; *CCT* (n 42) [241] (Applegarth J, Sofronoff P and McMurdo JA agreeing). *R v NAF* [2023] QCA 197 [31] (Boddice JA, Mullins P and Cooper J agreeing).

55 See, eg, *Daniel* (n 53) 512.

56 See *R v Libl; Ex parte A-G (Qld)* [1996] QCA 63, 6 (Fitzgerald P, McPherson JA and Helman J); *R v Cutts* [2005] QCA 30 [22] (McMurdo P) ('*Cutts*').

57 See *R v VN* [2023] QCA 220 17 [30] (Bowskill CJ and Morrison and Dalton JJA).

58 See *R v Enright* [2023] QCA 89 [90]–[91] ('*Enright*').

59 *Criminal Code* s 349; *R v Smith* [2020] QCA 23 [37] (Morrison J) ('*Smith*').

In the 1987 decision of *Ibbs v The Queen,*[60] the High Court recognised that the offence of sexual assault (rape)[61] could involve a 'spectrum' of seriousness, and the seriousness or 'the heinousness of conduct in a particular case depends not on the statute defining the offence but on the facts of the case'.[62] It also said that 'a sentencing judge has to consider where the facts of the particular case lie in a spectrum at one end of which lies the worst type of sexual assault perpetrated by *any* act which constitutes sexual penetration as defined'.[63] In other words, the seriousness of a particular example of rape or sexual assault must depend on an assessment of all the facts and circumstances involved in the case.

In 2003, the Court of Appeal considered the digital-vaginal rape of a 5-year-old child in *R v D.*[64] President McMurdo observed that while pregnancy was not a risk given the age of the child, penile penetration would be 'expected to cause even more serious injury than those here', and therefore digital-vaginal rape was 'less serious than if the offence of rape had involved penile penetration'.[65] The 12-year sentence was reduced to 10 years to reflect this. In contrast, in 2005, the Court of Appeal determined a sentence of 3 years' imprisonment was within 'the permissible range' for digital-vaginal rape of an adult woman.[66]

The 2008 *decision of R v Wark*[67] ('*Wark*') is the authority for the statement that penile-vaginal or anal penetration will often be treated as more serious than digital penetration, with McMurdo P further stating:

> [E]ach case will turn on its own circumstances. Relevant exacerbating factors include whether the complainant is a child and if so, the age of the child; whether violence has been used; the physical and psychological effect of the offence on the victim; and whether the offender has previous relevant history.[68]

Cullinane J, while accepting 'as a general proposition that rape constituted by penile-vaginal or anal penetration will attract a higher sentence than rape cases involving digital or oral penetration', at the same time expressed a view that previous cases did not support 'the proposition that there is a rigid compartmentalisation of rape offences into these two categories'.[69] His Honour noted: '[i]n all cases it is the particular circumstances which will determine the level of criminality and together with other factors the sentence to be imposed', and there may be cases of non-penile penetration 'which because of their associated circumstances call for punishment which may be as great as or exceed cases involving penile penetration'.[70] His Honour further stated, 'the facts of the particular case and the overall criminality must always govern the seriousness of the offence'.[71]

In the 2010 decision of *R v Colless*[72] ('*Colless*'), the Court of Appeal stated:

> While the *Criminal Code* establishes the same maximum penalty, whether the rape be accomplished by penetration by the penis or digitally, it is reasonable to observe that without additional aggravating factors (weapons, extra brutality, threats of serious harm, premeditation, residual injury etc), a rape accomplished digitally may *generally* be

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60 *Ibbs* (n 38) 451–2 [4] (Mason CJ, Wilson, Brennan, Toohey and Gaudron JJ) (emphasis added).
61 These comments were made with respect to the former section 324F of the *Criminal Code* (WA) (repealed) which described non-consensual penetrative acts as 'sexual assault'.
62 *Ibbs* (n 38) 452.
63 Ibid (emphasis added).
64 [2003] QCA 88 (McMurdo P, Mackenzie and Philippides JJ). This followed reforms which meant this conduct was now included within the offence of rape rather than indecent dealing with a child which then carried a 10-year maximum penalty.
65 Ibid, 7–8.
66 *R v TM* [2005] QCA 130, [36] (Cullinane J, Jerrard JA and Jones J agreeing).
67 [2008] QCA 172 ('*Wark*').
68 Ibid [2] (McMurdo P).
69 Ibid [37] (Cullinane J).
70 Ibid [36]–[36] (Cullinane J). See also Mackenzie AJA at [13].
71 Ibid [13] (Mackenzie AJA).
72 (n 48).

> seen as somewhat less grave than a rape accomplished by penile penetration. That is because it may be less invasive, would not carry a risk of pregnancy and would ordinarily carry a substantially reduced risk of infection.[73]

In a 2012 appeal decision, Justice Fryberg was of the view that 'penile rape effected in the mouth of the victim may generally be seen as somewhat more grave than vaginal rape, particularly where there is ejaculation in the mouth or throat'.[74] Gotterson JA, referring to Fryberg J's remarks, refrained from 'expressing any view on the comparative gravity of different types of penile rape'.[75]

The Court in 2014 accepted that 'as a general proposition … penile rape is more culpable than, for example, digital rape'. [76] This was due to digital rape not carrying 'the same risk of disease or pregnancy' and on the basis it does not 'generally, give rise to as great a sense of violation on the part of the victim'.[77]

In 2020, Morrison JA commented on comments made in *Colless* that the Court of Appeal was not attempting to 'lay down an overriding principle' that 'digital rape may be expected to be less severe than other forms of rape'.[78] His Honour endorsed Cullinane J's remarks in *Wark,* that as a 'general proposition', penile-vaginal rapes and penile-anal rapes 'will attract a higher sentence than digital rape or oral rape'.[79]

The 2023 decision of *R v Wallace*[80] reaffirmed remarks made in *Wark* as to 'comparisons between penile rapes and other types of rape'.[81] Chief Justice Bowskill endorsed 'the need to consider the particular circumstances of each case rather than … generalisations as to what kind of rape is worse or more serious'.[82] However, the Court said later in 2023, that a person sentenced for 'the rape of a child under the age of 12 years based on digital penetration of the vagina with limited additional violence' will be at 'the lower end of the possible sentences for the offence of rape'.[83]

The Court of Appeal has agreed rape conduct involving a fist forced into a victim's vagina or anus (referred to commonly as the act of 'fisting') is 'distinct from what might be called the usual cases of digital rape, referred to in *Colless*, which only involve one or two fingers'.[84] In *R v Clarke*,[85] the appellate inserted his entire fist with force into the victim's vagina while she was saying no, struggling and screaming in pain. The Court did not see 'any reasonable basis to differentiate this rape, in terms of the sentence at least, from penile rape', noting the absence of risk from pregnancy or infection.[86] The Court has said that such an act can involve conduct that is 'brutal', 'degrading' and 'injurious'.[87] In *R v Kellett*,[88] Morrison J concluded that the penetration of the complainant's vagina by 'fisting', resulting in grievous bodily harm, 'was violent, brutal, degrading and callous'[89] and was an 'act designed to humiliate and degrade'.[90]

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73 Ibid [17] (de Jersey CJ, Holmes and Muir JJA) (emphasis added).
74 *R v GAP* [2012] QCA 193 33–4 [138] ('*GAP*').
75 Ibid 17 [83].
76 *R v CBL; R v BCT* [2014] QC A 93 [105] (Muir J, Gotterson JA and Douglas J agreeing) referring to *R v MBG & MBH* [2009] 252.
77 Ibid.
78 *Smith* (n 59) [35]–[36].
79 Ibid [37].
80 *R v Wallace* [2023] QCA 22 ('*Wallace*').
81 Ibid [44] (Dalton J).
82 Ibid [13] (Bowskill CJ). See also *R v RBG* [2022] QCA 143 [4] (Dalton JA) ('*RBG*') citing *Smith* (n 59) [34]–[37] (Morrison J).
83 *R v Misi; Ex parte A-G (Qld)* [2023] QCA 34, [28].
84 *R v Clark* [2017] QCA 226 [152].
85 Ibid.
86 Ibid [152]. See also *SDM* (n 45).
87 *R v Kellett* [2020] QCA 199 [103] (Morrison JA).
88 Ibid.
89 Ibid [113].
90 Ibid [103].

Child sexual offences are to be treated as more serious

In 2003, the Queensland Parliament introduced several reforms addressing child sexual violence, which included the introduction of special sentencing considerations for child sexual offences and that such offences are to be 'recognised as offences equating in seriousness to offences of violence'.[91]

In 2010, the Queensland Parliament made further amendments to the PSA, enacting what is now section 9(4)(b) [that in sentencing a person for a sexual offence against a child under 16 years, the person must serve actual imprisonment unless there are exceptional circumstances] and section 9(5). The Explanatory Notes noted that the Bill,

> [by] strengthening the penalties imposed upon child sexual offenders complements the existing legislative measures aimed at the protection of our most vulnerable members of the community; recognises the inherent seriousness of any form of indecent treatment upon a child; reflects the lasting and potentially devasting impact this conduct may have upon a young victim; and ensures that the need for general deterrence, punishment and reflection of the community's condemnation of the conduct are at the forefront when passing sentence.[92]

The Court of Appeal has commented that the impact of those reforms 'are reflected also in the increasing understanding of and recognition by courts in more recent decades, of the profoundly damaging impact of sexual offences on child victims'.[93] The Court also said those reforms had 'also been reflected in increasing sentences'.[94]

The Court has further noted in relation to the impact of sexual offences against children:

> While the wider public may not have been aware until recent times about the persistent corrosive effective upon the lives of [sexual violence victims], those in the legal profession, in law enforcement and in some medical fields have long known that even a single sexual offence against a child may have terrible and enduring consequences.[95]

In 2019, the Court of Appeal said in *R v O'Sullivan; Ex parte Attorney-General (Qld)*:[96]

> The sequence of legislative changes since 1997 puts it beyond question that the legislature has made a judgment about the community's attitude towards violent offences committed against children in domestic settings. The amendments constitute legislative instructions to judges to give greater weight than previously given to the aggravating effect upon a sentence that an offence was one that involved infliction of violence on a child and that the offender committed the offence within the home environment.[97]

While those remarks were made in relation to offences involving the unlawful killing of a child, they are applicable to all forms of violence offences committed against children. The Court also affirmed the High Court decision of *R v Kilic*[98] ('*Kilic*') and the need for sentencing practices for 'sexual offences' to depart from past practices 'by reason, inter alia, of changes in understanding about the long-term harm done to victims'.[99] Referring to those remarks, the Court expressly said, 'being sensitive to the community's attitude about a particular kind of offence is part of the exercise of judicial discretion'.[100]

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91 Explanatory Notes, Sexual Offences (Protection of Children) Amendment Bill 2002 (Qld) 7.
92 Explanatory Notes, Penalties and Sentences (Sentencing Advisory Council) Amendment Bill 2010 (Qld) 2.
93 *R v Free; Ex parte A-G* (2020) 4 QR 80, 103 [69] ('*Free*'), referring to *Franklin v The Queen* [2019] NSWCCA 325, [126]–[127], referring to *R v Gavel* (2014) 239 A Crim R 469, 483 [110]; *R v Cattell* (2019) 280 A Crim R 502, 521–22 [109]–[111]; *Dalgliesh* (n 51) 447 [56]–[57].
94 *Free* (n 93) [69].
95 *R v RAZ; Ex parte A-G (Qld)* [2018] QCA 178, 5 [23] (Sofronoff P, Gotterson JA and Boddice J agreeing) ('*RAZ*').
96 *R v O'Sullivan; Ex parte A-G (Qld)* (2019) 3 QR 196 ('*O'Sullivan*').
97 Ibid 231 [93].
98 (n 40) [21] (Bell J, Gageler J, Keane J, Nettle J and Gordon J).
99 *O'Sullivan* (n 96) 234 [103].
100 Ibid [103].

In 2020, the Court of Appeal reaffirmed in *R v Stable (a pseudonym)*[101] ('*Stable*') that the 2003 child sexual offence reforms, noting the special sentencing considerations,[102]

> constituted a legislative command to sentencing judges and signify the legislature's opinion that, henceforth, offences of a sexual nature against children were to be regarded with greater seriousness than previously.[103]
>
> The [2003] amendments have brought the circumstances of the victim and other potential victims to the forefront of a sentencing judge's consideration. These are matters that address the community's denunciation of sexual offences against children. These provisions constituted a legislative representation about the community's attitude to sexual offences against children, particularly against very young children.[104]

The Court also referred to the 2016 case of *Kilic,* stating:

> Community attitudes change and the amendments made in 2003 reflected such changes. The amendments have brought the circumstances of the victim and other potential victims to the forefront of a sentencing judge's consideration. These are matters that address the community's denunciation of sexual offences against children. These provisions constituted a legislative representation about the community's attitude to sexual offences against children, particularly against very young children. The amendments made these matters the starting points for the judicial task. Statute law, having the higher authority of the legislature, cannot be waived by the parties simply because they are ignorant of it or because they choose not to argue it although it is applicable.[105]

Relationship and context between victim survivor and perpetrator

The Court of Appeal has identified that the relationship and context between the victim survivor and perpetrator is important to the determination of offence seriousness. Depending on the circumstances, the type of relationship or absence of any, may increase the harm caused to the victim survivor and/or the culpability of the perpetrator.

Historically, rape committed by a stranger appears to have been regarded more seriously than rape committed by a person known to the victim. This is inferred from the Court of Appeal's observation that rape of a stranger in a public place, without additional physical violence or a relevant criminal history, warrants a sentence in the range of 7 to 10 years' imprisonment.[106]

In 2014, McMeekin J stated that while stranger rapes are an 'aggravating feature', 'sometimes the fact that the parties are known to each other can itself be an aggravating one' and in doing so referred to a Victorian appeal decision:[107]

> In particular, it might be said that his Honour purported to apply any principle to the effect that rape by a man of his wife or former wife or of a person with whom he is or has been in a close relationship is to be treated more leniently than a rape by a stranger. The authorities do not appear to support any such principle. The most that can be said, in my opinion, is that the penalty imposed for the crime of rape cannot be regarded as necessarily conditioned by the relationship of the parties to it. Any relationship or lack of it between them will no doubt usually fall to be considered as one of the circumstances to be taken into account in a determination of the appropriate penalty. In some circumstances, a prior relationship may serve as a factor of mitigation, but it need not, and it may indeed serve to aggravate the offence.[108]

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101 [2020] QCA 270 ('*Stable*').
102 PSA (n 4) ss 9(4), 9(6).
103 *Stable (*n 101), 13 [33] (Sofronoff P, and Fraser and Philippides JJA agreeing).
104 Ibid.
105 Ibid 15 [45].
106 *Kahu* (n 43) [24] referring to *Basic* (n 43) [25].
107 *R v Williams; Ex parte A-G (Qld)* [2014] QCA 346 [109] (McMeekin J, Henry J agreeing)
108 Ibid [109] citing *R v Harris* [1998] VR 21 at 28 referred to with approval by Winneke P in *R v Mason* [2001] VSCA 62 [8] ('*Mason*').

Since 2016, the courts have been required to treat the fact that an offence is also a domestic violence as aggravating (unless there are exceptional circumstances) by virtue of section 9(10A) of the PSA. It is a factor that a sentencing judge may take into account in imposing a more severe sentence than might be imposed in the absence of that factor'.[109] The Court has affirmed that cases sentenced prior to the introduction of section 9(10A) 'would now not reflect an appropriate sentence for that type of offending with the aggravating factor of being a domestic violence offence'.[110]

The operation of section 9(10A) and its effect on sentencing was discussed by the Court of Appeal in the 2018 decision of *R v McConnell*:

> [S]ubsection 10A of section 9 of the *Penalties and Sentences Act 1992* (Qld) … provides that, '[i]n determining the appropriate sentence for an offender convicted of a domestic violence offence, the court must treat the fact that it is a domestic violence offence as an aggravating factor, unless the court considers it is not reasonable because of the exceptional circumstances of the case.' … As Mullins J observed in *R v Hutchinson*, this provision is likely over time to have an effect on the sentencing of offenders convicted of offences that are domestic violence offences, but the effect in a particular case will depend on balancing all of the relevant factors relating to the offending and the offender.[111]

Subsequent appeal decisions suggest the aggravating factor has been applied in support of sentences that in some instances exceed those imposed for 'stranger' rape – however, noting important differences going both to matters of harm and culpability.

For example, in *R v VN*[112] (*'VN'*), the applicant was sentenced to 12 years' imprisonment (with an automatic serious violent offence declaration, meaning he would have to serve 80 per cent of the sentence before being eligible for parole) after being convicted following a trial for 3 counts of rape alongside other offences committed against the daughter of a woman he was in an intimate relationship with. The complainant was aged 17 at the time of the first rape with the offences committed over a period of months. The applicant referred to several cases including *R v Benjamin*[113] and *R v Heckendorf*[114] to argue 12 years was manifestly excessive.[115] Both cases involved penile-vaginal rape and additional physical violence to subdue the victim. The Court of Appeal disagreed with that argument, dismissing the appeal, noting that while the circumstances of each case varied, the consequences for the complainant, the Court found, 'cannot be said to be less serious or severe'[116] with the Court noting in this case:

> She was a young, vulnerable 17 year old when she was first raped, in her home, by a man in the position of de facto head of her family. Her education was affected because she dropped out of school. Her brother moved out of the family home. Her relationship with her mother must have been damaged and confused. She lived for months with the trauma and burden of having her rapist live in the same house, not knowing when he might rape again, and with the threat of destruction of her reputation, a matter of particular significance given her cultural background [as a Tamil who had come to Australia from Sri Lanka]. She was robbed of the opportunity to develop as a sexual being in her own time and on her own terms.[117]

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109 *O'Sullivan* (n 96), 230 [91].
110 *SDM* (n 45) [37] referring to *R v Pickup* [2008] QCA 350.
111 *R v McConnell [2018] QCA 107* [17] (Fraser JA) (citations omitted).
112 *VN* (n 48*).*
113 *R v Benjamin* (n 43).
114 *R v Heckendorf* [2017] QCA 59.
115 Ibid.
116 Ibid.
117 Ibid [32].

Other cases of rape involving older adult ex-intimate partners also support the view that the treatment of 'relationship' rapes as less serious than those committed in other contexts given the operation of section 9(10A) should no longer apply.[118]

In March 2024 in the District Court, an offender was sentenced for rape (MSO), as well as several non-sexual violence offences (all were domestic violence offences). Additional offences included common assault, assault occasioning bodily harm (simpliciter and aggravated) and strangulation, some being a precursor to the rape. The judge referred to the Court of Appeal having indicated potential ranges for rape in the context of a relationship and stated the Crown and defence had accepted the applicable range for this type of case was 8–10 years, subject to aggravating and mitigating circumstances.[119]

The Council will be further exploring how the aggravating factor under section 9(10A) is being applied in sentencing more generally, during the next stage of our review in response to the Terms of Reference regarding domestic and family violence.

Use of additional violence

By its very nature, the act of rape is inherently violent. However, the use of additional 'gratuitous' violence in the commission of the offence is generally viewed as increasing seriousness. As noted above, the PSA expressly requires courts to treat 'the nature or extent of the violence used, or intended to be used, in the commission of the offence' as being a primary sentencing consideration when sentencing for offences that involved the use of violence against another person.[120]

Rape cases that have involved additional violence are generally viewed as more particularly serious examples of the offence, and the Court of Appeal has observed that authorities 'tend to distinguish between cases of rape which involve and do not involve substantial [accompanying] violence'.[121] A review of appellate decisions found in several cases that the use of additional violence was the decisive feature in cases resulting in a sentence of 10 years or more being imposed.[122] For example, the Court has said 'cases where rape and grievous bodily harm are involved, on a plea of guilty, the sentencing range is 10 to 14 years' imprisonment'.[123] However there are inconsistencies.

In *R v Kellett*,[124] the perpetrator forced his entire fist into the victim's vagina, resulting in a grievous bodily injury and had immediate medical treatment not been sought, the victim would have died from the injuries. Kellett was found guilty by a jury and sentenced to 7 years with an SVO. This was not disturbed on appeal.

There appears to have been a shift recently, with the Court of Appeal cautioning practitioners about focusing on physical harm alone. For example, in the 2020 decision of *R v WBM,*[125] the Court noted the

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118 See, for example, *R v FBC* [2023] QCA 74 (in which an appeal against a 9-year sentence with parole eligibility after 6 years on a plea of guilty was dismissed); *R v BEA* [2023] QCA 78 (in which in a case involving a conviction for 18 offences, including 13 rapes, committed over a period of about 3 years following a trial, with the highest sentence imposed being a sentence of 11 years' imprisonment for 2 of the rape counts was dismissed); and *R v NT* [2018] QCA 106 (in which a 9-year sentence for rape sentenced alongside other serious offences, including two counts of torture, was found not to be manifestly excessive, even taking into account the offender had spent 17 months in pre-sentence custody which could not be declared as time served under the sentence).

119 *R v [Deidentified]* QDC [2024] (7394 of 2023).

120 PSA (n 4) s 9(3)(e).

121 *R v Tory* [2022] QCA 276 [38] (Kelly J, McMurdo and Dalton JJA agreeing) ('*Tory*').

122 See *R v Buchanan* [2016] QCA 33 ('*Buchanan*'); *Benjamin*. (n 43).

123 *Wallace* (n 80) [17] (Bowskill CJ, Bond JA agreeing) citing *R v Newman* [2007] QCA 198 [54] (Jerrard JA) ('*Newman*').

124 *R v Kellett* [2020] QCA 199.

125 *R v WBM* [2020] QCA 107.

reactions of both child and adult rape complainants may mean that the use of additional significant physical violence by the perpetrator is not required:

> When a father prevails upon a seven year old to have sex with him, a high level of physical violence may not be required. It was not required in this case. The physical violence sometimes required to overcome the physical resistance of an adult victim is not required. Some adult victims of sexual assault are immobilised by fear and a sense of powerlessness. The absence of strong physical resistance from a seven year old daughter is unsurprising. Therefore, the absence of a high level of physical violence by the applicant is also unsurprising.[126]

In the 2022 decision of *R v Smith,*[127] involving an adult victim survivor, the Court found that 'none of these [factors] advances' an applicant's argument that his sentence was manifestly excessive:

> (a) there was no use of a weapon or threat of a weapon;
>
> (b) there were no threats of harm to [the victim];
>
> (c) there was no deprivation of liberty nor physical attack;
>
> (d) there was no sodomy; and
>
> (e) there were no threats to silence [the victim] if she screamed, and no covering of the mouth.[128]

And, in the 2023 decision of *VN*, the Court cautioned against focusing on physical harm as this may minimise the weight that should be placed on other harms experienced by victim survivors, saying:

> Previous decisions of this Court have referred to an appropriate 'range' of 10 to 14 years' imprisonment for violent rape where the offender is entitled to the benefit of a plea of guilty. The effect of these decisions is to regard physical injury and harm as an aggravating feature, rendering the offence more serious in those cases, than in cases where physical harm is not caused. The tendency to use physical injury and harm as a tool for comparison of sentences seems to have developed in cases where the rape or rapes occurred on one violent occasion. By contrast, here the rapes and other violence occurred over a prolonged period of time and involving … non-physical harm … It is hard to see how it could be said the psychological harm caused to a complainant such as in the present case can be said to be any less significant. … To diminish the harm caused by serious sexual offending of the kind the applicant committed by contrasting it with physical harm is to misunderstand the real impact of offending of this kind.[129]

Recently, in *R v CDF*,[130] Bond JA said, 'the penile/vaginal rape of a pre-pubescent girl by a mature man is an intrinsically violent act'.[131] He went on to say, 'the applicant's argument that there was no accompanying or additional violence merely amounts to an identification of the absence of what would have been an aggravating factor'.[132]

These cases suggest the Court of Appeal is encouraging legal practitioners and sentencing courts to adopt a more nuanced understanding of assessments of both harm and culpability rather than making assumptions that offences involving the use of additional violence (usually involving older adult victims) are, by their very character, more 'serious' and 'harmful' due to this feature.

Where a sexual act results in 'extreme violence' on a very young child 'for the purpose of seeking revenge on the mother' and resulting in 'serious injuries to the child', the Court has said 'in those circumstances it

126 Ibid [31] (Applegarth J, Fraser and Mullins JJA agreeing).
127 *R v Smith* [2022] QCA 55.
128 Ibid [56]–[57] (Morrison JA, Fraser and Bond JJA agreeing).
129 *VN* (n 48) [32].
130 *R v CDF* [2024] QCA 207.
131 Ibid [35] (Bond JA, Brown JA and Kelly J agreeing).
132 Ibid.

matters little whether the weapon used was a penis, a finger or fingers or some other object' when assessing the conduct.[133]

As discussed in section 6.4.6, the use of additional violence is often not necessary where offences against vulnerable victim survivors, including children and people with an intellectual disability, are concerned, although these offences result in significant emotional and psychological harm (and, in some cases, physical injury). Further, the fact the offender targeted a vulnerable victim survivor while knowing the likely impacts on the victim of their behaviour means they have a high level of culpability even where no additional violence was used.

Sexual assault offences

There is a wide range of conduct captured within the offence

Sexual assault involves a wide range of conduct with both simpliciter and aggravated tiers of the offence. Generally, offences under clothing involving skin-on-skin contact are viewed as more serious forms of non-aggravated indecent assaults than 'over clothing' offences, although the existence of aggravating factors can increase the seriousness of the case.[134]

For example, in *R v Abdullah*,[135] on separate occasions the applicant indecently touched 2 women he did not know on their breasts, bottom, thighs and back, as well as kissing, or attempting to kiss, their cheeks. In dismissing the appeal, Bowskill CJ referred to 'the physical invasion of the sexual assaults perpetrated by the applicant' as being 'objectively less serious than those which involve assaults under a complainant's clothes and underwear'. [136] However, there were a number of aggravating features that increased the seriousness of this case:

- The complainants were both much younger than the applicant.
- He was a stranger to them.
- The offending was of a predatory nature (the applicant having come to their homes in his capacity as a tow-truck driver, in the first case unannounced, and in the second in response to the planned sale of a car).
- There were two complainants.
- The second offence was committed after the applicant had been arrested, charged and released on bail for the first.[137]

In *R v Downs*[138] – a case involving 10 counts of sexual assault and 4 counts of common assault committed against 8 girls aged between 15 and 17 years working at a pizza store where the applicant was the manager – the Court of Appeal commented:

> [T]he distinction sought to be made [that there were no instances of touching underneath clothing – which was found to be not correct] is hard to understand. The applicant touched the breasts of complainant B (squeezing them and touching them on the sides), complainant E (grazing her breasts), complainant F (resting his hand on the side of her

133 *R v TK* [2004] QCA 394 [29].
134 *R v Kane; Ex parte A-G (Qld)* [2022] QCA 242 ('*Kane*'). Aggravating factors include: targeting a woman in a public place, removing her to a secluded area, overcoming her resistance and protests and not desisting until a passer-by approached: [27] (Mullins P, Dalton JA, Flanagan JA).
135 [2023] QCA 189 ('*Abdullah*').
136 Ibid [44] (Bowskill CJ, Flanagan JA and Buss AJA agreeing).
137 Ibid [2], [44].
138 [2023] QCA 223.

> breast, and grazing both breasts), and complainant G (slowly and deliberately brushing her breasts). In the circumstances that the conduct took place at the complainant's place of work and the applicant was their manager, the under-clothing significance is difficult to see.[139]

Relationship between victim survivor and perpetrator, breach of trust and victim age

The Court of Appeal has found sexual assaults committed by a stranger are an aggravating factor.[140]

The element of abuse of trust also has long been identified as a factor that makes an offence more serious; however, even noting this, the Court of Appeal has commented generally on the limited utility of cases decided prior to the introduction of section 9(10A) as comparable sentencing decisions.[141]

In the 2018 case of *R v SDF,*[142] the Court of Appeal noted that the utility of some comparable sentences was limited, having been decided prior to the enactment of section 9(10A).[143] The Court of Appeal found it was 'not a misuse of language [by the sentencing judge] … to describe the applicant's opportunistic conduct of using the complainant [his granddaughter] for his own sexual pleasure as a serious breach of trust and deliberate and predatory conduct'.[144]

Factors such as the context of the offending, use of additional violence and engaging in degrading acts also make these offences more serious. For example, in *R v HCH*,[145] Davis J remarked:

> The maximum penalty for [non-aggravated] sexual assault is 10 years. That offence by itself, must in my view, attract at least five years imprisonment … Section 9(10A) mandates that a court must treat the fact that an offence is a domestic violence offence as an aggravating factor in the absence of exceptional circumstances … Section 9(10A) effectively mandates that considerations such as denunciation and deterrence should have greater weight than they might otherwise … Here all the offending was serious and was conducted over a protracted period. The offending was committed in a domestic setting upon the applicant's domestic partner and on some occasions, in the presence of children. The offending was demeaning and degrading to the complainant and has caused her ongoing harm. The offending reflected in the second indictment [the sexual assault] was particularly serious and obviously designed to humiliate the complainant.

As for rape, the fact the victim was under 18 years of age is a relevant consideration for sexual assault,[146] — although, in contrast to rape, indecent assaults against children aged under 16 years are more commonly charged as indecent treatment of a child rather than under the broader section 352 offence of 'sexual assault'.

6.3.3 Personal mitigating factors and seriousness

Personal mitigating factors are relevant in determining sentence, but do not reduce the *objective* seriousness of the offending[147] and can never outweigh the gravity of the offence.[148] Courts must consider 'the subjective matters personal the offender which have reduced their moral culpability'[149] to ensure a sentencing outcome that is 'just in all the circumstances'.[150] In some cases, this may result in

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139 Ibid [49] (Morrison JA, Mullins P and Bond JA agreeing).
140 *Abdullah* (n 135) [2], [44]; *Kane* (n 134) [27] (Mullins P, Dalton JA, Flanagan JA).
141 For example, see *SDM* (n 45) [135].
142 *R v SDF* [2018] QCA 316.
143 Ibid [20].
144 Ibid [17] (Fraser JA, Philippides JA and Boddice J agreeing).
145 [2021] QCA 218 (Davis J, Sofronoff P and Williams J agreeing).
146 See, for example, *Downs* (n 138) [33].
147 *R v HYQ* [2024] QCA 151 [52] (Bowskill CJ, Dalton JA and Wilson J agreeing) ('*HYQ*').
148 *R v Mahony & Shenfield* [2012] QCA 366 [34] (Gotterson JA, Muir JA and Applegarth J agreeing); *Munda v Western Australia* (2013) 249 CLR 600, 619 [53].
149 *HYQ* (n 147) [52].
150 Ibid referring to this requirement under PSA (n 4) s 9(1)(a).

'a penalty that might appear lenient, having regard to the objective seriousness of the offending'. [151] For example, a person with a significant mental disorder causally to the offending will reduce their moral culpability and this may warrant a sentence lower than the objective seriousness of the offending.

The following factors are regarded in statute and case law as mitigating considerations in sentencing for sexual offences; however, they are not always given the same weight. The weight these are given depends on the individual circumstances of the case and the gravity of the offending:[152]

- guilty plea;[153]
- lack of criminal history or no relevant/recent convictions;[154]
- 'good character';[155]
- age of offender, such as young or elderly;[156]
- assistance to law enforcement, such as full admissions;[157]
- offender is a victim survivor of domestic violence;[158]
- offender is a victim survivor of child sexual abuse;[159]
- remorse;[160]
- rehabilitation efforts or willingness to engage in rehabilitation;[161]
- impact of childhood trauma and disadvantage;[162]
- where a person's time in prison will be more onerous[163] – for example, due to significant health conditions;[164] and

151 Ibid referring to the principles in *Verdins* (n 17); *Tsiaras* (n 17). See also *R v Sproutt; Ex parte A-G (Qld)* [2019] QCA 116, [42] (Sofronoff P, Gotterson JA and Henry J agreeing); *R v FAS* [2019] QCA 113 [134] (Ryan J, Fraser and Morrison JJA agreeing); *R v Burge* [2004] QCA 161, 18 (McMurdo P, Mullin J and Jerrard JA given separate reasons for judgment, each concurring as to the orders made); *R v Miller* [2022] QCA 249.

152 *R v Shales* [2005] QCA 192, 9 (de Jersey CJ, McPherson and Keane JJA agreeing).

153 PSA (n 4) s 13. The weight attributed to a plea of guilty is discussed in Chapter 15.

154 *R v Smith* (n 59) 30 [49] (Morrison JA, Holmes CJ and McMurdo JA agreeing); *Wallace* (n 80), 6 [19] (Bowskill CJ and Bond JA agreeing).

155 PSA (n 4) ss 9(2)(f), (3)(h), (6)(h); *Ryan v The Queen* (2001) 206 CLR 267 ('*Ryan*'). For a sexual offence to a child under 16 years, the court must not have regard to the person's good character if it assisted the person to commit the offence: PSA (n 4) s 9(6A).

156 *Wallace* (n 80) 6 [19] (Bowskill CJ and Bond JA agreeing); *Newman* (n 123), 8 [44] (Williams JA and White J agreeing).

157 PSA (n 4) s 9(2)(i); *Smith* (n 59) 10 [49] (Morrison JA, Holmes CJ and McMurdo JA agreeing). PSA (n 4) ss 13A–13B. See also *R v WBT* [2022] QCA 215 [30] (McMurdo and Flanagan JJA and Freeburn J); *R v LAT* [2021] QCA 104 [12] (McMurdo JA, Morrison JA and Burns J agreeing).

158 PSA (n 4) s 9(10B). This was introduced in the *Domestic and Family Violence Protection (Combatting Coercive Control) and Other Legislation Amendment Act 2023*, which commenced 23 February 2023.

159 Generally, there needs to be evidence as to the causal connection between the offending being sentenced and an offender's own victimisation: *R v MBY* (n 51) [74]–[75] (Morrison JA, Muir JA and Daubney J agreeing).

160 PSA (n 4) ss 9(2)(g), (6)(i); *Smith* (n 59) 10 [49] (Morrison JA, Holmes CJ and McMurdo JA agreeing).

161 *R v D'Arcy* [2001] QCA 325 [167] ('*D'Arcy*').

162 *R v KU; Ex parte A-G (Qld) (No 2)* [2011] 1 Qd R 439, 476–77 [133], [140], 480 [149] (de Jersey CJ, McMurdo P and Keane JA agreeing); *Wallace* (n 154) 6 [19] (Bowskill CJ and Bond JA agreeing); *MBY* (n 51) 13–17 [60]–[76] (Morrison JA, Muir JA and Daubney J agreeing) citing *Bugmy v The Queen* [2013] HCA 37 ('*Bugmy*') and *Munda v Western Australia* [2013] HCA 38.

163 See *R v O'Sullivan; Ex parte A-G (Qld); R v Lee; Ex parte A-G (Qld)* (2019) 3 QR 196 [156] (Sofronoff P, Gotterson JA and Lyons SJA); *R v Males* [2007] VSCA 302 [51]: 'Counsel will need to make clear to the sentencing court how the particular protection regime is said to make the offender's experience of imprisonment harsher than it would be if those conditions had not been imposed.'

164 See *D'Arcy* (n 161) citing *R v Pope* [32] QCA 318; CA No 271 of 1996, 30 August 1996.

- cognitive impairment and/or mental illness;[165] particularly if this was causal to the offending. it will reduce a person's moral culpability (blameworthiness).[166]

6.4 What other jurisdictions do

6.4.1 The legal frameworks used to assess offence seriousness are similar to those used in Queensland

The approach in other jurisdictions generally involves a mix of legislative guidance and case law guidance. Some jurisdictions have created legislative circumstances of aggravation, statutory aggravating factors, sentencing guidelines and formal guideline judgments. These different types of guidance, and the Council's recommendations regarding reforms in Queensland, are discussed in **Chapters 8 and 10**.

In New South Wales, for example, judicial officers must assess the objective seriousness of an offence by identifying factors relevant to the 'nature of the offending' and where that offending falls in the range of conduct covered by the offence.[167] When assessing the objective seriousness, the following factors are considered relevant:

- the offending conduct (for example, for sexual assault involving non-consensual sexual intercourse, the range of acts that can constitute 'sexual intercourse' as defined);
- the offender's mental state (or fault element) when they committed the offence; and
- the consequences of the offending (the harm).

There is debate about whether matters personal to the perpetrator should form part of the 'nature of the offending', and therefore should be considered when assessing objective seriousness.[168] In New South Wales, the distinction between objective factors and matters going to culpability only matters where this is important to the operation of the standard non-parole period scheme.[169] The standard non-parole period represents the non-parole period for an offence 'that, taking into account only the objective factors affecting the relative seriousness of that offence, is in the middle of the range of seriousness.[170]

The NSW Court of Criminal Appeal ('NSWCCA') has said some personal factors may, in some circumstances, be relevant to assessing both the objective seriousness of an offence and the moral culpability of the perpetrator.[171] These include:

- motive;
- provocation;
- non-exculpatory duress;
- the perpetrator's mental illness, mental health impairment or cognitive impairment;
- the perpetrator's age.[172]

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165 See *R v WBK* (2020) 4 QR 110, 129 [53]–[54] (Lyons SJA and Boddice J agreeing, with Fraser JA in dissent).
166 PSA (n 4) ss 9(2)(d), (f), (3)(j), (6)(g), (j); *Verdins* (n 17); *Tsiaras* (n 19); *Yarwood* (n 17).
167 *Muldrock v The Queen* (2011) 244 CLR 120 [27].
168 See *DS v R* (2022) 109 NSWLR 82 [71].
169 On the operation of the standard non-parole period scheme see Chapter 8.
170 *Crimes (Sentencing Procedure) Act 1999* (NSW) 54A(2).
171 *DS v R* (2022) 109 NSWLR 82 [96]; *Paterson v R* [2021] NSWCCA 273 [29]; *Yun v R* [2017] NSWCCA 317 [40]–[47]; *Tepania v R* [2018] NSWCCA 247 [112].
172 Ibid.

In the 2023 decision of *R v Eaton*,[173] the NSWCCA found that for a personal factor to impact the assessment of objective seriousness, there must be 'more than a simple or indirect causal connection between the relevant subjective feature of the case and the offending'.[174]

The Victorian Court of Appeal has been clear that 'the absence of … aggravating features does not mean … that his offending fell into the lower range. Their absence simply means that the offending, while grave, was not even more serious'.[175]

The Sentencing Guidelines for England and Wales set out 3 tiers of harm and 2 tiers of culpability to assist judicial officers in their assessment of seriousness for rape.[176] Harm factors include severe psychological or physical harm, pregnancy or STI as a consequence of offence, abduction, violence or threats of violence (beyond that which is inherent in the offence) and victim vulnerability. How extreme those factors are will determine whether the offence sits in categories A, B or C. Similarly, culpability factors include a significant degree of planning, abuse of trust, acting with others, previous violence against the victim, recording the offence, and whether the offence was motivated by the victim's race, religion, sexual orientation or disability. The type of rape conduct is not a factor of harm or culpability.

6.4.2 Jurisdictions categorise non-consensual sexual acts differently and maximum penalties vary

While, in Queensland, rape and sexual assault are two distinct offences capturing different forms of conduct (including sexually penetrative acts), there is no uniform approach in Australia or internationally regarding how conduct is categorised and offences are structured. The labels used for these criminal acts also differ.

Under the common law, rape was defined as carnal knowledge of a woman against her will and was confined to a narrow definition of what constituted 'sexual intercourse'.[177] As acknowledged by the Australian Law Reform Commission ('ALRC') in 2010, '[s]tatutory extensions and modifications to the common law crime of rape have been made in all Australian jurisdictions to varying degrees, but with resulting inconsistency across jurisdictions'.[178]

Rape (and its equivalents) now adopt a gender-neutral approach and generally (but not universally) involve penetration of the genitalia by a penis, object or body part (such a finger, hand or tongue), as well as penetration of the mouth by a penis. Compelling another person to take part in sexual penetration is also criminalised in several jurisdictions.

In contrast to the approach in most Australian jurisdictions, Canada has a broad offence of sexual assault that does not distinguish between penetrative and non-penetrative non-consensual sexual acts.

In Queensland, non-consenting mouth–genital contact without penetration is sexual assault under section 352(2), with a maximum penalty of 14 years. This includes where a person puts a victim's penis

173 *R v Eaton* [2023] NSWCCA 125 [49].
174 Ibid affirming the approach taken by the High Court in *Muldrock v The Queen* (2011) 244 CLR 120 and *Bugmy* (n 162).
175 *DPP v Tewksbury (a pseudonym)* 271 A Crim R 205; [2018] 38 [74] ('*Tewksbury*').
176 Sentencing Council for England and Wales, *Sentencing Guideline for Rape* (effective from 1 April 2014) and *Sentencing Guideline for Rape of a Child Under 13* (effective from 1 April 2014).
177 Australian Law Reform Commission, *Family Violence: A National Legal Response* (ALRC Report 114) [25.8].
178 Ibid.

(or testes) into their mouth without their consent. However, in the ACT,[179] New South Wales,[180] South Australia,[181] the Northern Territory[182] and Western Australia,[183] this conduct is rape (or its equivalent).

Maximum penalties, discussed in **Chapter 8**, also differ, and some jurisdictions have adopted tiered penalties structured around the presence or absence of aggravating factors.

Acts of gross indecency and indecent assaults, as for rape, are similarly categorised differently across jurisdictions and maximum penalties differ.

For more information, see section 10.2 of the **Consultation Paper: Background**.

For acts falling under the definition of rape in Queensland, the Model Criminal Code Officers Committee that led the development of work on a Model Criminal Code over the 1990s favoured the adoption of a descriptor of 'unlawful sexual penetration'.[184] The Committee also supported establishing a separate offence of compelling sexual penetration (capturing self-penetration, or forced penetration of a third person, which in Queensland fall within the aggravated (life) sexual assault provision) and 'indecent touching without consent' to capture other acts of indecent assault, again with a separate offence of compelling indecent touching.[185]

6.4.3 Case law supports the seriousness of each offence being based on its own individual circumstances, not just the type of penetration or act involved

As discussed in **Appendix 4**, the Council's analysis has found a clear 'clustering' of sentences for rape based on the different types of conduct involved (discussed further in **Chapter 7**). The same can be said for sexual assault, where distinctions are often made between 'over clothing' and 'under clothing' offences and, for acts of indecent assault, what part of the body has been touched.

Other Australian jurisdictions

In New South Wales, the Court of Criminal Appeal ('NSWCCA') has affirmed that determining the objective seriousness of an offence depends on all the circumstances of the case and is not confined to the nature of the act committed by the perpetrator. Similar to the position in Queensland, in *R v Hibberd*[186] ('*Hibberd*'), it was held that while the type of penetration 'is an important factor, it is not to be regarded as the sole consideration'.[187]

When comparing penile–vaginal and penile–anal penetration with cunnilingus or fellatio, the NSWCCA has said 'the penetration of a victim by a sexual organ derives its seriousness from a consideration of the particular circumstances of the case rather than from the nature of the sexual act itself'.[188] A similar view is held for digital penetration, with comments being made in the 2009 decision of *Hibberd* that 'there is

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179 *Crimes Act 1900* (ACT) s 50.
180 *Crimes Act 1900* (NSW) s 61HA.
181 *Criminal Law Consolidation Act 1935* (SA) s 5.
182 *Criminal Code Act 1983* (NT) sch 1 ('*Criminal Code* (NT') s 208G.
183 *Criminal Code Act Compilation Act 1913* (WA) ('*Criminal Code* (WA)') s 319.
184 Model Criminal Code Officers Committee of the Standing Committee of Attorneys-General, *Model Criminal Code – Chapter 5: Sexual Offences Against the Person Report* (May 1999). Queensland was not represented on the Committee.
185 Ibid.
186 (2009) 194 A Crim R 1.
187 *R v Hibberd* (2009) 194 A Crim R 1 [56] ('*Hibberd*').
188 *R v Andrews* [2001] NSWCCA 428 [6]. Although this was a two-judge bench decision it was cited with approval and applied in *R v Hajeid* [2005] NSWCCA 262 [52]; *R v MS* [2005] NSWCCA 322 [16] and *R v Sanoussi* [2005] NSWCCA 323 [32].

no canon of law which mandates a finding that digital penetration *must* be considered less serious than other non-consensual acts of sexual intercourse'.[189] Tobias JA said the law in support of non-consensual sexual intercourse by digital penetration being viewed as being generally less serious than an offence of penile penetration, should change:

> The time has come for this Court to depart from any prima facia assumption, let alone general proposition, that digital sexual intercourse is regarded as less serious than penile sexual intercourse … [T]he objective seriousness of the offence is wholly dependent on the facts and circumstances of a particular case …[190]

In *R v Shannon*,[191] Howie J of the NSWCCA said that penile penetration of a young child is 'the most serious form of sexual assault for the obvious reason that it is the most likely to result in physical injury to the child'.[192]

The NSWCCA has noted that 'the duration of offending is no measure of its seriousness' and that 'sexual offences of allegedly short duration, minutes, rather than hours, can have lifelong effects'.[193]

Support has been given by the South Australian Court of Appeal to the position that 'there is no hierarchy of sexual penetration and the seriousness of every offence must be determined according to its own individual circumstances',[194] with similar statements made by the Victorian Court of Appeal[195] and the Western Australian Supreme Court of Appeal ('WASCA').[196]

For example, regarding 'the proposition that penile–vaginal penetration without consent is more serious criminal conduct, irrespective of any aggravating factors, than digital–vaginal sexual penetration without consent', Chief Justice Quinlan of the WASCA said in *Musgrave v The State of Western Australia*:

> That proposition is not only wrong, as a matter of law. It is incoherent.
>
> The proposition is wrong because, as this Court has repeatedly confirmed, there is no hierarchy of sexual penetration. The seriousness of every offence of unlawful sexual penetration must be determined by its own individual circumstances. Statements to the effect that digital penetration is 'ordinarily less serious or that penile penetration is 'often' perceived by the victim as a more serious affront to personal dignity, are not statements concerning the inherent seriousness of one form of unlawful penetration compared to others. They are statements describing, and explaining, variations in sentences imposed in the particular circumstances of previous cases. They do not express a principle and cannot be applied so as to suggest some *a priori* starting point for a sentencing court that is called upon to sentence a particular offender, for a particular offence against a particular victim.
>
> … Other than in the pages of the *Criminal Code*, sexual offences do not exist in the abstract. They are always, and in every case, a violation by one (or more than one) human being of another human being. And the impacts that such violations have on each individual victim are as many and varied as the individual experiences of victims themselves. To suggest that 'all things being equal' one form of violation is inherently more serious than the other is incoherent because, when it comes to such matters, 'all things are never equal'.[197]

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189 *Hibberd* (n 187) [56] (emphasis in original) cited with approval in *Musgrave v The State of Western Australia* [2021] WASCA [82].
190 *Hibberd* (n 187). This was a dissenting position.
191 *R v Shannon* [2006] NSWCCA 39.
192 Ibid 37.
193 *R v Jackson* [2024] NSWCCA 156 [53] referring to *R v Gavel* (2014) 239 A Crim R 469, [110], as cited in *Kelly v R* NSWCCA 189, [33].
194 *Baxter (a pseudonym) v The King* [2024] SASCA [42].
195 Judicial College of Victoria, *Victorian Sentencing Manual*, 335 ('*Victorian Sentencing Manual*') citing *R v Lomax* [1998] 1 VR 551, 558–9; *DPP (Vic) v Tewksbury* 271 A Crim R 205, 220 [67]; *DPP (Vic) v Elfata* [2019] VSCA 63, [36]. See also *DPP (Vic) v Mokhtari* [2020] VSCA 16, [41].
196 *Musgrave v The State of Western Australia* [2021] WASCA 67, 6–7 [5]–[8] (Quinlan CJ) and 73 [283] (Pritchard JA) ('*Musgrave*'); *The State of Western Australia v Perieira* [2023] WASCA 162, [45] (Buss P, Mazza JA and Vandongen JA agreeing); *The State of Western Australia v HNU* [2023] WASCA 6, [74] ('*HNU*').
197 *Musgrave* (n 196) [5]–[8] (Quinlan CJ).

In the same judgment, Buss P stated:

> It is impossible to create a hierarchy of the seriousness of the several categories of sexual penetration within the offence created by s 325(1). The facts and circumstances of each particular case determine the seriousness of the offence … the absence of any hierarchy of sexual penetration means that some forms of penetration cannot, in any and all circumstances, be considered less seriousness than others. That is, there can be no general assumption that some forms of penetration are intrinsically less serious than other forms of penetration.[198]

In the *State of Western Australia v Tumata*,[199] a case that involved 3 men repeatedly perpetrating physical and sexual violence against another prison inmate over a 2-week period, the WASCA found that the most serious form of penetration of those charged was using a broom handle to penetrate the victim survivor's anus[200] and the seriousness of all the rape offences[201] 'was heightened because they occurred in the context of the ongoing extortion of [the victim survivor], as well as the threats, assaults, causing bodily harm and aggravated indecent assaults perpetrated against him'.[202]

In a decision of the Victorian Court of Appeal, *Forbes (a pseudonym) v The Queen*,[203] the appellant argued it was an error that the digital–vaginal rape was given the same sentence (7 years) as the penile–anal rapes and that this 'invited scrutiny'.[204] The Court found the sentence imposed on the digital–vaginal rape was within the range of sentencing options, as it 'was perpetrated in the victim's own home, after she had attempted to flee from the applicant's violent attacks, whilst she was unconscious as a result of further assault upon her with her sleeping child close by, by her former domestic partner'.[205] The Court further rejected the argument that the sentence on one of the penile–anal rapes (considered to be the most serious by the sentencing judge) 'in some ways supports an argument that the sentence on [the digital-vaginal rape] is manifestly excessive'.[206] When comparing the relevant circumstances, the Court concluded that 'the sentence on [the penile–anal rape] was “merciful” rather than that the sentence on [the digital–vaginal] rape was excessive'.[207]

The Victorian Court has also noted that offending will be more serious where there are successive rapes (either over time or during a single course of offending):

> The repetition of the sexual abuse likely to heighten the victim's fear that the abuse will occur again, and to increase the damage which or she suffers. Equally the repetition is likely to make the offender progressively more aware of the effect the abuse is having on the victim. In each of these respects, culpability is heighted.[208]

New Zealand

The guideline judgment of the New Zealand Court of Appeal in *AM v The Queen*,[209] referring to previous decisions of that Court, noted that all forms of sexual violation (including rape and other forms of sexual connection) under the *Crimes Act 1961* carried the same maximum penalty of 20 years and that 'an approach which treats these forms of violation as broadly similar in the sentencing context is consistent

198 Ibid [126]–[127] (Buss P).
199 [2022] WASCA 161 ('*Tumata*').
200 Ibid, [135] (Mazza and Vaughan JJA, Quinlan CJ agreeing).
201 This offence is called 'sexual penetration without consent' in Western Australia: *Criminal Code* (WA) s 325. The definition of 'sexual penetration', however, is broader than conduct classified as acts of 'rape' in Queensland and includes acts of cunnilingus or fellatio: ibid s 319 (definition of 'to sexually penetrate').
202 Ibid [120].
203 [2018] VSCA 341 (Ferguson CJ, Whelan JA, Macaulay AJA agreeing) ('Forbes').
204 Ibid [30].
205 Ibid [37].
206 Ibid [38].
207 Ibid.
208 *DPP v DDJ* [2009] VSCA 115 [32].
209 *AM v The Queen* [2010] 2 NZLR 750 ('*AM*').

with the purpose of the rape law reforms'.[210] This recognised that 'any act of sexual violation involves … "an act of violation to the body of another involving at the very least an invasion of privacy and loss of personal dignity"'.[211] The Court referred to the approach under the UK guidelines that applied the same starting points to all non-consensual penetration on the basis that, 'It is impossible to say that any one form of non-consensual penetration is inherently a more serious violation of the victim's sexual autonomy than another'.[212] However, it did suggest that 'seriousness increases as the degree of violation increases, for example, use of a finger as opposed to a fist',[213] and distinctions were made in setting the bands between sexual violation where the lead offence is rape, penile penetration of the mouth or anus, or violation involving objects and other forms of sexual connection.

Canada

Speaking of the offence of sexual assault in the context of offending against children, the Canadian Supreme Court in *R v Friesen* ('*Friesen*'), in relation to the type of conduct involved, said:

> Courts should not assume that there is any clear correlation between the type of physical act and the harm to the victim … an excessive focus on the physical act can lead courts to under-emphasise the emotional and psychological harm to the victim that all forms of sexual violence can cause…the modern understanding of sexual offences requires greater emphasis on these forms of psychological and emotional harm, rather than only on bodily integrity.[214]

> It is an error to understand the degree of physical interference factor in terms of a type of hierarchy of physical acts. The type of physical act can be a relevant factor to determine the degree of physical interference. However, courts have at times spoken of the degree of physical interference as a type of ladder of physical acts with touching and masturbation at the least wrongful end of the scale, fellatio and cunnilingus in the mid-range, and penile penetration at the most wrongful end of the scale. This is an error – there is no type of hierarchy of physical acts for the purposes of determining the degree of physical interference … physical acts such as digital penetration and fellatio can be just as serious a violation of the victim's bodily integrity as penile penetration.[215]

6.4.4 Sexual offences against children are viewed as being more serious than offences against adults

There is significant case law in Australian and the jurisdictions examined to support the view that sexual offences against children are more serious than the same types of offences committed against adult victim survivors.

As acknowledged by Kirby J in *Ryan v The Queen*:[216]

> Courts must uphold the law which treats sexual offences against children and young persons as extremely serious crimes, particularly where (as is often the case) such offences involve breaches of trust and responsibility on the part of those who had such young persons in their care.[217]

In this context, the sentencing purposes of denunciation, deterrence and community protection assume particular importance in the context of the profound and ongoing impacts of this offending on children.

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210 Ibid 769 [68].
211 Ibid citing *R v Accused* (CA 265/88).
212 Ibid 769 [69] citing the UK Guidelines.
213 Ibid 766 [52]. Also mentioned by the court under the heading of 'degree of violation' was whether this involves 'very brief penetration as opposed to a lengthy assault', with the Court also commenting 'the more force involved in the actual violation the more serious the offending will be'.
214 *R v Friesen* [2020] 1 S.C.R [142] 500 ('*Friesen*').
215 Ibid [146] 502.
216 *Ryan v The Queen* (n 155).
217 Ibid 302 [117].

In the 2011 Canadian decision of *R v Woodward*,[218] the Court of Appeal for Ontario stated:

> When trial judges are sentencing adult sexual predators who have exploited innocent children, the focus of the sentencing hearing should be on the harm caused to the child by the offender's conduct and the life-altering consequences that can and often do flow from it. While the effects of a conviction on the offender and the offender's prospects for rehabilitation will always warrant consideration, the objectives of denunciation, deterrence and the need to separate sexual predators from society for society's well-being and the well-being of our children must take precedence.[219]

Further commenting:

> Three … consequences are well-recognised (i) Children often suffer immediate physical and psychological harm; (ii) children who have been sexually abused may never be able, as an adult, to form a loving, caring relationship with another adult; (iii) and children who have been sexual abused are prone to becoming abusers themselves when they reach adulthood.[220]

The NSWCCA has recognised that sexual abuse of children may have a 'profound and deleterious effect … upon victims for many years, if not the whole of their lives'[221] and 'will inevitably give rise to psychological damage'.[222] Even 'a single act of sexual abuse may have a substantial impact upon the psychological state of a young victim, with the likelihood of long-term adverse consequences'.[223]

In *R v MJR*,[224] a 2002 decision of the NSWCCA, Mason P stated there has been a pattern of increasing sentences for sexual offences against children and that this 'has come about in response to the greater understanding about the long-term effects of child sexual abuse and incest; as well as by a considered judicial response to changing community attitudes to these crimes'.[225]

Similar strong statements have been made by the Victorian Court of Appeal, which has determined that Victorian law has set 'an absolute prohibition on sexual activity with a child' for 2 purposes:

> The first is to protect children from the harms caused by premature sexual activity and - to that end - protect them from their own immaturity. On behalf of the community, Parliament has decided that those under 16 cannot meaningfully consent to sexual activity, even if subjectively attracted to the idea of participating in such activity. Secondly - and in order to advance a protective purpose - the prohibition is designed to deter those who might contemplate sexual activity with a person under 16.[226]

The Court examined similar decisions by Australian and international appellate courts, and found their conclusions aligned with other jurisdictions, including Queensland.[227] For example, the Court referred to statements by Baroness Hale of Richmond of the 'long term and serious harm, both physical and psychological, which premature sexual activity can do'.[228]

The Victorian Court of Appeal has emphasised 'the importance of general deterrence and protection of the community in relation to sexual offences against children'.[229]

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218 *R v Woodward* 2011 ONCA 610.
219 Ibid [76].
220 Ibid [72] referring to principles established in the earlier decision of *R v D* [2002] OJ No 1061 (QL).
221 *R v CMB* [2014] NSWCCA 5 [92], (Ward JA, Harrison and R A Hulme JJ agreeing).
222 *SW v R* [2013] NSWCCA 255 [52].
223 Ibid [52] referring to *RR v R* [2011] NSWCCA 2235 [147].
224 (2002) 54 NSWLR 368.
225 Ibid [57].
226 *Clarkson v The Queen* [2011] VSCA 157, 11 [26] (Maxwell ACJ, Nettle, Neave, Redlich and Harper JJA agreeing).
227 Ibid 24 [63].
228 Ibid 13 [32] referring to *R v G* [2009] 1 AC 92 (Baroness Hale).
229 *Tewksbury* (n 175) [82] referring to *DPP v Garside* (2016) 50 VR 800, 810[25] and 820–21 [71] and *Meharry* [2017] VSCA 387 [166], [199].

In 2017, the High Court decision in *Director of Public Prosecutions v Dalgliesh (a pseudonym)*[230] made it clear that sentencing judges and intermediate appellate courts should not consider themselves constrained by current sentencing practice to impose a sentence they consider to be inadequate in the particular circumstances. The High Court concluded that current sentencing practices were 'one factor and not the controlling factor in the fixing of a just sentence'[231] and the case was returned to the Victorian Court of Appeal and resentenced.[232]

In effect, the Court of Appeal's and High Court's decisions in these proceedings collectively meant that sentences for incest in Victoria not only should increase to better acknowledge the seriousness of this type of offending and better accord with community expectations, but should do so immediately, not incrementally.

In 2020, the Supreme Court of Canada handed down its landmark decision of *R v Friesen*[233] ('*Friesen*'), which determined that Canadian courts should impose higher sentences for sexual violence offences committed against children.

Friesen has been referred to with approval by the South Australian Court of Appeal, including by Chief Justice Kourakis in the 2023 decision of *R v Lian*.[234] His Honour included relevant passages from the Canadian Supreme Court decision of *Friesen* and findings from the Final Report of the Royal Commission into Institutional Response to Child Sexual Abuse on the impact of sexual offending on children. He encouraged 'all sentencing judges to familiarise themselves with the content of those materials'.[235]

Some of the main aspects of *Friesen* were extracted in *Lian* and included in an appendix to that case.[236] A summary is provided below:

Personal autonomy, bodily integrity, sexual integrity, dignity and equality

- 'The prime interests that the legislative scheme of sexual offences against children protect are the personal autonomy, bodily integrity, sexual integrity, dignity, and equality of children.'
- Emotional and psychological 'forms of harm are particularly pronounced for children. Sexual violence can interfere with children's self-fulfilment and healthy and autonomous development to adulthood precisely because children are still developing and learning the skills and qualities to overcome adversity.'
- 'Sexual violence causes additional harm to children by damaging their relationships with their families and caregivers.'
- 'The ripple effects can cause children to experience damage to their other social relationships.'

Harms to families, communities and society

- 'The Criminal Code recognizes that the harm flowing from an offence is not limited to the direct victim against whom the offence was committed.'

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230 *Dalgliesh* (n 51).
231 Ibid [68] (Kiefel CJ, Bell and Keane JJ). See also [78]–[79], [82] (Gageler and Gordon JJ).
232 *DPP v Dalgliesh (a pseudonym)* [2017] VSCA 360.
233 *Friesen* (n 214).
234 *R v Lian* [2023] SASCA 122 ('*Lian*'). See also *R v Harris* [2023] SASCA 129; *R v Bradley* [2024] SASCA 56; and *R v Beaumont* [2023] SASCA 128.
235 *Lian* (n 234) [99].
236 Ibid 'Appendix A – Extracts from *The Queen v Friesen* [2020] 1 S.C.R. 424 (Supreme Court of Canada)'.

- 'The ripple effects of sexual violence against children can make the child's parents, caregivers, and family members secondary victims who also suffer profound harm as a result of the offence.'
- 'Beyond the harm to families and caregivers, there is broader harm to the communities in which children live and to society as a whole.'

Wrongfulness of exploiting children's weaker position in society

- 'The protection of children is one of the most fundamental values of Canadian society. Sexual violence against children is especially wrongful because it turns this value on its head.'
- 'Children are most vulnerable and at risk at home and among those they trust.'

Degree of responsibility of the offender

- 'Courts must also take the modern recognition of the wrongfulness and harmfulness of sexual violence against children into account when determining the offender's degree of responsibility. They must not discount offenders' degree of responsibility by relying on stereotypes that minimize the harmfulness or wrongfulness of sexual violence against children.'
- 'Intentionally applying force of a sexual nature to a child is highly morally blameworthy because the offender is or ought to be aware that this action can profoundly harm the child.'
- 'All forms of sexual violence, including sexual violence against adults, are morally blameworthy precisely because they involve the wrongful exploitation of the victim by the offender – the offender is treating the victim as an object and disregarding the victim's human dignity.'
- 'The fact that the victim is a child increases the offender's degree of responsibility. Put simply, the intentional sexual exploitation and objectification of children is highly morally blameworthy because children are so vulnerable.'[237]

In the same decision, Kourakis CJ observed:

> it has long been accepted that sentences for sexual offending against children must be calculated to protect children, who are by reason of their age, naïve and vulnerable from the predations of adults. Children are easily influenced and have only a limited understanding of the nature, consequences and, in particular, risks of sexual relationships with adults.
>
> ... the need for general deterrence in order to protect children is not limited to paedophiles. It is not limited to offenders who have developed settled criminal habits. It applies to all people who commit sexual offences against children. [238]

His Honour further noted that there must be a 'proportionate relationship' between offenders in 'formal or informal positions of trust' and those 'who do not occupy these positions' when sentencing sexual offences against children, stating:

> Sentences for all offending against children will necessarily be fixed at a point along a continuum of sentences calibrated to reflect the particular offences, and the applicable maximum penalty, and the aggravating and mitigating circumstances of each case.[239]

In another South Australian decision of *R v Bradley*,[240] reference was made by the Court to submissions made by the Director of Public Prosecutions citing other relevant passages in *Friesen*, including to counter

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237 Ibid.
238 Ibid [99], [107] (Kourakis CJ, Lovell and Doyle JJ agreeing).
239 Ibid [103].
240 *R v Bradley* (n 234).

views that a child's non-resistance to sexual offending constitutes 'de facto consent' and referring to the element of grooming often involved in this form of offending.[241]

In *R v Beaumont*,[242] the South Australian Court of Appeal noted the studies and research referred to in *Friesen* and made by the Royal Commission into Institutional Responses to Child Sexual Abuse, finding that they:

> demonstrate that a number of assumptions often made require care if not reconsideration. These include assumptions to the effect that children may not be at significant risk of psychological harm where the offending does not involve what might be thought more serious, invasive physical contact by an offender.[243]

The South Australian Court of Appeal has further found 'the significant, lifelong emotional and psychological harm caused to victims can be inferred without direct evidence'.[244]

6.4.5 Relationship and context between victim survivor and offender

Several jurisdictions now recognise that offences occurring in the context of a pre-existing relationship may be just as serious and harmful as those committed against a stranger.

In Victoria, the 'existence of a relationship between the offender and the victim may be relevant in assessing the gravity of the offending'.[245] On the one hand, offending in a domestic context 'can never be mitigating and may be aggravating, particularly in cases of family violence, rape[246] or other sexual offending'.[247] On the other, 'the absence of any relationship may be significant, and offending against an "innocent stranger" is a serious offence'.[248] However, 'there is no rule that a rape committed by a partner or former partner is intrinsically more or less serious than one committed by a stranger'.[249]

The NSWCCA has determined that a pre-existing relationship between an offender and a victim does not mitigate the criminality of the rape; however, seriousness may be diminished where it 'suggests some prevarication or at least initial consent on the part of the victim'.[250] The NSWCCA has contrasted those circumstances with rape committed by a stranger, observing that the latter would have 'a further element of terror and fear'.[251] However, 'the fact that [rape] occurred in a domestic context (as distinct from an attack by a stranger) does not lessen their gravity'.[252]

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241 Ibid [42] citing *Friesen* [150]–[151], [153]–[154].
242 *R v Beaumont* (n 234).
243 Ibid [48].
244 *Warner v The King* [2022] SASCA 142 [76].
245 *Victorian Sentencing Manual* (n 195) 84.
246 *Forbes* (n 203) [42] 'the context of domestic violence is also very important'.
247 *Victorian Sentencing Manual* (n 195) 84 (references omitted).
248 Ibid.
249 Ibid 341 citing *Mason* (n 108) [7], *Shrestha v The Queen* [2017] VSCA 364 (11 December 2017) [17] and *DPP (Vic) v MacArthur* [2019] VSCA 71 [65], [75].
250 *R v Cortese* [2013] NSWCCA 148 [55] (Beech-Jones J, Hoeben CJ and Harrison J agreeing). See also, *Bellchambers v R* [2011] NSWCCA 131 [47]; *NM v R* [2012] NSWCCA 215 [59].
251 *ZZ v R* [2013] NSWCCA 83 [103].
252 Ibid [104] citing *Heine v R* [2008] NSWCCA 61 [40].

6.4.6 The use of additional violence is aggravating, but the fact that no additional violence is used cannot support an argument the harm caused was not significant

The Victorian Court of Appeal has stated that 'the absence of force or violence' in sexual violence matters does 'not in any relevant sense “mitigate” the offending'.[253] Rather, when additional violence, coercion or force is required to ensure a victim survivor engages in sexual activity then a 'significant aggravating factor' is present.[254] Similar remarks have been made by the WASCA.[255]

The Victorian Court of Appeal also has said:

> The very act of rape is inherently serious, simply by virtue of the invasion of the victim’s bodily integrity without consent. It is, quite simply, an act of violence, whether or not accompanied by other violent conduct. The violation is physical, emotional and psychological. It follows that, aggravating features apart, all acts of non-consensual penetration are objectively serious, irrespective of the form and the extent of the penetration.[256]

In *Dalgleish (No. 1)*, the Court of Appeal 'emphatically rejected' the assertion there was no violence accompanying the incest offending, along with 'the associated implication that no harm was really done to the victim'.[257] Referring to the Victorian Sentencing Advisory's Council's report on *Sentencing of Offenders: Sexual Penetration with a Child Under 12*, the Court said, '[S]uch arguments rest on a serious misconception about the nature of a sexual abuse of a child.’[258]

Similarly, in the context of sexual offending against children, the Supreme Court of Canada has said:

> We would emphasize that courts should reject the belief that there is no serious harm to children in the absence of additional physical violence. As we have explained, any manner of physical sexual contact between an adult and a child is inherently violent and has the potential to cause harm.[259]
>
> The fact that additional forms of violence such as weapons, intimidation, and additional physical assault may not be present does not provide a basis to ignore the inherent violence of sexual offences against children[260]

6.4.7 There is some recognition that attitudes to women and other vulnerable groups may be relevant to assessing culpability and risk of reoffending

While the Canadian case of *Friesen* was concerned with sexual violence offending against children, the Court also took the opportunity to comment on other matters, including the relevance of evidence that the person sentenced has misogynistic attitudes and beliefs. The Court commented that 'we do emphasize that judges should be attentive to evidence of an offender’s misogynistic attitudes. Such attitudes may have a significant bearing on, among other factors, moral blameworthiness, insight and likelihood to reoffend.'[261]

While there is no legislative recognition of specific attitudes and beliefs as an aggravating feature in Queensland, a new aggravating factor has been introduced that applies to some offences in circumstances where the offence was motivated by hatred or serious contempt for a person or group of

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253 *Clarkson v The Queen* [2011] VSCA 157, 29 [80] (Maxwell ACJ, Nettle, Neave, Redlich and Harper JJA agreeing).
254 Ibid.
255 See *Tumata* (n 199).
256 *DPP (Vic) v Mokhtari* [2020] VSCA 161 [41] (Maxwell P, Beach JA and Weinberg JA).
257 *DPP v Dalgleish (a pseudonym)* [2017] VSCA 148 [45].
258 Ibid [46].
259 *Friesen* (n 214) [82] (citations omitted).
260 Ibid [152].
261 Ibid [180].

person in relation to race, religion, sexuality, sex characteristics or gender identity.[262] These reforms, when legislated, were not extended to the offence of sexual assault or other sexual offences.

6.5 Council findings on how Queensland courts determine offence seriousness

The High Court has affirmed transparency of sentencing is important and that 'accessible reasoning is necessary in the interests of victims, of the parties, appeal courts and the public'.[263]

A key source of information about how courts assess seriousness is their sentencing remarks, which are the official record of how the sentencing court determined the seriousness of the offence and its reasons for sentence.

In **Appendix 6**, we report on our findings in detail based on our review of a sample of sentencing remarks regarding how courts approach sentencing for rape and sexual assault, including in determining offence seriousness.

In this section, we discuss relevant high-level findings relating to recognition of offence seriousness, together with the reflections of our subject matter expert interview participants on what factors or case characteristics make one example of rape or sexual assault more serious than another.

6.5.1 Recognition of offence seriousness for rape and sexual assault

Sentencing remarks analysis

The Council's thematic analysis of a sample of sentencing remarks highlighted a number of aspects relevant to offence seriousness – see **Appendix 6** for more information.

Judges and magistrates regularly recognised that sexual assault and rape offences were inherently serious. The following comments are illustrative of the types of remarks made with respect to rape:

> The matter is obviously serious. Any case of rape is serious. (Rape, major city, imprisonment < 5 years, #19)

> Your offending is particularly serious. The offences of rape that you committed each carry a maximum penalty of life imprisonment. That should indicate to you how very seriously our Parliament considers this sort of offending. (Rape, major city, imprisonment > 5 years, #5)

> Your offending is particularly serious. The offences of rape that you committed each carry a maximum penalty of life imprisonment. That should indicate to you how very seriously our Parliament considers this sort of offending. (Rape, major city, imprisonment > 5 years, #5)

The same types of observations were made when sentencing for sexual assault:

> All cases of sexual assault are serious… (Sexual assault, regional/remote, higher courts, custodial, #4)

> But be under no misapprehension, [perpetrator]. Your offending was serious. It has caused no doubt irreparable harm to each of the complainants. (Sexual assault, regional/remote, higher courts, custodial, #5)

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262 *Criminal Code* (Qld) s 52B inserted by *Criminal Code (Serious Vilification and Hate Crimes) and Other Legislation Amendment Act 2023* (Qld) pt 3. This part commenced on 29 April 2024: *Proclamation No 2 – Criminal Code (Serious Vilification and Hate Crimes) and Other Legislation Amendment Act 2023* (Qld) SL 193/2023.

263 *Markarian* (n 39) [39] (Gleeson CJ, Gummow, Hayne and Callinan J agreeing).

> The offences that you have committed are each serious ones. They involve, to some extent or another, violence and the violation of another person's body. The offences of sexual assault are, in my view, the more serious of the offences that I am dealing with... (Sexual assault, major city, higher courts, custodial, #12)

Aggravated sexual assaults were considered even more so:

> That is exacerbated by the fact that your offending against [victim survivor] was repetitive and continuous over a number of years and, further, that it escalated to the offence of oral sex, which was count 2 on the indictment. It is more seriously regarded by Parliament, having a maximum penalty of 14 years imprisonment, and should be regarded more seriously in the sentencing process. (Sexual assault, major city, higher courts, custodial, #2)

The Council's analysis found that judicial officers most commonly identified victim vulnerability when assessing offence seriousness in sentencing remarks. Judicial officers often focused on the impact of the offending on the victim survivor, particularly if there were circumstances that made the victim survivor vulnerable when assessing the offence seriousness. In these cases, the additional factor of the offending involving a breach of trust/abuse of power was often present.

The following comments were made in the context of sentencing for rape, one of which involved a separate offence of sexual assault:

> I think you know by now that your behaviour was very serious. This was a terrible breach of trust when you were in a position of power over that young girl. You subjected her to vile, degrading sexual assault and oral rape, and caused her significant ongoing distress. (Rape, major city, imprisonment < 5 years, #11)

> This is extremely serious and concerning criminal offending. You brazenly abused your position as guardian of your 11 or 12 year old stepdaughter, someone who is entitled to feel safe and protected in your presence. These are heinous acts that have had a devastating consequence, unsurprisingly, on this young woman, who, despite telling someone at the time, was not believed. Unsurprisingly, too, this offending has torn apart the family. (Rape, major city, imprisonment < 5 years, #23)

> To offend in a sexual way against your own daughter who was so young within the sanctity of her own home when she was so vulnerable, by reason not only of her age but by reason of you being the only other person in the house and being her father, is reprehensible... (Rape, major city, imprisonment < 5 years, #22)

Sentencers also identified sexual assaults committed against a vulnerable victim survivor, including one who was sleeping, as being more serious on this basis – for example:

> It has always been viewed extremely seriously, any sort of sexual assault, but particularly despicable when it is a woman who is asleep or unconscious. (Sexual assault, major city, higher courts, custodial, #13)

The potential of language used to minimise offence seriousness

There has been a growing focus on the importance of language in the context of criminal proceedings, including sentencing. Some academics have explored, for example, how psychological explanations for behaviour and causal attributions may transform deliberate acts of sexual violence into acts that are non-deliberate and non-violent.[264]

The Council found some examples of problematic language being used in the way sexual assault and rape conduct was described in sentencing for rape and sexual assault that could risk minimising the seriousness of this conduct, including:

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264 See, for example, Linda Coates and Allan Wade 'Telling it like it isn't: Obscuring perpetrator responsibility for violent crime' (2004) 15(5) *Discourse and Society* 499.

- Not fitting words to deeds – that is, using terms to characterise conduct which are more suitable to consensual acts rather than to rape or sexual assault:
    - forced oral contact as 'kissing';[265]
    - forced vaginal penetration as ‘intercourse’ or ‘sex’;[266]
    - forced oral-genital contact/penetration as ‘oral sex’, ‘fellatio’ or ‘cunnilingus’;[267] and
    - violating physical sexual contact with a child as ‘play’ and ‘fondling’.[268]
- Using language that omitted the agency of the offender – using words which passively present the offender’s actions, such as ‘insert’ or ‘put’. This may reflect the language used in police records and victim survivor statements.

> you pulled her pants down and then you proceeded to climb on top of the complainant and insert your penis into her vagina.[269]
>
> Count 20, rape, inserting your penis into [the victim’s] vagina, which was very painful … covering her mouth, inserting your penis into her vagina.[270]
>
> You then took your pants down and put your penis inside her vagina.[271]

- Minimising the culpability of the person being sentenced and/or harm caused, by saying 'no violence was used'[272] when the victim survivor was asleep/unconscious when the offender raped them, and the use of additional violence was not necessary to perpetrate the non-consensual act.

> You committed two separate acts of rape on a sleeping woman [his partner] … I also have regard to the fact that you did not use any weapons and that there was no overt violence or, indeed, there was no application any force more than what was required to achieve penetration.[273]
>
> You violated a woman, your friend, sleeping in her own bed. I accept that it is not suggested that you were violent, and that no threats were made.[274]
>
> [Defence counsel] confirms the absence of aggravating features, such as there was no violence, no threats, no intimidation, and no force used to overcome resistance. Indeed, it seems given the state that the complainant was in [semi-conscious due to heavy intoxicated], she did not offer any resistance, but

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265 For example, ‘kissed her on her mouth and put your tongue inside her mouth’ (sexual assault, regional/remote, higher courts, custodial, #4); ’you kissed her and gently pushed her on to a bed’ (sexual assault, regional/remote, higher courts, custodial, #9); ‘hugged her from behind and kissed her on the neck’ (sexual assault, major city, lower courts, custodial, #1); ‘grabbed her with his hands on either side of her head and kissed her on the lips’ (sexual assault, major city, lower courts, non-custodial, #12)

266 For example, ‘you inserted your penis into her vagina and had sex with her until you ejaculated’ (rape, major city, imprisonment < 5 years, #12); ‘Each involve you having sexual intercourse with her while she was asleep’ (rape, major city, imprisonment < 5 years, #5).

267 See, for example, *R v LBC* [2023] QCA 178, 6 [17] and the way the respondent described the offender’s conduct and contrast the language used for the different types of rape conduct (j) ‘(ii) digital penetration of her vagina, (iv) his performing oral sex upon her, (iv) his forcing her to perform oral sex upon him and (vi) penile/vaginal rapes’).

268 ‘He then fondled the girl’s vagina (aged 8) … He then took his penis out of her mouth and had her play with it until he ejaculated’ [3]: *R v Ruiz; Ex parte Attorney-General (Qld)* [2020] QCA 72 [3] (Sofronoff P).

269 Rape, major city, imprisonment < 5 years, #15.

270 Rape, major city, imprisonment > 5 years, #19.

271 Rape, major city, imprisonment > 5 years, #17.

272 *R v Hutchinson* [2010] QCA 22 [22] (Keane JA, de Jersey CL and Douglas J agreeing). See also *Enright* (n 58) (Mullins P, Bond JA and Boddice AJA), where it was stated at [86] that: 'The sentencing judge found that the offending conduct did not involve other aggravating features such as violence, although that was not unusual in offences involving the sexual assault of a sleeping person.’

273 Rape, major city, imprisonment < 5 years, #5.

274 Rape, regional/remote, imprisonment < 5 years, #14.

> nonetheless, the point should be made that there is the absence of those aggravating features which occurs in some cases.[275]

We explore the use of language and its importance in more detail in **Chapter 15**.

Subject matter expert interviews

Several participants referred to the determination of the seriousness of offence as often involving a 'balancing exercise' for the sentencing judge. The seriousness of the offending was viewed as being case-specific and may be aggravated by one factor or a combination of factors when viewed together.[276]

For sexual assault, the nature of the assault was referred to by many interviewed as important when assessing offence seriousness [e.g. touching a person on top of clothing or under clothing (skin on skin) or other indecent assault conduct (e.g. rubbing genitals up against someone) or acts of gross indecency],[277] as well as the number of offences committed,[278] and persistence[279] whether the person was in a position of trust (including taxi and Uber drivers),[280] the age difference between the person who committed the offence and the victim survivor,[281] whether the offender had knowledge of the vulnerability of the victim survivor (for example, because of their age, background, history of previous sexual assault, abuse or neglect, level of intoxication or intellectual or physical disability)[282] and the impacts of the offending on the victim survivor (recognising that the impacts can vary considerably).[283]

Similarly, for rape, interviewees indicated that a broad range of factors impacted the assessment of the objective seriousness, including the type of rape committed, the context within which the offence occurred and various other relevant factors.

Circumstances where the victim survivor consented to sexual intercourse but did not consent to the non-use of a condom were considered less serious than circumstances where the victim survivor did not have the opportunity to communicate their non-consent at all (such as where the victim survivor was asleep or unconscious).[284] Circumstances involving a risk of pregnancy and/or contracting a sexually transmitted disease (STD) were also viewed as a 'much worse violation' than circumstances where there was no risk of this occurring.[285]

The context within which the offending occurred was also viewed as important when assessing its seriousness, with examples given including the age of the victim survivor, whether there was additional physical violence (particularly if gratuitous or protracted[286]) or threats of violence and/or a weapon used, the duration of the offending, whether it was premeditated, whether it involved the person breaking and entering the victim survivor's house at night, the nature of the relationship between the victim survivor and the person who committed the offence and the number of offenders involved. [287]

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275 Rape, regional/remote, imprisonment > 5 years, #2.
276 SME Interviews 7, 18.
277 SME Interviews 1, 9, 26.
278 SME Interview 9.
279 SME Interviews 5, 6, 12, 15, 25.
280 Ibid.
281 Ibid.
282 SME Interviews 5, 7, 9.
283 SME Interview 9.
284 SME Interview 9.
285 SME Interview 14.
286 SME Interview 22.
287 SME Interviews 3, 5, 6, 7, 8, 10, 11, 12, 13, 14, 26.

Some participants referred to opportunities to enhance understanding of legal practitioners about the harm caused by sexual violence offending.[288] One practitioner highlighted the importance of language used in the courtroom and in sentencing remarks, and said that practitioners need to be mindful of not using words that minimise or trivialise a victim survivor's experience and/or the offender's conduct.[289] The interviewee referred to comments made by Cardinal George Pell's defence barrister to describe the alleged crimes as 'no more than a plain vanilla sexual penetration case' and suggested that remarks like those were unhelpful:

> I've always said it's a real challenge … there is relativity of offending and that's fine. But this is what happened to this child. This is what happened to this particular woman. And so you don't need to characterize it anything other than this is what you did to her. That is the conduct. So I think, of course, everything is relative and comparable. But I think once you start labelling it, it undermines it to that person. And it objectively undermines it overall. So I think language is a huge thing for judicial officers. We really could learn a thing or two about particularly with sexual offenses, I think.[290]

6.5.2 The type of penetration for rape often guides assessments of offence seriousness

The Council's analysis has concluded that, despite Court of Appeal commentary, the type of penetration is used as the primary measure in determining offence seriousness. Our findings indicate that penetration is assessed on a scale, with digital and oral penetration (forced fellatio and cunnilingus) on the lower end, the use of a fist in the mid-to-high range and penile–vaginal and penile–anal penetration at the higher end of the spectrum of seriousness scale. Interviews with subject experts reinforced this view, with many practitioners viewing digital and oral rape offences as being less serious than penile–vaginal or penile–anal rape or rape with an object.[291]

As explored further in **Appendix 4**, sentencing levels for rape have remained relatively stable over the 18-year data period, with the median custodial penalty ranging between 5.0 and 6.0 years.

Although all forms of rape conduct have the same maximum penalty, our review of sentencing outcomes showed a clear difference in sentencing outcomes based on conduct type.

An analysis of rape cases sentenced between 1 July 2020 and 30 June 2023 by conduct and victim survivor age found penetrative conduct aligned with the hierarchy stated above. Median sentences were higher where the victim was a child, except for digital-vaginal rape, where the median was the same for child and adult victim survivors (3.0 years) (see Table 6.1).

Table 6.1: Median length of custodial sentences by type of rape and age of victim survivor (MSO)

Penetration type	Child victim (median)	Adult victim (median)	Total (median)
Penile–anal rape	9.0 years	6.8 years	8.0 years
Penile–vaginal rape	7.0 years	6.0 years	6.5 years
Digital–vaginal rape	3.0 years	3.0 years	3.0 years
Oral rape	4.0 years	*	4.0 years
Total	**4.8 years**	**5.5 years**	**5.0 years**

288 SME Interview 9.
289 SME Interview 11.
290 Ibid.
291 SME Interviews 6, 13, 14.

Source: Content analysis of sentencing remarks – see Chapter 4 for a description of the methodology.
Data includes matters sentenced between 2020–21 and 2022–23 (a 3-year period).
* Medians were not calculated for categories with less than 10 cases sentenced.

Sentencing remarks analysis

The thematic analysis of rape sentences examined whether judges identified types of penetration as more or less serious that another type in their remarks.

This confirmed that with respect to rape, the nature of the conduct was often considered relevant in assessing offence seriousness. For example:

> You committed two separate acts of rape on a sleeping woman, one of them involved anal penetration which I accept should be approached as a more serious act than the vaginal penetration, at least in the circumstances before me.[292]

> There were two different forms of penetration on the single occasion of sexual offending. Each of the sexual offences which I've described had particularly serious and distressing aspects to them. In particular, the penile penetration was neither shallow nor momentary but, rather, was prolonged and caused pain.[293]

> I have noted already that your offending extends beyond inappropriate touching and so involves the more serious counts of rape, which involve penetrative acts of the complainant's vagina by your fingers or forcing the complainant to perform oral sex on you. It is particularly aggravating in terms of your conduct that you ejaculated in the complainant's mouth.[294]

The Council also found examples where judicial officers used problematic language when discussing rape conduct – for example, using different language for some forms of rape conduct, which may reduce the seriousness of that conduct (e.g. using 'digital penetration' rather than digital rape and 'oral sex' rather than oral rape). Similarly, sometimes digital and oral rape were framed differently from penile rape when dealing with multiple counts of rape:

> it progressed to more invasive conduct involving digital penetration, oral sex and non-consensual penile vaginal intercourse … slid your hand under her underwear and digitally penetrated her. You then raped her.[295]

The Council notes this difference in language may reflect that until reforms in 2000, rape was defined as vaginal and anal penetration and practices of police, legal practitioners and judicial officers have not yet adjusted completely. It may also reflect broader social constructs of sexual activities that "real" rape is heterosexual penile/vaginal rape and oral and digital rape are foreplay activities, and therefore less important in the hierarchy of sexual activity. Certainly, some participants in the UniSC research referred to a 'pecking order' of sexual activity and 'the ranking of sexual behaviours by young people as "bases" suggests an incremental build up or working towards vaginal intercourse and the loss of virginity'.[296]

Sentencing submissions analysis

Given the markedly lower median sentences for digital and oral rapes for both children and adults, the Council was interested in understanding what case law practitioners use in submissions and the way in which submissions were being made for those types of offences. We wanted to know whether practitioners were applying recent Court of Appeal decisions affirming not compartmentalising

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292 Rape, major city, imprisonment < 5 years, #5.
293 Rape, major city, imprisonment > 5 years, #13.
294 Rape, regional/remote, imprisonment < 5 years, #4.
295 Rape, major city, imprisonment < 5 years, #18.
296 Dominique Moritz and Ashley Pearson and Dale Mitchell, *Community Views on Rape and Sexual Assault Sentencing: Final Report* (Sexual Violence Research and Prevention Unit, UniSC, March 2024) 39 ('*UniSC Final Report*').

penetrative conduct when recommending appropriate sentencing ranges,[297] and in the case of child victim survivors, the 2020 decision of *Stable,*[298] which recognised the Queensland Parliament's intention that sexual offences against children should be treated more seriously and that sentences should have increased following amendments in 2003 and 2010 to that effect.

The Council examined sentencing submissions for a sample of rape (MSO) cases sentenced in 2023. The methodology for this analysis is discussed in **Chapter 4**, with further information available at **Appendix 7**.

Our analysis showed that, generally, legal practitioners submit 2 or 3 cases that are factually similar to the matter being sentenced and that involve the same penetrative conduct. We found practitioners primarily relied on older cases in their submissions, with the majority of the 41 appeal cases referred to dating from between 2004 and 2014. Only 14 appeal cases referred to were from 2018 onwards.[299] We did not find any reference to *Stable*,[300] suggesting practitioners are not applying those comments to cases involving the rape of a child.

With one exception (discussed below in Case Study 2), the analysis found that appellate guidance surrounding not compartmentalising penetrative conduct was not being applied in child victim survivor cases. Related commentary in the 2020 case of *R v Smith,*[301] was discussed in 7 cases where an adult woman was the victim survivor of digital-vaginal rape. As discussed above in section 6.3.2, Morrison JA referred to remarks in *Colless* and *Wark* about rape conduct, noting that while there may be cases of digital or oral rape 'calling for punishment as great or exceeding those involving penile rape', it was accepted as a 'general proposition that penile rape will attract a higher sentence'.[302] However, none of the submissions argued for digital–vaginal rape to be sentenced as seriously as a penile–vaginal rape.

The 2 cases below illustrate current judicial commentary regarding the type of penetration and how it should impact the sentence the Council thought was problematic. The first illustrates that penile–vaginal rape is always regarded as more serious, even when it was an attempt, and the second is the only instance in the sample of cases examined where a prosecutor sought to increase the sentencing range for a penile–oral penetration of a child.

Case study 1: Rape of adult

The 57-year-old perpetrator pleaded guilty to 2 counts of vaginal rape (digital and lingual) of a 23-year-old woman with an intellectual impairment. He also attempted to rape her with his penis and sexually and indecently assaulted her. He pleaded guilty on the morning of trial, although the victim survivor had given evidence and been cross-examined via pre-recording. Both the prosecutor and defence submitted for parole eligibility at one-third. The case of *Smith* was relied upon by the prosecution (submitting for 3 years) and defence (submitting for 2.5 years). He was sentenced to a prison term of 2 years and 6 months with parole eligibility after serving 6 months. In relation to the rape conduct, the sentencing judge said:

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297 *RBG* (n 82) and *Wallace* (n 80) 5 [13] (Bowskill CJ) endorsing remarks made in *Wark* (n 67) by McMurdo P (at [2]), Mackenzie AJA (at [13]–[14]) and Cullinane J (at [36]), and also referring to remarks by Dalton JA in *RBG* (n 82) at [4] referring to *Smith* (n 59) [34]–[37] per Morrison J. Similar remarks were also made by Dalton JA in her dissenting judgment.

298 *Stable* (n 101).

299 See Appendix 5, section 5.3 for the list of cases identified in this analysis.

300 *Stable* (n 101).

301 *R v Smith* (n (n 59).

302 Ibid [35]–[37] (Morrison JA).

> [*Smith*] does provide some guidance in relation to the type of penalty to be imposed in relation to offending of this nature and whilst the offending against [the victim] was unacceptable in any way, **it is as is noted different at least to an actual rape of a penile vaginal character which would have been even more traumatic for her than is the nature of the offending perpetrated by you**. I note in that regard that *Smith*'s case specifically made reference to the *R v Colless* [2010] QCA 26 where the point was made that sentences in respect of digital rape may be expected to be less severe than other forms of rape and specific reference was made there to the considerations in relation to rape.[303]

Case study 2: Rape of child

The 42-year-old perpetrator pleaded guilty to 2 counts of oral rape of his 15- to 16-year-old son with mental health issues. The prosecutor submitted for 6 to 8 years, referring to comments in *Smith* to not to compartmentalise rape categories and *obiter* remarks by Justice Fryberg in *R v GAP* ('*GAP*') that penile-oral rape can be more serious than vaginal rape.[304] The prosecutor argued that, since the 2013 case of *GAP*, 'community attitudes towards this type of offending has hardened', to which the sentencing judge replied, 'that might be right, but I think I'm sort of more rather guided by the Court of Appeal'.[305] Defence counsel argued the aggravating features of the case were 'not uncommon', nor would they 'take this outside the realm and the scope of what's been imposed and considered by the Court of Appeal in comparable cases'. The judge agreed and sentenced the man to 4.5 years with parole eligibility after 18 months.

The Council's review suggests that there continues to be 'compartmentalisation' of rape conduct based on most submissions made – particularly given that the comparable sentences and Court of Appeal decisions referenced were invariably those that involved the same type of rape conduct being sentenced, rather than common law principles. As discussed in the second case example, on the rare occasion when a prosecutor argued that a higher range was warranted, this was not acted on by the sentencing judge, and attracted criticism by defence counsel because the prosecutor asked for a sentence that, in the defence's view, was entirely 'out of range'.

Subject matter expert interviews

This ranking of the seriousness of rape offending by penetration type was echoed by legal practitioners in the SME interviews who clearly set out sentencing ranges based on the rape conduct involved. Practitioners also recognised many contextual factors as increasing seriousness, including the age of the victim survivor (particularly if a young child), additional physical violence and whether the victim survivor was a stranger or the offence occurred in a domestic violence context or a breach of trust.[306] However, practitioners often referred to stranger scenarios, where a perpetrator attacked the victim survivor in a public place, usually using violence, as an example of a very serious rape offence.[307] However, several practitioners identified penile–vaginal and penile–anal rape as the most serious form of rape conduct:

> There's also that divide of digital and penile, anal, what the mechanism of rape is. Yeah, there's a gradation; exactly. Digital less, penile, anal, implement, more.[308] The cases say, for example, that vaginal penetration is particularly serious. They say this in the context of maintaining, in particular. And … I understand conceptually why that's so, because of, I suppose, a risk of pregnancy if you're talking about a female who's able to become pregnant. But if you're talking about sentencing in the context of a child who is between six and 12, I don't really understand why the

303 (QDC18, emphasis added).
304 *GAP* (n 74) [138].
305 (QDC22).
306 For example, SME Interviews 5, 6, 7, 13, 14, 15, 16, 19.
307 For example, SME Interviews 7, 14, 18, 22.
308 SME Interview 6.

> absence of vaginal penetration makes it a less, rather than a more serious, offence. Because I'd have thought any form of penetration, oral penetration, it's all horrendous if you're 6. If you know what I mean. But the cases squarely say that vaginal penetration makes it, you know, it's kind of worse.[309]
>
> So the sentences imposed, for example, for digital penetration rapes are significantly lower than penile penetration rapes.[310]
>
> So obviously penile rapes are going to be penile vaginal. Penile oral are considered quite significant, perhaps obviously more so to digital penetration. A vaginal or penile anal rape.[311]
>
> Kind of rape, whether it's a digital or penile rape or anal rape.[312]
>
> Nature of penetration. Penile vaginal or penile anus most serious; then penile mouth. Digital penetration lower level.[313]
>
> I think generally the penile and the anal are considered more serious than digital penetration – and this is adults we're talking about, of course … Digital penetration to a young child would be equally traumatic.[314]

Contrary to these perspectives, some SME participants thought not enough weight was being given to the objective seriousness of digital and oral rape (particularly when an offender commits penile–oral rape), with the comment: '[s]entencing outcomes do not adequately reflect the offensive nature of it and the demeaning aspect of it'.[315] Several participants told us there should be more emphasis placed on the impact of the offending on the victim survivor.[316] However, they noted this assessment could be complex, as 'you never really know what the impact on the individual is',[317] which was particularly the case for offences committed against young children.[318] It is always important to consider 'what's happened to that person, recognising everyone is different'.[319]

While those interviewed noted that offending is often categorised as being more or less serious depending on the type of conduct (e.g. digital–vaginal, penile–oral or penile–vaginal), interviewees viewed child sex offending as being in a 'different category' in terms of offence seriousness[320] — recognising that any form of penetration is serious and harmful from a child's perspective.[321] The comment was made that 'the tendency to 'overemphasise the mechanics of rape is problematic for sentencing' offences against children.[322]

For multiple counts of rape committed against multiple child victim survivors, a life sentence was described by one participant as the 'proper outcome' for this type of offending.[323]

309 SME Interview 8.
310 SME Interview 13.
311 SME Interview 15.
312 SME interview 16.
313 SME Interview 20.
314 SME Interview 22.
315 SME Interview 8.
316 SME Interviews 11, 17.
317 SME Interview 1.
318 SME Interview 11.
319 SME Interview 10.
320 SME Interview 9, 26.
321 SME Interview 8.
322 SME Interview 11.
323 SME Interview 26.

6.5.3 Courts consider a broader range of factors in assessing offence seriousness for sexual assault

Sentencing remarks analysis

The Council's sentencing remarks analysis found the offence of sexual assault established by section 352 of the *Criminal Code* (Qld) captures a broad range of conduct. Cases examined between 1 July 2020 and 30 June 2023 of non-aggravated sexual assault involved the offender (without consent):

- using their hands to touch, grab or slap a victim survivor's buttocks;
- kissing victim survivors on the neck or mouth;
- grabbing or groping a victim survivor's breasts;
- using their hands to touch, rub or grab a victim survivor's genitals;
- rubbing their penis on a victim survivor's body or genitals (no penetration);
- masturbating in front of the victim survivor; and
- throwing ejaculate on the victim survivor.

Cases involving aggravated sexual assault involved the offender (without consent):

- putting their mouth on a victim survivor's genitals, including taking the victim's penis in their mouth;
- having or pretending to have a weapon or committing the offence in company.

Generally, when the conduct involved skin-on-skin contact it was treated more seriously by judicial officers. Our analysis found that offending involving on-skin contact was more like to result in a custodial penalty, with three-quarters of cases receiving a custodial penalty (73.7% to 75.0% depending on whether the contact was on another body part or genitals). However, the exception was on-skin contact involving a person's mouth on a body part (not genitals), in which just over half (55.6%) of cases received a custodial penalty. In contrast, the Council found over-clothes contact with genitals received a custodial penalty in 58.8 per cent of cases, and in 49.1 per cent of cases involving over clothes contact with another part the body.

See **Appendix 4** for more details.

Subject matter expert interviews

During SME interviews, legal stakeholders commented that in assessing the seriousness of sexual assault, it was often the context in which the offending took place (whether the person was known to the victim survivor or a stranger) and the person's prior criminal history that were relevant, rather than the conduct alone. If there was additional physical violence involved, the offending was predatory, the disparity between the offender and victim survivor's age, the particular vulnerability of the victim survivor and emotional harm were all mentioned as relevant,[324] as well as whether it was a protracted incidence or momentary.[325] In this context, the person being in a position of trust was viewed as making these

[324] For example, SME Interviews 3, 4.
[325] For example, SME Interviews 5, 6, 17.

offences more serious[326] — which extended to rideshare drivers and taxi drivers, employers and other professionals, including security personnel.

Offences occurring in the context of a burglary – going into someone's home[327] – or the offence occurring in a secluded location were also mentioned.[328] These offences were generally viewed as more serious where several factors were present that, considered together, made the offending more serious.[329]

There were some distinctions drawn between whether offending was 'over clothes' or 'under clothes',[330] as well as the location of the touching (e.g. if it was around the genital area),[331] with the perceived level of 'invasiveness' or 'intrusiveness' viewed as relevant in this context.[332]

Some interview participants thought too much emphasis was placed on the 2005 Court of Appeal decision *R v Demmery*[333] ('*Demmery*'), which was acting as a "ceiling" despite understanding of harm for sexual violence having evolved significantly since that decision.[334] In *Demmery*, the 27-year old applicant had pleaded guilty to one count of sexual assault of a 16-year old girl in which 'he pulled her underwear to the side and then masturbated and ejaculated over her vulval area. She was asleep while he did that'.[335] The Court found the sentencing judge's description that 'the offence was another instance of a situation where a female in a very vulnerable situation had been taken advantage of for the self-gratification of a male, albeit a person of generally good character and standing', was 'quite accurate'.[336] The Court of Appeal found the sentence of 2 years' imprisonment, suspended after 6 months, was manifestly excessive, and he was resentenced to 12 months' imprisonment, suspended after 25 days (time the applicant had already served in custody prior to being released on bail) 'because of concern at returning to jail a person with a good prior history'.[337] This is discussed further in **Chapter 9**.

6.6 The Council's view

6.6.1 Rape and sexual assault are inherently serious

Key Finding

1. Rape and sexual assault are inherently violent and serious acts

Rape and indecent assaults are inherently violent and serious acts involving the exercise of dominion by one person over another person's body without their consent, in breach of the person's right to personal autonomy, bodily and sexual integrity and sexual identity. Engaging in unwanted sexual conduct involves a fundamental disregard of another person's dignity, right to equality, right to be free from violence and discrimination, right to be free from torture and cruel, inhuman or degrading treatment, and right to privacy.

326 For example, SME Interviews 9, 21.
327 For example, SME Interviews 15, 25.
328 For example, SME Interviews 23, 24.
329 For example, SE Interviews 7, 8, 11.
330 For example, SME Interviews 8, 9, 12, 13.
331 For example, SME Interviews 11, 14, 16, 17.
332 SME Interviews 5, 12, 13, 16, 20.
333 [2005] QCA 462.
334 SME Interviews 14, 15, 16, 19.
335 *Demmery* (n 333) [7].
336 Ibid [9].
337 Ibid [26].

A lack of physical injury does not mean these offences have not caused substantial and ongoing harm, or that they should be treated as less serious than if physical injury had been caused.

See **Recommendations 1 and 4.**

As discussed earlier in this chapter, the Council has been asked to advise whether penalties currently imposed on sentence under the PSA or sexual assault and rape offences adequately reflect community views about the seriousness of this form of offending, and the sentencing purposes of just punishment, denunciation and community protection.

The Council's assessment of 'adequacy', explored in detail in the following chapter, includes an assessment of how serious sexual assault and rape offences are relative to other offences, including those that share the same maximum penalty or are comparable for other reasons.

As discussed in **Chapter 5**, there have been several efforts, both in Australia and internationally, to rank offences based on assessed offence seriousness and harm.

Rape is consistently ranked as among the most harmful and serious forms of criminal offending, while generally falling below intentional homicide and, depending on the circumstances, offences causing permanent serious physical injury or with a high risk of lethality (death).

While the methodology adopted for the University of the Sunshine Coast's research does not allow for comprehensive offence-based rankings, it was clear that community members assess the seriousness of sexual offences on a range of factors, including:

- the long-term psychological and emotional harm suffered by victim survivors of rape and sexual assault;
- the perpetrator's relationship with the victim survivor, including whether they were in a position of care, supervision or authority in relation to the victim survivor;
- the age of the victim survivor, with offences against children inherently more serious;
- the context of the offence, such as whether it took place at night or whether the offence was committed in company.[338]

A threshold question for the Council in determining whether there is a need for any legislative or other changes to ensure the imposition of appropriate sentences, as requested under the Terms of Reference, is the Council's assessment of offence seriousness based on evidence gathered during this review.

The Council agrees there are several aspects of rape and sexual assault that make these offences particularly serious, based on the nature of the act and the harm caused, including:

- **These offences are inherently violent in nature**. Regardless of whether or not accompanied by other acts of violence, rape and indecent assault are properly considered to constitute acts of violence.
- **They involve a high degree of violation of a victim survivor**: All acts of non-consensual penetration and aggravated sexual assault involve an extreme form of being subject to another's

338 *UniSC Final Report* (n 296).

dominion, resulting in the highest level of intrusions to sexual and bodily integrity. They are acts demeaning to the victim survivor that expose that person to high levels of humiliation.[339]

- **The harm caused by this offending can be significant and long-lasting**: These offences may involve pain, shame, loss of self-esteem, a sense of violation and objectification,[340] with rape being described by one legal scholar as equating to 'murder of the spirit'.[341] Just because the victim survivor has not suffered physical injuries as a result of the offence does not mean these offences have not caused substantial and ongoing harm, or they should be treated as less serious than if physical injury had been caused. For children, the impacts of sexual violence offending are typically even more pronounced and enduring (see **Key Finding 2**).
- **They involve a significant infringement of a victim survivor's human rights**: Engaging in unwanted sexual conduct involves a fundamental disregard of another person's dignity, right to equality, right to be free from violence and discrimination, right to be free from torture and cruel, inhuman or degrading treatment and right to privacy. As the Supreme Court of Canada recognised in the leading case of *Friesen*, the harm caused by rape and sexual assault arises from the violation of these fundamental and basic human rights involving the wrongful exploitation of the victim survivor by the offender:[342]

This emphasis on personal autonomy, bodily integrity, sexual integrity, dignity, and equality requires courts to focus their attention on emotional and psychological harm, not simply physical harm.[343]

We further acknowledge that **the culpability of the person being sentenced will depend on the individual facts and circumstances of the case.** Both rape and sexual assault may involve a wide range of culpability; however, some circumstances will increase the culpability of the perpetrator and therefore the seriousness of the offence. These include premeditation and planning, an existing relationship between the perpetrator and victim survivor and/or the person being in a position of trust, the offence being committed 'in company' and multiple instances of offending.

In our view, the recognition of rape and some forms of aggravated sexual assaults as being among the most serious offences in the *Criminal Code* (Qld) and the current maximum penalty of life imprisonment (the highest maximum penalty available at law) are appropriate and warranted.

Indecent assaults violate the same rights as rape, although in the case of non-aggravated sexual assaults, the level of violation will in most cases be lesser and the harm caused may be of a less-severe nature. There is no doubt, however, that these are offences of violence – a fact we discuss in **Chapter 8**.

As discussed in **Chapter 2**, some groups are particularly vulnerable to sexual abuse, including children, Aboriginal and Torres Strait Islander women, people with a disability, women from culturally and racially marginalised (CARM) groups, LGBTIQA+ people and sex workers.

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339 von Hirsch and Nils Jareborg (n 14) 26: This point is made by von Hirsch and Jareborg with respect to ranking the seriousness of both forcible rape and what they describe as 'date rape'.
340 Nicola Lacey, 'Unspeakable subjects, impossible rights: Sexuality, Integrity and Criminal Law' (1998) 11(1) *Canadian Journal of Law and Jurisprudence* 47.
341 Ibid citing Robin West, 'Legitimating the Illegitimate: A Comment on "Beyond Rape"' (1993) 93 *Columbia Law Review* 1442, 1448.
342 *Friesen* (n 214) referred to with approval in *Lian* (n 234) [99], 'Appendix A' (Kourakis CJ).
343 Ibid referred to with approval in *Lian* (n 234) [99], Appendix A (Kourakis CJ).

Victim survivor vulnerability is an important consideration in assessing the seriousness of the offending, both due to the higher level of harm that may be experienced and the higher level of culpability of the perpetrator in targeting a vulnerable victim survivor.

6.6.2 Offences against children are more serious than offences against adults

Key Finding

2	**Sexual offences against children are particularly serious** Due to the vulnerability of children, sexual offences committed against children are particularly serious, noting the inherently wrongful nature of the offending conduct and the profound ongoing harm these offences cause to children during their formative years. See **Recommendation 1.**

Courts have recognised that an adult who commits sexual offences against children will, in all but exceptional cases, be highly culpable for their actions due to their awareness of the harm their conduct is likely to cause and because children are highly vulnerable:

> Intentionally applying force of a sexual nature to a child is highly morally blameworthy because the offender is or ought to be aware that this action can profoundly harm the child … For sexual offences against children … save for possibly certain rare cases, offenders will usually have at least some awareness of the profound physical, psychological, and emotional harm that their actions may cause the child.[344]

It is inherently exploitative for an adult to engage in sexual activity with a child. This exploitation is fixed in the power imbalance between adults and children, and is compounded when an adult is in a position of trust, care or authority over a child and when the victim survivor is particularly young and therefore more vulnerable to sexual violence. Courts have recognised that 'the intentional sexual exploitation and objectification of children is morally blameworthy because children are so vulnerable'.[345]

In sentencing, courts are required to 'take the modern recognition of the wrongfulness and harmfulness of sexual violence against children into account when determining the offender's degree of responsibility'.[346] Courts must avoid reliance on stereotypes that minimise the harmfulness or wrongfulness of this form of offending[347] or notions that there is a correlation between the type of physical act and the harm to the child – see also **Key Finding 3**.

Sexual offending always puts children at risk of serious harm and can permanently alter the course of a child's life, with the offending having broad and often far-reaching consequences, and some impacts only being realised later in life.[348] The Queensland Court of Appeal has said 'even a single sexual offence against a child may have terrible and enduring consequences'.[349]

A 'robust body of research evidence now clearly demonstrates the link between child sexual abuse and a spectrum of adverse mental health, social, sexual, interpersonal and behavioural as well as physical

344 Ibid [88] (citations omitted).
345 *Friesen* (n 214) [89].
346 Ibid [87] citations omitted – referred to with approval in *Lian* (n 234) [99], Appendix A (Kourakis CJ).
347 Ibid.
348 Royal Commission into Institutional Responses to Child Sexual Abuse, *Final Report: Volume 3, Impacts* (2017), 9.
349 *RAZ* (n 95) 5 [23] (Sofronoff P, Gotterson JA and Boddice J agreeing).

health consequences'.[350] The impacts of childhood sexual abuse may vary, but are likely to include 'shame, embarrassment, unresolved anger, a reduced ability to trust others' and a fear that people can and will abuse them and their bodies in future.[351]

While 'childhood experiences of sexual abuse manifest differently in each individual and may change over time',[352] the negative impacts associated with this abuse can be profound and lifelong.

While sexual violence against either a child or an adult is serious, the Queensland Parliament has determined that sexual violence against children should be punished more severely. The evolution of the Queensland Parliament's and the Queensland community's view of the gravity of offences involving child sexual abuse is reinforced by Parliament's reforms to the law that applies to sentencing for child sexual offences. Since 2003, Parliament has advanced a number of legislative changes to the PSA and *Criminal Code* applicable to sexual offences against children.[353] While rape was never expressly identified in those reforms, many of those changes apply to the sentencing of a person convicted of raping a child under 16. We agree with the Court of Appeal's remarks in *Stable* that:

> Community attitudes change and the amendments made in 2003 reflected such changes [that currents sentencing practices may depart from past practices by reason of changes in understanding long-term harm to victim survivors]. The amendments have brought the circumstances of the victim and other potential victims to the forefront of a sentencing judge's consideration. These are matters that address the community's denunciation of sexual offences against children. These provisions constituted a legislative representation about the community's attitude to sexual offences against children, particularly against very young children. The amendments made these matters the starting points for the judicial task. Statute law, having the higher authority of the legislature, cannot be waived by the parties simply because they are ignorant of it or because they choose not to argue it although it is applicable. Once such omission comes to light in proceedings that are still current within the Judicature, judges are under a duty to give them effect.[354]

Parliament also legislated an aggravating factor for offences committed in a domestic and family violence context.[355] Sadly, sexual violence offences are often perpetrated by a family member. We note comments by the Court of Appeal in *O'Sullivan* that this reform (and others concerning violence against children) are,

> legislative instructions to judges to give greater weight than previously given to the aggravating effect upon a sentence that an offence was one that involved infliction of violence on a child and that the offender committed the offence within a home environment.[356]

We agree with the Court's guidance that '[w]hen applicable legislation changes, the laws as changed must be applied faithfully and a previous range of sentencing may no longer be useful'.[357]

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350 The Bugmy Bar Book, 'Childhood Sexual Abuse' (November 2023) <https://bugmybarbook.org.au/wp-content/uploads/2024/03/BBB-Childhood-Sexual-Abuse-chapter.pdf> ('Bugmy Bar Book), citing the Australian Institute of Family Studies, 'The Long-Term Effects of Child Sexual Abuse' (CFCA Paper No 11, January 2013) 23; Divna Haslam et al, 'The Prevalence and Impact of Child Maltreatment in Australia: Findings from the Australian Child Maltreatment Study' (Brief Report, Australian Child Maltreatment Study, Queensland University of Technology, 2023) 17–18.

351 *Friesen* (n 214) (citing statements made in *R v McDonnell* 1997 CanLII 389 (SCC), [1997] 1 S.C.R. 948) [57] referred to with approval in *Lian* (n 234) [99], Appendix A (Kourakis CJ).

352 Bugmy Bar Book (n 350) citing Royal Commission into Institutional Responses to Child Sexual Abuse, *Final Report: Volume 3, Impacts* (2017) 25.

353 See section 7.2.3 and Chapter 8 for more details.

354 *Stable* (n 101) [45] (references omitted).

355 PSA (n 4) s 9(10A).

356 *O'Sullivan* (n 96) [93].

357 Ibid [94].

The Council is concerned that current sentencing levels for rape in Queensland do not significantly reflect the important differences in seriousness between conduct perpetrated against a child when compared with the same types of offences committed against adults.

In our view, there is a need for legislative reform to clarify the position at law that offences against children must in every case be treated as more serious on the basis of a child's level of vulnerability clearly signalling that higher sentenced for such offending are warranted.

We outline our reasons in **Chapter 7**.

6.6.3 The seriousness of an offence should be assessed by its own individual circumstances

Key Finding

3. **The seriousness of rape should be assessed based on the circumstances of each case, not just penetration type**

The seriousness of every rape offence must be determined based on the particular circumstances of each case. Sentences for rape should reflect that one form of sexual penetration is not inherently any more or less serious than another form of sexual penetration.

See **Recommendations 6, 18, 19 and 20**.

Section 349 of the *Criminal Code* (Qld) makes no distinctions between the relative seriousness of rape based on conduct alone, meaning one form of penetration is not more or less serious than another. The seriousness of every rape must therefore be determined by its own particular circumstances.

Focusing on the type of penetration as the primary measure of offence seriousness in our view is an inherently flawed exercise. It suggests that a hierarchy of penetration exists, and that some physical acts are, by their very nature, always more serious on the basis of conduct alone and without reference to the surrounding context of the offending and circumstances of those involved, or the harm caused to the victim survivor. This is particularly so for children, and it is dangerous to assume that there is a 'correlation between the type of physical act and the harm to the child'.[358]

The Council agrees with comments made by the Queensland Court of Appeal in *Wark*[359] that the seriousness of every rape offence must be determined by its own particular circumstances, and notes the Court of Appeal's endorsement and restatement of this principle in the more recent 2023 decision of *Wallace*.[360]

Based on our review of sentencing submissions, we share the Court's concerns about 'an unwarranted tendency in submissions … when comparing not just rape cases but sexual offending cases in general, to compartmentalise cases according to the specific "category" of sexual offending involved' (see **Appendix 7**).[361] We have observed and been advised by subject matter experts that there is a hierarchy of penetration in Queensland, with digital and oral penetration (forced fellatio and cunnilingus) on the lower end of the scale, use of a fist in the mid-to-high range and penile–vaginal and penile–anal penetration at

358 *Friesen* (n 214).
359 *Wark* (n 67) [2] (McMurdo P), [13]–[14] (Mackenzie AJA), [36] (Cullinane J).
360 *Wallace* (n 80) 5 [13] (Bowskill CJ), [44]–[45] (Dalton JA). See also *R v RBG* [2022] QCA 143 [4] (Dalton JA) referring to *R v Smith* (n 59) [34]–[37] (Morrison JA).
361 *Wallace* (n 80) [45] (Dalton JA).

the most wrongful end of the scale. The Council's analysis of current sentencing outcomes showed that, with some exceptions, digital–vaginal rape receives the lowest penalties, while penile–anal and penile–vaginal rapes receive the highest (see **Appendix 4**).

Discussed further in **Chapter 7**, the position in Queensland is in contrast to a number of other jurisdictions that do not make these same distinctions.

As a UK Home Office review in 2000, *Setting the Boundaries: Reforming the Law on Sex Offences*, concluded in considering the seriousness of oral sex relative to other forms of penetration, '[f]orced oral sex is as horrible, as demeaning and as traumatising as other forms of forced penile penetration'.[362] In rejecting the establishment of any 'gradation' or 'degrees' of rape, the review team concluded:

> If we are to consider a rape as being not just an offence of violence, but a violation of the integrity of another person, then there is neither justification nor robust grounds for grading rape into lesser or more serious offences. The impact on victims is no less, and indeed there are arguments that it can be more serious and long-lasting. Rape is a very serious crime but sentences can, and should, reflect the seriousness of each individual case within an overall maximum.[363]

The Law Reform Commission of Western Australia, following its review of sexual offences, rejected differentiating between different forms of penetration on similar grounds, finding that all forms of penile and non-penile penetration 'constitute equally serious violation of the complainant's sexual autonomy and bodily integrity and may [depending on the circumstances involved] be equally serious'.[364] This is discussed further in **Chapter 7**. We endorse these comments.

We have also observed that the starting point for sentencing submissions by prosecutors and defence practitioners focuses on previous Court of Appeal and first-instance decisions involving rape conduct *of the same kind*, and few are from contemporary case law.[365] In our view, this can result in unhelpful distinctions being made based on conduct type, leading to assumptions about what type of penetration is 'worse' or 'more serious' or harmful. Further, relying on older case law may perpetuate outdated concepts of harm and power imbalances in relation to sexual violence. This may result in current sentencing practices reinforcing past norms and could mean that judicial officers are constrained when imposing sentences for rape, regardless of changing community attitudes. In this context, we acknowledge statements made by the High Court in *Kilic,* affirmed in subsequent cases by the Queensland Court of Appeal,[366] that 'current sentencing practices with respect to sexual offences may be seen to depart from past practices by reasons of changes in understanding about long-term harm done to victims', suggesting sentencing practices for these offences can change as we better understand the substantial harm they cause.[367]

The Council notes remarks by the Western Australian Court of Appeal that

> an assessment of seriousness of an offence of sexual penetration is not governed by whether the penetration involves a penile, digital, oral or other form of penetration, but, rather, depends on all of the circumstances of the offence.

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362 Home Office (UK), *Setting the Boundaries: Reforming the Law on Sex Offences* (July 2000) vol 1, 15 [2.8.5] ('*Setting the Boundaries*').
363 Ibid 16 [2.8.8].
364 Law Reform Commission of Western Australia, *Sexual Offences* (Project 113, October 2023) 181 [6.43].
365 See Appendix 7: The Council reviewed submissions for the most recent 24 cases considering oral rape and digital-vaginal rape of both child and adult victim survivors from 2022-23. Our analysis did not identify any reference to the recent decisions of *Stable* (n 101) or *Wallace* (n 80), and of the 51 appeal cases referred to in submissions, only 14 were from 2018 onwards, with the majority of decisions dating from 2004 to 2014.
366 See *O'Sullivan* (n 96) [103]; *Stable* (n 101) [45].
367 *Kilic* (n 40) [21] (Bell J, Gageler J, Keane J, Nettle J and Gordon J).

> Consequently, consideration of reasonably comparable cases in the present case should not proceed by reference to only cases involving oral penetration [the conduct in the case being reviewed].[368]

Another issue of concern that is often raised is the treatment of rapes committed by someone known to the victim survivor compared with 'stranger rapes'. We agree with the questioning by some of 'whether there are genuinely lesser rapes' and traditional conceptions of stranger rapes as being more serious than rapes perpetrated by partners, friends and family members.[369] The 2000 Home Office review relevantly found:

> Victim/survivor organisations told us that although all victims/survivors were deeply affected by rape, there was often greater victimisation in rapes that were seen as lesser than the traditional model of stranger rape. A woman or man attacked in the street is a chance victim – it is truly appalling, but no blame attaches to the victim. To be raped by someone you know and trust, whom you may let into your house, or when you visit theirs, is not such a matter of chance. The victim has made decisions to put their trust in the other person. There may or may not be overt physical violence but those victims face additional issues of betrayal of trust and being seen as, or feeling, guilty for being in that situation. Some research indicates that the level of violence in partner/ex-partner rape is second only to stranger rape. We were told by those who counsel victim/survivors that those raped by friends or family often find it much harder to recover and may take longer to do so. … The crime of rape is so serious that it needs to be considered in its totality rather than being constrained by any relationship between the parties.[370]

The same might be said regarding any unhelpful assumptions made about offence seriousness based on the relationship between the perpetrator and victim survivor for offences of sexual assault.

During our expert interviews, several of those interviewed pointed to the changes with the introduction of domestic violence as an aggravating factor as achieving a shift in attitudes that stranger rapes are, by their nature, more serious. However, this was not universally the case with the fact the person was a stranger being one of the factors (alongside many others) referred to in a number of interviews as making the offence more serious.[371]

We acknowledge that the description 'stranger rapes' is sometimes used as a convenient 'shorthand' for the types of factors that typically group together in such cases which contribute to the assessment of offence seriousness. However, in our view it is important that no assumption be made that stranger rapes 'will always' or 'will usually' be more serious than a rape by someone known to the victim survivor. These types of narratives play into the 'stranger rape' myth and what constitute 'real' rapes by suggesting such rapes are more serious and deserve more severe punishment.

Similar criticisms might be made about the focus in some cases on the absence of physical injury or the absence of the use of 'additional violence' as a reason to consider the offending as less harmful or serious due to its relevance to an assessment of the perpetrator's culpability. This is most concerning when the victim survivor is a child and violence is not required to achieve compliance or when the victim survivor (child or adult) was asleep or unconscious, and therefore additional violence, aside from the rape or sexual assault, was not required to commit the offence.

As discussed earlier in this chapter, the Court of Appeal has cautioned against the adoption of these types of default judgments that an absence of physical harm or use (or threatened use) of violence automatically renders a person's offending less serious than another example of offending. There may be

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368 *HNU* (n 196) [74] (Beech JA, Vaughan JA and Hall JA agreeing).
369 *Setting the Boundaries* (n 362) 16 [2.8.7].
370 Ibid.
371 For example, SME Interviews 20, 21, 22, 24.

very good reasons why the use of additional violence by the person perpetrating the act may not be necessary to facilitate its commission.

In our view, in assessing offence seriousness, the vulnerability of the victim survivor should be the overriding consideration, not whether 'actual violence' (as is sometimes suggested) is used (noting that all acts of rape and indecent assault are violent). This is because the more vulnerable the victim survivor (including due to factors such as age or other circumstances), the higher the level of culpability of the person in committing the offence.

While we do not discount the emphasis on the need for community protection in cases involving perpetrators who are unknown to the victim survivor, there are other aspects of offences committed by someone the victim survivor knows and trusts, which make these offences equally, if not more, serious. Such offences often involve a significant betrayal of trust and may in fact be no less traumatic than an offence committed by a stranger and result in a higher level of harm.

We note in some jurisdictions which have adopted sentencing guidelines or have issued guideline judgments, there is formal recognition that the 'starting points' or sentencing ranges for imposing a sentence for rape and sexual assault focus on factors impacting culpability and harm, irrespective of whether the perpetrator was a stranger or known to the victim survivor and the type of rape conduct/penetration involved. For example:

- In the sentencing guidelines issued by the Sentencing Council of England and Wales for rape, rape of a child under 13 and (sexual) assault by penetration,[372] the assessment of harm and culpability does not include any reference to the type of penetration involved, although abuse of trust is a factor in assessing culpability.[373] A separate guideline on domestic abuse which applies across all offences, including rape, states that '[t]he domestic context of the offending behaviour makes the offending more serious because it represents a violation of the trust and security that normally exists between people in an intimate or family relationship'.[374]
- Similarly, the draft sentencing guideline for rape currently under development by the Scottish Sentencing Council does not refer to the type of penetration in the assessment of harm and culpability.[375]
- In its guideline judgment,[376] *R v AM*,[377] the NZ Court of Appeal determined sentencing bands (i.e. starting points) based on harm and culpability. No distinction was made between different types of penetration, nor was penetration type a determinate of seriousness. Rather, the Court stated: 'It would be wrong to suggest that violation by digital penetration and oral violation (not involving penile penetration of the mouth) is always less serious.'[378] Cases provided by the Court as examples of those falling within different sentencing 'bands' involve a range of different

372 For a discussion of the role of guidelines, see Chapter 10.
373 Sentencing Council for England and Wales, *Guideline for Rape* (effective from 1 April 2014), *Guideline for Rape of Child Under 13* (effective from 1 April 2014) and *Guideline for Assault by Penetration* (effective from 1 April 2014).
374 Sentencing Council for England and Wales, *Overarching Principles: Domestic Abuse* (effective from 24 May 2018).
375 Scottish Sentencing Council, *Draft Sentencing Guideline: Rape* (2024) <https://www.scottishsentencingcouncil.org.uk/media/ufcaqjes/rape-draft-guideline.pdf>.
376 On the nature of 'guideline judgments', see Chapter 10.
377 *AM* (n 209).
378 Ibid [73] with reference to statements made in the earlier decision of *R v Singh* (CA160/02, 26 November 2002), which are consistent with those made by the Queensland Court of Appeal that 'any rigid categorisation is unhelpful. As the circumstances of this case clearly demonstrate, it is the total circumstances which need to be assessed and it is the combination of them which will indicate the appropriate sentencing level': [24].

> conduct, some of which involves offending committed by strangers and some by friends, acquaintances, intimate partners and family members. Factors are listed that increase culpability, with a statement made for offences committed against partners or ex-partners: 'Culpability is not reduced by any sense of entitlement associated with a current or previous relationship' noting 'there is no separate regime for sexual violation of a spouse or partner or those who have previously been in a relationship.'[379]

The updating and, where required, development of sentencing resources that provide prosecutors, defence practitioners and sentencing courts with clear advice about these matters, with reference to contemporary case law and research evidence, may go a long way towards raising awareness of these issues (see **Recommendation 6**).

Ongoing professional development and training are another critical aspect of ensuring court sentencing practice that continues to evolve in response to our improved understanding of the nature and impacts of sexual victimisation, the contexts in which sexual violence occurs and its differential impacts on those who are particularly vulnerable to abuse such as children, Aboriginal and Torres Strait Islander women, people with a disability, women from culturally and racially marginalised groups, LGBTIQA+ people and people who are vulnerable for other reasons, such as sex workers (see **Recommendations 18, 19 and 20**).

[379] Ibid [61].

Chapter 7 – Adequacy and appropriateness of sentencing outcomes

7.1 Introduction

As discussed in previous chapters of this report, the Council has been asked to determine whether penalties currently imposed on sentence under the *Penalties and Sentences Act 1992* (Qld) ('PSA') 'adequately reflect community views about the seriousness of this form of offending' and the purposes of sentencing, with a focus on just punishment, denunciation and community protection.[1] We have also been asked to identify any reforms required 'to ensure the imposition of appropriate sentences'.[2]

In this chapter, we consider:

- whether the current *penalty types* imposed on people convicted of rape and sexual assault (such as orders of imprisonment or suspended imprisonment, probation and fines) appropriately reflect the seriousness of this offending, and the purposes of sentencing; and
- whether current *sentencing levels* adequately reflect this – such as, for sentences of imprisonment, the length of sentence and minimum time required to be spent in custody prior to release into the community on parole, under a suspended prison sentence or on probation.

7.2 Views of offence seriousness and sentencing practices

7.2.1 Community views

The research that the Council commissioned the University of the Sunshine Coast ('UniSC') to undertake on community views has provided an important evidence base for our assessment of offence seriousness and adequacy. The detailed findings of this research are presented in **Chapter 5**.

The focus group research included several exercises designed to test offence seriousness. This approach had the advantage of enabling current sentencing practices to be compared with community views of relative offence seriousness without participants needing to attach a specific sentencing 'quantum' to specific offence or case scenarios, given the methodological problems with this approach. The methodology adopted for this research is discussed in **Chapter 4**.

Participants identified that the level of harm experienced by the victim survivor, the circumstances of the offending and the culpability of the perpetrator for the suffering inflicted all contribute to offence seriousness. A significant factor identified in assessing offence seriousness was the long-term

1 Appendix 1, Terms of Reference.
2 Ibid.

psychological harm involved in offences of sexual assault and rape, as well as the perpetrator's relationship with the victim survivor, which was identified as being a complex culpability factor.

In section 7.3.1, we discuss how these rankings compare with sentencing levels and outcomes.

7.2.2 Consultation views

In **Chapter 5**, we report on views expressed during consultation events, meetings and in submissions.

As discussed in that chapter, there was universal agreement among those consulted that the offences of rape and sexual assault are serious. Offences against children were viewed as being particularly serious.[3]

Participants at our consultation events pointed to the significant and long-lasting harm such offences can cause to victim survivors, affecting all aspects of their lives, from their sense of safety and general emotional and mental wellbeing to their personal and family relationships, their ability to engage in study and work, and their physical and mental health.

The broader question of whether sentences are 'adequate' and 'appropriate' generated a wide range of responses in submissions and at our consultation events, from those who viewed sentencing practices as generally 'adequate' and reflective of offence seriousness to those who felt very strongly that they did not and called for sentences to increase.

Generally, legal stakeholders thought ‘sentencing for sexual assault and rape offences adequately reflect the purposes of sentencing and the seriousness of these offences', although they generally supported providing courts with more options for sentencing, such as the ability to fix a parole release date and to combine suspended prison sentences with supervised non-custodial orders when sentencing for a single offence, in support of community protection and rehabilitation.

The inflexibilities of the current sentencing framework and barriers to the use of certain types of orders were viewed as likely contributing to the high proportion of sentencing orders for rape and sexual assault that do not involve supervision or a requirement to engage in treatment or other forms of interventions.

Many victim survivors and support and advocacy stakeholders were strongly of the view that sentences for rape and sexual assault are too low and do not align with community expectations.

They told us sentences must increase to better reflect community standards and the seriousness of this offending, and in order not to discourage victim survivors from reporting these offences and going through the criminal justice system process.

Subject matter expert interviews

Subject matter expert interview participants were invited to share their perspectives on the current approach by courts to assessing offence seriousness. These views are discussed in **Chapter 6**.

Adequacy of sentencing levels

In providing their views, some participants commented that sentences were generally sufficient, while others had concerns about current sentencing levels.

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3 Submission 1 (Name withheld) 1.

A few participants commented that sentences for sexual assault, in particular, 'are usually quite low' and may not reflect their true seriousness.[4] Reliance on dated case precedents was suggested as a potential reason for this. This issue is further discussed in **Chapter 8.**

As discussed in **Chapter 5**, some participants supported the view that particular forms of rape, such as penile–oral and digital–vaginal rape, should be treated as more serious than is currently the case, particularly where this involves offences committed against children – recognising that any form of penetration is serious and harmful from a child's perspective.[5] The comment was made that the tendency to 'overemphasise the mechanics of rape is problematic for sentencing'.[6]

Views about changes in sentencing practices

Interviewees expressed mixed views about whether sentences have increased over time.[7] Although most interviewees thought the sentencing outcomes appeared to have increased for domestic violence-related cases,[8] offences involving child victims[9] and sexual assault offences,[10] some interviewees expressed the view that there had not been a 'noticeable [increase] in terms of sentence outcomes'.[11]

Some interview participants recognised that there had been changes to societal views, with corresponding impacts upon the sentences being imposed. For example, one interviewee noted that rape offences committed within a domestic setting are now viewed as just as significant as a rape offence committed by a stranger – which represents a marked difference from previous sentencing practices.[12]

Interviewees also referred to sentences for penile–vaginal rape being higher than for non-penile rape,[13] and said penile–vaginal rape sentencing levels had stayed relatively stable over time.[14]

Legislative changes were generally viewed as having had a significant impact on the sentences imposed for some offences. One interviewee referred to statements made by Justice Sofronoff that legislative changes needed to be taken into account when determining the appropriate sentence.[15] As a relevant example, the legislative change that resulted in digital penetration being moved to conduct falling within the offence of rape rather than indecent treatment of a child under 16 years was viewed by interviewees as having resulted in a slight uplift in penalties for this form of conduct.[16]

Interviewees also noted the importance of being aware of different maximum penalties across different timespans and encouraged practitioners to avoid using dated case precedents for sexual assault (from the 2000s to 2010) as these represent decisions and views 'from a different era'.[17]

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4 For example, SME Interviews 14, 15.
5 SME Interview 8.
6 SME Interview 11.
7 SME Interviews 3, 7, 9, 14, 15, 17.
8 SME Interviews 6,9, 15, 17, 26.
9 SME Interviews 13, 20.
10 SME Interviews 7, 23.
11 SME Interview 16. A similar view was expressed in SME Interview 25.
12 SME Interview 15.
13 SME Interviews 9, 12, 14, 22.
14 SME Interview 7.
15 SME Interview 10.
16 SME Interview 7.
17 Ibid.

7.2.3 Parliament's views of offence seriousness

Maximum penalties

As discussed in **Chapter 6**, maximum penalties are an important indication of Parliament's views about the seriousness of sexual assault and rape offences. This is because the maximum penalty reflects the views of Parliament (and therefore the community) about the seriousness of each offence relative to other offences. It is a factor that courts in Queensland are required to take into account in sentencing.[18]

The highest maximum penalty available in Queensland is a life sentence. Rape and sexual assault offences with circumstances of aggravation charged under section 352(3) of the *Criminal Code* both carry this maximum penalty.[19] Examples of other offences with a maximum penalty of life imprisonment include murder (to which both a mandatory life sentence and mandatory minimum non-parole periods apply), manslaughter, repeated sexual conduct with a child, incest, unlawful striking causing death, acts intended to cause grievous bodily harm and other malicious acts, armed robbery/robbery in company/robbery with violence, several aggravated forms of burglary (including at night, with violence/threat of violence, armed, in company or by break) and arson.[20]

Sexual assault offences charged under section 352(2) of the *Criminal Code* (indecent assaults or acts of gross indecency where these include bringing into contact any part of the genitalia or the anus of a person with any part of the mouth of a person) carry a maximum penalty of 14 years. Offences with 14-year maximum penalties include non-aggravated forms of burglary, engaging in penile intercourse with a child under 16 years (previously known as 'carnal knowledge with or of children under 16'), indecent treatment of a child under 16 in circumstances where the child is 12 years or older, distributing and possessing child pornography, grievous bodily harm, torture, aggravated forms of serious assault and attempted rape.[21]

Non-aggravated sexual assault has a maximum penalty of 10 years (s 352(1)). Offences that share a 10-year maximum penalty with non-aggravated sexual assault include some aggravated forms of assaults occasioning bodily harm (armed or in company, or if motivated by hate), several forms of stealing offences and unlawful use of a motor vehicle without circumstances of aggravation.[22]

The maximum penalties for the review offences are indicative of the high level of seriousness with which rape and aggravated forms of sexual assault in particular are viewed.

The role and purpose of maximum penalties as a form of sentencing guidance for courts is discussed further in **Chapter 8**.

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18 *Penalties and Sentences Act 1992* (Qld) s 9(2)(b) ('PSA').
19 *Criminal Code Act 1899* (Qld) sch 1 ('*Criminal Code* (Qld)) s 352(3).
20 Ibid s 222 (Incest), s 229B (Repeated sexual conduct with a child), s 305 (Punishment of murder), s 310 (Punishment of manslaughter), s 314A (Unlawful striking causing death), s 317 (Acts intended to cause grievous bodily harm and other malicious acts), s 411 (Punishment of robbery), s 419 (Burglary), 461 (Arson).
21 Ibid s 419(1) (Burglary), s 215(2) (Engaging in penile intercourse with a child under 16), s 210(2) (Indecent treatment of a child under 16) s 228C (Distributing child exploitation material), s 228D (Possessing child exploitation material [both offences have a 20-year maximum penalty if the person uses a hidden network or anonymising service in committing the offence], s 320 (Grievous bodily harm), s 320A (Torture), s 340 (Serious assaults), s 350 (Attempt to commit rape).
22 Ibid ss 339(3) (Assaults occasioning bodily harm), s 398 (Punishment of stealing), s 408A (Unlawful use or possession of motor vehicles, aircraft or vessels).

Reforms to conduct captured within the offences of sexual assault and rape

In 2000, changes were made to the offence of rape in response to recommendations made by the Taskforce on Women and the Criminal Code,[23] which signalled that certain forms of non-consensual penetrative conduct were to be viewed differently than had previously been the case.

Rape was redefined from being limited to 'carnal knowledge' (penile–vaginal and penile–anal intercourse) to include penetration by the offender of the vagina, vulva or anus of the victim by any body part or object, and penetration of the mouth of victim by the offender's penis.[24] This was conduct previously included in the offence of sexual assault.

In recommending this change to expand the offence of rape, the Taskforce observed:

> In Queensland, penetration of the vagina or the anus by an object or a part of the body other than the penis is called 'sexual assault'. It carries the same maximum penalty as rape.
>
> Clearly, penetration with an object such as a bottle or a piece of wood is a significant violation. The potential for serious injury can be far greater than that if a penis is used.
>
> Likewise, penetration of the mouth by the penis (being forced to perform oral sex) is for many women (and men who are victims) as bad as vaginal rape. Under present law [which categorised this as a sexual assault], forced oral sex is a sexual assault with a maximum penalty of 14 years imprisonment, in other words, less than the maximum penalty for penetration by a finger or hand. This does not accord with many women's views of the relative seriousness of the conduct.[25]

For more information on the legislative history of these offences, see **Consultation Paper: Background**, section 3.4.

Assessing the relative seriousness of conduct following the 2000 reforms

The fact that all forms of non-consensual penetrative conduct falling within the offence of rape share the same maximum penalty of life imprisonment supports the view that it was not Parliament's intention that penetrative acts be viewed in a fixed hierarchy — for example, with penile–vaginal rape at one end being the most serious, and other forms of rape, formerly defined as types of 'sexual assault'/indecent assaults, such as digital–vaginal or digital–anal, at the other.

The maximum penalties that apply, however, indicate that some forms of sexual assaults, such as non-consensual acts of mouth–genital contact without additional circumstances of aggravation (armed or in company) are to be viewed as being of a lesser category of offence seriousness than penetrative acts captured within the offence of rape and sexual assault. They also suggest that non-aggravated forms of sexual assault, such as non-consensual forms of non-penetrative sexual touching, are generally to be viewed as less serious than the other forms of sexual assault and rape.

Introduction of sentencing reforms for 'serious violent offences'

Both sexual assault and rape are included in Schedule 1 of the PSA, to which the serious violent offences ('SVO') and cumulative sentencing (s 156A) schemes apply. Both schemes were introduced in 1997.[26]

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23 The Taskforce on Women and the Criminal Code, *Report of the Taskforce on Women and the Criminal Code* (February 2000) ('*Taskforce on Women and the Criminal Code Report*').
24 *Criminal Law Amendment Act 2000* (Qld) s 24.
25 *Taskforce on Women and the Criminal Code Report*, (n 23) 217.
26 *Penalties and Sentences (Serious Violent Offences) Amendment Act 1997* (Qld) ss 8 (inserting s 156A) and s 10 (inserting Part 9A into the PSA (n 18)). These changes came into effect on 1 July 1997.

The introduction of the SVO scheme reflected a government election commitment 'to introduce into the penalties and sentences legislation a section dealing with serious violent offences that reflects [its] concern for community safety as well as community outrage with this form of crime'.[27] It also referred to its concern that 'current sentences for serious offences have not had and are not having a sufficient deterrent effect' with reference to the growing numbers of people serving sentences of 10 years to less than life for serious offences within the schedule.[28]

If a court makes a declaration that a person is convicted of a serious violent offence, this means they must serve a minimum period of 80 per cent, or 15 years (whichever is less) of the sentence before being eligible for parole.[29] The declaration is mandatory in circumstances where the sentence imposed is 10 years or greater.[30]

Under section 156A of the PSA, if a person has been convicted of a Schedule 1 offence and the offence was committed while serving another prison sentence (including on parole), then the court must order any sentence of imprisonment for the new offence to be served cumulatively with any other term of imprisonment the person must serve or is currently serving (that is, one after the other).[31]

For more information on key legislative reforms impacting the sentencing of rape and sexual assault, see **Consultation Paper: Background**, Table 5.

Sentencing reforms signalling that offences against children are to be treated as more serious

Parliament has made several legislative changes and reforms over the past 20 years that can be viewed as reinforcing the assessed seriousness of these offences – in particular, offences against children. They include:

- **In 2003**, the introduction of special sentencing considerations for offences of a sexual nature committed in relation to a child under 16 years, including to provide that the principle of imprisonment as a sentence of last resort does not apply.[32]
- **In 2010**, the introduction of the requirement that if a person is sentenced for a sexual offence against a child, they 'must serve an actual term of imprisonment unless there are exceptional circumstances'[33] and the requirement for a court, in deciding whether to declare an offender convicted of a serious violent offence under the SVO scheme for offences that involved the use, or attempted use of violence against a child under 12 years, to treat the age of the child as an aggravating factor.[34]
- **In 2012,** the introduction of the repeat serious child sexual offence scheme, which requires a court to impose a mandatory life sentence (or indefinite sentence in the alternative) when

27 Queensland Legislative Assembly, *Parliamentary Debates*, 595 (Denver Beanland, Attorney-General).
28 Ibid 597.
29 See PSA (n 18) pt 9A.
30 PSA (n 18) ss 161A, 161B(1).
31 See ibid pt 9A, s 156A.
32 *Sexual Offences (Protection of Children) Amendment Act 2003* (Qld) s 28 inserting ss 9(5)–(6) into the PSA (n 18).
33 *Penalties and Sentences (Sentencing Advisory Council) Amendment Act 2010* (Qld) s 5 replacing s 9(5) of the PSA (n 18) and inserting a new s 9(5A) providing guidance to courts that, in deciding whether there are exceptional circumstances, a court may have regard to the closeness in age between the offender and the child.
34 Ibid s 7 inserting s 161B(5) into the PSA (n 18)). This also applies to offences that caused the death of a child under 12 years.

sentencing a person for an offence listed in Schedule 1A of the PSA (which includes rape and sexual assault – where a maximum penalty of life imprisonment applies) in circumstances where both the original offence and the repeat offence were committed in relation to a child under 16 years and the person who committed these offences was an adult, which also requires a person to serve a minimum non-parole period of 20 years under changes made to the *Corrective Services Act 2006* (Qld).[35]

- **In 2016**, the introduction of domestic violence as an aggravating factor was introduced in the PSA.[36] While not specific to child victims, it recognises the higher level of seriousness of child sexual abuse committed in a family situations which can occur 'for many years undetected and cause great harm to their own children, and other children within their extended families'.[37]
- **In 2020**, changes to provide that when sentencing a person for a sexual offence against a child under 16 years, a court 'must not have regard to the offender's good character if it assisted in committing the offence' and requiring a court to have regard to the sentencing practices, principles and guidelines applicable when the sentence is imposed rather than when the offence was committed.[38]

Why legislative reforms matter to sentencing

The High Court has acknowledged that a change in the maximum penalty can be of particular relevance as it suggests Parliament viewed previous penalties imposed as inadequate.[39] However, maximum penalties that historically have been fixed at a very high level, or more recently at a high 'catch-all level' may be of less relevance in a given case.[40]

The Queensland Court of Appeal has referenced these comments on several occasions. For example, in *R v Stable (a pseudonym)* ('*Stable*'),[41] the Court of Appeal, referring to these earlier statements of principle, concluded in the case of the offence of indecent treatment of children under 12 years that the effect of the 'substantial increases in the penalty from 14 years' imprisonment to 20 years' imprisonment' in 2003 was that:

> sentences that were imposed before 2003 must now be regarded as generally inadequate. This is because the penalties were increased by the amending legislation and, at the same time, a new basis for sentencing of such offences was introduced. Together, those two sets of changes to the statute law of sentencing demonstrated that the legislature regarded these offences as more serious than they had previously been thought.[42]

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35 *Criminal Law (Two Strike Child Sex Offenders) Amendment Act 2012* (Qld) ss 3 inserting a new s 181A into the *Corrective Services Act 2006* (Qld) and s 7 inserting new pt 9B into the PSA (n 18).
36 PSA (n 18) s 9(10A) unless there are exceptional circumstances. Inserted by *Criminal Law (Domestic Violence) Amendment Act 2016* (Qld).
37 See *R v MDZ* [2024] QCA 139 [16] (Dalton JA, Bradley and Hindman JJ).
38 *Criminal Code (Child Sexual Offences Reform) and Other Legislation Amendment Act 2020* (Qld) s 53 inserting new ss 9(4) and 9(6A) into the PSA (n 31). These reforms were introduced following recommendations made by the Royal Commission into Institutional Responses to Child Sexual Abuse, *Criminal Justice Report: Executive Summary and Parts I to II* (Report, 2017) recs 74 and 76.
39 *Markarian v The Queen* (2005) 228 CLR 357, 372 [30] (Gleeson CJ, Gummow, Hayne and Callinan JJ), referring with approval to statements to this effect made in Eric Stockdale and Keith Devlin, *Sentencing* (Law Book Co of Australasia, 1987) [1.16]–[1.18].
40 Ibid.
41 *R v Stable (a pseudonym)* [2020] QCA 270 [37] ('*Stable*').
42 Ibid [38].

Referencing an earlier statement made by Fraser JA in *R v CBI*,[43] the Court said that 'it is to be expected that these changes would produce a general increase in the severity of sentences, rendering the earlier cases of little utility'.[44]

The impact of legislative reforms to the PSA on sentencing practices is discussed further in **Chapter 8**.

7.3 Evidence of alignment between sentencing outcomes and the community's and Parliament's views of offence seriousness

A disparity between current sentencing levels for an offence and the seriousness of that offence (as viewed by the community and Parliament) may be indicative of current sentencing practices not being adequate and appropriate.

7.3.1 Sentencing outcomes and community views

As discussed in section 7.3.1, community members who participated in the UniSC research exploring community views were asked to rank a series of paired scenarios to assess views on relative offence seriousness.

The Council matched these views of relative seriousness with sentencing outcomes to measure the extent to which outcomes were consistent with community rankings. Table 7.1 sets out our findings, which compare participant rankings with median sentencing levels in Queensland between 2020–21 and 2022–23.[45]

In most cases, the offence that most participants ranked as most serious also had the longest median custodial penalty. This suggests sentencing practices for these offences align with community views about the relative seriousness of these offences. However, there were some notable exceptions, with community members ranking some offences as more serious but the median sentence lengths being lower.

Ranking of rape conduct

Sentences imposed for the digital–vaginal rape of a child (DV offence) did not match community members' views about the offence's level of seriousness. Despite the digital–vaginal rape of a child being ranked by a majority of participants as more serious than any of the adult rape scenarios (including those involving penile–vaginal rape and in company offences (Pairs 1, 3 and 20), it had the lowest median term of imprisonment across all the adult rape scenarios used as a comparison (3.0 years).

An overwhelming majority of participants (85.4%) considered the digital rape of a child (DV offence) to be more serious than the penile–vaginal rape of an adult (non-DV offence) (Pair 1) despite sentences for the adult rape offence being considerably higher. There was a difference in the median sentences for those

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43 *R v CBI* [2013] QCA 186 [19].
44 *Stable* (n 41) [38].
45 The horizontal bar graph shows the proportion of the 89 participants who thought this offence was most serious within the pair of scenarios. The right-hand (blue) columns show the sentencing outcomes in Queensland between 2020–21 and 2022–23 for the scenarios, displaying the proportion of sentenced cases that had a custodial order imposed and the median custodial order length (years). The last column indicates whether the seriousness ranking within the pair matches the sentence outcome – 'yes' indicates the offence considered more serious within the pair also has the longer median custodial sentence, while 'no' indicates the offence considered more serious within the pair does not have the longer median sentence.

two case scenarios of about 3 years and 8.5 months (3.7 years) which suggests that if the child scenario was to be sentenced as more serious than the adult rape scenario, a much higher sentence would be imposed than is consistent with current sentencing practices.

Ranking of sexual assault conduct

Most participants (86.5%) also ranked the scenario involving aggravated sexual assault (non-consensual oral sex/fellatio performed by a teacher on a 16-year-old male student – a s 352(2) offence with a maximum penalty of 14 years' imprisonment) as more serious than sexual assault involving forced self-penetration with a sex-toy (s 352(3) offence with a maximum penalty of life imprisonment) (Pair 5). It was also ranked by about half of participants (49.4%) as more serious than strangulation in a domestic setting (Pair 14), which has a lower maximum penalty of 7 years. However, aggravated sexual assault (life) offences and strangulation both had longer median sentences imposed by the court of 2.5 years compared with 1.8 years for offences sentenced under s 352(2).

The majority of participants (74.2%) thought the non-aggravated sexual assault of an employee by their employer was more serious than burglary (Pair 7). However, burglary received a longer custodial sentence than non-aggravated sexual assault (median 1.3 years versus 0.8 years). Burglary was also more likely to attract a custodial sentence (79%) than non-aggravated sexual assault (64%). This finding suggests that the community may have viewed the sexual assault as more serious due to the physical and personal nature of the offence.

Ranking of offences involving death, serious physical injury or risk of death

Our analysis found discrepancies between the community views about the seriousness of the offence and the length of the custodial sentence imposed in Queensland courts in Pairs 17, 21 and 25 (see Table 7.1). In each of these scenario comparisons, the community thought the non-sexual offence was more serious than rape; however the median custodial sentence length was longer for the sexual offence.

Table 7.1: Seriousness of offence results from the University of the Sunshine Coast focus groups compared with the sentences imposed for these offences in Queensland (2020–21 to 2022–23)

Community view comparisons of seriousness of offence scenarios (n=89)			Sentencing outcomes in Queensland			Does the seriousness rank match the sentence outcome for each pair?
Pair #	Scenario number & offence description	Proportion most serious offence within pair *	N	% custodial orders	Median custodial sentence (years)	
1	8 Rape: digital (vaginal) child, niece (DV)	85.4%	24	100	3.3	No
	1 Rape: penile (vaginal), adult, stranger (not DV)	11.2%	23	100	7.0	
2	1 Rape: penile (vaginal), adult, stranger (not DV)	79.8%	23	100	7.0	Yes
	2 Rape: penile (anal), adult (DV)	14.6%	53	100	6.0	
3	8 Rape: digital (vaginal) child, niece (DV)	94.4%	24	100	3.3	No
	2 Rape: penile (anal), adult (DV)	1.1%	53	100	6.0	
4	8 Rape: digital (vaginal) child, niece (DV)	73.08%	24	100	3.3	Yes
	6 Sexual assault (agg): Teacher–student oral	22.5%	16	100	1.8	
5	6 Sexual assault (agg): Teacher–student oral	86.5%	16	100	1.8	No
	7 Sexual assault (agg life): Sex toy–vaginal	7.9%	2†	100	2.5	
6	7 Sexual assault (agg life): Sex toy–vaginal	66.3%	2†	100	2.5	Yes
	5 Sexual assault (non-agg): Employer-employee‡	30.3%	487	64	0.8	
7	5 Sexual assault (non-agg): Employer-employee‡	74.2%	487	64	0.8	No

Community view comparisons of seriousness of offence scenarios (n=89)				Sentencing outcomes in Queensland			Does the seriousness rank match the sentence outcome for each pair?
Pair #	Scenario number & offence description		Proportion most serious offence within pair *	N	% custodial orders	Median custodial sentence (years)	
	10	Burglary (at night)‡	21.3%	2,249	79	1.3	
8	6	Sexual assault (agg): Teacher–student oral	93.3%	16	100	1.8	Yes
	10	Burglary (at night)‡	3.4%	2,249	79	1.3	
9	11	Murder (DV)	66.3%	10	100	Life	Yes
	3	Rape, Penile (vaginal & anal) in company (not DV)	21.8%	8†	100	8.5	
10	11	Murder (DV)	74.2%	10	100	Life	Yes
	8	Rape: digital (vaginal) child, niece (DV)	21.3%	24	100	3.3	
11	2	Rape: penile (anal), adult (DV)	79.8%	53	100	6.0	Yes
	13	Common assault (Duncan)‡§	15.7%	4,511	21	0.5	
12	7	Sexual assault (agg life): Sex toy–vaginal	83.1%	2†	100	2.5	Yes
	13	Common assault (Duncan)‡§	11.2%	4,511	21	0.5	
13	14	Strangulation (DV)	87.6%	839	100	2.5	Yes
	5	Sexual assault (non-agg): Employer-employee‡	6.7%	487	64	0.8	
14	6	Sexual assault (agg): Teacher–student oral	49.4%	16	100	1.8	No
	14	Strangulation (DV)	44.9%	839	100	2.5	
15	12	Dang op vehicle GBH (speeding & alcohol)	56.2%	56	100	4.6	Yes
	6	Sexual assault (agg): Teacher–student oral	38.2%	16	100	1.8	
16	12	Dang op vehicle GBH (speeding & alcohol)	86.5%	56	100	4.6	Yes
	5	Sexual assault (non-agg): Employer-employee‡	11.2%	487	64	0.8	
17	12	Dang op vehicle GBH (speeding & alcohol)	66.3%	56	100	4.6	No
	2	Rape: penile (anal), adult (DV)	27.0%	53	100	6.0	
18	1	Rape: penile (vaginal), adult, stranger (not DV)	87.6%	23	100	7.0	Yes
	7	Sexual assault (agg life): Sex toy–vaginal	7.9%	2†	100	2.5	
19	3	Rape: penile (vaginal & anal) in company (not DV)	52.8%	8†	100	8.5	Yes
	9	Intention to cause GBH (DV)	41.6%	14	100	6.3	
20	3	Rape: digital (vaginal) child, niece (DV)	48.3%	24	100	3.3	No
	8	Rape: penile (vaginal & anal) in company (not DV)	47.2%	8†	100	8.5	
21	9	Intention to cause GBH (DV)	64.0%	14	100	6.3	No
	1	Rape: penile (vaginal), adult, stranger (not DV)	30.3%	23	100	7.0	
22	9	Intention to cause GBH (DV)	84.3%	14	100	6.3	Yes
	14	Strangulation (DV)	10.1%	839	100	2.5	
23	12	Dang op vehicle GBH (speeding & alcohol)	91.0%	56	100	4.6	Yes
	10	Burglary (at night)‡	5.6%	2,249	79	1.3	
24	2	Rape: penile (anal), adult (DV)	52.8%	53	100	6.0	Yes
	4	Rape: digital (vaginal) (not DV)	40.4%	47	100	3.0	
25	14	Strangulation (DV)	62.9%	839	100	2.5	No
	4	Rape: digital (vaginal) (not DV)	29.2%	47	100	3.0	
26	4	Rape: digital (vaginal) (not DV)	82.0%	47	100	3.0	Yes
	13	Common assault (Duncan)‡§	14.6%	4,511	21	0.5	

Data notes: Sentencing outcomes in Queensland – MSO, sentenced as adults, higher and Magistrates Courts, 2020–21 to 2022–23
Sources: Community views on rape and sexual assault offences, University of the Sunshine Coast, and Queensland Government Statistician's Office, Queensland Treasury - Courts Database, extracted September 2023.
Information in the rape cases regarding victim (adult/child), type of conduct, and victim-offender relationship was manually coded from sentencing remarks received from Queensland Sentencing Information Service.

* some participants did not provide a response to all scenario pairs presented. These responses were included in the analysis but are not shown.
† This sample size is small. Caution should be used when interpreting these results.
‡ these offences include sentences imposed in the higher courts and Magistrates Courts combined.
§ sentencing data could not identify cases where the victim was a stranger to the offender. Cases where the offence was a DFV offence have been excluded as these have been identified as having a known relationship. However other non-DFV victim-offender relationships remain in the data.

7.3.2 Sentencing outcomes and Parliament's views of seriousness

Challenges in assessing adequacy based on maximum penalties

As discussed in section 7.2.3, the same maximum penalties apply to a wide range of offences, including rape and some forms of aggravated sexual assaults. Many sentencing reforms apply not only to the offences of sexual assault and rape, but also to other sexual offences and non-sexual violent offences.

For these reasons, maximum penalties and sentencing reforms cannot be relied on as the sole determinant of adequacy.

In practice, researchers have found that 'the ordering of crimes according to the severity of their statutory maximum penalties bears little relationship to their ranking according to the sentences actually imposed by the courts'.[46] This is because courts must take into account the individual circumstances of the person being sentenced and the offence, taking into account that maximum penalties are reserved for the 'worst category' of offending.[47]

On some occasions, courts have pointed to the maximum penalty as a basis for finding that sentencing outcomes are not appropriate. For example, in *Director of Public Prosecutions v Dalgliesh (a pseudonym)* ('*Dalgliesh*'),[48] the High Court supported the view of the Victorian Court of Appeal that the current sentencing range for incest in Victoria reflected 'a disregard of the gravity of the offending as indicated by the maximum sentence prescribed for the offence' as well as the moral culpability of the offender in that particular case as 'clearly correct'.[49] The Victorian Court of Appeal in reaching this finding had considered 12 cases of incest involving pregnancy, for which the range of sentences was 4 to 7 years' imprisonment.[50] The High Court noted that the range of sentences 'pays scant, if any, regard to the maximum penalty prescribed for the offence of incest' which had increased in September 1997 from 20 years' imprisonment to 25 years' imprisonment.[51]

Median and maximum sentences compared with maximum penalties

As discussed in **Appendix 4**, sentencing outcomes for rape and sexual assault vary across a wide sentencing range, and sentence lengths tend to vary by offence and conduct type in particular.

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46 Richard Fox and Arie Frieberg, 'Ranking Offence Seriousness in Reviewing Statutory Maximum Penalties' (1990) 23(3) *Australian and New Zealand Journal of Criminology* 165, 170.
47 See *R v Kilic* (2016) 259 CLR 256, 265–6 [18]–[19]. Both the nature of the crime and circumstances of the person being sentenced are to be considered in determining whether an offence falls within this category.
48 *Director of Public Prosecutions v Dalgliesh (a pseudonym)* (2017) 262 CLR 428.
49 Ibid [53].
50 *Director of Public Prosecutions v Dalgliesh (a pseudonym)* [2016] VSCA 148, [25]–[39] (Kiefel CJ, Bell and Keane JJ).
51 *Dalgliesh* (n 49) [11]. See also *DPP v Maynard* [2009] VSCA 129, in which the Victorian Court of Appeal pointed to the fact that a 4-year sentence of imprisonment for a rape offence 'was only 16% of the available maximum' of 25 years as a basis for concluding the sentence in that case 'does not accord with current sentencing practices for such a serious example of the offence': [41].

The Council examined the median and maximum actual sentences received for sexual assault and rape over the 18-year period as a proportion of the maximum penalties, noting that a similar approach was taken by the Victorian Sentencing Advisory Council ('VSAC') in its 2016 Sentencing Guidance review.[52]

Assessing median imprisonment lengths as a proportion of the maximum penalty is an imperfect exercise, given that a life sentence has no numerical value and the custodial component can be for a person's natural life if parole is never applied for or granted. We assigned life imprisonment a nominal value of 30 years, as this is the highest-non parole period prescribed.[53]

As shown in Table 7.2, median sentences for rape and sexual assault ranged from just 8.3 per cent of the maximum penalty (for aggravated sexual assault (life) offences) to 16.7 per cent for rape and non-aggravated sexual assault where sentenced in the Magistrates Courts (based on the courts' 3-year jurisdictional limit).[54]

Rape was the only offence for which the maximum penalty was imposed during the data period.[55] The longest sentence for non-aggravated sexual assault in the Magistrates Courts, however, corresponded with the courts' 3-year jurisdictional limit.[56] A sentence representing 70 per cent of 10-year maximum penalty was also imposed for non-aggravated sexual assault sentenced in the higher courts.

Aggravated sexual assault (life) offences had the lowest maximum sentence applied, considered as a percentage of the maximum penalty.

Table 7.2: Median and longest custodial sentence lengths for rape (MSO) and sexual assault (MSO) as a percentage of the maximum penalty/sentence 2005–06 to 2022–23

Offence	Median	Median as % of max penalty/ sentence	Longest penalty imposed	Longest penalty imposed as % of max penalty/ sentence
Rape (s 349)	5.0	16.7	Life	100.0
Aggravated sexual assault (s 352(3))	2.5	8.3	6.0	20.0
Aggravated sexual assault (s 352(2))	1.5	10.7	3.8	27.1
Non-aggravated sexual assault (s 352(1) – higher courts)	1.0	10.0	7.0	70.0
Non-aggravated sexual assault (s 352(1) – Magistrates Courts)	0.5	16.7	3.0	100.0

52 Sentencing Advisory Council (Victoria), *Sentencing Guidance in Victoria* (Report, 2016) 74–76.
53 *Criminal Code* (Qld) s 305(2).
54 Ibid s 552H. This applies unless the Court is imposing a drug or alcohol treatment order, in which case a sentence of up to 4 years' imprisonment can be imposed: ibid s 552H(1)(a). Also, a Magistrates Court must abstain from dealing summarily with a charge if satisfied that because of the nature or seriousness of the offence or any other relevant consideration the defendant, if convicted, may not be adequately punished on summary conviction: s 552D.
55 Over the 18-year data period, 7 rape cases (MSO) received a life sentence. Of those, 4 were due to the mandatory operation of the repeat serious child sex offence scheme, PSA section 161E and 2 had the life sentence for rape removed on appeal. See Appendix 4 for details.
56 *Criminal Code* (Qld) s 552H. Note that a Magistrates Court is not permitted to deal with a charge if satisfied that if because of the nature or seriousness of the offence or any other relevant consideration, the defendant, if convicted, may not be adequately punished on summary conviction: ibid s 552D(1).

Notes: 1. Offences with a maximum penalty of life imprisonment assigned a 30-year nominal term 2. Non-aggravated sexual assault calculations based on a maximum 3-year sentence for offences sentenced in the Magistrates Courts (Criminal Code (Qld) s 552H).
Source: Queensland Government Statistician's Office, Queensland Treasury - Courts Database, extracted September 2023.

Median sentences for these offences aligned with the ordinal ranking of current maximum penalties, noting the following:

- Rape, which has a maximum penalty of life imprisonment, had the longest median custodial sentence (5.0 years), followed by aggravated sexual assault (life) offences (2.5 years).
- Aggravated sexual assault offences with a maximum penalty of 14 years' imprisonment had the next highest median penalties (1.5 years).
- Non-aggravated sexual assault, which has a maximum penalty of 10 years' imprisonment, had the lowest median sentences (1.0 years for cases sentenced in the higher courts and 0.5 years for cases sentenced in the Magistrates' Courts).

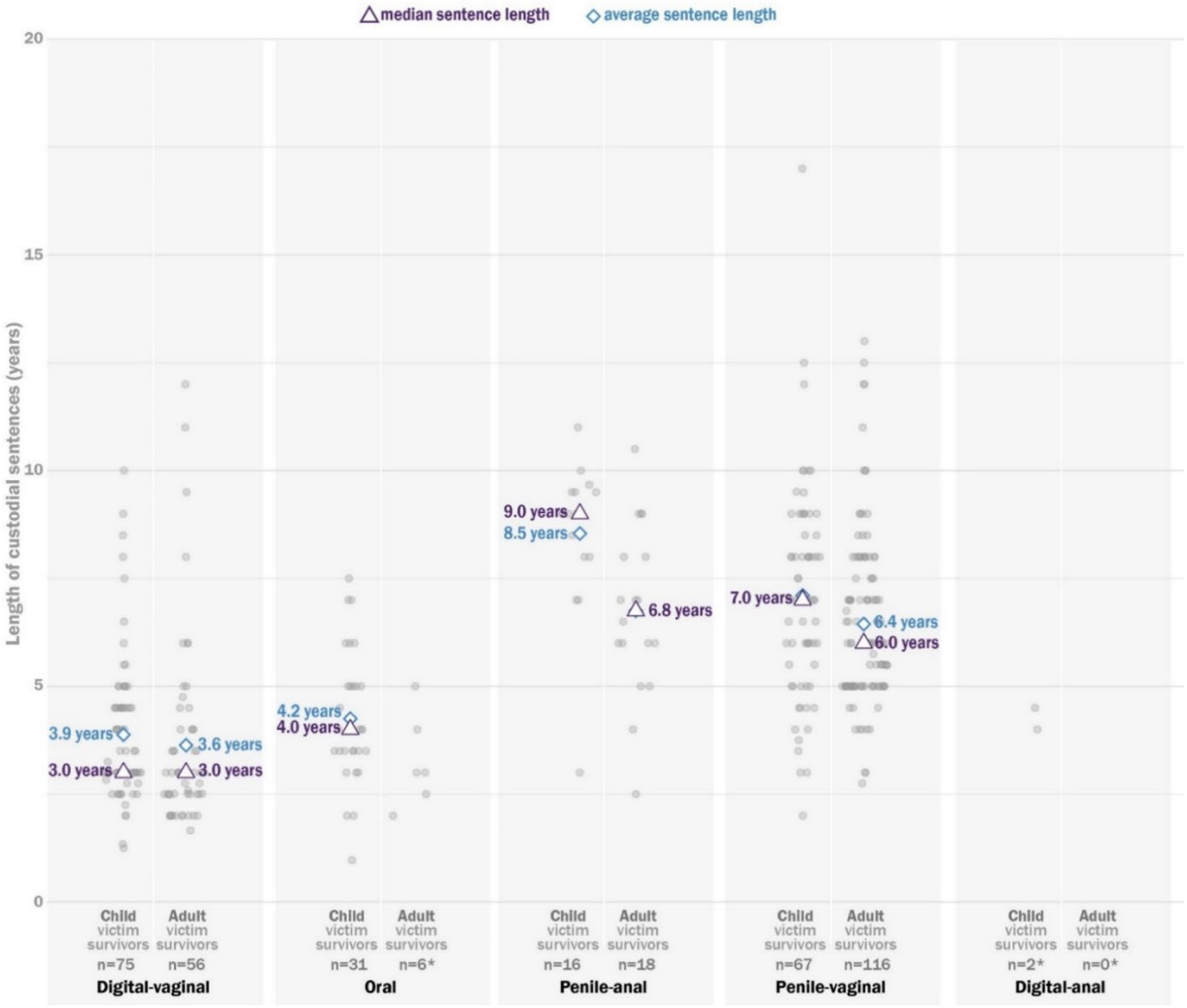
Beyond this observation, it is not possible to draw any conclusions from this analysis. This is because the same limitations apply to use of the maximum penalty as a guide to offence seriousness more generally, taking into account it is reserved for the worst category of offending, and both rape and sexual assault occur in a wide spectrum of circumstances. A low median as a proportion of the maximum penalty may simply reflect that fact.

Sentencing practices for different forms of sexual penetration

As discussed in section 7.2.3, one maximum penalty (life imprisonment) applies to all forms of penetration captured within the offence of rape. There is no suggestion in the framing of the offence of rape that different types of conduct captured within this offence should be viewed differently from other types of conduct.

Despite this, our analysis has found that sentencing outcomes generally 'cluster' at different levels based on the type of penetration involved – for example, digital–vaginal rape of an adult clustered around the 3-year mark, while penile–vaginal rapes clustered around the 6-year mark (see Table 7.1).

Figure 7.1: Length of custodial sentences by type of rape and age of victim survivor (MSO)



In **Chapter 6**, we note that the differential treatment of penetration types is occurring despite Court of Appeal guidance to the contrary that conduct type alone does not in itself determine offence seriousness.

Sentencing practices for different forms of sexual assault conduct

While we also found differences in sentencing practices for non-aggravated sexual assault based on conduct type, from our review of sentencing remarks and other evidence gathered, we did not find the same clear distinctions between assessed levels of seriousness based on conduct type alone, with a broader range of factors generally considered. This is consistent with views expressed in our subject matter expert interviews (see section 6.5.3, **Chapter 6**).

When sentencing outcomes were analysed by conduct type alone rather than the context of the offending, we found the following:

- Offending involving skin-to-skin ('on skin') contact was more likely to result in a custodial penalty (predominantly a wholly suspended prison sentence), depending on whether the conduct involved touching of the genitals (73.7%) or another body part (75.0%). The exception was where the on-skin contact involved the perpetrator putting their mouth to a non-genital body region (e.g. kissing

a person's breast, lips, face, neck or hand), in which 55.6 per cent of cases resulted in custodial sentences.

- Over-clothes sexual assaults resulted in custody in 58.8 per cent of cases involving touching of a person's genitals, and 49.1 per cent of cases involving other body parts.
- Custodial penalties were longer on average for offences involving touching of the genitals, whether over or under clothing (with under clothing 'on-skin' offences resulting in the longest median sentences):
    - when the indecent touching involved the touching of a person's genitals, on skin offending resulted in a median sentence length of 1.0 years, compared to 0.8 years for touching a person's genitals over clothing;
    - for indecent touching that involved touching another body part, on skin offending resulted in a median sentence of 0.8 years compared to 0.5 years for over clothes offending.

For more information, see **Appendix 4**.

7.3.3 Victim age and sentencing outcomes

The legislative reforms made by Parliament, including under sections 9(4)–(6) of the PSA (discussed in **Chapter 8**), have been designed with the intention of ensuring that sexual offences against children 'are recognised as offences equating in seriousness to offences of violence'.[57] The community's view is that offences against children are more serious.

The Council undertook a separate analysis of outcomes for rape (MSO) by victim age to test whether these offences are being treated as more serious based on sentencing outcomes.

Based on an analysis of cases sentenced during the three-year period between 1 July 2020 to 30 June 2023, we found rape cases with an adult victim survivor had a median custodial sentence that was 9 months longer than cases where the victim survivor was a child (5.5 years compared with 4.8 years, respectively).

However, once the penetration type was controlled for, these trends were reversed. Within a penetration category, cases involving a child victim survivor generally resulted in sentences that were the same length, or longer compared to cases involving an adult victim survivors. For example:

- digital-vaginal rape of a child had a median custodial sentence of 3.0 years, which was the same median custodial sentence for digital-vaginal rape of an adult; and
- penile-vaginal rape of a child had a median of 7.0 years, compared to penile-vaginal rape of an adult, which had a median sentence of 6.0 years.

The higher sentences imposed for child rape cases for some types of conduct suggest courts are sentencing consistently with the community's and Parliament's views of offence seriousness by, in general, treating offences against children as being more serious than the same offences committed against adults.

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[57] Explanatory Notes, Sexual Offences (Protection of Children) Amendment Bill 2002 (Qld) 7.

However, based on the UniSC study, the extent to which the higher level of seriousness of child rape is reflected in sentencing outcomes in terms of increased sentence lengths would appear to be insufficient.

Significantly, despite substantive changes in child sexual offence legislation and our understanding of the harm caused by these offences to children, sentencing practices have not sufficiently shifted. For example, a 3-year sentence of imprisonment for digital-vaginal rape of a child by her father was upheld by the Court of Appeal in a 1997 decision, aligning with current median of 3.0 years for the same offence.[58]

The higher ranking of the case scenario involving aggravated sexual assault by a teacher on a child (which carries a 14-year maximum penalty) than the aggravated sexual assault (life) and strangulation in a domestic setting scenario is further evidence that the community expects sexual assault offences involving older adolescent children (aged 16 to 17 years) to attract higher penalties.

The UniSC findings are consistent with views of the Queensland community in ranking crime harm, given that child sexual abuse was ranked as the second most serious offence in the Crime Harm Index based on a weighted score.

7.4 How sentencing outcomes for sexual assault and rape compare with other offences

As another measure of the appropriateness and adequacy of sentencing outcomes for rape and sexual assault, we also compared sentencing outcomes for these offences with outcomes for other offences.

The comparator offences selected vary in seriousness, maximum penalty and whether they involve personal violence, property or drug-related harms. Several offences were chosen because they align with offences selected by UniSC as part of its focus group research for this review. For more information see **Appendix 4**.

As 'there are no widely agreed metrics to use in scaling [offence] seriousness or punishment severity',[59] comparing offence outcomes is a limited tool to assess offence seriousness.

Generally, it is suggested, the penalties that attach to particular forms of criminal wrongdoing should be 'scaled to the degree of wrongdoing' involved in the offence, thereby reinforcing prevailing norms of acceptable behaviour.[60] For example, a sexual assault should be punished more severely than a minor property offence. Beyond this, developing comprehensive scales of offence seriousness that are then matched to penalties as part of a discretionary sentencing exercise is a virtually impossible exercise, given the multiplicity of circumstances in which offences are committed and their differential impacts.[61]

Using administrative data also has limitations, as we cannot control for factors including whether the person's conviction due to them pleading guilty or being found guilty following a trial, the number of offences involved in specific cases and the seriousness of individual examples of offending within these

58 *R v P* [1998] 2 Qd R 191.
59 Michael Tonry, 'Proportionality Theory in Punishment Philosophy: Fated for the Dustbin of Otiosity?' in Michael Tonry (ed), *Of One-eyed and Toothless Miscreants: Making the Punishment Fit the Crime?* (Oxford University Press, 2019), referring to Emile Durkheim's observations on the role of the legal system in reinforcing important norms and values.
60 Michael Tonry, 'Doing Justice in Sentencing' (2021) 50 *Crime and Justice* 1, 10.
61 For a discussion of these challenges, see Tonry (n 59).

broad offence categories, the number of victims involved, or whether the person had a prior history of offending.

Despite the limitations of this analysis, it illustrates how rape and sexual assault are sentenced in comparison with other offences. The differences in the use of sentencing orders and lengths can provide a useful guide as to how 'serious' different types of offences are viewed. Generally, the more intrusive, restrictive or onerous the sentence type and conditions, the more severely a penalty is viewed.

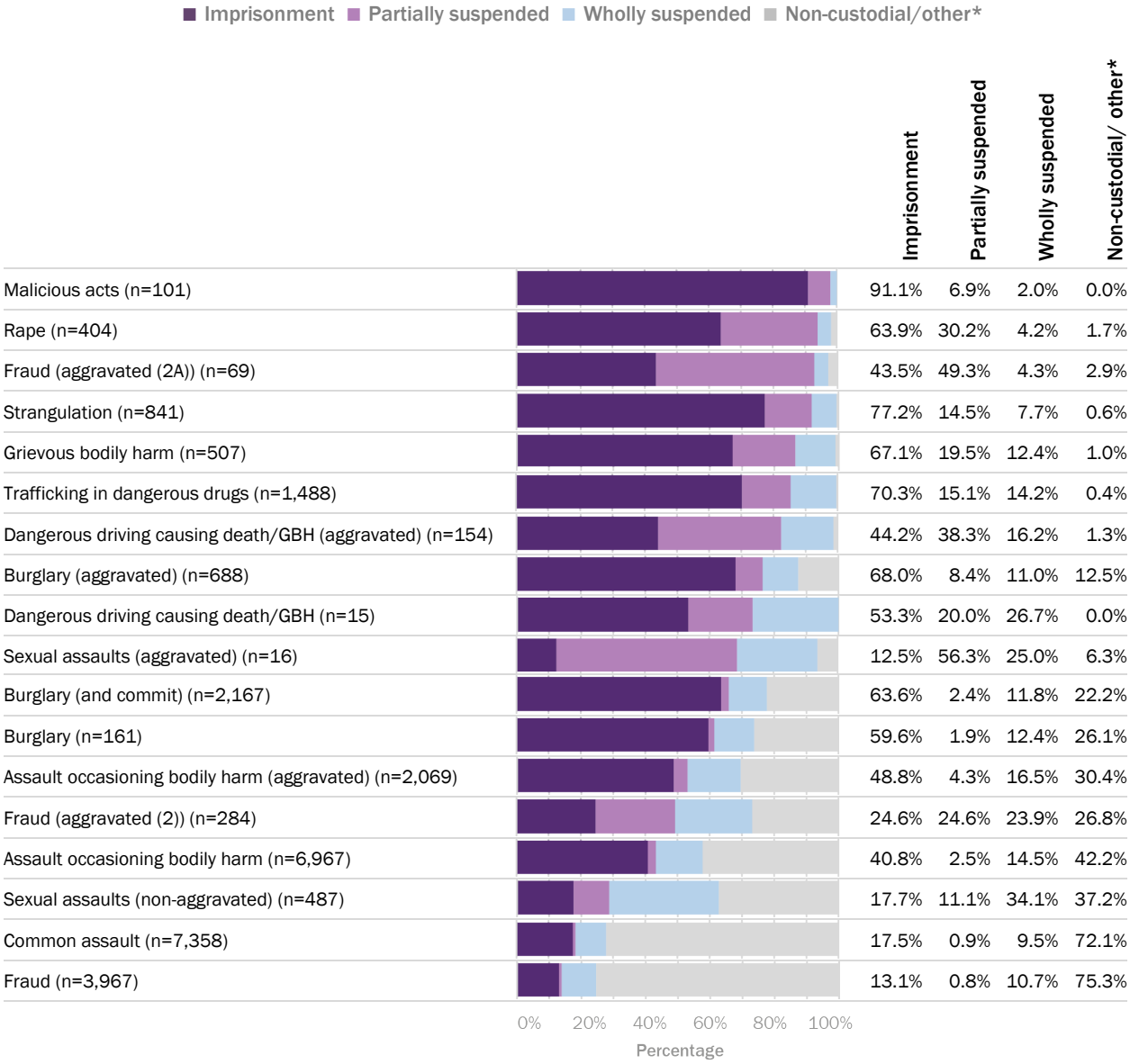
Comparisons based on the relative severity of penalties is complex because of the challenges in commensurability. For example, there is no direct equivalence between days spent in custody versus time spent subject to conditions under a probation order or the dollar value of a fine.[62] An attempt to rank the relative severity of penalties based on type also fails to take account of how these penalties impact the individual being sentenced, which may depend on their personal circumstances.

There are also differences in the penalty types considered by a court to be appropriate to meet the purposes of sentencing. For example, if the objective is community protection, then a fine is unlikely to be particularly effective unless there is evidence of its specific deterrent effect (see **Chapter 11**).

With these limitations in mind, we identified differences in the use of different penalty types based by offence (see **Chapter 11**).

62 Note, however, that there are some limited contexts in which this is sought to be quantified. See, for example PSA (n 18) s 69 regarding fine option orders, which cap the number of community service hours for each penalty unit, and s 182A regarding imprisonment in lieu of payment of a fine.

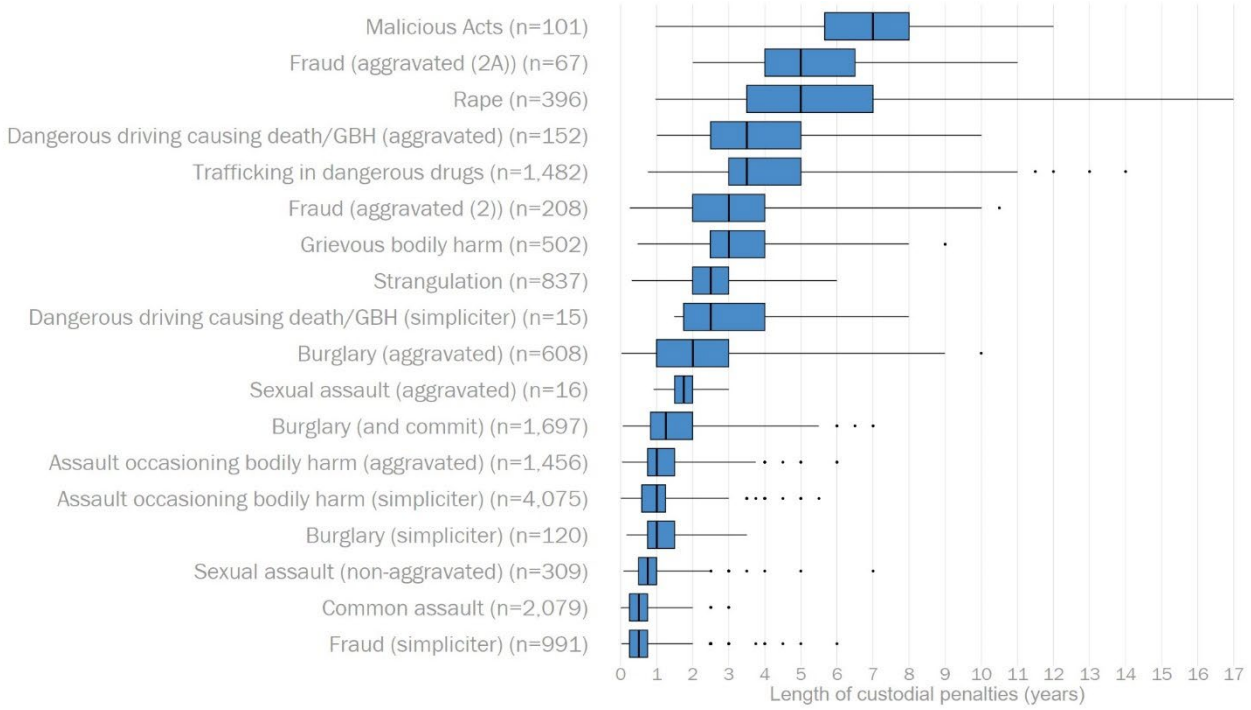
Figure 7.2: Proportion of sentenced cases by penalty type (MSO), comparator offences, 2020–21 to 2022–23



Data notes: includes cases (MSO) sentenced from 2020–21 to 2022–23. Imprisonment includes combined prison-probation orders.
Cases sentenced for aggravated sexual assault under s 352(3) where the maximum penalty is life imprisonment were not included due to the small number of cases sentenced (n=2).
* 'Other' includes a small number of custodial orders of intensive correction orders and rising of the court. The values above are sorted in descending order based on the time spent in actual custody (defined as a period of imprisonment or the proportion of a partially suspended prison sentence in which the person was required to serve before the sentence was suspended).
Source: Queensland Government Statistician's Office, Queensland Treasury - Courts Database, extracted September 2023.

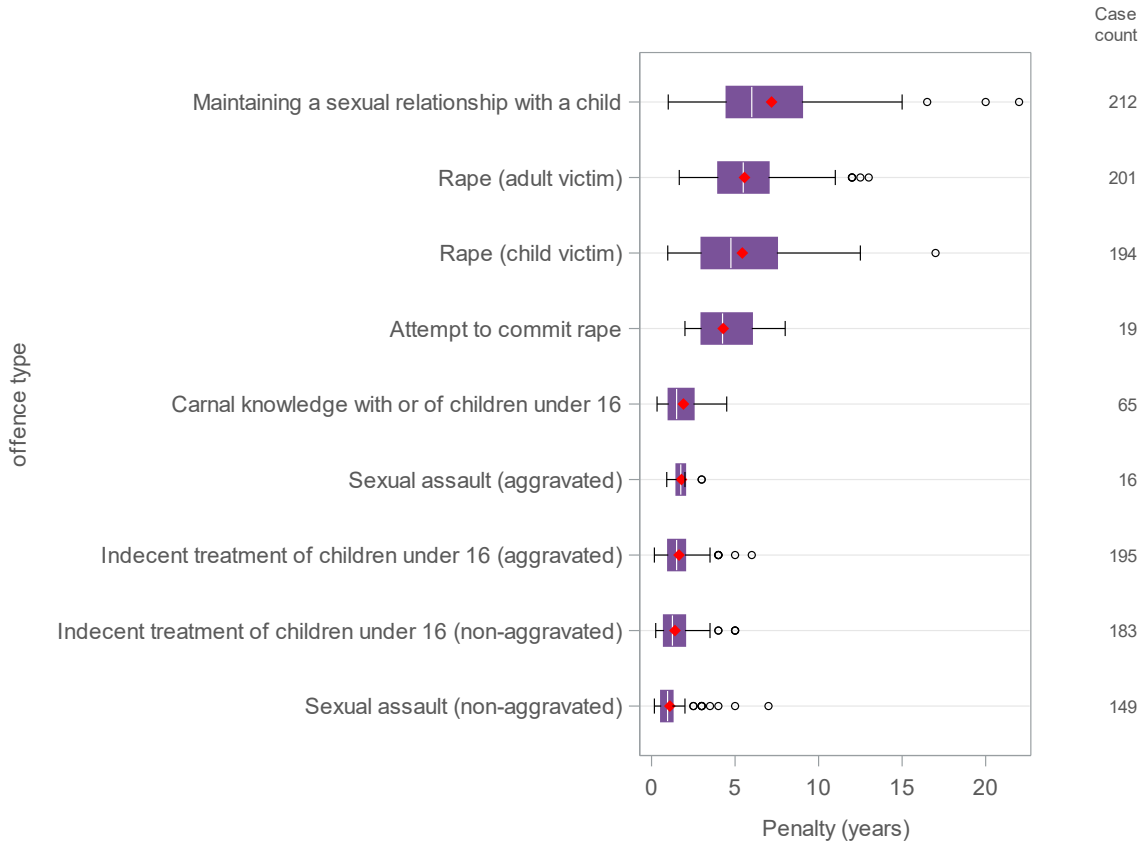
The Council also compared penalty lengths for rape and sexual assault with select non-sexual offences (Figure 7.3) and sexual offences (Figure 7.4) during the 3-year data period (1 July 2020–30 June 2023). Life sentences were excluded from this analysis.

Figure 7.3: Distribution of length of custodial orders (MSO), comparator offences, 2020–21 to 2022–23



Data notes: includes cases (MSO) sentenced from 2020–21 to 2022–23. Box plots exclude life sentences. Sexual assault (aggravated) and sexual assault (aggravated life) have not been presented due to small sample sizes.
Custodial sentences included in this figure include sentences of imprisonment (including suspended imprisonment and combined prison-probation orders), and intensive correction orders. Sentences of rising of the court are not included.
Source: Queensland Government Statistician's Office, Queensland Treasury - Courts Database, extracted September 2023, updated April 2024.

Figure 7.4: Custodial sentence lengths for Australian Standard Offence Classification (ASOC) 031 sexual assault (MSO) sentenced in the higher courts, July 2020 to June 2023



Data notes: Custodial orders for ASOC subdivision 031 'Sexual assault', MSO, adults, higher courts, 2020–21 to 2022–23. Life sentences for maintaining a sexual relationship with a child (n=4) and for rape (n=1) are excluded from this figure. Offences with less than 10 cases receiving a custodial order are excluded from this analysis - Attempts to procure commission of criminal acts, [Cth] Child sex offences outside Australia, [Repealed] Unlawful sodomy, Assault with intent to commit rape, Sexual assault (aggravated life), Incest, and Abuse of persons with an impairment of the mind,
Source: Queensland Government Statistician's Office, Queensland Treasury - Courts Database, extracted September 2023, updated April 2024.

The following is a high-level summary of our findings about how sentencing outcomes for sexual assault and rape compare with those for other offences. More information can be found in **Appendix 4**.

7.4.1 Rape

Comparative sentencing outcomes for rape, sexual assault and select non-sexual offences

Based on our analysis of sentencing outcomes, we observed that compared to sexual assault and 15 other select non-sexual offences, rape:

- **ranked 2nd based on the use of custodial orders and average custodial sentence length**; the offence of Acts intended to cause grievous bodily harm and other malicious acts ('malicious acts') ranked first;
- **had the broadest range of custodial sentence length distribution**, potentially reflecting the wide range of circumstances involved in this form of offending;

- **ranked fourth for use of partially suspended prison sentences as a proportion of all penalties imposed** with sexual assault (aggravated) ranked first,[63] followed by fraud (aggravated 2A) and dangerous driving causing death/GBH;
- **Ranked sixth for use of imprisonment orders, as a proportion of all sentences**. The offences of malicious acts, strangulation, grievous bodily harm, drug trafficking and burglary (aggravated) all ranked higher.

These findings suggest that rape sentences are more varied compared with other select non-sexual offences, potentially reflecting the wide range of conduct in this type of offending. It also shows the use of partially suspended prison sentences is high in comparison to other offences examined. Some offences with a lower maximum penalty had a higher proportion of imprisonment orders (such as strangulation, grievous bodily harm and drug trafficking).[64]

Comparative sentencing outcomes for rape and select sexual offences

We also compared rape (child victim) and rape (adult victim) outcomes for 5 sexual offences over the same 3-year data period used for the above analysis and found the following:

- Rape (child victim) ranked second based on the use of custodial orders and third for average sentence length.
- Rape (adult victim) ranked third for custodial order use and second for average sentence length.
- The use of partially suspended prison sentences was high across all sexual offences analysed.[65]

7.4.2 Sexual assault

Comparative sentencing outcomes for sexual assault, rape and select non-sexual offences

When comparing penalty outcomes for sexual assault with rape and 15 non-sexual offences we found the following: [66]

- Aggravated sexual assault ranked tenth for custodial order use as a proportion of all sentences, and eleventh for average custodial sentence length.
- Aggravated sexual assault ranked first for use of partially suspended prison sentence use, as a proportion of all sentences imposed.
- Non-aggravated sexual assault ranked sixteenth for custodial order use as a proportion of all sentences and fifteenth for average custodial sentence length.
- Non-aggravated sexual assault ranked first for wholly suspended prison sentence use and eleventh for partially suspended prison sentence use as a proportion.

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63 Although this involved only 16 cases, meaning these findings should be interpreted with caution.
64 The maximum penalty for trafficking in dangerous drugs increased to life imprisonment in May 2023: *Police Powers and Responsibilities and Other Legislation Amendment Act (No 2) 2023* (Qld) s 4.
65 Partially suspended prison sentences accounted for just over one quarter of penalties imposed for rape of a child (26.2%) and repeated sexual conduct with a child (formerly 'maintaining a sexual relationship with a child') (25.5%), to just over a third of all penalties for rape of an adult (34.3%) and closer to half of penalties for aggravated indecent treatment of a child under 16 offences (46.1%).
66 Although this involved only 16 cases, meaning these findings should be interpreted with caution.

The high use of wholly and partially suspended prison sentences may be due in part to a court's inability to set a parole release date, which is discussed further in **Chapter 11**.

Comparing sentencing outcomes for sexual assault with outcomes for assaults occasioning bodily harm

For cases sentenced in the higher courts, the median custodial sentence length for assaults occasioning bodily harm ('AOBH') was one year, which was higher than for non-aggravated sexual assault (9 months) and common assault (0.5 years).

For cases finalised in the Magistrates Courts, AOBH (simpliciter and aggravated) attracted longer custodial sentences than non-aggravated sexual assault cases (one year compared with 0.5 years respectively).

These findings could suggest that current sentencing practices place greater weight on physical harm than psychological or emotional harm, thereby giving rise to more custodial penalties and longer sentences for AOBH than for non-aggravated sexual assault.

This analysis, however, does not take into account the type of conduct involved. In our select sentencing remarks analysis (n=75)[67] we found that a higher proportion of cases involving indecent touching under clothing/on skin (up to 75.0%) received custodial sentences and the median sentences for this conduct was also higher (the highest median being 1.0 years where the touching was of genitals). This outcome aligns with the median AOBH outcome, suggesting courts may be treating touching under clothing/on skin in a similar way to physical harm (although we do not know the conduct involved in the AOBH cases).

Further, due to the large number of case-specific and defendant-specific factors that are not accounted for, including the number of offences the person was sentenced for, relevant history of prior offending, age and the context of the offending, no conclusions can be drawn from this analysis.

Comparative sentencing outcomes for sexual assault and select sexual offences

The Council's comparison of sexual assault (non-aggravated) sentenced with 5 sexual offences sentenced in the higher courts during the 3-year data period found it:

- **had the lowest proportion of imprisonment sentences** (13.7%) compared with other sexual offences;
- **had the highest proportion of wholly suspended prison sentences** (44.7%) compared with other sexual offences.

The Council also compared sentencing outcomes for non-aggravated sexual assault sentenced in the Magistrates Court with select sexual and non-sexual offences that had similar conduct/seriousness or maximum penalties.[68] This analysis found that both forms of AOBH (both non-aggravated and aggravated)

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67 See Chapter 4 and Appendix 5 for the methodology used for this analysis.

68 AOBH which has a 7-year maximum penalty, or up to 10 years if a circumstance of aggravation applies; burglary (aggravated) and burglary (commit an indictable offence)– both of which have a maximum penalty of life imprisonment; carnal knowledge with child under 16 years (now called engaging in penile intercourse with a child under 16) which has a 14-year maximum penalty, or life imprisonment if committed in certain circumstances – for example, the child is a person with an impairment of the mind; common assault, which has a 3-year maximum penalty, Common assault now includes circumstances of aggravation which increases the maximum penalty to 4 years if a circumstance of aggravation applies.

attracted a greater proportion of custodial penalties[69] than non-aggravated sexual assault, and a smaller proportion of monetary penalties, despite having similar maximum penalties.

More detailed findings are presented in **Appendix 4**.

7.4.3 Consultation views

Submissions and consultation events

While we did not ask a specific consultation question regarding views about how sentencing outcomes for sexual assault and rape compare with other offences, we did receive some feedback in relation to this aspect.

At the Brisbane Consultation Event, some participants thought rape and sexual assault should be treated with a higher level of seriousness than drug trafficking on the basis that sexual offences are more likely to cause trauma.[70] A related view was expressed in the Cairns Consultation Event, with some participants commenting on the jurisdictions of the courts and what this communicated in terms of offence seriousness.[71] Participants queried why drug trafficking is dealt with by the Supreme Court, while rape cases are dealt with by the District Court. For victim survivors, this is often the worst thing they have experienced, and the court level may make them feel like the harm caused to them is less important than drug trafficking.

Subject matter expert interviews

Some SME participants were asked for their views on the seriousness of sexual assault and rape offences compared with other types of offences. One participant considered that, in their experience, fraud and drug trafficking offences can receive higher sentences in contrast to sexual assault and rape, which may lead to victim dissatisfaction and a perception that the sentence was inadequate. [72] The same person also considered that victims can be frustrated because sentences for rape and sexual assault are 'nowhere near the maximum penalties', given the 'sense of violation that's involved'.

Another participant thought there was a discrepancy between the sentencing for drug offences and indecent treatment of a child offences, with the former often receiving longer periods of imprisonment.[73]

7.5 Problems with the assessment of objective seriousness of sexual assault and rape offences

As discussed in **Chapter 6**, Queensland courts are required to take account of the nature of the offence and how serious it was, and the extent to which the offender is to blame for the offence under section 9(2) of the PSA. These provisions require a court to assess the harm and culpability that inherently exist in the offence and are part of the objective elements of the offence. The court's assessment and categorisation of an offence in terms of its objective seriousness are therefore integral to the sentencing

69 Includes imprisonment, partially and wholly suspended prison sentences.
70 Brisbane Consultation Event, 11 March 2024, .
71 Cairns Consultation Event, 21 March 2024.
72 SME Interview 15.
73 SME Interview 17.

process.[74] This is why the Council included this criterion as a relevant measure of assessing adequacy of the current Queensland sentencing approach.

The Council's analysis has identified 3 issues relating to the objective seriousness of sexual assault or rape and the court's assessment of offending conduct that may be affecting current sentencing practices.

7.5.1 All types of penetrative rape conduct are objectively serious

In **Chapter 6** and **Chapter 8**, we comment in some detail about problems highlighted by the Court of Appeal regarding what we consider to be the unhelpful categorisation of rape conduct and forms of penetrative acts into different levels of offence seriousness.

Legal stakeholders advised the Council that the type of rape was highly relevant in assessing where on the spectrum of gravity an individual case falls, with participants suggesting a hierarchy of offending, with digital and oral penetration (both with tongue and penis) on the low end of the scale and penile penetration of a vagina or anus at the high end.

Evidence of this categorisation is illustrated by the 'clustering' of sentencing outcomes based on the type of penetrative conduct alone (see **Appendix 4**). The Council's analysis found the median sentence length for rape (MSO) varied substantially when the type of rape was considered with acts of penile–anal and penile–vaginal having the highest average and median sentence lengths and digital–vaginal penetration the lowest.

Some SME interview participants thought not enough weight was being given to the objective seriousness of digital and oral rape, particularly when an offender commits penile–oral rape), with the comment that 'sentencing outcomes do not adequately reflect 'the offensive nature of it and the demeaning aspect of it'.[75]

7.5.2 Offences against children are objectively more serious than similar offences against adults

In **Chapter 6**, the Council finds that due to the vulnerability of children, sexual violence offences committed against children were objectively more serious than similar offences committed against adults. This is due to the inherently wrongful nature of the offending conduct (higher culpability) and the profound harm caused to children during their formative years (**Key Finding 2**).

The median sentence length for rape (MSO) for digital–vaginal rape of a child and an adult are the same (3.0 years). This suggests there is a sentencing problem with this offence and the objective seriousness of the victim being a child is not being adequately recognised.

VSAC compared sentencing practices for the offences of sexual penetration with a child under 12 with rape and found there was evidence of differences between the two offences in approach to the treatment of harm and culpability and the categorisation of objective offence seriousness. Differences appeared to

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74 The Queensland Court of Appeal has recognised that 'many different factors can determine the objective seriousness of an offence, such as the nature of the attack, its duration, the degree of any planning, whether the offender voluntarily desisted, whether a weapon was used, the injuries suffered by the victim and other such matters': *R v Sprott; Ex parte Attorney-General (Qld)* [2019] QCA 116 [17].

75 SME Interview 8.

be due to the way violence was characterised, with the child cases often being described as less violent and the offender's behaviour presented in a way that 'diminished [their] agency and degree of force used'.

The Council observed language used in Queensland courts at times that similarly risks diminishing the degree of agency involved and use of violence that such offences necessarily entail – for example, describing the perpetrator's rape and indecent assault of an 8-year-old child as 'play' and 'fondling'.[76]

The importance of language is discussed further in **Chapter 14** and **Chapter 15**.

The Court of Appeal recently commented in a case involving one count of maintaining a sexual relationship with a child under 16 years and a separate count of rape that 'penile–vaginal rape of a pre-pubescent girl by a mature man is an intrinsically violent act' and the absence of 'accompanying or additional violence merely amounts to the identification of the absence of what would have been an aggravating feature'.[77]

As discussed in **Chapter 6**, this feature is a common element of rape and sexual assault offences committed against children and other vulnerable persons, and should not be viewed as suggesting that the offence falls into a lesser category of seriousness.

7.5.3 Conduct captured within the offence of sexual assault and objective seriousness

The offence of sexual assault captures a wide range of conduct. This makes determining the objective seriousness of this offence challenging to ascertain, and it may lead to inconsistency in sentencing practices for sexual assault.

The Council's sentencing remarks analysis found that the breadth of conduct captured under non-aggravated sexual assault (s 352(1)) ranges significantly in terms of both seriousness and the types of acts captured.

The UniSC research and the Crime Harm Index show that the Queensland community sees sexual assault as having a high-level objective seriousness. However, because of the wide range of contexts in which non-aggravated conduct occurs and the nature of these indecent assaults – ranging from acts such as the momentary touching of an adult victim's buttocks over clothing to an offender rubbing his exposed penis on the victim's bare genitals – sentencing outcomes vary considerably. In addition, if the offence involves the circumstance of aggravation (being or pretending to be armed with a weapon or in company), the offence will have a maximum penalty of life imprisonment (even if it involves a non-aggravated form of sexual assault).

The breadth of conduct and circumstances captured has the potential to impact community confidence in sentencing levels for this offence, particularly where there is a wide disparity between the maximum penalties that apply to these forms of offending and sentencing outcomes.

The framing of non-penetrative sexual assault and gross indecency offences is different in other Australian and international jurisdictions. Conduct falling within these offences also attracts different

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76 'He then fondled the girl's vagina (aged 8) … He then took his penis out of her mouth and had her play with it until he ejaculated'[3]: *R v Ruiz; Ex parte Attorney-General (Qld)* [2020] QCA 72 [3] (Sofronoff P).

77 *R v CDF* [2024] QCA 207, [35] (Bond JA, Brown JA and Kelly J agreeing).

maximum penalties, and the range of sentencing orders available to the court in sentencing are also different. For example, New South Wales has two offences that capture section 352(1) conduct: sexual touching[78] and sexual act.[79] Within each are simpliciter and aggravated forms of the offences with different maximum penalties.[80] For more information, see **Appendix 15**.

7.6 Comparisons of sentencing outcomes with other jurisdictions

7.6.1 Difficulties of cross-jurisdictional comparisons

There are substantial differences in the equivalent offences of rape and sexual assault and sentencing frameworks across both the other Australian jurisdictions examined and internationally.

The different statutory regimes for offences and sentencing frameworks that apply across jurisdictions significantly limit the ability to undertake such an analysis. For this reason, it has not been possible for us to test whether sentences in Queensland for sexual assault and rape are higher or lower than those in other Australian and international jurisdictions and the reasons for this.

In **Chapter 11**, we consider sentencing outcomes for select jurisdictions based on the Australian Standard Offence Classification scheme, which reports on outcomes for the classification 'Sexual assault and related offences'). This broad offence classification captures a wide range of offences and is not confined to sexual assault.

For these reasons, we cannot draw any robust conclusions from this analysis. It does, however, demonstrate that there are differences in sentencing patterns across jurisdictions, noting also that the available types of sentencing orders vary by jurisdiction.

7.6.2 The research of the Judicial Commission of New South Wales

A small number of Australian studies have attempted a comparison of sentencing levels and practices at an offence-based level. Of relevance to this review, the Judicial Commission of New South Wales ('Judicial Commission'), in a 2015 study, compared sentencing outcomes for rape committed against an adult victim sentenced from 1 July 2007 to 30 June 2013 across 3 jurisdictions: Queensland, New South Wales and Victoria.[81]

The Judicial Commission's study found New South Wales had the highest rate of full-time imprisonment for rape (called sexual assault; both non-aggravated and aggravated) (92.6%) compared with Victoria (87.0%) and Queensland (74.6%). However, when partially suspended prison sentences were factored in, the imprisonment rate rose to 91.3 per cent for Victoria and 97.5 per cent for Queensland (with 22.8% of imprisonment sentences for rape of an adult being partially suspended).

The Judicial Commission found the median head sentence for sentences of full-time imprisonment for sexual assault (rape) offences involving adult victims was highest in Queensland (84.0 months, or 7 years) compared with 72.0 months (6 years) in New South Wales and 60.0 months (5 years) in Victoria.

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78 *Crimes Act 1900* (NSW) ss 61KC–KC.
79 Ibid s 61KE.
80 Circumstances of aggravation are those in which: the accused person is in company or the complainant is under the authority of the accused person or has a serious physical disability or cognitive impairment: ibid s 61KD(2).
81 Georgia Brignell and Hugh Donnelly, *Sentencing in NSW: A Cross-jurisdictional Comparison of Full-time Imprisonment* (Research Monograph 39, Judicial Commission of NSW, March 2015) 3.2 'Sexual assault'.

The Commission acknowledged a potential reason for the higher median sentence in Queensland as being that partially suspended prison sentences were excluded from this calculation.[82]

As discussed in **Appendix 4**, the median custodial sentence for the rape of an adult for cases sentenced over the period July 2020 to June 2023, including partially suspended imprisonment sentences, was 5.5 years (ranging from 3.0 years for digital-vaginal rape to 6.8 years for penile–anal rape).

The Council's analysis suggests that current median sentence lengths more closely approximate sentencing outcomes in New South Wales and Victoria based on sentencing outcomes reported in the Judicial Commission's earlier study once partially suspended prison sentences are taken into account. However, this does not factor in whether sentencing patterns in New South Wales and Victoria have changed, given that the earlier study was based on data from 2007 to 2013, and whether sentences for these offences have since increased.

For example, Victoria has since had several statutory reforms and common law developments in relation to sexual offences. In 2021, VSAC examined sentencing outcomes for sexual offence cases sentenced over a 10-year period (from 2010 to 2019) and found that sentences for many offences had increased following those reforms and case law developments. For a summary of these developments, see **Appendix 10**.

VSAC reported that the average prison sentence for rape increased to nearly 7 years for offences sentenced as 'standard sentence offences',[83] up from 5 years and 8 months.[84] It attributed this change as possibly the result Court of Appeal calling for an increase in sentencing levels for digital rape offences.[85]

VSAC found average prison sentences for sexual penetration with a child aged under 12 years had also increased, but with some fluctuations over time. For cases sentenced during the most recent 2 years of the reference period (2018 and 2019), the average sentence at a charge level was 4.8 years (in 2018) and 5.7 years (in 2019), while the average total effective sentence was 8.0 years (in 2018) and 8.3 years (in 2019).[86] VSAC found that the charge-level increase was statistically significant although the case-level changes were not.[87]

In comparison, the average custodial sentence length for the rape of a child in Queensland based on the Council's analysis of 3 years of data (2020–21 to 2022–23) was 5.4 years (similar to the Victorian charge-based average, but below the total effective sentence average), with a median sentence length of 4.8 years (see further **Appendix 4**).

The Victorian and Queensland sentencing data, however, is not directly comparable given that VSAC's analysis relates to offences against children under 12 years while the Council's analysis is for rape of child under 18 years, as well as due to the very different sentencing practices and frameworks that apply.

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82 Ibid.
83 See Chapter 8 for a discussion of the standard sentences scheme.
84 Sentencing Advisory Council (Victoria), *Sentencing Sex Offences in Victoria: An Analysis of Three Sentencing Reforms* (Report, June 2021) ix.
85 Ibid referencing *Shrestha v The Queen* [2017] VSCA 364 (11 December 2017). In this case, the Court of Appeal dismissed the appeal against a sentence of 6 years' imprisonment with a non-parole period of 4 years for digital rape in circumstances where the applicant, who was found guilty following a trial, had followed a woman in the early hours of the morning on seeing her leaving a nightclub, grabbed her from behind and forced her to the ground.
86 Sentencing Advisory Council (Victoria) (n 84) 52–53.
87 Ibid 53.

Further, the Victorian offences have a lower maximum penalty of 25 years, compared with a life sentence in Queensland.

For example, in Queensland a common approach in sentencing a person for two or more offences is for a court to impose a 'global sentence' for the most serious offence, taking into account the total criminality involved in the offending behaviour (commonly referred to as 'the *Nagy* approach'),[88] rather than to cumulate sentences for some or all sentenced offences. In contrast, in Victoria, due to the operation of the serious offender provisions in Part 2A of the *Sentencing Act 1991* (Vic), sentences are more commonly ordered to be served cumulatively. This is what is meant by the 'total effective sentence' in Victoria (the sentence imposed taking into account all sentences for all offences sentenced and orders for cumulation). For more information, see **Chapter 15**.

The standard sentences scheme, discussed in **Chapter 8** and in **Appendix 10**, may also be impacting sentencing levels. The VSAC report noted only three cases involving charges of sexual penetration with a child under 12 years had been sentenced to which the standard sentences scheme applied with outcomes ranging from 6 years and 3 months[89] to 9 years (for a digital–vaginal rape).[90] The latter was reduced on appeal to 6 years and 6 months with a non-parole period of 4 years[91] on the basis that the offending involved 'an isolated example of relatively fleeting digital penetration', the seriousness of which fell 'well towards the lower end' of the range of seriousness, and 'the sentence imposed failed to reflect adequately the applicant's traumatic and disadvantaged past or his associated mental health problems'.[92]

In Queensland, the highest sentence for the digital rape of a child during the 3-year data period examined by the Council was a life sentence imposed on a repeat child sex offender sentenced under the repeat serious child sex offences scheme. The operation of this scheme is discussed in **Chapter 8**.

The next highest sentence for the digital rape of a child was a sentence of 10 years' imprisonment (attracting a mandatory serious violent offence declaration) on a person convicted following a plea of guilty of 3 counts of rape of a 6-month-old baby while drug affected, sentenced alongside several other child sexual offences and child exploitation material offences.

However, in the vast majority of cases where digital rape of a child was the MSO, the sentence was one of 5 years or less (88.0%; n=66/75).

This limited comparison highlights some of the complexities of undertaking this type of cross-jurisdictional comparison.

88 See *R v Nagy* [2004] 1 Qd R 63.
89 *DPP v Aneterea (A Pseudonym)* [2019] VCC 1721 (22 October 2019) [69].
90 *DPP v McPherson* [2019] VCC 1745.
91 *McPherson v The Queen* [2021] VSCA 53.
92 Ibid [27]–[28], [30] (Priest and T Forrest JJA).

7.7 Evidence of alignment between penalty types and sentencing purposes

The Terms of Reference ask us, in assessing adequacy, to expressly consider the sentencing purposes of just punishment, denunciation and community protection.[93] Other relevant sentencing purposes under section 9(1) of the PSA are rehabilitation and deterrence.

In this section, we discuss whether current sentencing practices with respect to the types of penalties imposed reflect the purposes of sentencing, including those viewed as being most important by the general community, victim survivors and other stakeholders.

We have concluded that current penalty and parole options are inadequate in several respects. This is explored in greater detail in **Chapter 11**.

7.7.1 Sentencing trends and purposes

In section 7.7.4 below and in **Chapter 11**, we summarise the evidence about the efficacy of different types of sentencing orders in meeting relevant purposes of sentencing and consider this evidence in the context of current sentencing practices. This includes the following:

- For rape, there was increasing use of partially suspended prison sentences, with a corresponding decrease in the use of imprisonment. Imprisonment was still the most common form of penalty being imposed in just under two-thirds of cases (64.7%) in the 3 data periods (2020–21 to 2023–24) compared with just under one-third of sentences being partially suspended (30.7%). For 2023-24, partially suspended prison sentences continued to represent over 30 per cent of sentences imposed for rape.
- For non-aggravated sexual assault:
    - In the Magistrates Courts, overall, the increasing use of sentences of imprisonment and wholly suspended prison sentences (for the period 2020–21 to 2022–23, these represented 19.3 and 26.8 per cent of all sentencing outcomes respectively), together with the decreasing use of monetary penalties (16.6% of penalties imposed). Wholly suspended prison sentences, probation, imprisonment and monetary penalties were the most common forms of penalties imposed.
    - In the higher courts, the high use of wholly suspended prison sentences relative to other penalty types (for the recent three-year period examined (July 2020 to June 2023) accounted for almost half of penalties imposed (45.3%), followed by partially suspended prison sentences (18.2%) and imprisonment (10.9%). The trend of increasing use of wholly suspended and partially suspended prison sentences has continued based on data for the most recent financial year (2023-24).

This suggests that in some rape cases, to guarantee certainty of release, courts may prefer to set a fixed release date (in circumstances where a sentence of 5 years or less is open) over imprisonment with parole eligibility. The potential reasons for this are discussed in **Chapter 11**. For non-aggravated sexual assault,

93 Appendix 1, Terms of Reference.

it suggests an increasing preference for custodial penalties, with wholly suspended prison sentences commonly being ordered across both court levels.

A person subject to a suspended prison sentences must not commit an offence punishable by imprisonment during the operational period of the order. If they do, they risk having the remainder of the sentence activated. In contrast to imprisonment with parole, the person is not actively supervised in the community or required to engage with treatment and program interventions as a condition of their sentence. When a person is being sentenced for more than one offence, it is possible for a court to make a supervised order alongside a suspended prison sentence, such as probation (although the Council heard during consultation that any programs the person must attend could only relate to the offence the probation order was attached to, which may not be a sexual offence). This is not possible if the person is being sentenced for only one offence.

7.7.2 Community and stakeholder views

Community views

As discussed in **Chapter 5**, when initially asked about the importance of sentencing purposes for rape and sexual assault, participants in the UniSC research considered denunciation, deterrence and punishment equally important for sexual assault, and punishment (followed by community protection) as the most important purposes for rape offences.

However, when provided with a specific case scenario for each offence, the views of participants changed. Community protection (followed by punishment) became the most important sentencing purpose for sexual assault. For rape, all sentencing purposes (besides deterrence) were weighted equally.

This demonstrates that the purposes which are important will be case specific with:

- community protection linked to the perceived dangerousness of a perpetrator;
- denunciation viewed as having value when responding to family and domestic violence; and
- punishment favoured in circumstances involving a vulnerable victim survivor or where the offending made the community vulnerable.

Community members were not asked for their views about the extent to which they considered different penalty types met the intended purposes of sentencing.

Consultations and submissions

As also discussed in **Chapter 5**, community members and stakeholders who attended our consultation events, participated in one-on-one interviews and made submissions varied in their views about the adequacy and appropriateness of current sentencing practices and outcomes in meeting intended sentencing purposes.

Generally, legal stakeholders thought 'sentencing for sexual assault and rape offences adequately reflect the purposes of sentencing and the seriousness of these offences' and that the current purposes 'strike an appropriate balance between reflecting the interests of the victim, the community and the offender'.[94]

However, they supported giving courts more options in sentencing, such as the ability to fix a parole release date and to combine suspended prison sentences with supervised non-custodial orders when sentencing for a single offence, in support of the sentencing purposes of community protection and rehabilitation.

The inflexibilities of the current sentencing framework and barriers to the use of certain types of orders were viewed as likely contributing to the high proportion of sentencing orders for rape and sexual assault that do not involve supervision or a requirement to engage in treatment or other forms of interventions.

Victim survivors and victim advocacy and support stakeholders, while generally of the view that sentences were inadequate, raised concerns that suspended prison sentences do not deliver adequate punishment and denunciation, given the nature and seriousness of sexual assault and rape.

The high use of suspended prison sentences was seen as problematic. At our consultation event in Cairns, for example, we were told that victim survivors often view a suspended prison sentence as 'weak' or 'disappointing' outcome and feel it was not worth going through the process at all, particularly as there is no requirement for the person to participate in any programs or comply with any conditions (other than not to reoffend).[95] They were described as 'a bit of a "nothing" sentence'.[96]

Victim survivors confirmed these views, with one victim survivor with whom we met viewing the outcome in her case, which involved the imposition of a suspended prison sentence, as failing to deliver proper accountability to the person for his actions and not requiring him to receive any psychological treatment or support.[97] Another victim survivor was concerned that orders such as suspended prison sentences, intensive correction orders and fines did not act as an appropriate deterrent.[98]

As discussed in **Chapter 5**, there were also concerns about the time required to be spent in custody prior to parole eligibility or release from custody. This again speaks to concerns about this period representing an adequate period for the purposes of punishment and denunciation.

Resourcing for programs in custody and in the community was viewed by several stakeholders as a barrier to ensuring the purposes of community protection and rehabilitation are met, with some calls made for treatment and services to be delivered in a consistent way across all correctional centres.[99] Barriers to accessing programs while on remand were also mentioned, given lengthy periods spent by some defendants in pre-sentence custody.[100]

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94 Submission 23 (Legal Aid Queensland) 2. See also, Submission 19 (Basic Rights Queensland) 3; Submission 30 (Youth Advocacy Centre) 2.
95 Cairns Consultation Event, 21 March 2024.
96 Ibid.
97 Victim Survivor Interview 7.
98 Submission 27 (Name Withheld) 1.
99 For example, see Submission 23 (Legal Aid Queensland) 11.
100 Ibid 19.

7.7.3 Subject matter expert interviews

Many participants in our SME interviews considered supervision was important for people convicted of sexual offences,[101] and the exclusion of court ordered parole for sexual offences impacted sentencing and limited judicial discretion.[102]

In the absence of other options, they reflected that courts may choose to suspend the sentence to ensure certainty of release (or, alternatively, make use of prison-probation orders where this option is available). Several participants remarked that this results in people on suspended prison sentences potentially not being under any supervision in the community,[103] with one participant suggesting suspended prison sentences should 'be a last resort for sexual offending'.[104] Another participant was concerned about how a wholly suspended prison sentence might look to a victim survivor, with no requirement to perform community service or pay a fine and to be under supervision.[105]

Several participants supported court-ordered parole being extended to sexual offences, allowing judges to set a fixed parole release date.[106] This would ensure the person was supervised in the community but also had certainty of release.

There was also some support for courts having a dual discretion to set either a parole release date or parole eligibility date (as previously recommended by the Council) and for the release of those given a parole release date, release being conditional on the completion of relevant courses while in custody.[107] They considered that this certainty of release (even if conditional) might translate into more people pleading guilty.[108]

The current rigidity of orders was considered by some to be a barrier to achieving sentences that met their intended purposes,[109] with one participant suggesting that a new form of community-based order might be more appropriate for some types of sexual offences.[110]

One practitioner commented on the ability to combine a suspended prison sentence with a probation order or immediate imprisonment of greater than 12 months with probation for a single charge as potentially beneficial providing courts with greater flexibility in sentencing.[111]

7.7.4 Research evidence

In **Chapter 11**, we consider relevant research evidence drawn from literature reviews commissioned by the Council concerning the known efficacy of different order types in meeting the purposes of sentencing. Findings discussed include:

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101 SME Interview 14, 16.
102 SME Interview 6.
103 SME Interviews 1, 4, 11.
104 SME Interview 1, an example of last resort is an offender who will be deported because they have failed the character test and parole would not be appropriate.
105 SME Interview 14.
106 SME Interview 3.
107 SME Interview 7. See also SME Interview 4.
108 SME Interview 7.
109 SME Interview 7.
110 SME Interview 11.
111 SME Interviews 1, 7.

- **Imprisonment supports the sentencing purposes of punishment and denunciation, but is unlikely to be an effective deterrent and its rehabilitative potential is limited:** 'Although imprisonment is undoubtedly effective at punishing offenders and denouncing criminal behaviour, research shows that it is not effective as a deterrent to further offending and it appears to reduce reoffending via incapacitation only to a limited extent.'[112]
- **Programs for sexual violence (including those delivered in custody) can play an important role in reducing reoffending:** 'There is a large [body of] literature on the effectiveness of offender rehabilitation programming, with consistent international evidence now available that programmes for sexual violence can play an important role in reducing reoffending.'[113]
- **Minimum non-parole periods may achieve the sentencing purposes of punishment and denunciation, but do not achieve deterrence and are unlikely to support rehabilitation and long-term community safety:** Evidence suggests 'the setting of non-parole periods does not achieve effective deterrence and fails to support rehabilitation but will incapacitate people in prison in the short term and result in longer periods of imprisonment. On this basis they can be considered to achieve the sentencing purposes of punishment and denunciation.'[114] However, '[m]ore and not less time on parole would allow time to engage in rehabilitative programmes' in support of long-term community safety.[115]
- **Parole is more effective than unsupervised release in reducing reoffending:** Parole is more effective than unsupervised release in reducing recidivism – although there are evidence gaps in assessing the effectiveness of parole for those convicted of sexual offences and the impact of court-ordered parole versus board-ordered parole and particular cohorts.[116]
- **Electronic monitoring while on parole appears to reduce reoffending cost-effectively:** Electronic monitoring appears to reduce recidivism cost-effectively, especially when used as a genuine alternative to imprisonment for those who have committed sexual offences and are assessed as high risk.[117]
- **Probation appears to be effective for those who commit sexual offences:** While probation appears to be effective for those who commit sexual offences, the evidence is weak.[118] 'Failure [on probation] appears to be more likely among those with a criminal history or substance abuse issues and may be more likely with low-level supervision and fewer treatment conditions.'[119]

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112 Karen Gelb, Nigel Stobbs and Russell Hogg, *Community-based Sentencing Orders and Parole: A Review of Literature and Evaluations Across Jurisdictions* (Prepared for the Queensland Sentencing Advisory Council by Queensland University of Technology, 2019) ('*QUT Literature Review*') 91. This report was informed by an earlier report prepared by Michelle Sydes, Elizabeth Eggins and Lorraine Mazerolle on 'what works' in corrections for Queensland Corrective Services (2018, unpublished).

113 Andrew Day, Stuart Ross and Katherine McLachlan, *The Effectiveness of Minimum Non-parole Period Schemes for Serious Violent, Sexual and Drug Offenders and Evidence-based Approaches to Community Protection, Deterrence, and Rehabilitation* (Prepared for the Queensland Sentencing Advisory Council by The University of Melbourne, August 2021) ('*University of Melbourne Literature Review*') 19 (references omitted). See also Lacey Schaefer et al, *Sentencing Practices for Sexual Assault and Rape Offences (Griffith University for Queensland Sentencing Advisory Council,* 2024) *('Griffith University Literature Review')* which reached a similar conclusion, citing several relevant systematic reviews and meta-analyses: 62–4.

114 *University of Melbourne Literature Review* (n 113) 12.

115 Ibid 23.

116 *QUT Literature Review* (n 112) 109.

117 Ibid xii.

118 *QUT Literature Review* (n 112) 112.

119 Ibid 146 [4.6.5].

- **Wholly suspended prison sentences of imprisonment have a small effect on reducing reoffending compared to imprisonment:** Wholly suspended prison sentences have been found to have a small effect on reducing recidivism compared with imprisonment, especially for repeat offenders (although this finding is not specific to those sentenced for sexual offences) and of being of potential benefit for those who are unable to access other orders, such as due to living in rural and remote areas.[120]
- **Reoffending rates for partially suspended sentences of imprisonment may be higher than for wholly suspended sentences:** There is 'no robust research on the effectiveness of partially suspended prison sentences' and '[w]hat little research exists finds that recidivism rates are higher following a partially suspended prison sentence than after a wholly suspended prison sentence'.[121] 'Recidivism rates following a partially suspended prison sentence appear to be lower among older offenders and those with no criminal history, but the evidence for this is weak.'[122]
- **Intensive correction orders are no more effective than a combined suspended prison sentence with a supervised order in reducing reoffending, but are more effective than short terms of imprisonment**: While intensive correction orders have been found of equal benefit as suspended prison sentences in reducing recidivism, evidence suggests they are more effective than short terms of imprisonment, however there is no evidence on the effectiveness of intensive correction orders among vulnerable cohorts.[123]
- **Community service appears to reduce reoffending more effectively than a term of imprisonment and a bond, but not as effectively as a fine:** Community service appears to reduce recidivism more effectively than a term of imprisonment and a bond, but not as effectively as a fine although this finding is based on studies of those convicted of non-sexual offences.[124]
- **Supervision as a condition can be useful in reducing reoffending provided it is supported by rehabilitation services and support:** Supervision in the community: 'best reduces recidivism when [it] adheres to the principles of effective correctional intervention and core correctional practices'.[125] In particular, 'Supervision that emphasises relapse prevention and assists offenders to identify, avoid, and resist crime opportunities may be more useful for individuals who have sexually offended.'[126]
- **The impacts of fines and other monetary penalties on reoffending for those sentenced for a sexual violence offence is unknown:** The review of research evidence conducted by Griffith University for this review did not find any relevant research literature related to monetary penalties for sexual assault and rape offences.[127] Generally, there is insufficient evidence to assess the effectiveness of monetary penalties in preventing crime or deterring reoffending.[128] As discussed

120 Ibid 115
121 Ibid xii.
122 Ibid.
123 Ibid xiii.
124 Ibid xiv. The study referred to in support of this finding was focused on adult offenders convicted of aggravated drink-driving (a third or subsequent conviction), drink driving (first or second offence), shoplifting (estimated value under $500) and common assault: see Michelle Morris and Charles Sullivan, *The Impact of Sentencing on Adult Offenders' Future Employment and Re-offending: Community Work Versus Fines* (New Zealand Treasury Working Paper 15/04, June 2015).
125 *Griffith University Literature Review* (n 113) 53.
126 Ibid.
127 Ibid.
128 Ibid.

in **Chapter 11**, generally fines are intended primarily to serve a punitive purpose rather than a rehabilitative one.

7.7.5 Assessment of adequacy of penalty types in meeting sentencing purposes

In **Chapter 11**, we discuss several aspects of Queensland's sentencing framework that we consider should be changed to better meet the purposes of sentencing taking into consideration:

- the apparent disconnect between sentencing levels and community, victim survivor, support sector stakeholders and Parliament's views of the seriousness of rape and aggravated sexual assault – in particular, where these offences are committed against children;
- concerns by many victim survivors and victim advocacy and support organisations that some form of orders, and in particular suspended prison sentences, fail to adequately recognise the seriousness of this offending and to hold the perpetrator accountable for their actions, as well as the limited time between a person being sentenced and being eligible for release on parole or on a suspended prison sentence;
- the impacts on sentence of people spending extended periods in pre-sentence custody, which historically has limited opportunities for program engagement and completion, and for the person to be supervised for an adequate period on their release in the community;
- the increased use of partially and wholly suspended prison sentences that do not involve supervision or conditions, such as treatment and program conditions;
- the continued, although decreasing, use of fines for non-aggravated sexual assault, which given the nature of the rights violated, may not be appropriate.

We discuss our concerns about the use of orders, in particular, suspended prison sentences– noting the existence of substantial evidence that supervision is an effective means of reducing risks of reoffending, particularly where such supervision is 'active, high-quality and has a rehabilitative rather than a surveillance focus'.[129]

We note several factors contributing to these key sentencing trends, including:

- restrictions on the availability of court ordered parole for sexual offences under Part 9 of the PSA;
- lengthy periods spent in some cases by people in pre-sentence custody by some people and historically, the limited access of remand prisoners to programs in custody which may take some time to complete before parole is granted;
- the inflexibility of current sentencing orders and conditions ordered under them, including the inability for a court to order a suspended prison sentence alongside supervised orders, such as probation or community service, when sentencing a person for a single offence.

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[129] Neil Donnelly et al, 'Have the 2018 NSW Sentencing Reforms Reduced the Risk of Re-offending?, (Crime and Justice Bulletin, No 246, NSW Bureau of Crime Statistics and Research, March 2022) 20, citing James Bonta and D A Andrews, *Risk-need-Responsivity Model for Offender Assessment and Rehabilitation: 2007-06* (Public Safety Canada, Carleton University, 2007); Wai-Yin Wan et al 'Parole supervision and reoffending' (Trends and Issues in Crime and Criminal Justice No 485, Australian Institute of Criminology, 2014); Wai-Yin Wan, Suzanne Poynton and Don Weatherburn, 'Does parole supervision reduce the risk of re-offending?' (2015) 49(4) *Australian and New Zealand Journal of Criminology* 497.

Our views are discussed below.

7.8 The Council's view

7.8.1 Sentencing outcomes for rape

Key Finding

4. **Penalties imposed for rape are not adequate**

Penalties currently imposed on sentence for rape do not adequately reflect the seriousness of this form of offending and the purposes of sentencing, including punishment, denunciation and community protection – particularly as these relate to offences against children.

See **Recommendations 1, 5, 6, 7, 8 and 10.**

There is a problem with sentencing outcomes for rape

Based on the evidence gathered and the Council's analysis, we have found that there is a problem with sentencing levels and penalty types for rape in Queensland in that:

- too much emphasis is placed on the type of penetration conduct when assessing offence seriousness rather than on issues of harm and perpetrator culpability;
- sentences do not reflect the seriousness of this form of offending, given the significant infringement of the rights of victim survivors, particularly with respect to offences against children;
- the increasing use of partially suspended prison sentences is a problem as a court has no ability to attach supervision, treatment and program conditions; and
- the current structure of the SVO scheme means very few discretionary declarations are made for rape sentences of less than 10 years, with parole eligibility commonly set at or below one-third of the head sentence, and the mandatory nature of the scheme as it applies to sentences of 10 years or more means it likely is exerting downward pressure on head sentences at or just below the 10-year mark.

Too much emphasis placed on the categorisation of types of rape

The Council's analysis of sentencing outcomes for rape, discussed in section 7.3.2, and in more detail in **Appendix 4**, shows penile–vaginal and penile–anal rape are commonly treated as more serious than acts of digital and oral rape.[130] This finding is supported by an analysis of sentencing remarks, sentencing submissions and advice provided by SMEs interviewed during the initial stages of the review.

In the case of rape, the Council has concluded that all types of penetrative conduct are objectively serious and there should be no distinctions made between the relative seriousness of rape based on conduct alone – see **Key Finding 3**.

130 'Oral rape' was defined for the purposes of this analysis as including forced penile–mouth penetration and lingual–vaginal and lingual–anal rape.

As discussed in **Chapter 6**, we share the Court of Appeal's concerns about the unhelpful 'compartmentalisation' of cases 'according to the specific "category" of sexual offending involved'.[131] This approach in a practical sense means sentencing practices for rape offences involving conduct considered to fall at the 'lower end of seriousness', such as digital-vaginal/anal, penile–oral rape and lingual–vaginal/anal rape, are sentenced according to submitted sentencing 'ranges' that perpetuate a false dichotomy between 'real rape' (meaning penile–vaginal or penile–anal rape) and other forms of penetration.

While it is true that penile–vaginal rape is the only form of rape conduct carries a risk of pregnancy for some victim survivors, in our view this places too much emphasis on this aspect and risks undervaluing the significant psychological (and sometimes physical) harm that can arise from other forms of non-consensual sexual acts. Similarly, while penile–oral rape carries a risk of the victim contracting a sexually transmitted infection (albeit lower than for vaginal or anal rape),[132] it is only in the context of penile–vaginal and penile–anal rape that this factor is generally mentioned. The focus on such considerations serves to further compartmentalise these acts by attributing them presumed harms or risk of harms.

It was not the intention of the Taskforce on Women and the Criminal Code, which recommended expanding the definition of rape beyond non-consensual penile–vaginal and penile–anal penetration. that other acts of rape should be treated as involving a 'lesser' form of harm and culpability. This was particularly the case for forced oral sex, which had formerly attracted a maximum penalty of 14 years' imprisonment. [133] The Taskforce observed that the lesser penalty that then applied did 'not accord with many women's views of the relative seriousness of the conduct'.[134]

The Taskforce countered concerns that 'extending the definition to encompass more acts of sexual penetration may "devalue" the offence', thereby impacting the willingness of juries to convict by referring to the 'educative function' of the law. The Taskforce referred to submissions received in support of these reforms and the psychological harm that could be sustained.[135]

While it is beyond scope of this review to consider changes to the substantive criminal law in Queensland, we acknowledge developments in jurisdictions such as Canada to not distinguish between penetrative and non-penetrative sexual acts in the structure of their offences or to include acts that current are defined as 'sexual assault' in Queensland under section 352(2) as forms of 'sexual intercourse' falling within their rape offence equivalents (see further **Chapter 8**). These developments signal a clear and intentional move away from a focus on the act involved to an assessment of culpability of the person

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131 *R v Wallace* [2023] QCA 22, [45] (Dalton JA) ('*Wallace*'). See also Bowskill CJ at [13] endorsing observations made in *R v Wark* [2008] QCA 172 by McMurdo P (at [2]), Mackenzie AJA (at [13]-[14]) and Cullinane J (at [36]).

132 For more information, see Queensland Health, 'Oral Sex and STIs' (web page, published 29 May 2024), reporting on relevant evidence regarding risks https://www.health.qld.gov.au/newsroom/features/oral-sex-and-stis-be-safe-before-you-head-down#:~:text=While%20the%20risk%20of%20contracting%20most%20STIs%20from%20oral%20sex.

133 *Taskforce on Women and the Criminal Code Report* (n 23). See also *R v AM* [2010] 2 NZLR 750 in which the New Zealand Court of Appeal said, with reference to similar reforms in New Zealand: 'an approach which treats [different forms] of violation as broadly similar in the sentencing context is consistent with the purpose of the rape law reforms. That is because one of the objects of the rape law reform exercise was to recognise that any act of sexual violation involves, as this Court put it in *R v Accused (CA 265/88)* "an act of violation to the body of another involving at the very least an invasion of privacy and loss of personal dignity"': 769 [68].

134 *Taskforce on Women and the Criminal Code Report* (n 23) 217.

135 Ibid 218, 220. The Taskforce noted the same concern about devaluing the offence of rape could be made of digital penetration, pointing to research in Victoria which found that 11 out of 18 Victorian judges considered the inclusion of digital penetration within the offence of rape '"devalued" or "trivialised" the "real offence"': ibid 218, citing Melanie Heenan and Helen McKelvie, *Rape Law Reform Evaluation Project Evaluation of the Crimes (Rape) Act 1991 Executive Summary*.

responsible and the nature and level of harm caused taking into account the significant infringement involved of the victim's human rights.[136] This is discussed further in **Chapter 8**.

By analogy in Queensland, most non-sexual forms of assault are graded based on harm (for example, bodily harm, grievous bodily harm or death) and culpability (for example, whether the harm caused was intended), as well as whether other aggravating circumstances are present (such as use of a weapon or the offence occurring 'in company') – not by the parts of the body involved in the assault.

As discussed in **Chapter 6**, we agree with the Court of Appeal that greater scrutiny is required regarding the approach of focusing primarily on conduct that, in essence, reflects developments in other jurisdictions. We agree with recent observations made by Chief Justice Bowskill that it is necessary 'to consider the particular circumstances of each case' rather than 'formulaic compartmentalisation of offending or generalisations as to what kind of rape is worse or more serious'.[137]

We also agree with Dalton J's comments about the over-reliance in submissions 'when comparing not just rape cases … according to a specific "category"'.[138] We consider the approach of only referring to cases involving the same type of penetrative conduct, while somewhat embedded in practice, to be outdated and not in line with contemporary understanding of the extent to which even a non-penetrative sexual assault can cause significant harm to a victim:

> An assessment of the seriousness of an offence of sexual penetration is not governed by whether the penetration involves a penile, digital, oral or other form of penetration, but, rather, depends on all of the circumstances of the offence. Consequently, consideration of reasonably comparable cases in the present case should not proceed by reference only to cases involving oral penetration.[139]

Sentencing practices for rape of an adult should be monitored, but immediate legislative reform is not recommended

Developments in Victoria discussed in **Appendix 10** in response to statements made by the Victorian Court of Appeal[140] demonstrate that an increase in sentencing levels for penetrative acts that traditionally have attracted lower sentences is achievable without the need for legislative reform.

In our view, the additional step of recommending changes to legislation should only be taken where it is not possible to achieve the desired change to sentencing practice without legislative reform.

Given the clear direction given by the Court of Appeal regarding the need to assess the serious of each offence based on its own individual circumstances, we do not consider it necessary to recommend any additional legislative guidance with respect to the treatment of different forms of rape conduct be introduced in support of this outcome. Our reasons are discussed in more detail in **Chapter 8**.

Rape of a child should be treated as being more serious and legislative reform is required

For offences of rape committed against children, we consider that there is a pressing need for sentences to increase, taking into account community views and the significant public interest in ensuring children – as the most vulnerable members of our community – are properly protected.

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136 In Canada, different circumstances of aggravation are also established.
137 *Wallace* (n 131) [13].
138 Ibid [45].
139 *The State of Western Australia v HNU* [2023] WASCA 6 [74] (Beech, Vaughan and Hall JJA agreeing).
140 *R v Shrestha* [2017] VSCA 364.

We also consider that there has been inadequate recognition of the various legislative reforms made over time under the PSA, which clearly signal Parliament's intention that sexual offences against children be treated more seriously than offences of a similar kind committed against adults.

We strongly endorse the view that the objective offence seriousness of a sexual offence is higher when the victim survivor is a child than for similar conduct committed against an adult. This is due both to factors relating to culpability and to the higher level of harm these offences cause to children (see **Key Finding 2**).

Despite views expressed by many of our SME interview participants that these offences are treated as being in an entirely different category to adult sexual offences and as being more serious, we have not seen this reflected sufficiently in sentencing outcomes.

For these reasons, as discussed in **Chapter 8**, we recommend amending section 9 of the PSA to introduce a new aggravating factor that applies to offences against children.

In our view, the problems associated with using the type of penetration as a starting point for assessing offence seriousness is even more pronounced where offences against children are concerned. We agree with the views of one SME interview participant, who commented:

> If you're talking about sentencing in the context of a child who is between 6 and 12, I don't really understand why the absence of vaginal penetration makes it a less, rather than a more serious, offence. Because I'd have thought any form of penetration, oral penetration, it's all horrendous if you're six.[141]

From the UniSC's research, it is clear that community members did not agree with the assessments of digital-vaginal rape as being in a 'lesser' category of offending where children were concerned. Community members focused on the long-term harm such offending causes to a child as a reason why the offending was much more serious, irrespective of the nature of the penetrative act.

While the findings of the UniSC's research have provided an important evidence base, we have also taken into account views shared with us during consultations, including by victim survivors, that sentences are inadequate and other evidence regarding current sentencing levels.

While we acknowledge the UniSC's findings are not necessarily representative of the views of all Queensland community members and were based on limited case studies, the findings are consistent with the findings of other research, discussed in **Chapter 5**. This includes research which similarly found, even adopting a more rigorous methodology in assessing community views, that there was a 'punitiveness gap' between judges and members of the public that could not 'be dismissed as a methodological artefact or a product of a lack of information'.[142] While this view was with respect to offences against children under 12 years, our research has found that this also applies in the case of older adolescent children, taking into account their higher level of vulnerability when compared with older adult victim survivors.

While median sentence lengths for rape offences against children are generally longer, they are not long enough, and do not adequately reflect community views of offence seriousness

The UniSC's research findings reinforce that the community considers sexual offending against children to be particularly serious and harmful.

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141 SME Interview 8.

142 Warner et al (n 3). Kate Warner et al., 'Measuring Jurors' Views on Sentencing: Results from the Second Australian Jury Sentencing Study' (2017) 19(2) *Punishment & Society* 180.

While we have found that evidence courts share this view, and sentences imposed are intended to recognise this, when custodial sentence lengths for rape of a child are compared with those for rape of an adult by conduct type, the increase or additional 'loading' that offences against children attract to reflect this higher level of vulnerability and harm can, at best, be described as modest. For some categories of conduct, sentencing levels were the same as for adult victims. For example, based on median custodial sentence lengths for rape from 2020–21 to 2022–23:

- median sentence lengths were the same for digital-vaginal rape regardless of whether the victim was an adult or a child (3.0 years); and
- for penile-vaginal rapes, there was a one-year difference between the median sentences imposed in circumstances where the victim was a child compared with cases involving an adult victim (7.0 years compared with 6.0 years).

The largest difference was between median sentences for penile-anal rape of a child, being 6.8 years for adult offences, and 9.0 years where the same conduct was committed in relation to a child.

Given that Queensland community members ranked the case involving digital rape of a child under 12 years as more serious than every other rape scenario presented involving an adult victim (including a case involving penile–vaginal and penile–anal rape committed by co-offenders), the disconnect between community views of offence seriousness and current sentencing levels becomes starkly apparent.

By extension, if the community rankings were applied to sentencing outcomes, it would mean that the digital rape of a child should attract a sentence that is, on average, at least as high as penile-vaginal rape of an adult victim – and arguably higher.

Table 7.3 summarises the implications of these findings should the digital–vaginal rape of a child (which was committed by a family member in the UniSC case example) be treated as being at least as serious as the penile–vaginal rape committed by a stranger.

Table 7.3: Ranking of seriousness – UniSC findings on community views mapped to median custodial sentence length

	Adult – digital (vaginal)	Adult – penile (anal) (DV)	Adult – penile (vaginal) stranger	Adult – penile (vaginal & anal) (in company)	Child < 12 yrs – digital (vaginal) (DV)	Not tested: Child <12 yrs – penile (vaginal)
Current median	3.0 years	6.0 years	7.0 years	8.5 years	3.3 years	8.0 years

The ranking of seriousness by community members also raises the question of whether sentences for penile–vaginal and penile–anal rape of a child, which are currently higher on average than where the victim is an adult, are high enough.

Other considerations

We acknowledge the difficulty of determining the degree to which sentences for offences against children do not sufficiently reflect community views of offence seriousness with any precision, taking into account differences in case characteristics.

More serious examples of rape committed against a child victim generally will occur in circumstances where there has been more than one unlawful sexual act committed against the child over a period of time. Offences occurring in this context are commonly charged and sentenced under section 229B of the *Criminal Code* as repeated sexual conduct and will constitute the MSO. In circumstances where rape was not the MSO, the overwhelming majority (82.9%) were offences sentenced under this provision.

Why offences against children should be treated as being significantly more serious than offences against adults

As discussed in detail in **Chapter 6**, there are many reasons why sexual violence cases involving child victims are often significantly more serious than those committed against adult victims and which justify treating these offences differently, including:

- that children are more vulnerable than adults to sexual violence due to their lack of maturity, judgment and experience;[143]
- the inherent power difference between children and adults, which enables adults to sexually violate children, typically without the need to resort to the use of threats or additional violence to overcome the child's will;
- the high level of emotional and psychological harm caused by sexual violence offending, which is 'particularly pronounced' for children and can interfere with their development and change the course of the child's life;[144]
- that a person who intentionally sexually offends against a child is 'highly morally blameworthy because the offender is or ought to be aware that this action can profoundly harm the child', because it involves 'the wrongful exploitation of the [child] victim by the offender', and because 'children are so vulnerable'.[145]

Our research has highlighted the importance of treating child sexual offending as being of a qualitatively different nature than the same type of conduct directed at adults. For example, in sentencing for rape of an adult, much attention is often directed at the 'level of force' or 'additional violence' used in the commission of an offence, when such force is generally not needed to commit an offence against a child due to their highly vulnerable position.

In circumstances where a sexual violence offence against a child is committed by a family member and involves a breach of trust, additional harm can be caused by compromising a child's relationships with their families and caregivers.[146] This may result in further trauma to the child victim, including the potential to lose trust in the ability of family members to protect them from harm.

Our recommendations to address this inadequacy as to sentencing levels are set out in **Chapter 8** (see **Recommendations 1, 3 and 4**).

143 *R v Friesen*, 2020 SCC 9 (CanLII), [2020] 1 SCR 424 [53].
144 Ibid [58].
145 Ibid [88]–[89].
146 Ibid [60]–[61].

The high use of partially suspended prison sentences is concerning due to the inability to attach supervision, program and treatment conditions

Discussed in **Chapter 11**, we are concerned about the high use of suspended prison sentences, including for rape, the increasing use of partially suspended prison sentences.

Applying the Council's fundamental principles guiding the review,[147] sentencing outcomes for sexual assault and rape should not only reflect the seriousness of these offences (**Principle 3**) but also provide for appropriate supervision (**Principle 4**).

The main problem with suspended prison sentences in Queensland, in our view, is their lack of flexibility. We also acknowledge the views of many victim survivors and advocacy organisations that wholly suspended prison sentences, in particular, do not adequately reflect the seriousness of sexual offending in support of the sentencing purposes of just punishment and denunciation.

In contrast to many other jurisdictions that have retained suspended prison sentences of imprisonment as a sentencing option, in Queensland a court is not permitted to order that the person be subject to supervision or to engage in rehabilitation and treatment and program interventions as part of their sentence. Under a suspended prison sentence, the only condition the person must comply with is not to commit an offence punishable by imprisonment.

The current approach is contrary to the substantial evidence that supervision is an effective means of reducing risks of reoffending, particularly where such supervision is 'active, high-quality and has a rehabilitative rather than a surveillance focus'.[148] Engagement in rehabilitation and program interventions has also been found to have an important role in reducing risks of reoffending. While those subject to a suspended prison sentence on their release from custody can engage in these programs and interventions voluntarily, there is no requirement to do so.

In practice, courts seeking to achieve certainty of release together with supervision and access to programs and other forms of interventions may use their ability to make a probation order alongside sentencing the person to a partially suspended prison sentence. However, there are several practical issues with relying on this approach as a means to achieve both certainty of release and supervision. First, in more than one in 4 cases, we found the person sentenced for rape had no co-sentenced offence. In this case, such an option is not open. Second, even if the person is being sentenced for more than one offence, the use of this form of combination order is reliant on the co-sentenced offence being of a lower level of seriousness than the rape offence to justify a probation order rather than imprisonment or another partially suspended prison sentence being ordered. Third, if the co-sentenced offence is a non-sexual offence (for example, a drug offence) the types of conditions and interventions to which the person is subject will not be tailored to address factors contributing to that person's sexual offending.

In our 2019 *Community-based Sentencing Orders Imprisonment and Parole Options: Final Report,*[149] we recommended reforms that would enable a court to order a suspended prison sentence alongside a community-based order, which might assist to some extent in overcoming this problem. In **Chapter 11**, we again make such a recommendation.

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147 For a full list of the fundamental principles, see Chapter 3.
148 See Neil Donnelly et al (n 129) and references cited in support.
149 Queensland Sentencing Advisory Council *Community-Based Sentencing Orders, Imprisonment and Parole Options* (Report, 2019).

In this same report, we recommended that the courts should also be provided with a discretion to set either a parole eligibility date or a parole release date when sentencing a person for a sexual offence provided the sentence is for a period of 3 years or less (aligning with the current eligibility criteria that applies to non-sexual offences). This would overcome the current anomalous position that a reform intended to ensure that sexual offenders were not subject to automatic release on community safety grounds has, on the contrary, resulted in more sexual offenders not being subject to any form of supervision at all while under sentence, in contrast to people convicted of non-sexual offences. This outcome clearly was not intended.

Making court-ordered parole available as a sentencing option to courts in sentencing for sexual offences is likely to result in more people being subject to parole supervision rather than released on suspended prison sentences without being subject to any form of supervision as part of their sentence. It would also provide an enhanced ability for corrective services officers to manage a person's risks in the community than is currently possible under other forms of orders (such as a suspended prison sentence ordered alongside a probation order, or an imprisonment-probation order). This is because if a person subject to parole fails to comply with the conditions of the order, the conditions of their order can be amended by the Parole Board or the person immediately returned to custody, in contrast to breaches of probation orders, which must be dealt with by a court.

The operation of the SVO scheme

As recommended following our previous review of the SVO scheme, we also recommend changes be made to this scheme, which would result in more serious offence declarations being made for sentences for rape of greater than 5 years, meaning they would be required under our proposals to serve at least 50 per cent of their sentence and up to 80 per cent of their sentence prior to parole eligibility. These reforms were previously recommended to balance the need for just punishment and denunciation, with the importance of promoting long-term community protection by allowing for a sufficient period of supervised release prior to the expiry of the person's sentence.

These changes, if adopted, will not only mean more people sentenced for rape will be required to serve a greater proportion of their sentence in custody prior to parole eligibility, but also should result in head sentences at and above the 10-year mark increasing, as a court will be able to reflect factors in mitigation by setting a parole eligibility date below the current fixed 80 per cent mark instead of only by reducing the head sentence.

7.8.2 Sentencing outcomes for sexual assault

Key Finding

5. There is a potential problem with the structure of sexual assault

There is a potential problem with the current structure of the offence of sexual assault under section 352 of the *Criminal Code* (Qld), which impacts sentence outcomes, considering:

- the breadth of conduct captured which ranges significantly in terms of both seriousness and the type of acts captured;
- the anomalous treatment of fellatio performed by a perpetrator on a male victim as aggravated sexual assault, which has a 14-year maximum penalty, when compared with penile-oral rape, which has a maximum penalty of life imprisonment; and

- the approach in some other jurisdictions, which separates acts involving self-penetration or being forced to penetrate another person as a separate offence.

See **Recommendation 4**.

There is a potential problem with sentencing outcomes for sexual assault

Based on the evidence gathered and the Council's analysis, we have found there is a potential problem with sentencing levels and penalty types for sexual assault in Queensland due to:

- the objective seriousness of some forms of offending, including based on the nature of the offending and the harm caused being poorly understood;
- the current structure of the offence of sexual assault;
- the need to ensure sexual assaults against children are treated as being more serious than offences against adults and for this to be reflected in sentencing outcomes;
- the high use of suspended prison sentences, fines and short prison sentences, which may not be appropriate given the nature of this offending.

Sentencing outcomes may be inadequate due to assessments of offence seriousness and the current structure of the offence

There is evidence that sentencing outcomes for sexual assaults are inadequate due to how offence seriousness is determined and the current structure of the offence.

We received significant feedback from victim survivors and the services that support them indicating that the seriousness of this offending is poorly understood and that sentencing levels should increase.

As discussed in section 7.4, sentencing outcomes for non-aggravated sexual assault suggest that courts may place greater weight on physical harm than psychological or emotional harm, and sentences should increase. When sentencing outcomes for specific categories of sexual assaults were examined (for example, under-clothing versus over-clothing and genital versus non-genital contact), outcomes for some forms of sexual assault more closely approximate those for AOBH (an offence involving an act of violence resulting in bodily harm). We further acknowledge the limited nature of this analysis, which did not take into account case-specific and defendant-specific factors that might have been important.

Some subject expert interview participants were concerned that sentences for these types of offences 'are usually quite low', given the seriousness of the behaviour. The following example was provided by one interview participant of how the seriousness of this form of offending can be significantly under-estimated:

> I don't think [prosecutors] treat it very seriously. 'That's not so bad.' That's the impression that I get. '"That's not so bad.' When you think, you know … Really? Really? This was a public place. Really? We don't walk around asking people to grab us on the vagina in a public place just because it's over the top of the clothes. Really? So yes, anything that's over the top of the clothes is not considered very serious.[150]

[150] SME Interview 14.

The majority of community members who participated in the UniSC research ranked the case example of non-aggravated sexual assault of an employee by their employer[151] as being more serious than burglary (at night, no harm caused to the occupants), despite burglary being more likely to result in a custodial sentence and median sentences for burglary being longer.

This evidence, when considered together with current sentencing practices, provides a strong indication that there is a sentencing problem.

Similar issues apply to forms of aggravated sexual assault captured within section 352(2) involving mouth-to-genital and mouth-to-anus contact. For example, from a victim-survivor's perspective, there likely is little difference in the degree of emotional and psychological harm caused by an offence involving non-consensual acts of cunnilingus charged as aggravated sexual assault (with a 14-year maximum penalty) or as rape based on the person's tongue penetrating the vagina or vulva, despite their very different maximum penalties. Often such distinctions come down not to what has occurred but to charging practices, what can be proven and plea negotiation processes.

Compelled oral penetration (non-consensual fellatio performed on a male victim survivor) in Queensland is also treated as being in a lesser category of seriousness attracting a lower maximum penalty than other forms of non-consensual penetrative acts, in contrast to the approach in most other Australian jurisdictions. There are also differences with other jurisdictions examined, including with respect to the breadth of conduct captured and the categorisation of self-penetration or being forced to penetrate another person as a form of aggravated sexual assault.

We recommend a reconsideration of these aspects of the current framing of sexual assault as part of work already underway in response to the Women's Safety and Justice Taskforce's report in response to this issue in **Chapter 8**.

In **Chapter 10** and **Chapter 14**, we also discuss several reforms intended to reinforce the seriousness of this form of offending. This includes enhancing the resources available to judicial officers and legal practitioners to inform sentence (**Recommendation 6**), ensuring that training and resources for prosecutors and criminal defence practitioners promote recognition of the objective seriousness of this form of offending and the significant impacts it has on victim survivors (**Recommendations 19 and 20**), and ensuring that judicial officers have access to ongoing professional development focused on sexual violence (**Recommendation 18**).

Sexual assaults against children should be considered as being more serious

We have concluded that, as is the case for rape, there is a potential problem with the treatment of offences involving older adolescent children (generally aged 15 years and above),[152] which may impact current sentencing practices in circumstances where the offence is charged as 'sexual assault' rather than as indecent treatment of a child under 16.[153]

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151 The sexual assault was described as an offence involving an employer touching an employee's breasts over the top of her clothing without her consent.

152 This is based on our analysis of Court of Appeal decisions and a sample of cases which found some involved victim survivors aged 15 at the time of the offence. This offence may be charged if the child is older than 12 years in circumstances where there is some question about whether the person knew the child was under 16.

153 See *Criminal Code* (Qld) s 210. Note, under 210(5), if the offence is alleged to have been committed in respect of a child of or above the age of 12 years, it is a defence to prove that the accused person believed, on reasonable grounds, that the child was of or above the age of 16 years. The accused person bears the onus of proof and must establish this on the balance of probabilities.

As discussed in section 7.2.1, the ranking by community members of a case study involving aggravated sexual assault (oral sex/fellatio performed by a teacher on a 16-year-old male student) is not consistent with median sentencing levels for this form of conduct.

Participants in this research viewed this case as being more serious than:

- a scenario involving sexual assault involving forced self-penetration with a sex-toy would be charged as a section 352(3) offence with a maximum penalty of life imprisonment, which also has a lightly longer median sentence (Pair 5);
- a scenario involving strangulation in a domestic setting (which has a 7-year maximum penalty), although the sexual assault offence had a shorter median custodial sentence length than strangulation (Pair 14).

In future, the conduct described in this case scenario may be charged under the offence to be introduced into the *Criminal Code* (Qld) of sexual acts with a child aged 16 or 17 under one's care, supervision or authority.[154] However, non-consensual acts may continue to be charged as aggravated forms of sexual assault, given that the maximum penalty for the described conduct would be 10 years, not 14 years, if charged under this new offence.

As discussed in **Chapter 2**, girls aged under 18 years are particularly vulnerable to being victims of a sexual offence representing 40 per cent of all victim survivors of sexual offences reported to police (compared with boys, who represented 8% of all victim survivors of reported sexual offences).[155] While male victim survivors represented a smaller proportion overall of people reporting being victims of a sexual offence than female victim survivors, over half (55%) of offences reported by men and boys occurred in the under 18 years age group.[156]

As is the case for rape, young people's higher level of vulnerability means these offences are objectively more serious both due to the higher level of harm that results to a young person who is still developing in their sexuality when subjected to non-consensual sexual acts, and the increased culpability of those who direct their unwanted sexual attention towards a young person.

For the reasons discussed in **Chapter 8**, we recommend the new aggravating factor should apply both to offences of rape and sexual assault.

The high use of suspended prison sentences, fines and short prison sentences may not be appropriate and better penalty options are needed

We are also concerned about the high level of use of wholly suspended prison sentences (now the most common penalty type for this offence, representing over one-quarter of sentencing outcomes) and the frequent use of monetary penalties in the Magistrates Courts (although we note that the use of these penalties is decreasing) (see further, **Chapter 11** and **Appendix 4**).

The reforms discussed above that would give courts a discretion to set either a parole release date or a parole eligibility date when imposing a sentence of imprisonment of 3 years or less would equally be beneficial in the sentencing of people for sexual assault for similar reasons as those outcomes above.

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154 *Criminal Code* (Qld) s 210A inserted by *Criminal Justice Legislation (Sexual Violence and Other Matters) Amendment Act 2024* (Qld) s 8. This section is yet to be proclaimed into force (at 1 December 2024).

155 Queensland Government, Open Data Portal, Victims numbers–police districts – monthly from January 2001 <https://www.data.qld.gov.au/dataset/victims-numbers-police-districts-monthly-from-jan-2001/resource/fb7388be-8186-4fbb-84a8-7dbfa63ff378> calculated based on figures reports for 2019 to 2023 at 7 November 2024.

156 Ibid.

However, the short duration of custodial sentences (median of 1.0 years for cases sentenced in the higher courts and 6 months for those sentenced in the Magistrates Courts) is of concern if the objective is not just to punish, denounce and deter, but also to promote the objectives of community protection and rehabilitation. The current length of sentence based on this median sentence length leaves little time for participation in programs or other treatment interventions, or for the person to be under supervision in the community prior to the expiry of their sentence. These same problems would apply even if courts were able to set a date for the person's release on parole.

This provides further justification for providing courts with the ability to make a community-based order alongside a suspended prison sentence when sentencing a person for a single offence.

In place of the existing range of community-based orders, we recommend, as we have previously, the introduction of a new intermediate sanction – a 'community correction order' ('CCO'), which can be tailored through the conditions imposed to meet the various purposes of sentencing while also responding to the individual factors contributing to offending.[157] The introduction of this form of order, in our view, will better enable conditions to be targeted to respond to issues associated with the person's offending behaviour, and to meet the important purposes of sentencing by allowing for a range of conditions.[158]

We acknowledge these reforms will have significant resourcing recommendations and may take some time to implement. We discuss these issues in more detail in **Chapter 11**.

7.8.3 Other issues impacting the ability of sentencing orders to meet the purposes of sentencing

The Council has identified several other issues regarding the appropriateness and adequacy of penalty and parole options that negatively impact the ability of these orders to not only meet the purposes of punishment and denunciation, but also rehabilitation and long-term community protection. These include extended periods being spent by some people in pre-sentence custody prior to sentence, which traditionally has limited opportunities for program engagement and completion and, if parole is applied for and granted, time under supervision in the community.

Stakeholders have also raised significant concerns about the adequacy of resourcing for programs in custody and in the community, which is a clear barrier to ensuring the purposes of community protection and rehabilitation are met, with some calls made for treatment and services to be delivered in a consistent way across all correctional centres.[159]

As discussed in **Chapter 3**, a fundamental principle adopted for this review has been that sentencing orders should be administered in way that satisfies the intended purposes of sentencing, and the services delivered under them – including programs and treatment – should be adequately funded and available across Queensland, both in custody and in the community (**Principle 8**). We continue to be of the view that services and programs delivered to offenders under sentence – and particularly those convicted of sexual assault and rape –should be:

- adequately funded as far as practicable, and universally available across Queensland;

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157 Ibid rec 9.
158 For example, community service, supervision, participation in rehabilitation activities, treatment, alcohol and/or drug abstinence and monitoring, non-association and residence (or non-residence) requirements, place or area exclusions, curfew, payment of a bond, judicial monitoring and electronic monitoring.
159 For example, see Submission 23 (Legal Aid Queensland).

- regularly evaluated with adherence to best practice standards; and
- appropriately targeted and tailored to meet the individual needs of offenders, taking into account factors such as the offender's age, gender, cultural background, mental health issues and any cognitive impairments they might have.

We discuss our findings in more detail and recommendations for reform in **Chapter 11**.

PART C: Sentencing principles, guidance and processes

Contents

PART C: Sentencing principles, guidance and processes

List of Tables

Chapter 8 – Legislative sentencing guidance

8.1 Introduction

The Terms of Reference asked us to advise the Attorney-General about whether current sentencing purposes and factors are adequate for the purposes of sentencing sexual assault and rape offenders and whether any additional legislative guidance is required.[1]

In this chapter, we consider the current approach in Queensland to the sentencing purposes, principles and factors under the *Penalties and Sentences Act 1992* (Qld) ('PSA'), which provides courts with legislative guidance about how to approach the complex task of sentencing.

We explore:

1. the statutory objectives of the PSA and how these are relevant to the sentencing of sexual assault and rape offences;
2. the permitted purposes of sentencing under section 9(1) of the PSA and similarities and differences with other Australian jurisdictions and select overseas jurisdictions;
3. the principles and factors a court must consider and apply when determining sentence set out in section 9 of the PSA and other relevant sections of the Act; and
4. the primary sentencing considerations to which a court must have regard when either sentencing a person for an offence involving the use of violence against another person or for an offence of a sexual nature committed in relation to a child aged under 16 years.

We discuss the maximum penalties that apply to sexual assault and rape as well as the structure of these offences to determine whether they are appropriate, particularly for the offence of sexual assault.

The chapter also briefly discusses other forms of legislative sentencing guidance, such as mandatory and presumptive sentencing schemes in Queensland and other Australian and international jurisdictions, as well as standard sentence and standard non-parole period schemes. More information about these schemes can be found in Chapter 10 of our **Consultation Paper: Background**.

8.2 Overview of the current approach in Queensland

The PSA is the primary legislation that guides the sentencing of adults in Queensland. It sets out the purposes of sentencing, principles and factors that Parliament has determined a court must consider and the types of penalties and parole options open to a court to impose, as well as, in some cases, their conditions.

The general approach to sentencing, as in other Australian jurisdictions, is based on structured discretion (choice).

Parliament prescribes the limits within which judicial discretion can be exercised (setting maximum penalties, and in some cases, minimum or mandatory penalties) which in the case of sexual assault and

1 Appendix 1, Terms of Reference.

rape, are set out in the sections establishing these offences in the *Criminal Code* (Qld). The PSA includes the principles and factors that courts may (or must) consider and apply when determining sentence.

Courts exercise their discretion to impose a sentence that is reflective of the circumstances of the offence and the person sentenced in accordance with the important principle of individualised justice. This approach to sentencing is known as 'instinctive synthesis'.[2]

The High Court has consistently said that 'there is no single correct sentence' and the process of sentencing is not a mechanical or mathematical exercise.[3] While consistency of sentencing is an important objective, the consistency generally sought to be achieved is consistency of approach rather than consistency of outcome.[4] This is also a stated objective of the PSA.[5]

Within this context, legislative forms of sentencing guidance take many different forms, ranging from 'broad, generalised guidance, such as the way a maximum penalty indicates parliament's assessment of the seriousness of an offence, to more specific and prescriptive guidance'.[6] In certain cases, the Queensland Parliament has determined there is only one 'correct' sentence, such as 'repeat serious child sex offences', to which a mandatory life sentence applies.[7]

8.3 Sentencing guidance under the PSA: An overview

8.3.1 Purposes of the Act

A statement of legislative intent is set out in the preamble to the PSA. This highlights Parliament's views in enacting this legislation:

1. Society is entitled to protect itself and its members from harm.
2. The criminal law and the power of courts to impose sentences on offenders represent important ways in which society protects itself and its members from harm.
3. Society may limit the liberty of members of society only to prevent harm to itself or other members of society.[8]

The strong focus of the preamble on the protection of members the community from harm is highly relevant to the sentencing of sexual assault and rape given the nature of these offences and the significant harm they can cause to victim survivors.

The PSA also contains a statement of purposes in section 3 which elevates the protection of the Queensland community as being 'a paramount consideration' in appropriate circumstances, in the context of its broader purpose of 'providing for a sufficient range of sentences for the appropriate

2 *Markarian v The Queen* (2005) 228 CLR 357 ('*Markarian*').
3 Ibid 371 [27] (Gleeson CJ, Hayne and Callinan JJ), 405 [133] (Kirby J); *DPP (Vic) v Dalgliesh (a pseudonym)* (2017) 262 CLR 428, 443 [45] (Keifel CJ, Bell and Keane JJ) ('*Dalgliesh*') citing *Wong v The Queen* (2001) 207 CLR 584, 611 [75] (Gaudron, Gummow and Hayne JJ) ('*Wong*').
4 See Sarah Krasnostein and Arie Freiberg, 'Pursuing Consistency in an Individualistic Sentencing Framework: If You Know Where You're Going, How Do You Know When You've Got There?' (2013) 76(1) *Law and Contemporary Problems* 265.
5 *Penalties and Sentences Act 1992* (Qld) s 3(d) ('PSA').
6 Sentencing Advisory Council (Victoria), *Sentencing Guidance in Victoria* (Report, 2016) 22 ('*Sentencing Guidance in Victoria*').
7 PSA (n 5) s 161E. As an alternative, the court can instead impose an indefinite sentence in place of a life sentence: s 161E(2). Relevant mandatory sentencing schemes are discussed below in section 8.6.2 and in Chapter 11.
8 It also states 'Society is entitled to recover from offenders funds to help pay for the cost of law enforcement and administration'.

punishment and rehabilitation of offenders'.[9] Other relevant purposes listed in section 3 of the Act include:

- 'promoting consistency of approach in the sentencing of offenders' (s 3(d));
- 'providing sentencing principles that are to be applied by courts' (s 3(f)); and
- 'promoting public understanding of sentencing practices' (s 3(h)).

These purposes can be used by a court in interpreting other sections of the PSA.[10]

Some jurisdictions have also legislated similar statements of legislative purposes and principles that apply specifically to sexual offending. For example, the Victorian Parliament amended the *Crimes Act 1958* (Vic) to include objectives and guiding principles that apply to sexual offences and related procedural and evidential matters.[11] This approach has been supported by the Australian Law Reform Commission ('ALRC') and NSW Law Reform Commission on the basis that

> these statements can perform an important symbolic and educative role in the application and interpretation of the law, as well as for the general community. While much more is required than simply a statement of guiding principles to change culture, it does provide an important opportunity for governments and legal players to articulate their understanding of sexual violence and a benchmark against which to assess the implementation of the law and procedure.[12]

8.3.2 Sentencing guidelines

Part 2 of the PSA sets out governing principles and sentencing guidelines and also includes some provisions that are procedural in nature.

The purposes and principles of sentencing and sentencing factors contained within sections 9(1) and (2) of the PSA were introduced by the legislature with the intention of encouraging 'a higher degree of conformity and consistency' in sentences imposed.[13]

There have been many other additions made to section 9 over the years, as well as to other sections falling within that Part of the Act.

As discussed in section 8.4, some provisions falling within section 9 of the PSA require a court to have primary regard to certain purposes and listed factors when sentencing for certain types of offences, including offences of a sexual nature committed in relation to a child under 16 years[14] and offences involving violence against another person, or which resulted in physical harm.[15]

Aggravating factors are also established under section 9 of the PSA requiring a court to treat certain factors as making the offence more serious, including whether the offence committed was a domestic violence offence,[16] or where it was committed against a person who was performing the functions of that

9 PSA (n 5) s 3(b).
10 *Acts Interpretation Act 1954* (Qld) s 14A(1): 'In the interpretation of a provision of an Act, the interpretation that will best achieve the purpose of the Act is to be preferred to any other interpretation'.
11 ss 37A and 37B.
12 Australian Law Reform Commission, *Family Violence–Improving Legal Frameworks* (ALRC CP 1, 2010) Chapter 16, 'Guiding principles and objects clauses'.
13 Queensland, *Parliamentary Debates*, Legislative Assembly, 5 November 1992, 150.
14 PSA (n 5) s 9(6).
15 Ibid ss 9(2A)–(3).
16 Ibid s 9(10A).

person's office or employment,[17] unless it is not reasonable to do so due to the exceptional circumstances of the case.

Section 9 of the PSA also requires certain factors to be treated as mitigating – in particular, in sentencing a person who is a victim of domestic violence, the effect of that violence on the person unless it is not reasonable due to the exceptional circumstances of the case; and if domestic violence was a contributing factor to the person's offending, the extent to which this is the case.[18]

Other provisions within Part 2 include considerations for a court in deciding whether to record a conviction,[19] a requirement to take a person's plea of guilty into account[20] and giving preference to compensation for victims over the imposition of a fine.[21]

In the following sections, we explore some aspects of those purposes and factors listed in section 9 of the PSA.

8.4 Sentencing principles and factors in the PSA

8.4.1 Introduction

In this section, we discuss the relevant sentencing principles and factors under the PSA and whether there are any issues or anomalies with the application of these factors when sentencing for sexual assault and rape. We also consider whether there is a need for additional legislative guidance as required under the Terms of Reference.[22]

General and primary sentencing principles and factors to which a court *must* have regard to in sentencing are set out in sections 9(2)–9(11) of the PSA. Although consideration of these factors is mandatory, it has been recognised with respect to a similar provision to section 9(2) in Victoria that the phrase 'must have regard to' 'should be read as subject to the necessary qualification that the relevance of a particular matter to the court's determination will affect the weight, if any, that it will be given. Some of the listed matters may have no relevance in a particular case':[23]

> No single matter specified … is 'fundamental' to the fixing of the sentence. The imperative that the sentencing court 'have regard to' the enumerated matters requires the judge to consider each of the matters and determine whether any or any particular weight should be given to them. The judge is required only to have regard to the factors so far as they are known to him or her. The provision does not require that the matter in question have an actual influence on the ultimate result. Every matter may inform the 'instinctive synthesis' but none is determinative; the emphasis each receives will vary from case to case.[24]

Table 8.1 sets out a summary of the factors in section 9 that must be applied (so far as these are relevant and known) when sentencing any offence generally. Under the general factors, imprisonment should only be imposed as a last resort and a sentence which allows the person to stay in the community is preferable.

17 Ibid s 9(10F).
18 Ibid s 9(10B).
19 Ibid s 12.
20 Ibid s 13.
21 Ibid s 14.
22 See Appendix 1, Terms of Reference.
23 *AB v The Queen (No 2)* [2008] 18 VR 391 [44] (Warren CJ, Maxwell P and Redlich JA agreeing) (citations omitted).
24 Ibid [45].

Table 8.1: General sentencing principles and factors

PSA Section	General factors applying to all offences
9(2)	In sentencing an offender, a court must have regard to:
(a)	principles that:
	(i) a sentence of imprisonment should only be imposed as a last resort; and
	(ii) a sentence that allows the offender to stay in the community is preferable; and
(b)	the maximum and any minimum penalty prescribed for the offence; and
(c)	the nature of the offence and how serious the offence was, including:
	(a) any physical, mental or emotional harm done to a victim, including harm mentioned in information relating to the victim …[including in the form of a victim impact statement]; and
	(b) the effect of the offence on any child under 16 years who may have been directly exposed to, or a witness to the offence; and
(d)	the extent to which the offender is to blame for the offence [culpability]; and
(e)	any damage, injury or loss caused by the offender; and
(f)	the offender's character, age and intellectual capacity; and
(fa)	the hardship that any sentence imposed would have on the offender, having regard to the offender's characteristics, including age, disability, gender identity, parental status, race, religion, sex, sex characteristics and sexuality; and
(fb)	regardless of whether there are exceptional circumstances, the probable effect that any sentence imposed would have on— (i) a person with whom the offender is in a family relationship and for whom the offender is the primary caregiver; and (ii) a person with whom the offender is in an informal care relationship; and (iii) if the offender is pregnant—the child of the pregnancy; and
(g)	The presence of any aggravating or mitigating factor concerning the offender; and …
(gb)	(i) whether the offender is a victim of domestic violence; and (ii) whether the commission of the offence is wholly or partly attributable to the effect of the domestic violence on the offender; and (iii) the offender's history of being abused or victimised; and
(h)	the prevalence of the offence; and
(i)	how much assistance the offender gave to law enforcement agencies in the investigation of the offence or other offences; and
(j)	time spent in custody by the offender for the offence before being sentenced; and
(k)–(m)	[other sentences imposed on the offender or that the offender is liable to serve]; and…
(o)	if the offender is on bail and is required under the offender's undertaking to attend a rehabilitation, treatment or other intervention program or course—the offender's successful completion of the program or course; and
(oa)	if the offender is an Aboriginal or Torres Strait Islander person—any cultural considerations, including the effect of systemic disadvantage and intergenerational trauma on the offender; and
(p)	if the offender is an Aborigional or Torres Strait Islander person–any submissions made by a representative of the community justice group in the offender's community …; and …
(r)	any other relevant circumstance.
9(9)(b)	[The court must not have regard to whether or not the person may become, or is, subject to an application or an order under the dangerous prisoners scheme]

9(9A)	Voluntary intoxication of an offender by alcohol or drugs is not a mitigating factor …
9(10)&(11)	[The court must treat the offender having 1 or more previous convictions as aggravating. The court must consider the nature and relevance of the criminal history and the time since the conviction Despite the offender's criminal history, the sentence must not be disproportionate to the gravity of the offence]
9(10A)	[If the offence is a domestic violence offence, this is an aggravating factor unless it is not reasonable because of exceptional circumstances][25]
9(10B)	[If the person sentenced is a victim of domestic violence] the court must treat as a mitigating factor: (a) the effect of the domestic violence on the offender, unless it is not reasonable to do so because of the exceptional circumstances of the case; and (b) if the commission of the offence is wholly or partly attributable to the effect of the domestic violence on the offender—the extent to which [this is the case].
9(10E)& (10F)	If— [(a) the court is sentencing a person for an offence involving personal violence (including attempting or conspiring) or result in physical harm to another person; and (b) the offender committed the offence while the other person … was performing, or had performed, the functions of the person's office or employment] …the court must treat the fact that the offender committed the offence while the other person was performing, or had performed, the functions of the person's office or employment as an aggravating factor, unless the court considers it is not reasonable to do so because of the exceptional circumstances of the case.

8.4.2 Application of sections 9(2A) and 9(3) of the PSA: Offences involving personal violence/physical harm

When sentencing a person for an offence that 'involved the use of, or counselling or procuring the use of, or attempting or conspiring to use, violence against another person' or that resulted in physical harm to another person,[26] there are special sentencing considerations. Courts must apply section 9(2A) (the principle of imprisonment as a last resort does not apply)[27] and give primary consideration to the factors in section 9(3) of the PSA (Table 8.2).[28]

25 For example, if the victim has previously committed an act of serious domestic violence, or several acts of domestic violence against the offender.
26 PSA (n 5) s 9(2A).
27 Ibid s 9(2)(a).
28 This does not mean that general factors in section 9(2) are wholly irrelevant: *R v HYQ* [2024] QCA 151 [78] (Bowskill CJ, Dalton JA and Wilson J agreeing) ('*HYQ*') citing *R v McGrath* [2006] 2 Qd R 58 [37] (Mackenzie J).

Table 8.2: Primary sentencing factors for offences of personal violence/resulting in physical harm

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

Primary factors and the offence of rape – section 9(3) of the PSA

Section 9(2A) and the primary factors in section 9(3) of the PSA apply to rape as courts have found the act of 'rape involves physical harm to another'.[29] The position in respect of sexual assault is not so clear, and is discussed below. It has also been recognised that rape is an inherently violent offence.[30]

Section 9(3) of the PSA was introduced in 1997 to 'reflect the Parliament's judgment that the community expected that crimes of violence were to be punished more severely by courts than they had been'.[31] These factors have not been amended since their introduction.

The nature of the offence can make imprisonment more likely due to the primary sentencing considerations which apply.[32] As explained in *R v Oliver*:[33]

> At the forefront of a sentencing judge's consideration of an offender who falls within s 9(2A) must be the risk to the community on the one hand and the interests of the victim of the offender on the other hand. No longer is the sentence to be seen, in the first instance, from the perspective of the offender who should not, except as a last resort, be sentenced to an actual term of imprisonment. Instead, a judge must place at the forefront of the sentencing process the question whether the risk to the public and to the victim, as well as the circumstances of the victim, point to the need for prison.

29 *R v KU; Ex Parte A-G (Qld) (No 2)* [2008] QCA 154 [157] (de Jersey CJ, McMurdo P and Keane JA agreeing) ('*KU (No 2)*').
30 See, for example, *R v MBY* [2014] QCA 17 [71] nn 70 (Morrison JA, Muir JA and Daubney J agreeing); *R v Benjamin* (2012) 224 A Crim R 40 ('*Benjamin*'); *R v Tong (a pseudonym)* [2021] QCA 261 [43] (Sofronoff P, McMurdo JA and Applegarth J agreeing).
31 *R v O'Sullivan; Ex parte A-G (Qld)* (2019) 3 QR 196, 224 [75] (Sofronoff P, Gotterson JA, Lyons SJA) ('*O'Sullivan*').
32 PSA (n 5) ss 9(6)(d), (f)–(g), (k); (3)(a)–(b), (k).
33 *R v Oliver* [2018] QCA 348 ('*Oliver*').

> This is a large difference from s 9(2). It is justified by the community's abhorrence of the use of violence and the community's expectation that the courts will protect the community when necessary from the risk of further violence by incarcerating the offender. That will deter the particular offender, will deter others from offending and will satisfy a justified need for a sense of retribution.
>
> These considerations are not at the forefront of sentencing non-violent offenders.[34]

The section 9(3) factors are framed in a way that places a strong focus on *physical harm, violence* and *injury* and, while they refer to the 'circumstances of the offence', they do not expressly refer to victim harm, or mental and emotional harm, which are mentioned in the general sentencing factors.[35] This may contribute to how Court of Appeal decisions have previously considered an absence of physical injury or additional substantial violence as a distinguishing feature in cases of rape.[36] Recent decisions have encouraged legal practitioners and sentencing courts to adopt a broader understanding of harm rather than using physical injury as a tool for comparison, as 'psychological harm cannot be said to be any less significant'.[37]

The factors in section 9(3) also prioritise the sentencing purpose of *community protection*, rather than making reference to other purposes that are equally as important in sentencing for sexual offences, such as denunciation. For a court to assess risk to the community as a primary factor, it must have reliable information on risk of reoffending.[38] We consider this further in **Chapter 12**.

Whether sexual assaults involve the use of personal violence and therefore imprisonment is not a sentence of last resort

While courts have found the act of rape itself is an offence which involves physical harm to another and therefore, section 9(2A) will apply,[39] there is no similar clear statement of the application of section 9(2A) of the PSA applying to sexual assault. For this reason, whether this provision applies depends upon the individual facts of the case.[40]

The term 'violence' is not defined in the PSA. The Court of Appeal has said it should not have a broad meaning because a person will be subject to a 'harsher sentencing regime' that can affect the level of punishment.[41] In other cases, the Court of Appeal has considered the term 'violence' in respect of threatening behaviour and offences that have not involved physical contact.[42]

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34 Ibid [26]—[28] (Sofronoff P, Fraser and Philippides JJA agreeing).
35 PSA (n 5) s 9(2)(c)(i).
36 See *R v Tory* [2022] QCA 276 [38] (Kelly J, McMurdo and Dalton JJA agreeing); *R v Buchanan* [2016] QCA 33; *R v Benjamin* (n 30) [4].
37 *R v VN* [2023] QCA 220 [32] (Bowskill CJ, Morrison and Dalton JJA) ('*VN*'). See also *R v WBM* [2020] QCA 107 [31] (Applegarth J, Fraser and Mullins JJA agreeing) ('*WBM*').
38 Geraldine Mackenzie and Nigel Stobbs, *Principles of Sentencing* (The Federation Press, 2010) 225–26.
39 *KU (No 2*) (n 29) [157] (de Jersey CJ, McMurdo P and Keane JA).
40 *Oliver* (n 33) [33]–[34], [42] (Sofronoff P, Fraser and Philippides JJA agreeing).
41 *R v Breeze* [1999] QCA 303 [16]–[18] [23] (Pincus, Davies JJA, Demack J). See more recently *Oliver* (n 33) [32] (Sofronoff P, Fraser and Philippides JJA agreeing).
42 *Oliver* (n 33) (unlawful stalking where there were threats of violence); *R v Barling* [1999] QCA 16 (arson); *R v Breeze* [1999] QCA 303 (threat in a robbery); *R v Tobin* [2008] QCA 54 (bomb threat). In *Tran v Queensland Police Service* [2023] QDC 217 Heaton KC DCJ stated: 'Despite there being evidence of physical contact … the evidence was so nebulous about that contact as to deny a court from concluding [it] involved the use of 'violence'. It was, however, a concerning feature of the offence of stalking.' [17]. Going armed to caused fear is an offence of 'violence' [19]. See also *Youth Justice Act 1992* (Qld) ('YJA'), and whether manslaughter as a result of dangerous driving is considered an offence of 'violence': see *R v BXY* [2023] 11 QLR [74] (Bowskill CJ) cf *R v YTZ; Ex parte A-G (Qld); R v YTZ* [2023] QCA 87 [21], [31]–[32] (Mullins P, Gotterson AJA and Henry J).

In several District Court appeals, judges have reached different conclusions about whether section 9(2A) applies in sentencing similar forms of offending – for example:

- In *Biswa v Queensland Police Service,*[43] the appellant approached a stranger in public and attempted to cuddle her, laid across her legs with his face on her inner thigh face down touching bare skin and began kissing her bare skin. He was pushed away but grabbed her thighs with both hands and made repeated attempts to embrace her, then lunged at her trying to grab her groin, despite being repeatedly pushed away and told to stop.[44] This was held not to be 'violence against another person' for the purposes of section 9(2A) and therefore his actions did 'not warrant that the appellant serve actual time in custody'.[45]
- In *Braga v Commissioner of Police*,[46] the appellant grabbed the victim around the waist, pulling her to him before trying to kiss her mouth and neck, but in this case, bit her neck. This was held to be personal violence, and sections 9(2A) and 9(3) were therefore applied.[47]
- In *R v Downs,*[48] the offender had committed multiple acts of sexual assault against 8 teenage employees.[49] While not directly stated, the conclusion reached by the Court that imprisonment was a last resort gives rise to an inference that section 9(2A) did not.[50] The Court referred to the sentencing judge's considerations, which supported imprisonment as a last resort, including that 'none of the acts involved the use of force or threats of physical violence'.[51]

Recently, in *R v Singh*,[52] a case involving 3 sexual assaults by an Uber driver against an 18-year-old female victim (touching her breasts, attempting to kiss her, pushing her underwear to one side to touch her vulva, forcibly placing her hand on his penis and attempting to get her to masturbate it), the Court of Appeal found it 'unnecessary to consider whether the actions of the applicant involved violence'.[53] In doing so, it was noted that the sentencing judge acknowledged he was not compelled to order the applicant to serve time in actual custody, and 'it was not contended … that the offending involved violence'.[54]

Section 9(2A): Thematic sentencing remarks and data findings[55]

Data findings

In **Appendix 4**, we explore the sentencing trends and outcomes for sexual assault using the administrative courts dataset.[56]

43 [2016] QDC 333 ('*Biswa*').
44 Ibid [6]–[8].
45 Ibid 9 [43].
46 [2018] QDC 48.
47 Ibid [11]–[12] and [28].
48 [2023] QCA 223 ('*Downs*').
49 The offending involved unclipping a bra, touching and squeezing breasts, punching a breast, a slap on the bottom, grabbing one complainant's breasts and lifting her: Ibid [8]—[27], [32](i) (Morrison JA, Mullin P and Bond JA agreeing)
50 Ibid [32](i), [45] (Morrison JA, Mullin P and Bond JA agreeing)
51 Ibid [32] (i).
52 [2024] QCA 50 ('*Singh*').
53 Ibid 8 [39] nn 17.
54 Ibid.
55 See Chapter 4 for the methodology of the thematic sentencing remark analysis.
56 Ibid for a description of the methodology used for quantitative analysis.

We found that, over the 18-year data period, just under half of the penalties imposed in the Magistrates Courts for a non-aggravated sexual assault were custodial penalties (48.3%, n=466), while in the higher courts, almost 80 per cent of non-aggravated sexual assault penalties involved a custodial sentence.

In the higher courts, the proportion of custodial sentences has remained relatively stable over time, while in the Magistrates Courts, the proportion of custodial sentences has been increasing (from 31.5% in the period 2005–06 to 2008–09 to 53.6% in the period 2020–21 to 2022–23).

The proportion of sentences that involved actual imprisonment (imprisonment, partially suspended prison sentence or prison-probation order) in the Magistrates Courts also increased from 15.1 per cent to 26.8 per cent over this same time period. However, the reverse trend was found in the use of actual imprisonment in the higher courts, with 45.7 per cent of cases resulting in a sentence involving actual imprisonment in the period 2005–06 to 2007–08 compared with 31.8 per cent in the period 2020–21 to 2022–23.

Wholly suspended prison sentences are commonly imposed across both court levels for non-aggravated sexual assault, representing 26.8 per cent of sentencing outcomes in the Magistrates Courts and 45.3 per cent of outcomes in the higher courts based on cases sentenced in 2020–21 to 2022–23, and their use has been increasing.

The use of custodial sentences may provide some indication of how often section 9(2A) is being applied given this displaces the usual principle of imprisonment as a sentence of last resort. It does not, however, prevent a court from imposing a sentence other than imprisonment.

Thematic sentencing remarks analysis

From the thematic review of sentencing remarks for sexual assault, it was difficult to discern any pattern in the application of section 9(2A) or a finding of 'imprisonment as a last resort' under section 9(2)(a) of the PSA applied. This was due to the small number of sexual assault cases where this principle or relevant subsections were mentioned (n=9). A finding of 'imprisonment as a last resort' does not mean a sentence of imprisonment was not imposed but the numbers were too small for any analysis on the likelihood of this occurring.

There were no observed differences as to whether imprisonment was or was not considered to be a sentence of last resort, based on the conduct involved in the sexual assault, however this finding should be treated with caution due to the small sample size.

For example, in one case in the Magistrates Courts, involving a hug and then 'touching and firmly groping the complainant's breast' it was stated 'although there is not a high level of violence, it still comes within the definition, I am satisfied, of violence under the Penalties and Sentence Act' (sexual assault, major city, lower courts, non-custodial, #5). In contrast, in another case in the Magistrates Courts, in which the offence involved the sentenced person touching the victim's breast, removing the shoulder strap of their garment to expose the victim's breast and then grabbing her calf and trying to pull her back to him as he was being pushed away, the judicial officer in this case said, 'a period of [imprisonment] is to be a sentence of last resort' (sexual assault, major city, lower courts, custodial, #3).

In a District Court case, the perpetrator approached the victim survivor, who had an intellectual disability and Down Syndrome, at a bus stop, held her shoulder or face and put his tongue in her mouth, touched her breasts, touched her bottom and tried to put his hand inside her dress. The judge considered that 'a sentence of imprisonment should only be imposed as a last resort and that a sentence that allows an offender to stay in the community is preferable' (sexual assault, regional/remote, higher courts, custodial, #4).

One magistrate noted the lack of case law and the subjectiveness of determining whether an offence involved 'violence'. In this case, the sentenced person followed the victim, who was walking home late at night, grabbed her from behind and put his hand across her face and eyes and with the other hand put pressure on her 'vagina

over her clothing'. Attempting to drag her off the street caused her to scream, struggle to escape and use her keys to strike him:

> The question of violence against [an]other person is a vexed one. And it really in my view turns on how one takes a view about the grabbing from behind and the attempt to drag off the street whether that is sufficient to be violent, to be considered violent. There is no definition under the Penalties and Sentences Act of the word 'violence'. There are multitudes of cases that have dealt with what it means for these purposes. There is no case that is clear for this particular set of circumstances and certainly there's none been put before me. I do think that it is a violent offence but I'm going to err on the side of caution and sentence on the basis that imprisonment is the last resort. (sexual assault, major city, lower courts, custodial, #7)

8.4.3 Application of sections 9(4)–(6) of the PSA: Offences of a sexual nature against a child under 16 years

Sections 9(4)–(6) of the PSA (summarised in Table 8.4: Examples of special purposes, principles and factors in sentencing sexual offences – select jurisdictions) state primary factors that a court must consider when sentencing an offence of a sexual nature committed against a child under 16. For a discussion of the limitations placed on the use of 'good character' evidence under section 9(6A) of the PSA, see **Chapter 9**.

Table 8.3: Primary sentencing factors for offences of a sexual nature committed in relation to a child under 16 years

PSA Section	Primary factors applying to offences of a sexual nature committed in relation to a child under 16 years.
9(4)(a)	Sentencing practices, principles and guidelines applicable when the sentence is imposed apply, rather than when the offence was committed
(b)	The principles that imprisonment should only be imposed as a last resort and allowing the person to stay in the community is preferable do not apply
9(4)(c), 9(5)	The person must serve an actual term of imprisonment, unless there are exceptional circumstances (a court may consider the closeness in age between the offender and child when deciding exceptional circumstances)
9(6)	The court must have regard primarily to:
(a)	the effect of the offence on the child
(b)	the age of the child
(c)	the nature of the offence, including, for example, any physical harm or the threat of physical harm to the child or another
(d)	the need to protect the child, or other children, from the risk of the offender reoffending
(e)	any relationship between the offender and the child
(f)	the need to deter similar behaviour by other offenders to protect children
(g)	the prospects of rehabilitation including the availability of any medical or psychiatric treatment to cause the offender to behave in a way acceptable to the community
(h)	the offender's antecedents, age and character
(i)	any remorse or lack of remorse of the offender
(j)	any medical, psychiatric, prison or other relevant report relating to the offender
(k)	anything else about the safety of children under 16 the sentencing court considers relevant
9(6A)	The court must not have regard to the offender's good character if it assisted the offender in committing the offence

Primary factors

The factors in sections 9(4)–(6) of the PSA and their relevance to sentencing purposes were explained by the court in *R v Stable (a pseudonym)*:[57]

> Subsection 9(6) is different. It is preceded by s 9(4) which excludes the application of the general principle that imprisonment is a punishment of last resort and substitutes the principle that, except in cases in which there are extraordinary circumstances, an offender must be ordered to serve an actual term of imprisonment. This legislative command overrides any weight that would otherwise be given, if the discretion were unconstrained, to factors that do not amount to exceptional circumstances that would mitigate against a prison term, including facts relating to the rehabilitation of the offender.
>
> The 11 factors to which the court "must have regard primarily" fall into two categories. Seven of the factors are directed to circumstances affecting the child victim or potential victims. The remaining four factors concern the offender.
>
> Each of these are factors that a sentencing judge would have regarded as relevant as a matter of common law. However, that is not a reason to regard s 9(6) as a mere declaration of existing law. This is because s 9(6) does not

57 [2020] QCA 270 ('*Stable*').

> just put forward these factors as something that may be taken into account. They are factors to which the sentencing judge 'must have regard *primarily*'.
>
> The seven factors that are referrable to child victims of sexual offences have nothing to do with the offender's subjective circumstances. The first three factors direct attention to the victim and to the effect of the offence upon the victim, something distinct from the offender's personal situation. These factors are also irrelevant to general deterrence. The fourth factor, concerning the need to protect the victim and other potential victims, requires attention to be paid to the likelihood of recidivism and whether, taking that into account, the weight to be given to the mitigating factors might otherwise serve to reduce the sentence. The fifth factor directs attention to the relationship between the offender and the victim. This factor requires consideration of such factors as the child's vulnerability to the offender and the degree to which the offender took advantage of the relationship in order to be able to commit the offence. The sixth factor expressly requires weight to be given to general deterrence as a factor. The final factor, requiring the sentencing judge to have regard "primarily" to "anything else about the safety of children" that is considered relevant, again addresses matters beyond the offender's personal mitigating circumstances.[58]

While the majority of primary factors are concerned with the victim of the offence and a court must have regard to the age of the child, there is no express mention of a child's vulnerability because of their age, although this may be implied. The vulnerability of the child can be concluded by considering 'the relationship between the offender and the child'.

Similar to the discussion above with respect to the factors in section 9(3), the factors listed in this subsection are framed in a way that places a strong focus on *physical harm* and *threat of physical harm* and the need to protect the child or other children from that risk.[59] While recent decisions have encouraged legal practitioners and sentencing courts to adopt a broader understanding harm rather than using physical injury as a tool for comparison,[60] consideration of mental and emotional harm are only mentioned in the general sentencing factors, not the primary factors of 9(6).[61]

In **Chapter 6**, we discussed the intention behind the introduction of these primary considerations when a victim is a child under 16 (section 6.3.2). In summary, they 'constituted a legislative command to sentencing judges and signify the legislature's opinion that, henceforth, offences of a sexual nature against children were to be regarded with greater seriousness than previously' and 'to ensure that such offences were to be equated in seriousness to offences of violence'.[62]

As discussed in **Chapter 7**, we are mindful that median sentences for rape generally have remained stable over the past 18 years. Our research based on current sentencing trends for 3 years of data (2020–21 to 2022–23) shows that when custodial sentence lengths for rape of a child are compared with those for rape of an adult by conduct type, the increase or 'premium' that offences against children attract appears relatively modest, and in some cases there is no difference.[63]

Definition of 'an offence of a sexual nature', knowledge of victim age and application to sexual assault

The PSA does not define what constitutes 'an offence of a sexual nature in relation to a child'. While the PSA defines a 'sexual offence' by reference to schedule 1 of the *Corrective Services Act 2006* (Qld) ('CSA')

58 Ibid [41]–[44] (Sofronoff P and Fraser and Philippides JJA) (emphasis in original) (footnotes omitted).
59 PSA (n 5) ss 9(6)(c), (d).
60 See *VN* (n 37) [32] (Bowskill CJ and Morrison and Dalton JJA); *WBM* (n 37) [31] (Applegarth J, Fraser and Mullins JJA agreeing).
61 PSA (n 5) s 9(2)(c)(i).
62 *Stable* (n 57) [33]–[34] (Sofronoff P, Fraser and Philippides JJA).
63 See further Appendix 4.

for the purpose of the parole provisions,[64] the courts have found section 9(4)–(6) of the PSA captures a broader range of offences beyond the definition of a 'sexual offence'.[65]

Some offences of a sexual nature against a child prescribe the child's age as an element of the offence.[66] For sexual assault, the victim survivor's age is not an element of the offence, which means it is not directly relevant to establishing the offence.

Despite a victim being under 16, a person being sentenced may seek to rely on the principle of imprisonment as a last resort. This point is illustrated in *DMS v Commissioner of Police*,[67] where the victim was 15 and 11 months and in *R v Downs*,[68] in which the victims were aged between 15 and 17 and imprisonment was considered a last resort.

Prior to the introduction of section 9(4)(c) of the PSA (as it is now), case law established that imprisonment should be imposed for a sexual assault on a child unless there were exceptional circumstances.[69] In this respect, the introduction of this provision simply reflected the position at common law. However, in *R v Manser*,[70] the complainant was aged 17 years and the Court found 'the legislature chose, by amendment, to except from s 9(2)'s application sexual offences against children under the age of 16, but not older. This is not, of course, to say that imprisonment cannot be imposed in such cases.'[71]

8.4.4 Aggravating and mitigating factors

Under the PSA, a court is required to take any aggravating or mitigating factors into account when determining a sentence.[72] Aggravating factors include objective details about the offence, the victim and/or the person to be sentenced, which tend to increase the person's culpability and the sentence they receive. Mitigating factors include subjective details about the person and the offence, which tend to reduce the severity of the sentence. At times 'many of these factors conflict with each other',[73] 'pulling … in opposite directions'.[74]

In **Chapter 6**, we list some of the relevant aggravating and mitigating considerations that are relevant in sentencing sexual offences. Statutory aggravating factors include the offence being a 'domestic violence offence',[75] a person's prior criminal history (if reasonable to do so, taking into account its nature, relevance and time since the conviction),[76] and whether the offence was committed while the victim was at work.[77] In some cases, these do not apply if a court decides it is not reasonable to treat these as

64 PSA (n 5) pt 9 div 3; *Corrective Services Act 2006* (Qld) sch 1 ('CSA').
65 See *HYQ* (n 28).
66 See, for example, Indecent treatment of children under 16: *Criminal Code Act 1899* (Qld) sch 1, s 210 ('*Criminal Code* (Qld)).
67 [2020] QDC 345 ('*DMS*').
68 *Downs* (n 48).
69 *R v Quick; Ex parte A-G (Qld)* [2006] QCA 477 [5] (de Jersey CJ, Chesterman J agreeing) citing *R v L; Ex parte A-G (Qld)* [2000] QCA 123; *R v M; Ex parte A-G (Qld)* [1999] QCA 442; *R v Pham* [1996] QCA 3 ('*Pham [1996]*').
70 [2010] QCA 32.
71 Ibid [14].
72 PSA (n 5) s 9(2)(g).
73 *R v Symss* (2020) 3 QR 336, 345 [31] (Sofronoff P, Morrison JA agreeing at [43] and McMurdo JA agreeing at [44]) ('*Symss*'). The High Court of Australia has made statements to this effect in discussing the nature of the approach taken to sentencing in Australia known as 'instinctive synthesis'. See *Wong* (n 37) (n 3) 611 [75] (Gaudron, Gummow and Hayne JJ cited with approval by Gleeson CJ, Gummow, Hayne and Callinan JJ in *Markarian* (n 2) at 373–5 [37].
74 *Markarian* (n 2) 405 [133] (Kirby J).
75 PSA (n 5) s 9(10A). This applies unless the court considers it is not reasonable due to the exceptional circumstances of the case. For the definition of a 'domestic violence offence', see *Criminal Code* (Qld) (n 66) s 1.
76 PSA (n 5) s 9(10), however the weight given depends on the nature of the previous conviction and its relevance to the current offence and the time elapsed since the conviction.
77 Ibid s 9(10F) - only if section 9(2A) applies.

aggravating because of the exceptional circumstances involved.[78] An aggravating factor is different from a 'circumstance of aggravation', which means the person who has been convicted is 'liable to a greater punishment' than if that circumstance is not charged and proven.[79]

8.4.5 Other factors

Child Protection (Offender Reporting and Offender Prohibition Order Act 2004 (Qld)

Where a victim of a sexual offence is a child (under 18 years), the *Child Protection (Offender Reporting and Offender Prohibition Order) Act 2004* (Qld) ('CPOROPO Act') can apply.

For certain offences to which the scheme applies,[80] the court may take into account the effect of the CPOROPO Act.[81] The purpose of the CPOROPO Act is to require particular offenders who commit sexual or other serious offences against children to keep police informed of their whereabouts and other personal details for a period of time after their release into the community. The objective of this scheme is to reduce the likelihood that they will reoffend, and to facilitate the investigation and prosecution of any future offences.[82]

Serious vilification and hate crimes

In 2024, amendments were made to the *Criminal Code* (Qld) establishing a circumstance of aggravation under section 52B of the *Criminal Code* (Qld), which applies if the offender was wholly or partially motivated to commit the offence by hatred or serious contempt for a person or group of person in relation to race, religion, sexuality, sex characteristics or gender identity.[83]

These reforms, when legislated, were not extended to the offence of sexual assault or other sexual offences.

The inclusion of sexual offences as prescribed offences under the new scheme was supported by the Caxton Legal Centre and Equality Australia.[84]

The Legal Affairs and Safety Committee ('LASC') on its report on the amendment Bill recommended '[t]hat the Queensland Government conducts a review within 24 months of the commencement of the Bill to ensure that the offences to which the circumstance of aggravation apply are adequate to address the serious vilification and hate crimes experienced by members of the Queensland community, with

78 Ibid ss 9(10A), (10F).
79 *Criminal Code* (Qld) (n 66) s 1. For example, there are 2 specific subsections of section 352 of the *Criminal Code* which establishes the offence of sexual assault that define circumstances of aggravation for the purposes of this offence and provide for higher maximum penalties to apply where those aggravating circumstances are established.
80 For what is a 'reportable offence' see *Child Protection (Offender Reporting and Offender Prohibition Order) Act 2004* (Qld) s 9 ('CPOROPO Act').
81 *R v Bunton* [2019] QCA 214 [27]–[31] (Morrison JA, Sofronoff P and Fraser JA agreeing) citing *R v Rogers* [2013] QCA 192 [40]–[42]. While a court may take it into account, a sentence should not be 'calculated to avoid the operation' of the scheme: *R v Nona* [2022] QCA 26 [79] citing *R v Rodgers* [2021] QCA 97 [11] (Henry J, Boddice J agreeing), see also [74]-[89] and [4] (Bond JA).
82 *CPOROPO Act* (n 80).
83 *Criminal Code (Serious Vilification and Hate Crimes) and Other Legislation Amendment Act 2023* (Qld) pt 3. This part commenced on 29 April 2024: *Proclamation No 2—Criminal Code (Serious Vilification and Hate Crimes) and Other Legislation Amendment Act 2023* (Qld) SL 193/2023.
84 Caxton Legal Centre Inc, submission 21, 2; Equality Australia, submission 23, cited in the Legal Affairs and Safety Committee, Parliament of Queensland, *Criminal Code (Serious Vilification and Hate Crimes) and Other Legislation Amendment Bill 2023* (Report No. 49, 57th Parliament, June 2023) 16–17 ('Legal Affairs and Safety Committee Report').

particular consideration to be given to the inclusion of sexual offences and property crimes such as graffiti.'[85]

The then government, in its response, committed to:

> give this recommendation detailed consideration, including the timeframe within which a review might occur, in conjunction with the implementation of the [Queensland Human Rights Commission Report, *Building Belonging – Review of Queensland's Anti-Discrimination Act 1991*)] recommendations'.[86]

The LASC further commented that consideration should be given to 'amending s 9 of the *Penalties and Sentences Act 1992* to allow judicial discretion in sentencing to increase a sentence where serious vilification or a hate crime may be identified as an aggravating circumstance'.[87]

8.4.6 How legislative changes can impact sentencing practices

As the primary source of sentencing guidance, section 9 of the PSA has been a convenient focus of law reform since it was first introduced in 1992, and in the last 32 years, the sentencing factors in this section have been amended, created, repealed or reintroduced on 29 occasions. When the PSA was introduced, section 9 spanned 3 pages with 4 subsections (**Appendix 12**). Currently, it comprises 11 pages with 24 subsections (**Appendix 11**). The frequency of amendments and volume of changes can make the law difficult to navigate and understand.[88] This can create an unnecessary burden on the criminal justice system, impact efficiency by resulting in delays or unnecessary appeals and impact public confidence.[89]

Legislative amendments to section 9 of the PSA generally are intended to change sentencing practices.[90] For example, in 2003 the *Sexual Offences (Protection of Children) Amendment Act 2003* (Qld) amended the *Criminal Code* (Qld) and PSA 'to ensure that sentences imposed on child sex offenders reflect the significant physical and psychological consequences of these offences'.[91] Parliament was of the view these reforms would ensure that 'a tougher sentencing regime [would] apply for persons convicted of sexual offences against children'.[92] Importantly, the sentencing reforms were 'designed to ensure that child sex offences are recognised as offences equating in seriousness to offences of violence'.[93]

In May 2016, the PSA was amended to express that if an offence was a domestic violence offence, this was an aggravating factor, unless there are exceptional circumstances.[94] While the relationship between the person being sentenced and the victim, and its relevance to sentencing was always a relevant sentencing factor that could be taken into account, [95] this was not expressly stated in the legislation. The

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85 Legal Affairs and Safety Committee Report (n 84), rec 5.

86 Queensland Government, *Queensland Government Response to the Legal Affairs and Safety Committee Report No. 49, 57th Parliament, Criminal Code (Serious Vilification and Hate Crimes) and Other Legislation Amendment Bill 2023* (3 October 2023) 3.

87 Legal Affairs and Safety Committee Report (n 84) 20.

88 Law Commission (UK), *The Sentencing Code* (Report, Law Com No 382, 2018) vol 1, 7 [1.15] ('*The Sentencing Code*').

89 Ibid 8–9 [1.16] – [1.21].

90 Another example is in respect of manslaughter where the child was under 12 years, under PSA (n 5) s 9(9B): see *R v Timberlake* (Supreme Court of Queensland, 29 September 2023, Freeburn J), *R v Peverill* (Supreme Court of Queensland, 6 October 2023, North J); *R v Conley* (Supreme Court of Queensland, 16 February 2023, Applegarth J) for recent examples where the aggravating factor has been applied.

91 Explanatory Notes, Sexual Offences (Protection of Children) Amendment Bill 2002 (Qld) 1 ('Sexual Offences (Protection of Children)' . This Act was the result of a joint Queensland Crime Commission and Queensland Policy Service inquiry into child sexual abuse, which was the subject of a report, *Project Axis, Child Sexual Abuse in Queensland: The Nature and Extent*.

92 Explanatory Notes, Sexual Offences (Protection of Children) (n 91) 7.

93 Ibid 2.

94 PSA (n 5) s 9(10A). Inserted by *Criminal Law (Domestic Violence) Amendment Act 2016* (Qld) s 5. The Act was passed on 5 May 2016 to commence the date of assent. For where the exception has been applied: see, for example, *R v Blockey* [2021] QCA 77 [11] (Sofronoff P and McMurdo JA and Boddice J); *R v Solomon* [2022] QCA 100.

95 See *R v Gesler* [2016] QCA 311 [31] (Henry J and Fraser and McMurdo JJA); *R v McCauley* [2000] QCA 265, 5–6 (Thomas JA, Davies and McPherson JJA agreeing).

intention of the aggravating factor was to recognise the increased culpability of an offender who committed an offence in these circumstances.[96]

Since this amendment, the Court of Appeal has referred to this aggravating factor as signifying legislative intention that offences committed in the context of domestic violence are more serious than previously decided cases.[97] In this way, an aggravating factor in legislation can influence sentencing practices, as cases decided prior to the amendment may no longer be used as a useful comparison:

> The previous sentencing decisions that were relied upon at first instance to determine the sentences in this case concerned sentences that were imposed under a different statutory regime. There have been the successive legislative changes to the laws that must be applied in the exercise of the sentencing discretion in these cases.[98] The range for appropriate sentences that was established by cases like *Chard* can no longer be regarded as useful for purposes of comparison because in none of them were the presently applicable legislative provisions taken into account. They were also not considered in the sentences under appeal.[99]

In *R v McConnell*,[100] the Court of Appeal also noted that comparable cases decided prior to these legislative amendments carried limited weight:

> All of those cases were decided before the commencement of operation on 5 May 2016 of subsection 10A of section 9 of the *Penalties and Sentences Act 1992* (Qld). … As Mullins J observed in *R v Hutchinson*, this provision is likely over time to have an effect on the sentencing of offenders convicted of offences that are domestic violence offences, but the effect in a particular case will depend on balancing all of the relevant factors relating to the offending and the offender.[101]

Similarly, in *R v SDM,*[102] the Court of Appeal also commented on the limited utility of cases decided prior to the amendment:

> In view of the response of the Parliament to addressing the problem of violence committed within, or after the conclusion of, a domestic relationship that is reflected in s 9(10A) of the Act, the sentence imposed in *Pickup* would not now reflect an appropriate sentence for that type of offending with the aggravating factor of being a domestic violence offence.[103]

However, in *R v RBO*,[104] it was considered 'past cases which took the aggravating context of violent offending in a domestic setting into account as a relevant circumstance, may retain some potentially comparable relevance.'[105] It was also found that introducing an aggravating factor in the PSA "may' result in a more punitive sentence' however, all the circumstances of the case must be considered.[106] The Court of Appeal referred to an earlier decision of *R v Pham*:[107]

> some of the principles described by s 9 of the PSA may have great weight and others little weight, depending on the circumstances of each offence and each offender. In some cases, some of these principles will have little or no effect upon the outcome of the process because, in the particular circumstances, other principles have an almost overwhelming claim on the sentencing discretion.[108]

96 Explanatory Notes, Criminal Law (Domestic Violence) Amendment Bill (No. 2) 2015 (Qld).
97 See *O'Sullivan* (n 31); *R v Hutchinson* (2018) 271 A Crim R ('*Hutchinson*'); *R v McConnell* [2018] QCA 107 [22] (Fraser JA, Sofronoff P and Philippides JA agreeing) ('*McConnell*').
98 see *R v Kaye* (1986) 22 A Crim R 366, discussed in *Dalgliesh* (n 3) [57] per Kiefel CJ, Bell and Keane JJ
99 *O'Sullivan* (n 31) [110] (Sofronoff P and Gotterson JA and Lyons SJA).
100 *McConnell* (n 97).
101 Ibid [17] (citations omitted).
102 [2021] QCA 135.
103 Ibid [37] (Mullins JA, Fraser JA and Henry J agreeing).
104 [2024] QCA 214 ('*RBO*').
105 Ibid [111] (Henry J, Mullins P and Brown JA agreeing).
106 Ibid [119] (Henry J, Mullins P and Brown JA agreeing).
107 (2009) 197 A Crim R 246.
108 Ibid [7] (Keane JA) ('*Pham (2009)*').

A legislated aggravating factor will not always have a significant impact, particularly in circumstances where it was already considered aggravating prior to its amendment, such as repeated sexual conduct with a child:

> the amendment to s 9(10A) of the *Penalties and Sentences Act* would not of itself have justified a significantly more severe sentence in the present case compared to sentences imposed in the past, which were imposed in similar circumstances and where similar aggravating circumstances were taken into account. In the present case, given the fact that the sentence of 12 years is not outside the exercise of sound sentencing discretion when the comparable cases which serve as a yardstick are considered, s 9(10A) of the *Penalties and Sentences Act* has little impact, although it serves to support a sentence being imposed at the upper end of that sentencing discretion.[109]

8.4.7 What do other jurisdictions do?

Similar to Queensland, the sentencing legislation in other states and territories and international jurisdictions examined set out general purposes, principles and factors courts must consider when imposing sentence.[110] Some jurisdictions provide a comprehensive list of factors (including aggravating and mitigating factors) a court must have regard to (see New South Wales, Australian Capital Territory and the Commonwealth).[111] In comparison, other jurisdictions list aggravating factors but make no reference at all to mitigating factors, leaving the discretion to the sentencing court (see Tasmania).[112]

Some jurisdictions express special purposes, principles and factors when sentencing offences involving sexual violence and/or a child victim, presented in Table 8.4.

109 *R v BDQ* (2022) 298 A Crim R 120 [54] (Brown J, Morrison and McMurdo JJA agreeing).
110 See *Crimes (Sentencing) Act 2005* (ACT) s 33; *Crimes (Sentencing Procedure) Act 1999* (NSW); *Sentencing Act 1995* (NT); *Sentencing Act 2017* (SA) s 11; *Sentencing Act 1991* (Vic); *Sentencing Act 1995* (WA) s 6(2); *Crimes Act 1914* (Cth); *Sentencing Act 2002* (NZ); *Sentencing Act 2020* (UK) pts 2–13, constitute the 'Sentencing Code': s 1.
111 *Crimes (Sentencing) Act 2005* (ACT) s 33; *Crimes (Sentencing Procedure) Act 1999* (NSW) s 21; *Crimes Act 1914* (Cth) s 16A.
112 *Sentencing Act 1997* (Tas).

Table 8.4: Examples of special purposes, principles and factors in sentencing sexual offences – select jurisdictions

Jurisdiction	Relevant section	What it applies to	Special purposes/factors
South Australia	*Sentencing Act 2017*, s 11(b)	Any offence	Court must take into account: • The personal circumstances and vulnerability of any victim of the offence, whether because of the victim's age, occupation, relationship to the defendant, disability or otherwise
Northern Territory	*Sentencing Act 1995*, s 5(2)(ba)	Sexual offences[113]	Court must have regard to: • whether the victim contracted a sexually transmissible medical condition as a result of the offence; and • whether the offender was aware at the time of the offence that he or she had a medical condition that could be sexually transmitted.
Tasmania	*Sentencing Act 1997*, s 11A(1)	Sexual offences	Court must treat as aggravating: • victim under the care, supervision or authority of the person; • victim being a person with a disability; or • victim under the age of 13 (or 18 years if the person is in a position of authority in relation to the victim); or • subjecting the victim to violence/threat of violence; • supplying the victim with alcohol or drugs to facilitate the commission of the offence; • entering the victim's home forcibly or when uninvited; • committing the offence in the presence of someone beside the victim; • doing an act likely to 'seriously and substantially degrade or humiliate the victim'.
Victoria	*Sentencing Act 1991*, s 6D	'serious offender' (including a 'serious sexual offender')[114] for a 'relevant offence'[115]	Where imprisonment is justified, when deciding the sentence length, court must treat the protection of the community as the principal sentencing purpose.[116]

113 Sexual offences are defined in s 3 of the *Sentencing Act 1995* (NT) to mean offences set out in sch 3.

114 *Sentencing Act 1991* (Vic) s 6B defines what is meant by a 'serious offender', including a 'serious sexual offender'. This scheme is discussed in Chapter 10 of the *Consultation Paper: Background*.

115 A 'relevant offence' in relation to a serious offender, is defined for a serious sexual offender to mean a sexual offence or a violent offence: ibid s 6B(3). A sexual offence or violent offence is further defined in s 6B(1) to mean an offence to which clauses 1 and 2 of Schedule 1 apply and includes rape, sexual assault as well as other sexual violence and non-sexual violence offences.

116 The court is also permitted, in order to achieve that purpose, to sentence the offender to a term of imprisonment that is longer than that which is proportionate to the gravity of the offence considered in light of its objective circumstances. The discretion to impose a disproportionate sentence is one the Victorian Court of Appeal has found should be exercised rarely: *R v GLH* [2008] VSCA 88, [25] (Lasry AJA, Warren CJ and Ashley JA agreeing) referring with approval to observations made by Buchanan JA in an earlier decision of *R v Prowse* [2005] VSCA 287.

Jurisdiction	Relevant section	What it applies to	Special purposes/factors
Cth	*Crimes Act 1914,* s 16A(2AAA)	Commonwealth child sex offences[117]	In addition to any other matters, court must have regard to the objective of rehabilitating the person, including by considering whether it is appropriate, taking into account such of the following matters as are relevant and known to the court: (a) when making an order--to impose any conditions about rehabilitation or treatment options; (b) in determining the length of any sentence or non-parole period--to include sufficient time for the person to undertake a rehabilitation program.
Canada	*Criminal Code,* RSC 1985, c C-46, ss 718.01, 718.04 718.2(1) and 718.201	Offence that involved the abuse of person under 18 years	Court required to give primary consideration to the purposes of denunciation and deterrence.
		Offence that involved the abuse of a person who is vulnerable (including because the person is Aboriginal and female)	Court required to give primary consideration to the purposes of denunciation and deterrence.
		Offence involving the abuse of an intimate partner	Court must consider the increased vulnerability of female persons who are victims, giving particular attention to the circumstances of Aboriginal female victims
		Any offence	Statutory aggravating factors include that the offender: • abused the person's intimate partner or member of the victim or the person's family; • abused a person under the age of eighteen years; abused a position of trust or authority in relation to the victim.
New Zealand	*Sentencing Act 2002,* s 9A s 9(1)(g)	Offence involving violence against, or neglect of child under 14 years	Court must treat as aggravating (to the extent they apply): • the defencelessness of the victim; • any serious or long-term physical or psychological effect on the victim; • the magnitude of the breach of any relationship of trust between the victim and offender; • threats by the offender to prevent the victim reporting the offending; • deliberate concealment of the offending from authorities.
		Any offence	Court must treat as aggravating factors including: • that the victim was particularly vulnerable because of his or her age or due to any other factor known to the offender.

117 Commonwealth child sex offences are defined in s 3 of the *Crimes Act 1914* (Cth) and include child abuse material offences established under the Commonwealth *Criminal Code*.

8.4.8 Stakeholder views

In our Consultation Paper, we invited feedback on:

- how well section 9 of the PSA captures the principles and factors that are important in sentencing for sexual assault and/or rape offences, and whether the section can be improved (Q.3);
- whether current forms of sentencing guidance are adequate to guide sentencing for rape and sexual assault, and any problems or limitations with these (Q.4); and
- whether the current approach to sentencing for sexual assault and rape committed against children is appropriate. What about for other people who are vulnerable? (Q.5).

Submissions from victim survivor support and advocacy stakeholders

Fighters Against Child Abuse Australia ('FACAA') supported changes to sentencing guidance to remove mitigating factors:

> The current guidelines offer several acceptable reasons why someone might commit [an] offence however there is no justification for rape or sexual abuse. It mentions the perpetrator being a victim of domestic violence or rape themselves, yet any survivor of these crimes will tell you that they wouldn't inflict this crime upon their worst enemy. It mentions their heritage however ignorance of the law is not an excuse for breaking the law. The fact is there are no acceptable reasons for committing a sexual offence so there should be no reasons for giving lenient sentences to rapists and sexual abusers.[118]

It also considered that where a victim is under 16 there should be 'special protections'[119] and changes to section 9(4) and (6) of the PSA:

> [A] There needs to be changes made to … the specifics of the exceptional circumstances that could lead to a non-custodial sentence. There needs to be a sliding scale whereby the younger the victim the more severe the sentence. C does not take into account that all rapes are violent offences because forcible penetration of a child is always violent and painful for the child and therefore rape is always a violent offence. D Once someone has raped a child, they are a risk to all children because they will forever be trying to find more child victims. E needs to include a severely aggravating factor for those in charge of children. F the need to deter similar behaviours needs to be re-written to be the need to stop similar crimes as it is a crime we are talking about also this principal should be the reason that non-custodial sentences should never apply for rape or sexual abuse cases. G child rapists can never be rehabilitated.[120]

Basic Rights Queensland supported further guidance to recognise the vulnerability of the victim in relation to age, the impact of the offence on the victim, the power imbalance and whether the offence occurred in the workplace. It was suggested that:

> protected attributes under Queensland Anti-Discrimination law, and any intersection of multiple attributes of disadvantage (as is foreshadowed in the forthcoming Anti-Discrimination Bill 2024 (Qld)), be a reference point for the consideration and determination of the vulnerability of the victim, and power imbalance and abuse between the parties.[121]

Basic Rights Queensland supports a similar approach to that of New Zealand, which provides the court must treat as aggravating 'that the victim was particularly vulnerable because of his or her age or due to any other factor known to the offender.[122] It also supports a similar approach to the additional aggravating factors:

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118 Submission 15 (Fighters Against Child Abuse Australia), 9–10.
119 Ibid 10.
120 Ibid 11.
121 Submission 19 (Basic Rights Queensland).
122 Ibid, citing *Sentencing Act 2002* (NZ) s9(1)(g).

> 9A Cases involving violence against, or neglect of, child under 14 years:
>
> (1) This section applies if the court is sentencing or otherwise dealing with an offender in a case involving violence against, or neglect of, a child under the age of 14 years.
>
> (2) The court must take into account the following aggravating factors to the extent that they are applicable in the case:
>
> (a) the defencelessness of the victim:
>
> (b) in relation to any harm resulting from the offence, any serious or long-term physical or psychological effect on the victim:
>
> (c) the magnitude of the breach of any relationship of trust between the victim and the offender:
>
> (d) threats by the offender to prevent the victim reporting the offending:
>
> (e) deliberate concealment of the offending from authorities.
>
> (3) The factors in subsection (2) are in addition to any factors the court might take into account under section 9.
>
> (4) Nothing in this section implies that a factor referred to in subsection (2) must be given greater weight than any other factor that the court might take into account.[123]

Moreover, it considers 'any attempt to further intimidate or prevent the victim from seeking assistance or reporting the event, should be an aggravating factor'.[124]

In respect of offences in the workplace, it considers that, '[t]he breach of trust, and the abuse of a work-related power dynamic, especially where the victim has one or multiple, and intersecting protected attributes, should be considered and reflected in sentencing.'

Basic Rights Queensland also supports inclusion of greater cultural considerations in sentencing, observing that that while these factors do not excuse rape and sexual assault, 'there are circumstances where it may be considered relevant in the context of sentencing for these offences'.[125] It was stressed that these circumstances are only of relevance where they relate to the experience of trauma or other psychological factors.

The Queensland Sexual Assault Network (''QSAN') advocated that, for 'victim-survivor rights to be recognised in any meaningful way, these rights need to be explicit and clear, especially in the criminal justice system which traditionally has focussed on defendants' rights and not on the rights of victim-survivors'.[126] It also considered that 'sentencing practice should be more aligned to community expectations and the gravity and impact of these crimes on victim survivors and a sentencing uplift be considered'.

With respect to amending sentencing legislation, QSAN suggested that 'stronger sentencing guidelines be developed' to limit 'suspended sentences and no convictions recorded in sexual violence matters'.[127]

Several victim survivor support and advocacy stakeholders raised significant concerns about the use of 'good character' evidence and, in particular, the use of character references. They told us that the use of personal references attesting to the person being otherwise of ‘good character’ can be deeply distressing and retraumatising for victim survivors, and this evidence should not be permitted at all, or at a minimum, the assertions made should be more closely scrutinised. Among the many concerns raised was that the

123 *Sentencing Act 2002* (NZ) s 9A.
124 Submission 19 (Basic Rights Queensland).
125 Ibid.
126 Submission 24 (QSAN).
127 Ibid.

use of personal references that suggest the person being sentenced is otherwise of 'good character' serves to minimise the objective seriousness of the person's offending, water down messages of denunciation and undermine perpetrator accountability. This issue is explored in detail in **Chapter 9**.

Other submissions

One submission considered that the current approach to sentencing sexual assault and rape offences committed against a child is not appropriate, as 'all too often we hear perpetrators get off lightly on rape [offences] of children'.[128] They considered that parole should not be an option 'when there has been any type of child sexual abuse'.[129] It was also recommended there needs to be greater transparency and publication of sentencing remarks, by recommending section 9 of the PSA be amended 'to release all judgments onto the Parole Board's website or create a public register in support of community safety'.[130]

Submissions from legal stakeholders

Legal Aid Queensland ('LAQ') told us:

> 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.[131]

They also considered 'exceptional circumstances' should not become 'too prescriptive' and supported maintaining judicial discretion, particularly in unique cases.[132] LAQ supports, as far as possible, maintaining the Courts' sentencing discretion to be able to cater for unique and unexpected situations. They supported not further defining this provision to allow for 'changing or evolving community standards relevant at the time of sentence'.

The Youth Advocacy Centre (''YAC') similarly considered that section 9 of the PSA captures important sentencing factors and principles. It considered that any further amendments should be meaningful and 'should not complicate or fetter the sentencing discretion by narrowing the considerations for sentencing'.

YAC recommended 'there needs to be a statutory recognition of victim vulnerability of children' to recognise their exceptional vulnerability and the long-term harm and impact on their development sexual offences have on children. It also noted that a child with disability or from another background has additional vulnerabilities and 'victim vulnerability connected to disability and background could be identified as a separate aggravating feature under the PSA.'

It considered that 'exceptional circumstances' are difficult to establish but noted that it does not automatically apply where age is not an element of the offence.[133] YAC requested us to consider extending the application of section 9(4)–(6) to victims aged under 18, to recognise the vulnerability of all children and to be consistent with new laws.

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128 Submission 27 (name withheld).
129 Ibid.
130 Ibid.
131 Submission 23.
132 Ibid, citing *R v Rainbow* [2018] QDCSR, 13 December 2018; *R v OYJ* [2020] QDCSR 379.
133 Citing *DMS* (n 67); *Downs* (n 48).

The Aboriginal and Torres Strait Islander Legal Service ('ATSILS') considered 'any proposed amendments to the existing regime do not inadvertently worsen progress towards targets to reduce incarceration rates of Aboriginal and Torres Strait Islander individuals' and considered 'opportunities are taken to improve the current regime to promote alternatives to incarceration'.[134] In this regard they recommended that we consider whether to legislate the principle in *Bugmy v The Queen*,[135] that 'the effects upon an offender of profound deprivation do not diminish over time and should be given full weight when sentencing the offender'.[136]

Subject matter expert interview participants

Sentencing factors in the PSA

Most participants considered the factors in the PSA were extensive and that no additional guidance as to relevant factors was required.[137] Many considered that there are too many factors[138] and section 9, in particular, had become 'increasingly complicated',[139] with one participant suggesting if anything more was added, it would 'need its own index at the end of the section'.[140] Another viewed is as a 'growing beast', while being a 'useful checklist', particularly for self-represented people appearing in the Magistrates Courts.[141]

Another participant commented that while they found section 9 useful, it may not be accessible to community members from a non-legal background:

> I also think that in terms of explaining it in a wider sense to those who are not lawyers, the phraseology is problematic, but I think with sufficient legal knowledge, you are able to explain to them what each one of them means in the context of their particular matter.[142]

Another participant similarly considered that section 9 'could probably be rewritten in a way that was clearer and more user-friendly.'[143]

There were mixed views about whether greater clarification was needed for 'exceptional circumstances' in section 9(4)(c), with some participants considering it was appropriately clear[144] but others considering it a 'grey area'.[145]

Application of PSA ss 9(2A) and 9(3)

One participant discussed the focus in section 9(3) on physical harm, 'particularly sexual assault, it's – there's less physical harm than emotional'.[146] Another participant noted that the

> brutality involved with rape is always front and centre. I don't think that needs clarifying to anyone because it's just, I mean, it comes with all those factors of the abhorrent nature of the offending … I can't see how you're helping anything or anyone by adding it in.

134 Submission 28 (Aboriginal and Torres Strait Islander Legal Service Inc).
135 (2013) 249 CLR 571 (''*Bugmy*'').
136 Submission 28 (Aboriginal and Torres Strait Islander Legal Service Inc).
137 SME Interviews 1, 5, 6, 7, 9, 10, 15, 17, 21, 22, 24, 25.
138 SME Interviews 8, 13, 14, 16.
139 For example, SME Interviews 14 and 25.
140 SME Interview 25.
141 SME Interview 6.
142 SME Interview 11.
143 SME Interview 13.
144 SME Interviews 7, 20.
145 SME Interview 4
146 SME Interview 12.

There were different views about whether sexual assault involved 'violence' for the purpose of section 9(2A) and 9(3). One participant considered sexual assault should automatically fall into section 9(2A) and 9(3): 'Because it's got the word assault in it. So straight up, it involves violence. It doesn't matter what the level is, it involves violence.'[147] Another considered that it is 'not clear' and 'would involve specific arguments to the court'.[148] Yet another considered clarity would be beneficial in cases such as where the victim was unconscious.[149] One participant considered that 'if there is a prevailing view that any sexual assault is by its nature violent, that expressly stating that would, I think be helpful'.[150]

Application of PSA s 9(6) – whether to extend it

There were mixed responses from participants about whether to extend the primary factors in section 9(6) of the PSA to victims aged 16 and 17 years. Some participants supported an extension[151] because a child is aged 16 and 17 years[152] and they are 'in their formative years'.[153] Other participants did not agree on the basis that it would not make a difference[154] and that further prescription in the PSA is not needed,[155] or unnecessary.[156]

Consultation events

At our consultation events, comments included:

- Most victim survivors considered the sentence given is not sufficiently reflective of the harm they have suffered and want more punitive sentences. However, there was agreement that most victim survivors just want to be believed more than anything.[157]
- The PSA currently reflects a gendered lens, and it was questioned whether it works in harmony with the *Human Rights Act 2019* (Qld) ('HRA').[158]
- There needs to be better genuine recognition/acknowledgment of the victim from both the court and the offender during the sentence, including what has happened to them, the impact the offending has had on their lives and how their life trajectory has changed.[159]
- For First Nations persons/victims of crime, this means being treated in such a way that they feel like they have been seen and heard, and that they feel safe when proceeding through the criminal justice system.[160]
- Judges require more flexibility, not less, to impose the most appropriate sentence in all the circumstances they face.[161]

147 SME Interview 14.
148 SME Interview 15.
149 SME Interview 20.
150 SME Interview 23.
151 SME Interviews 4, 10, 15, 17.
152 SME Interview 10.
153 SME Interview 4.
154 SME Interview 14.
155 SME Interviews 6, 9.
156 SME Interviews 21, 22.
157 Cairns Consultation Event, 21 March 2024.
158 Ibid.
159 Ibid.
160 Ibid.
161 Brisbane Consultation Event, 11 March 2024.

8.5 The purposes of sentencing

8.5.1 Introduction

Section 9(1) of the PSA (reproduced in **Appendix 11**) states that the permitted purpose of sentence in Queensland are:

> (a) to punish the offender to an extent or in a way that is just in all the circumstances; or
>
> (b) to provide conditions in the court's order that the court considers will help the offender to be rehabilitated; or
>
> (c) to deter the offender or other persons from committing the same or a similar offence; or
>
> (d) to make it clear that the community, acting through the court, denounces the sort of conduct in which the offender was involved; or
>
> (e) to protect the Queensland community from the offender; or
>
> (f) a combination of 2 or more of the purposes mentioned in paragraphs (a) to (e).

These purposes provide broad guidance to judicial officers when determining sentence and help guide the court in determining the relevance and weight given to aggravating, mitigating and other contextual factors.

The PSA does not suggest that one purpose should be more or less important than any other purpose, and the court can determine that only one, just a few or all are relevant; in practice, their relative weight must be assessed taking into account the individual circumstances involved,[162] including the nature of the offence and its seriousness, as well as the circumstances of the person being sentenced. For example, as discussed below, for rape, purposes that are often prioritised at sentence include deterrence and denunciation.

Over time, section 9 of the PSA has been expanded significantly, but the purposes have not changed substantially.[163]

8.5.2 Punishment that is 'just in all the circumstances'

A sentence can serve the purpose of punishment by seeking to adequately punish the person for the offence committed in a way that is just (fair) in all the circumstances. For example, imprisonment has a punitive purpose to meet the purpose of punishment[164] and is also a means for the criminal justice system to act on behalf of the victim and the community, as a form of retribution.[165]

The High Court has recognised that meeting the objective of punishment or retribution is an important aspect of maintaining public confidence in the criminal justice system:

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162 See, eg, *Veen v The Queen* [No 2] (1988) 164 CLR 465 ('*Veen [No. 2]*') in which the Court said that '[t]he purposes overlap and none of them can be considered in isolation from the others when determining what is an appropriate sentence in a particular case. They are guideposts to the appropriate sentence but sometimes they point in different directions' at [476] (Mason CJ, Brennan, Dawson and Toohey JJ).

163 Since 1992, the two purposes which have been amended are PSA s 9(1)(c) 'discourage' was replaced with 'deter' and s 9(1)(d) 'does not approve of' replaced with 'denounce': *Penalties and Sentences (Serious Violent Offences) Amendment Act 1992* (Qld) ss 6(1)–(2).

164 *Yeo v Attorney-General (Qld)* [2012] 1 Qd R 276, 276 (McMurdo P, Muir and White JJA agreeing); *R v NG* [2007] 1 Qd R 37 [71] (Keane JA).

165 Australian Government, Productivity Commission, *Australia's Prison Dilemma* (Research Report, October 2021) 49 ('Australia's Prison Dilemma').

> the existing principles require many sentences to be retributive in nature, a notion that reflects the community's expectation that the offender will suffer punishment and that particular offences will merit severe punishment. The "persistently punitive" attitude of the community towards criminals would mean that public confidence in the courts to do justice would be likely to be lost if courts ignored the retributive aspect of punishment.[166]

This is particularly the case with regard to child sex offences 'because their crimes are committed against one of the most vulnerable groups in society and they almost invariably have long term effects on their victims'.[167]

The concept of 'just punishment' reflects the principle of proportionality – a fundamental principle of sentencing in Australia. Sentencing courts must ensure the sentence imposed 'should never exceed that which can be justified as appropriate or proportionate to the gravity of the crime considered in the light of its *objective* circumstances'.[168]

8.5.3 Rehabilitation

The sentencing purpose of rehabilitation is forward-looking and aims to alter an individual's behaviour to reduce the likelihood that they will commit another offence. Rehabilitation is often relevant in the context of considering the need for community protection, particularly if the person is young and has a limited criminal history.[169] It may also be relevant where there is evidence of a person's good prospects of rehabilitation and an objectively low risk of reoffending.[170]

The primary goal of many community-based orders, such as probation and good behaviour orders with a condition to attend a program, is to rehabilitate the person.[171]

In some cases, particularly if the person is young, courts have acknowledged the desirability of rehabilitation as a sentencing purpose, noting the potential of imprisonment to expose a young person to negative influences and result in other impacts, thereby 'defeating the very purpose of the punishment imposed'.[172] Courts therefore have recognised that, for a young person, 'reformation is always an important consideration and, in the ordinary run of crime, the dominant consideration in determining the appropriate punishment to be imposed'.[173]

8.5.4 Deterrence

Deterrence is also forward-looking and aims to discourage the person and others from committing harmful acts through the fear of the perceived consequences.[174] As acknowledged by the Court of Appeal,

> the fear of severe punishment does, and will, prevent the commission of many offences that would have been committed if it was thought that the offender would escape without punishment, or only with light punishment. If a

166 *Ryan v The Queen* (2001) 206 CLR 267, 282–3 [46] (McHugh) ('*Ryan*').
167 Ibid.
168 *Hoare v The Queen* (1989) 167 CLR 348, 354 (Mason CJ, Deane, Dawson, Toohey and McHugh JJ) (emphasis in original).
169 See *R v Bainbridge* (1993) 74 A Crim R 265, 268 ('*Bainbridge*'); *R v Dullroy; Ex Parte A-G (Qld)* [2005] QCA 219 ('*Dullroy*') cf with *-R v Hopper; Ex parte A-G (Qld)* [2015] 2 Qd R 56 [28] (Fraser JA) citing *R v Horne* [2005] QCA 218 and *R v Mules* [2007] QCA 47 [21].
170 See *R v Theohares* [2016] QCA 51 [29]–[31] (Philippides J, Holmes JA and Philip McMurdo JA agreeing) ('*Theohares*'). See also PSA ss 9(3)(g), (6)(g).
171 Mackenzie and Stobbs (n 38) 48–9.
172 See *R v Kuzmanovski; Ex parte A-G* (Qld) [2012] QCA 19 [15] (White JA) citing *Dullroy* (n 169). See also *R v Bouttell* [2018] QCA 52 [5] (Holmes CJ, Fraser and Gotterson JJA agreeing). For the impact of imprisonment also see comments made in *Boulton* (n 108) 334, [108]. See also *DPP v Anderson* (2013) 228 A Crim R 128, 144 [65] which notes these views were expressed in 1975 and held to still apply in 2013.
173 *Dullroy* (n 169) [52] citing *R v Price* [1978] Qd R 68.
174 Mackenzie and Stobbs (n 38) 44–5; *Australia's Prison Dilemma* (n 165) 49 citing Aaron Chalfin and Justin McCrary 'Criminal Deterrence: A Review of the Literature' (2017) 55(1) *Journal of Economic Literature* 5, 6; Steven Shavell, 'A Simple Model of Optimal Deterrence and Incapacitation' (2015) 42 *International Review of Law and Economics* 13.

> court is weakly merciful, and does not impose a sentence commensurate with the seriousness of the crime, it fails in its duty to see that the sentences are such as to operate as a powerful factor to prevent the commission of such offences.[175]

General deterrence is 'always important in relation to sexual offences against young children'.[176] However, where a person's moral culpability is reduced – for example, because they have significant mental impairments, 'it is not generally appropriate to impose a sentence on such offenders to reflect the need for general deterrence' because they are 'inappropriate "mediums for making an example of to others"'.[177]

There is evidence that deterrence is associated with detection and conviction, rather than from imrisonment.[178]

Research has found 'there is limited evidence that simply lengthening the prison sentence for a given crime increases the deterrence effect'; moreover, 'imprisonment, harsher prison conditions and longer sentences may increase the likelihood or severity of recidivism'.[179] Based on a review of research, imprisonment has been found not to be effective as a deterrent to further offending and it appears to reduce reoffending via incapacitation only to a limited extent.[180]

8.5.5 Denunciation

The denunciatory role of sentencing involves a court communicating 'society's condemnation of the particular offender's conduct'.[181] As explained by Sofronoff P:

> Denunciation is intended to vindicate the community values that have been insulted by the wrongful act. It works to confirm the validity of those values by an act of judicial government that repudiates the offending conduct. A denunciatory sentence works to defeat the wrongdoer's own repudiation of the community value and works to restore the correct moral relationship between wrongdoer and victim. However, a denunciatory punishment must not be disproportionate to the seriousness of the offence. A disproportionate punishment might satisfy the community's need for vindication of the values that the wrongdoer has insulted, but it would itself constitute an affront to the shared moral value that requires every punishment to be a just punishment. In its excess it would constitute unjust retribution.[182]

While denunciation has been recognised as 'largely symbolic' in nature, it is considered to be an important purpose of sentencing and closely tied to the purpose of just punishment.[183]

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175 *R v H* (1993) 66 A Crim R 505, 507 ('*H*') quoting *R v Cuthbert* (1967) 86 W.N.N.S.W. 272, 277–8, approving a passage in *R v Radich* (1954) NZLR 86, 87.
176 *R v DBR* [2019] QCA 218 [19] (Philippides JJA, Fraser and Gotterson agreeing). See also PSA (n 5) s 9(6)(f).
177 *R v Potter; Ex parte A-G (Qld)* [2008] QCA 91, [73] (Chesterman J). See also *R v Zarnke* (2019) A Crim R 19 [33] (McMurdo JA) ('*Zarnke*').
178 *Australia's Prison Dilemma* (n 165) 49 citing Maurice J.G Bun et al. 'Crime, Deterrence and Punishment Revisited' (2020) 59(5) *Empirical Economics* 2303. For criticisms made of general deterrence, see Andrew Ashworth, *'The Common Sense and Complications of General Deterrent Sentencing'* (2019) 7 *The Criminal Law Review* 564.
179 *Australia's Prison Dilemma* (n 165) 50.
180 Karen Gelb, Nigel Stobbs and Russell Hogg, *Community-based Sentencing Orders and Parole: A Review of Literature and Evaluations across Jurisdictions,* 91 (Prepared for the Queensland Sentencing Advisory Council by Queensland University of Technology, 2019).
181 *Ryan* (n 166) 302 [118] (Kirby J).
182 *O'Sullivan* (n 31) 202–3; 242–3 [145] (Sofronoff P, Gotterson JA, Lyons SJA).
183 Mackenzie and Stobbs (n 38) 49.

Similar to the purpose of deterrence, in circumstances where a person's moral culpability is reduced, for example, because they have significant mental disabilities, denunciation will be 'less significant because of the offender's limited moral culpability'.[184]

8.5.6 Community protection

The protection of the community is a key concern of the legislature and a key consideration in sentencing for sexual assault and rape offences.[185]

As discussed in **Chapter 11**, there are complexities in considering how this might best be achieved.

While a person may be incapacitated (such as through imprisonment) for this purpose, as discussed above, the period of incapacitation or detention cannot be disproportionately based on the nature of the person's offending. Proportionality therefore sets 'outer limits' for a person's detention imposed as part of their sentence.[186]There are other ways the objective of community protection can be met, however, taking into account evidence that 'imprisonment has criminogenic effects',[187] with 'the great majority of studies point[ing] to a null or criminogenic effect on subsequent offending'.[188] The Court of Appeal has recognised in the case of people sentenced to imprisonment:

> Community protection is not achieved only by actual incarceration, it is also achieved by the oversight of the Parole Board, before a person may be released on parole; and by supervision of the person, on parole, if they are released, for the remainder of their sentence, whilst they make the adjustment from custody and back into the community.[189]

Engagement in treatment, program and other forms of interventions may also reduce a person's longer-term risks of reoffending in support of achievement of this objective.

8.5.7 Sentencing factors and sentencing purposes

While the PSA does not suggest that one purpose should be more or less important than any other purpose, the PSA identifies particular factors to be of primary importance when sentencing a person for an offence of a sexual nature in relation to a child under 16 years, or involving the use, or attempted use, of violence or resulting in physical harm to another person, including of an adult victim.[190] As listed in Table 8.2 and Table 8.3, these factors include elements of the purposes:

- community protection;[191]
- general deterrence;[192] and

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184 *Zarnke* (n177) [33] (McMurdo JA). As to the relevance of mental health conditions to sentencing discretion generally, see *R v Yarwood* (2011) 220 A Crim R 497 ('*Yarwood*') adopting the principles set down by the Victorian Court of Appeal in *R v Tsiaras* [1996] 1 VR 398 at 400 ('*Tsiaras*') and *R v Bowley* [2016] QCA 254, [34] adopting the approach in *R v Verdins* (2007) 16 VR 269 ('*Verdins*').

185 See primary sentencing considerations in PSA (n 5) ss 9(3)(a)–(b), (k), (6)(d), (f), (k).

186 *Veen [No 2]* (n 162) 490–1 (Deane J); see also *R v Parker* [2015] QCA 181 [31] (Gotterson JA, Fraser JA and Flanagan J).

187 Andrew Day, Stuart Ross and Katherine McLachlan, *The Effectiveness of Minimum Non-Parole Period Schemes for Serious Violent, Sexual and Drug Offenders and Evidence-Based Approaches to Community Protection, Deterrence and Rehabilitation* (Literature Review, University of Melbourne, August 2021) 13.

188 Lacey Schaefer et al, *Sentencing Practices for Sexual Assault and Rape Offences* (Literature Review prepared by Griffith University for the Queensland Sentencing Advisory Council, 2024) 47 ('*Griffith University Literature Review*').

189 *R v Free; Ex parte A-G (Qld)* [2020] 4 QR 80 [91] (Philippides JA and Bowskill and Callaghan JJ). See similar comments made in *Zarnke* (n 177) [34]–[36] (McMurdo JA).

190 PSA (n 5) ss 9(3), (6). Primary factors also apply when sentencing a child exploitation material offence (see s 9(7)), but this is not relevant to this review.

191 Ibid ss 9(3)(a), 9(3)(b) and 9(6)(k).

192 Ibid s 9(6)(f).

- rehabilitation.[193]

The purposes of sentencing are distinct from sentencing factors and represent high-level guidance. Understanding what sentencing purposes are most important can not only help guide courts in sentencing, but has been important during the Council's previous reviews in deciding that legislative reforms are needed. For example, during our review of the serious violent offences scheme, the Council determined that there are categories of offences that cause serious harm to individuals and the wider community, and therefore require the courts to place greater weight on the purposes of punishment, denunciation and community protection to ensure a just sentence.[194] The offences of aggravated sexual assault and rape were regarded by the Council as being among such offences. This finding was an important factor in the Council deciding to recommend changes to the serious violent offences scheme (see further **Chapter 11**).

8.5.8 How Queensland courts apply sentencing purposes

Which purposes are viewed as most important helps to guide sentencing courts in determining the appropriate sentence in an individual case. This includes helping to guide how a sentencing court approaches the consideration of other sentencing factors in deciding what factors are relevant and, if so, how much weight they should be given.

It is well established at common law that the purposes of sentencing overlap and cannot be considered in isolation when determining what is an appropriate sentence. The purposes represent 'guideposts to the appropriate sentence but sometimes they point in different directions'.[195]

A review of relevant Queensland Court of Appeal decisions indicates the purposes of punishment, denunciation, deterrence and community protection, in particular, are to be given significant weight by courts in sentencing these offences.[196] The purpose of rehabilitation is often considered in the context of community protection, and particularly where the offender is young and has a limited criminal history.[197] It may also be relevant where there is evidence of a person's good prospects of rehabilitation and an objectively low risk of reoffending.[198] The Court of Appeal has acknowledged the importance of sentencing practices reflecting community views about the seriousness of this form of offending through the sentences imposed:

> It is important not to fall into the trap of excusing inexcusable behaviour. Sexual assault is a very grave and serious affront to human dignity and personal space. It is unacceptable behaviour. It is essential that the courts reflect community sentiment, in a general way, by the sentences which are imposed for offences of this kind …[199]

The Council conducted a thematic analysis of sentencing remarks (at first instance) to consider how judicial officers in Queensland apply relevant sentencing purposes within the context of sentences for

193 Ibid ss 9(3)(g) and 9(6)(g).
194 Queensland Sentencing Advisory Council, *The '80 per cent Rule': The Serious Violent Offences Scheme in the Penalties and Sentences Act 1992 (Qld)* (Final Report, 2022).
195 *Veen [No 2]* (n 162) 476–7.
196 See, for example, *R v Misi; Ex parte A-G* (Qld) [2023] QCA 34 [4] (Mullins P, Dalton and Flanagan JJA); *Pham [1996]* (n 69); *R v GAW* [2015] QCA 166; *H* (n 175); *R v Williams; Ex parte A-G* (Qld) [2014] QCA 346 [58], [73] (McMeekin J, Henry JJ agreeing); *McConnell* (n 97) [22] (Fraser JA, Sarnoff P and Philippides JA agreeing); *R v Ruiz; Ex parte A-G* (Qld) [2020] QCA 72 [19] (Sofronoff P, McMurdo and Mullins JJ) ('*Ruiz*'); *R v Teece* [2019] QCA 246 [38] (Philippides JA, Morrison and McMurdo JJA agreeing).
197 *Bainbridge* (n 169) 268; *Dullroy* (n 169) .
198 *See R v Theohares* (n 170) [29]–[31] (Philippides J, Holmes JA and Philip McMurdo JA agreeing). See also PSA (n 5) ss 9(3)(g), (6)(g).
199 *R v Daniel* [1998] 1 Qd R 499, 519–20 (Fitzgerald P, McPherson JA agreeing), citing *R v Russell* (1995) 84 *Australian Criminal Reports* 386, 391, 395 (Kirby ACJ).

sexual assault and rape offences. These findings are discussed below. For more information about the methodology used to obtain the data, refer to **Chapter 4**.

Sentencing courts apply sentencing purposes in different ways

Judicial officers are not required to state which sentencing purpose they considered to be the most important and can refer to multiple sentencing purposes at sentence.[200]

The Council's thematic sentencing remark analysis revealed that magistrates and sentencing judges take varying approaches when applying sentencing purposes. For example, some judicial officers:

- began their sentencing remarks with an explanation that they must consider the purposes detailed in s 9(1) of the PSA;[201]
- expressly identified the sentencing purposes that they felt did not require consideration (e.g. stating that specific deterrence was unnecessary for a person considered to be a low risk of reoffending);[202]
- provided a general statement about the purposes of sentencing, without clearly stating the specific purpose for the sentence they handed down;[203] or
- expressly identified and provided a more extensive explanation of the purposes considered to be the most relevant to the specific person being sentenced.[204]

Sentencing courts often refer to the sentencing purposes of deterrence and denunciation, rather than punishment and community protection

The Council's content analysis of the most common sentencing purposes applied when sentencing offences of rape and sexual assault revealed that:

- for rape offences, the most common sentencing purposes included general deterrence and specific deterrence, followed by denunciation and then, to a lesser extent, rehabilitation, punishment and community protection; and
- for sexual assault offences, general deterrence was also often referred to, followed by denunciation, then specific deterrence and rehabilitation, with equal reference being made to these two purposes. Express reference was made to the purpose of 'punishment' in only 13 per cent (n=10/75) of cases.

For both rape and sexual assault offences, judicial officers mentioned community protection and punishment the least when considering the relevant sentencing purposes.[205] See **Chapter 4** for more

200 PSA (n 5) s 9(1).
201 Council thematic sentencing remark analysis, as observed in ,rape, regional/remote, imprisonment > 5 years, #13 .
202 As observed in the following remarks sexual assault, regional/remote, higher courts, non-custodial, #2; rape, major city, imprisonment < 5 years, #15.
203 As observed in rape, regional/remote, imprisonment < 5 years, #1.
204 As observed in the following remarks rape, major city, imprisonment > 5 years, #5; sexual assault, major city, higher courts, custodial, #6; sexual assault, major city, lower courts, custodial, #3; sexual assault, regional/remote, higher courts, custodial, #4; rape, major city, imprisonment < 5 years, #22; rape, major city, imprisonment < 5 years, #19.
205 A failure to mention a sentencing purpose does not mean it was not taken into account: See, for example, *Ruiz* (n 196) [19] (Sofronoff P and McMurdo and Mullins JJA): 'Of course, community protection was a live issue in the case … It should not be thought that a sentencing Judge has to prove that she has taken a particular factor into account by reciting or parroting the content of section 9 of the *Penalties and Sentences Act 1992* (Qld).'

information about the methodology of this analysis. Potential reasons for punishment not being more commonly mentioned are discussed below.

Deterrence as a sentencing purpose includes both specific deterrence and general deterrence

When referring to deterrence, judicial officers often highlighted the difference between the need to deter the sentenced person from committing further offences (specific deterrence) and the need to deter others in the community from committing similar offences (general deterrence). In some remarks, the 2 forms of deterrence were considered in tandem, but in others the judicial officer deemed one more important than the other – for example:

> General and personal deterrence are important to the exercise of my discretion. The sentence I impose must send a message to you, but, more significantly, to other likeminded individuals in the community that if you commit an offence of this nature, then you will be punished. (HCMC_SA8)

> There is also the very real and significant need to provide, what is called, general deterrence, to ensure that everyone within our community knows that this behaviour by you is wholly unacceptable in our community and our society and that, should others be minded to behave in such a way, they also are aware of the very real penalties that are imposed and of the real consequences that flow in relation to such offending. (MCL5_R21)

In sentences involving sexual offences committed against a child, the court specifically referred to both specific and general deterrence when sentencing the person, stating, for example:

> Nevertheless, you have continued to offend. In your case, there is what we lawyers call specific or personal deterrence. I have to impose a heavy penalty to impress on your mind, 'Don't do it again.' And you may or may not have followed the discussion with your barrister. But you, in the future, should not form any relationship with any woman who has a child and you should stay away from children from now on, okay. (MCM5_R15)

> I have taken into account the principle of general deterrence, that is, the courts must impose heavy penalties to send a message to men – it is mainly men that commit these offences; occasionally, women do – that you will get caught and you will get punished severely for it. You have to be living under a rock not to realise the community's grave concerns about the sexual abuse of children. We had a Royal Commission into it that went for some years in respect of sexual abuse within institutions. We have had [a] former Australian of the Year who is an advocate for victims of sexual abuse. So it is a matter of high social concern. (MCM5_R15)

Just because 'punishment' is not expressly mentioned, this does not mean it is not considered important

Punishment featured more prominently for rape cases than it did for cases of sexual assault. This may reflect community perceptions on the seriousness of rape offences. However, our thematic analysis of sentencing remarks also revealed that, for rape and sexual assault offences, punishment was rarely mentioned without being described as 'just punishment' or 'just in all the circumstances',[206] reflecting the wording in section 9(1)(a) of the PSA.[207]

Punishment was also not always used in isolation in the remarks in the way that other purposes of sentencing were. Often, when judicial officers discussed punishment, they made it clear that this was not the only purpose for imposing their sentence, but rather that the punishment was also to fulfil the sentencing purposes of denouncing the behaviour and deterring similar behaviour. For example, judicial officers stated that:

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206 Council thematic sentencing remark analysis: as observed in the following remarks, sexual assault, regional/remote, lower courts, custodial, #7; rape, major city, imprisonment < 5 years, #4.

207 PSA (n 5) 9(1)(a) states: 'to punish the offender to an extent or in a way that is *just* in all the circumstances' (emphasis added).

> You can accept that they deserve full protection from the law; and people who commit, on the other hand, these sorts of offences against vulnerable children deserve contempt by the community and must face the full impact, not only as punishment but to deter others from committing such brazen offences. (Rape, major city, imprisonment < 5 years, #20)

> Ultimately, the purposes for which I am sentencing you today are to punish you to an extent or in a way that is just in all the circumstances, to provide conditions which I consider may help you be rehabilitated. Importantly, in respect of offences of this kind, to deter you personally and other persons from committing the same or similar offences, and also of particular relevance in terms of these kinds of offences, to make it clear that the community acting through the Court, denounces the sort of conduct in which you were involved. (Rape, major city, imprisonment > 5 years, #1)

> What must be done by the Court in dealing with you is seeking a balance between the need to denounce and punish you for your conduct, particularly in order to finally send the message to you, although I think you understand that by now, of the seriousness of what you did, but also to send that message more generally into the community and otherwise to seek to protect the community as I have explained, particularly by having regard to your prospects of rehabilitation. (Sexual assault, major city, higher courts, custodial, #15)

These findings are consistent with an Australian study that analysed 135 sentencing remarks obtained for a study of jurors' views of sentencing in Victoria.[208] The study found that, despite statements commonly made by academic philosophers about the distinct and sometimes conflicting objectives of sentencing purposes, 'judges do make statements that tend to conflate general deterrence, just punishment and denunciation'.[209] The research also found that, despite the criticisms of the efficacy of general deterrence, this purpose was the dominant sentencing purpose to which judges referred, including for sex offences and in cases of child sexual assault.[210] A 'practical reason' for this suggested by the authors was judges' concern that to ignore it may result in an appeal.[211]

Within that study, the authors suggested a number of possible reasons why, in contrast, 'just punishment' is not more commonly referred to, including:

- There is 'broad acceptance of the principle of proportionality' which 'is so fundamental to sentencing practice that it does not require repetition or elaboration'.
- 'The association of just punishment with retribution, which … connotes a sense of vengeance, may not sit well with judges' sense of their role as dispensers of justice' which 'could lead to a preference for mentioning a forward-looking purpose like deterrence that appears to offer some beneficial outcome for the community'.
- Those 'judges who are disinclined to use an overtly retributive rationale' may instead 'express themselves in terms of censure, condemnation and the need to vindicate society's values' meaning that denunciation may be used 'as a proxy for just punishment', with both operating as 'different ways of emphasising the seriousness of the crime'.[212]

The findings echo earlier Queensland-based research based on interviews with judges.[213]

208 Kate Warner, Julia Davis and Helen Cockburn, 'The Purposes of Punishment: How Do Judges Apply a Legislative Statement of Sentencing Purposes?' (2017) 41 *Criminal Law Journal* 69.
209 Ibid 72.
210 Ibid 76, 84.
211 Ibid 77.
212 Ibid 75. Another possible reason the authors refer to is judges' potential reluctances that by prioritising just punishment, it may be interpreted as the adoption of a two-stage approach to sentencing of which the High Court has been highly critical.
213 Mackenzie and Stobbs (n 38) 93.

Community protection is considered important where the offender is deemed a high risk of reoffending

Community protection was most often referred to by judicial officers as a sentencing purpose in cases where the sentenced person was deemed by the sentencing judge to be at high risk of reoffending – particularly in circumstances where an element of domestic violence was involved.[214]

Comparatively, where the person being sentenced was deemed to be a low risk of reoffending, some judicial officers highlighted that they did not feel community protection should be a large consideration in determining their sentence, but rather the sentence should deter others from committing similar offences. For example, one stated:

> I accept that protection of the community plays little role in determining the appropriate sentence, but general deterrence is of particular importance, particularly in light of the serious nature of the offending against a particularly vulnerable man. (Sexual assault, major city, higher courts, custodial, #8)

Queensland courts do not always refer to harm

Recognition of the harm caused to the victim, was not discussed as a reason or purpose for which the sentence was being imposed as Queensland does not recognise this as a sentencing purpose. However, the harm caused to the victim survivor and the impact of the offence on that person is a primary sentencing factor in that it is relevant to the nature and seriousness of the offence and is implicit in the imposition of the sentence itself.[215] Acknowledgement of harm caused to victim survivors by sexual violence offending within the courtroom varies by case. This acknowledgement may include recognition of the presence of a victim survivor within a courtroom at sentence, the specific harm suffered by the victim survivor (as outlined in a victim impact statement, if provided) and/or the general, long-term physical damage caused to a victim survivor as a consequence of sexual violence offending (in the absence of a victim impact statement). However, there were also occasions where the sentencing judge made no reference at all to the victim survivor or the harm they suffered as a consequence of the offending.

8.5.9 Sentencing purposes in other jurisdictions

Most jurisdictions reviewed in Australia and internationally apply similar general purposes of sentencing to their equivalent offences of rape and sexual assault. Domestically, states and territories vary as to the purposes included. Notably, Western Australia's sentencing legislation does not contain a legislative statement of sentencing purposes.[216]

Where some jurisdictions differed was the additional sentencing purposes of perpetrator accountability and recognition of harm to a victim survivor – See Table 8.5.

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214 Council thematic sentencing remark analysis: an example being, sexual assault, major city, lower courts, custodial, #1 .

215 For any offence, a court must take into account 'the nature of the offence and how serious the offence was, including … any physical, mental or emotional harm done to a victim': PSA (n 5) s 9(2)(c)(i). In particular for an offence of personal violence see s 9(3)(c)–(e) and for an offence of a sexual nature committed in relation to a child under 16 years see ss 9(6)(a), (c).

216 A 2013 review of the *Sentencing Act 1995* (WA) found against the adoption of a purposes statement on the basis there was 'little need' for this in light of feedback this would simplify codify the current law: Department of the Attorney-General, *Statutory Review of the Sentencing Act 1995 (WA)* (October 2013) 12, Conclusion 2.

Table 8.5: Legislated sentencing purposes in Australian jurisdictions

Purpose	Qld	Cth	NSW	Vic	SA	WA	NT	Tas	ACT	NZ	Canada
Punishment	✓	✓	✓	✓	✓	×	✓	×	✓	✓	✓
Rehabilitation	✓	✓	✓	✓	✓	×	✓	✓	✓	✓	✓
Deterrence	✓	✓	✓	✓	✓	×	✓	✓	✓	✓	✓
Denunciation	✓	×	✓	✓	✓	×	✓	✓	✓	✓	✓
Community protection	✓	×	✓	✓	✓	×	✓	✓	✓	✓	✓
Perpetrator accountability	×	×	✓	×	✓	×	×	×	✓	✓	✓
Recognition of harm	×	×	✓	×	✓	×	×	×	✓	✓	✓

Recognition of victim, and in some cases community harm, is a legislated sentencing purpose in some jurisdictions

Sentencing legislation in both Canada and New Zealand contains multiple references to victim harm in listing relevant sentencing purposes.[217] Notably, in these jurisdictions, victim harm is not reflected as a standalone purpose, but rather is mentioned alongside other purposes, such as denunciation, holding the offender accountable and reparation. Canadian courts have interpreted their respective recognition of harm provisions as collectively 'promoting a sense of responsibility and an acknowledgment of the harm caused on the part of the offender, and attempting to rehabilitate or heal the offender'.[218]

The sentencing legislation in the Australian Capital Territory ('ACT'), New South Wales ('NSW'), South Australia ('SA') as well as in New Zealand and Canada contains specific sentencing purposes that, to varying degrees, acknowledge the harm the victim may have experienced as a result of the offending.

In NSW and SA, recognition of victim harm is a singular, stand-alone purpose.[219] In NSW, the relevant section was introduced in 2002 'to recognise the harm done to the victim of the crime and the community'.[220] It was intended to encourage 'consistency and transparency in sentencing' and promote 'public understanding of the sentence process'.[221] In practice, the NSW Court of Appeal has regarded section 3A of the *Crimes (Sentencing Procedure) Act 1999* (NSW) as a codification of common principles of sentencing.[222] The SA provision states, as a secondary purpose of sentencing, 'to publicly recognise the harm done to the community and to any victim of the offending behaviour'.[223]

Those jurisdictions that have included recognition of victim harm as a sentencing purpose also incorporate recognition of the harm caused to the broader community. In Canada, recognition of harm to the community is stated as an alternative to recognition of victim harm (through the use of the conjunction 'or'), while in the ACT, NSW and SA, the harm to both the victim and the community is to be acknowledged.[224]

217 *Criminal Code* RSC 1985 c C-46, s 718; *Sentencing Act 2002* (NZ) s 7(1).
218 *R v Gladue* [1999] 1 S.C.R. 688, [43] (Cory and Lacoucci JJ).
219 *Crimes (Sentence Procedure) Act 1999* (NSW) s 3A(g); *Sentencing Act 2017* (SA) s 4(1)(c).
220 *Crimes (Sentence Procedure) Act 1999* (NSW) s 3A, introduced by the *Crimes (Sentencing Procedure) Amendment (Standard Minimum Sentencing) Act 2002* (NSW).
221 New South Wales, *Parliamentary Debates*, Legislative Assembly, 23 October 2002, 5815.
222 *R v MA* [2004] A Crim R 434 [23].
223 *Sentencing Act 2017* (SA) s 4(1)(c). The primary purpose of sentencing is to 'protect the safety of the community': s 3.
224 *Crimes (Sentencing) Act 2005* (ACT) s 7(g); *Crimes (Sentencing Procedure) Act 1999* (NSW) s 3A(g); *Sentencing Act 2017* (SA) s 4(1)(c).

Promoting accountability and responsibility for their actions is a sentencing purpose in some jurisdictions

Ensuring that offenders are held accountable for acts of sexual violence (and domestic violence) is often recognised as an important aspect of the criminal justice system responses to sexual violence.[225]

Under section 9(2)(d) of the PSA, in sentencing courts must consider to what extent the offender is to blame for the offence as well as other factors listed in the Act, such as the nature and seriousness of the offence. Holding people accountable for their actions is an inherent part of the sentencing process and is also encompassed within the broader purpose of 'just punishment' recognised under section 9(1)(a).

In contrast to Queensland, the ACT, NSW and SA have legislated to include as an express purpose of sentencing to hold or make the offender accountable for their offending behaviour.[226] It is listed alongside the sentencing purpose of ensuring the offender is adequately punished for the offence.

In New Zealand, courts are required to consider purposes aimed at holding an offender accountable for the harm done to the victim and community and promoting a 'sense of responsibility for, and an acknowledgment of' the harm done to the victim and the community by their offending.[227]

The relevant section in the Canadian *Criminal Code*, similar to New Zealand, expresses the purpose as being 'to promote a sense of responsibility in offenders' and an acknowledgment of the harm caused.[228]

In Canada and New Zealand, punishment is not listed as a purpose of sentencing, while in the ACT, NSW and SA, reference to holding the offender accountable is made alongside the need for the person to be adequately punished for the offence.[229]

For more information on the wording of these sections, see **Appendix 14**.

Similar to Queensland, certain sentencing purposes are prioritised in legislation when a court is sentencing a person for certain types of offences

Similar to Queensland, some jurisdictions also direct the court to pay specific attention to some sentencing purposes when sentencing for specific types of offences.[230]

For example, in Canada, courts are required to give primary consideration to the purposes of denunciation and deterrence in sentencing a person for an offence that involved the abuse of a person under 18 years.[231] The same requirement applies for an offence that involved the abuse of a person who is vulnerable because of their personal circumstances (including because the person is Aboriginal and female).[232]

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225 See, for example, Victorian Law Reform Commission, *Improving the Justice System Response to Sexual Offences* (Report, September 2021) 32.

226 *Crimes (Sentencing) Act 2005* (ACT) s 7(1)(e); *Crimes (Sentence Procedure) Act 1999* (NSW) s 3A(e); *Sentencing Act 2017* (SA) s 4(1)(a)(ii).

227 *Sentencing Act 2002* (NZ) ss 7(1)(a)–(b).

228 *Criminal Code* RSC 1985 c C-46, s 718(f).

229 *Crimes (Sentencing) Act 2005* (ACT) s 7(1)(a); *Crimes (Sentence Procedure) Act 1999* (NSW) s 3A(a); *Sentencing Act 2017* (SA) s 4(1)(a)(i).

230 See section 8.4 of this report for an overview of the specific sentencing principles and factors which are for primary consideration in Queensland.

231 *Criminal Code*, RSC 1985 c C-46, s 718.01 inserted in 2005, c 32, s 24.

232 Ibid s 718.04 inserted in 2019, c 25, s 292.1 in response to the recommendations in the National Inquiry into Missing and Murdered Indigenous Women and Girls, *Reclaiming Power and Place: The Final Report of the National Inquiry into Missing and Murdered Indigenous Women and Girls* (Report, 2019), 185 [5.18].

For Commonwealth offences, the sole objective for all offences is to 'impose a sentence … that is of a severity appropriate in all the circumstances of the offence'.[233] In cases involving Commonwealth child sex offences, a court must also have regard to the objective of rehabilitation,[234] which includes consideration of 'sufficient time for the person to undertake a rehabilitation program' when determining the sentence length.[235]

In Victoria, a 'court must treat the protection of the community as the principal sentencing purpose' where imprisonment is justified for certain offences (including a 'serious sexual offender').[236]

For more information on the approach in other jurisdictions, see **Consultation Paper: Background**, Chapter 10.

8.5.10 What we know from other reviews of the purposes of sentencing

Australian Law Reform Commission

The ALRC undertook a comprehensive review of the sentencing of federal offenders in 2006.[237] In considering what sentencing purposes should be adopted under federal law, it acknowledged that victim harm and promoting perpetrator accountability were recognised in some jurisdictions as sentencing purposes.[238] However, it concluded 'the [only] legitimate purposes of sentencing are retribution, deterrence, rehabilitation, incapacitation, denunciation and restoration' which aside from restoration, were 'well established at common law and regularly applied by courts in all Australian jurisdictions'.[239] The Commission's views were reflected in its recommendation regarding changes to federal sentencing legislation.[240] These changes are yet to be enacted.[241]

New South Wales

The NSW Law Reform Commission considered the purposes of sentencing as part of its review of sentencing.[242] It considered that a legislative statement of sentencing purposes was needed and recommended a revised list of sentencing purposes, which included that the purpose to 'recognise the harm done to the victim of the crime and the community' be retained and 'to reduce crime' be added.[243] It did not consider restoration and reparation should be sentencing purposes as their objectives 'are sufficiently accommodated within the proposed purposes concerned with accountability and recognition of the harm caused'.[244]

233 *Crimes Act 1914* (Cth) s 16A(1).
234 Ibid s 16A(2AAA). 'Commonwealth child sex offence' is defined in s 3(1) of that Act to mean an offence against listed provisions of the *Criminal Code Act 1995* (Cth) Sch, including relating to child exploitation material offences.
235 Ibid s 16A(2AAA)(b).
236 *Sentencing Act 1991* (Vic) ss 6B, 6D.
237 Australian Law Reform Commission, *Same Crime, Same Time* (Report 103, 2006).
238 Ibid 140 [4.23].
239 Ibid 141 [4.27].
240 Ibid 147, rec 4-1. 'Restoration' was framed as 'to promote the restoration of relationship between the community, the offender and the victim'.
241 See *Crimes Act 1914* (Cth) s 16A which recognises as relevant matters to which a court must have regard: 'the deterrent effect that any sentence or order under consideration may have on the person' as well as 'on other persons', 'the need to ensure the person is adequately punished for the offence' and 'the prospects of rehabilitation of the person': ibid ss 16A(2)(j), (ja), (k), (n).
242 NSW Law Reform Commission, *Sentencing* (Report 139, 2013).
243 Ibid 37, rec 2.1.
244 Ibid 39–40 [2.136].

Scottish Sentencing Council

In 2024, the Scottish Sentencing Council considered the views and experiences of the sentencing process of victim survivors of rape and other sexual offences in Scotland.[245] The Scottish Sentencing Council found that victim survivors of rape and sexual assault value the imposition of custodial sentences as an important tool for victim survivors' recovery and perceptions of safety. There was also some support for imposing custodial penalties as a default sentence for offences involving rape.

England and Wales: House of Commons Justice Committee's Inquiry

In 2023, the House of Commons Justice Committee in the United Kingdom published a report that examined the public's understanding of sentencing in England and Wales.[246] The Committee recommended '[t]he Government should review the statutory purposes of sentencing to consider whether greater emphasis should be placed on achieving justice for the victims of crime and their families.'[247] In response, the government noted victims have an opportunity to be involved in the sentencing process through being able to make a Victim Personal Statement and courts must take into account the harm caused.[248] In respect of the recommendation to further review this, the response noted:

> The courts' role is to sentence on behalf of the wider public and sentencing must be proportionate to the offence committed. Maintaining this is critical and ensures that no victim is responsible for a sentence imposed and avoids the risk of threats being used if a victim were to be perceived as having an impact on the severity of a sentence.[249]

8.5.11 The UniSC findings

As discussed in **Chapter 5**, part of the research undertaken by the University of the Sunshine Coast ('UniSC') was exploring the community views of the most important purposes of sentencing for sexual assault and rape offences.

Researchers found that without exposure to contextual information about a case, offence type influences community views on which sentencing purposes should be given most consideration by the court. However, participant views were different when they were asked to consider the importance of sentencing purposes for the offence of rape generally, compared with when they were provided more contextual information about a specific case of rape (or sexual assault).[250] This finding was supported by the literature review which found that in general the public lean towards punitive measures, but become less inclined to do so when given more information.[251]

Three key themes emerged in the UniSC research about the sentencing purposes and sexual assault and rape offences:

- Community protection is linked to the perceived dangerousness of a perpetrator.[252]

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245 Scottish Sentencing Council, *Victim-Survivor Views and Experiences of Sentencing for Rape and Other Sexual Offences* (2024) 2.
246 House of Commons Justice Committee, *Public Opinion and Understanding of Sentencing* (10th Report of Session 2022-23, 2023).
247 Ibid 37 [85], 58 [16].
248 House of Commons Justice Committee, *Public Opinion and Understanding of Sentencing: Government and Sentencing Council Responses to the Committee's Tenth Report of Session 2022–23* (2024) Appendix 1, 10 [48].
249 Ibid [49].
250 See Dominique Moritz, Ashley Pearson and Dale Mitchell, *Community Views of Rape and Sexual Assault Sentencing: Final Report* (Sexual Violence Research and Prevention Unit, UniSC, June 2024) 17.
251 *Griffith University Literature Review* (n 188) 101.
252 Moritz, Pearson and Mitchell (n 250) 20.

- Denunciation has value when responding to family and domestic violence.[253]
- Punishment is favoured in circumstances involving a vulnerable victim survivor or where the offending made the community vulnerable.[254]

8.5.12 Stakeholder views

In its Consultation Paper, the Council invited feedback on:

- the most important purposes in sentencing a person for sexual assault and rape and the reasons for this (Q.1); and
- whether any changes should be made to the general or specific purposes a court must consider when sentencing a person for rape or sexual assault (Q.2).

Stakeholder views on the adequacy of the current sentencing purposes were mixed.

Submissions from victim survivor support and advocacy and support stakeholders

A common theme in submissions from and meetings with victim survivors and advocacy and support agencies was the need for justice to be seen to be done, especially in circumstances where victim survivors are reporting feeling alienated by the criminal justice system. It was recognised that incorporating recognition of harm as an express sentencing purpose, in this context, may serve as an important symbolic acknowledgement of the experiences of victim survivors.

The North Queensland Women's Legal Service ('NQWLS') noted that 'the concept of a sentence that is "just" in all the circumstances must clearly be shown to be "just" to the victim-survivor, not only the defendant'.[255] The NQWLS also observed that if harm were expressly recognised as a purpose, its impact on the sentencing process may be better communicated to the community. Not only would this improve the satisfaction of victim survivors, but it may assist the community at large.[256]

QSAN was supportive of the approach in NSW, SA and the ACT in listing recognition of harm to victims as a distinct sentencing purpose.[257]

In a similar vein, DV Connect told us that victim survivors do not consider that current sentencing practices adequately denounce offending as it is felt 'there is more negative impact from being a victim/survivor than being a perpetrator'.[258]

The Women's Legal Service Queensland recognised that sentencing purposes (and factors) may have broader impacts on other stages of the criminal justice process and how sexual offences are responded to.[259]

253 Ibid 22.
254 Ibid 24.
255 Preliminary submission 20 (North Queensland Women's Legal Service) 2.
256 Ibid.
257 Submission 24 (Queensland Sexual Assault Network) 9.
258 Submission 20 (DV Connect).
259 Preliminary submission 21 (Women's Legal Service Queensland) 1–2.

FACAA told us:

> The most important purpose of sentencing for a person for sexual assault and rape is the safety of the victim-survivors. This is one of the most common themes throughout all responses. Safety for victim-survivors of rape and sexual abuse is not just limited to their immediate safety needs but must extend to their lifelong safety.[260]

Submissions from research institutions, professional bodies and community advocacy organisations

TASC Legal and Social Services (Social Justice) questioned the efficacy of the sentencing purposes and told us:

> There is a strong likelihood that the criminal justice system cannot punish or deter its way out of the challenge presented by rape and other forms of sexual assault. While it may be effective for select individuals, it stands to increase criminogenic tendencies in many others. For individuals who were raised in violent and harsh environments, prison only confirms what these individuals already believe to be true. Deviant behaviour reflects both a deviant developmental environment and the overlay of social norms and belief systems which make it easier for these disordered inclinations to be rationalised and acted upon.[261]

Submissions from legal stakeholders

LAQ noted that harm done to the victim is already expressly addressed in section 9(2)(c) of the PSA which requires a court to take into account 'the nature of the offence and how serious the offence was, including—(i) any physical, mental or emotional harm done to a victim'. They also expressed concern about how harm would be quantified if it was further legislatively recognised.[262]

LAQ also observed that section 9 'has been revised and amended many times, resulting in legislation which is detailed and sometimes prescriptive'.[263]

The Queensland Law Society did not support adding victim harm as a purpose of sentencing in section 9(1) of the PSA as it is already a factor in the PSA.[264]

ATSILS told us rehabilitation and community safety should be prioritised as sentencing purposes. The most important purposes when sentencing for sexual assault and rape 'are penalties commensurate with the specifics of the conduct in question (punitive); but cross-referenced with community safety and thus the rehabilitation of the offender.'[265] Rehabilitation should be considered in a holistic way, having regard to 'criminogenic factors, cultural context and the best evidence-based way for that individual to address the root causes of the offending'.[266] ATSILS told us:

> Whilst punishment and deterrence … by way of incarceration and other punitive measures certainly have a place in certain contexts, these measures do not, in isolation, address the root causes of offending. Improving community safety necessitates an approach that also prioritises rehabilitation of the individual such that the individual is less likely to reoffend. In the context of Aboriginal and Torres Strait Islander individuals, to have the best chance of success, rehabilitation programs must be delivered by community-controlled organisations preferably within the local community that the individual belongs, to provide the cultural safety required to promote engagement by the individual. We are aware that there is a significant paucity of culturally safe rehabilitation/healing programs

260 Submission 15 (Fighters Against Child Abuse Australia).
261 Submission 22 (TASC Legal and Social Services (Social Justice)).
262 Submission 23 (Legal Aid Queensland) 3.
263 Ibid 3.
264 Meeting with Queensland Law Society, 9 July.
265 Submission 28 (Aboriginal and Torres Strait Islander Legal Service).
266 Ibid.

> throughout the State, especially in rural and remote areas. We see this as an area were there needs to be additional funding to empower local community-controlled organisations to expand delivery of such programs.[267]

YAC told us: 'All purposes have a role in determining the sentence for sexual assault and rape offences to balance the competing interests of the victim, the offender and community in arriving at a just punishment.'[268] It considered that, 'The protection of community, the protection of the children, deterrence and rehabilitation in sections 9(3) and (6) of the PSA is appropriate and should not change.'[269]

Subject matter expert interviews

Which sentencing purposes are the most important?

Participants in our subject matter expert interviews had different views on which sentencing purposes were generally the most important when sentencing for sexual assault and rape.

Some acknowledged the importance of the principles of community protection and denunciation in particular, along with punishment when sentencing sexual offences.[270] There was also support for the sentencing purpose of deterrence for sexual offending[271] – although some participants considered that while sentencing responses may be effective in meeting the purposes of punishment and individual or specific deterrence, they might be unlikely to be effective in achieving general deterrence.[272]

Rehabilitation in some cases was also viewed as an important sentencing consideration.[273] However, some participants were cautious about the ability to accurately assess a person's risk of reoffending[274] and suggested that providing the court with specific evidence of rehabilitation could be helpful to a judge when sentencing.[275]

Are current purposes adequate?

Most participants told us that they thought the sentencing purposes were adequate and provided a broad basis for sentencing.[276] They supported sentencing purposes being broad and flexible and considered rigid purposes can become 'problematic'.[277]

One participant questioned whether the purpose to protect the community should be limited to Queensland, as section 9(1)(e) of the PSA states, 'to protect the Queensland community'.[278]

Should any purposes be added?

Some participants told us there could be a recognition if victim harm as a purpose.[279] In this regard, one participant supported a stronger emphasis on punishment and recognising the impact on a victim.[280] Another also mentioned the importance of measures to protect victims from further harm.[281]

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267 Ibid.
268 Submission 30 (Youth Advocacy Centre).
269 Ibid.
270 SME Interviews 2, 9, 13, 14.
271 SME Interviews 2, 6, 8.
272 See, for example, SME Interviews 3, 13.
273 SME Interviews 6, 9, 11.
274 SME Interviews 2, 3, 11.
275 SME Interview 11.
276 SME Interviews 2, 4, 6, 7, 8, 9, 10, 11, 12, 13, 14, 16, 20.
277 SME Interview 11. See also SME Interviews 13, 21.
278 SME Interview 21.
279 SME Interviews 3, 15, 25.
280 SME Interview 15. See also SME Interview 25.
281 SME Interview 3.

Another participant was sceptical about the benefits of adding further legislative weight to specific factors, but recognised that there may be a benefit in the representation made to the community.[282]

Consultation events

There were mixed views by participants at the consultation events held in Brisbane, Cairns and online about which sentencing purposes were the most important. Many participants considered community protection/safety and denunciation the most important purposes when sentencing sexual offences. There was also support for a purpose specifically for recognition of victim harm.

Some participants considered that sentencing responses should act as a deterrent, and deliver clear retribution or punishment, while others were less confident about the ability of sentences to act as an effective deterrent (particularly, in deterring that individual from reoffending).

Several participants commented on sentences having particular value in 'sending a message' to the community about the offending, as well as to other victim survivors of this form of offending, reflected in the sentencing purpose of denunciation in conjunction with specific deterrence: 'We need to send a message that there are serious consequences for those types of actions.'[283]

Many participants considered that community safety/protection was the most important sentencing purpose, alongside other purposes.

At the Cairns consultation event, participants also mentioned the importance of ensuring offender accountability, alongside safety for the victim and the community and taking into account the need for rehabilitation, as well as the importance of restoration/restoring relations within the community in the context of sexual offending.[284]

In considering potential changes or enhancements to existing purposes, there was some support for recognition of victim harm being elevated to a sentencing purpose. Some participants commented that there might be particular value to victim survivors in having this harm clearly acknowledged through the sentencing process: 'The role of the criminal justice system is [to] deliver justice but the victim also needs to feel that this justice was delivered.'[285]

The recognition of the harm to the victim as a sentencing purpose was also viewed as potentially useful in guiding the crafting of sentencing remarks and in reinforcing the harm their actions had caused to the person being sentenced[286] as well as promoting community understanding and better reflecting contemporary values: 'The courts must recognise that times are changing and the sentencing "pillars" need to move with the times.'[287]

There was also support from some participants for the broader harms to the community of this form of offending to be more clearly recognised through the sentencing process.

However, some participants did not consider that there was any need to change the current purposes as recognition of victim harm as a purpose would always apply in considering the application of other sentencing purposes, and was already recognised under the Act. Some participants also raised concerns about the need in applying this purpose to quantify harm, and whether this fairly should be considered,

282 SME Interview 1.
283 Online Consultation Event 16 April 2024.
284 Cairns Consultation Event 21 March 2024.
285 Brisbane Consultation Event 11 March 2024.
286 Cairns Consultation Event 21 March 2024.
287 Online Consultation Event 16 April 2024.

noting the impact on individual victims will be different, and some of the harms may not be evident until a significant period of time after the offence has occurred—particularly in the case of child victims.

8.6 Other legislative forms of sentencing guidance and schemes

8.6.1 Introduction

In addition to the purposes, principles and factors contained in Part 2 of the PSA, several legislative schemes are established under the PSA that provide guidance to courts in sentence. In some cases, the guidance provided is of a mandatory nature meaning courts have no discretion to depart. In other cases, the court retains some discretion.

We explore some of these schemes below.

8.6.2 Mandatory, presumptive and standard sentencing schemes

Mandatory legislative schemes require a sentencing court to impose specific sentence outcome, regardless of any relevant factors in mitigation. Presumptive schemes allow for some discretion to depart from this if certain circumstances apply (for example, the court finds it is 'unjust to do so', is not 'in the interests of justice' or if 'exceptional circumstances' apply).

Current mandatory and presumptive sentencing schemes in Queensland

A number of statutory sentencing schemes have been established under the PSA to respond to certain types of offending that also impact sentencing levels and practices, including for rape and sexual assault. Some of these schemes operate wholly or partly in a mandatory way. They include the following:

- A requirement for a court when sentencing a person for **an offence of a sexual nature against a child aged under 16 years** to order the person to serve **an actual term of imprisonment** (meaning a term of imprisonment served wholly or partly in a corrective services facility) unless there are exceptional circumstances (presumptive imprisonment).[288]
- **The serious violent offences ('SVO') scheme**, which requires a person declared convicted of certain listed offences (including rape and sexual assault)[289] to serve 80 per cent of their sentence (or 15 years, whichever is less) in prison before being eligible for release on parole.[290] The making of a declaration is mandatory in the case of sentences of imprisonment of 10 years or more, but discretionary for offences dealt with on indictment where the sentence imposed is for 5 years or more, but less than 10 years.[291]

288 PSA (n 5) s 9(4)(c).

289 Or of counselling, procuring, attempting or conspiring to commit such an offence. Relevant offences are listed in Schedule 1 of the PSA. There is also discretion for a court to make a declaration in relation to a conviction for any offence dealt with on indictment provided such offence: (i) involved the use, counselling or procuring the use, or conspiring or attempting to use, serious violence against another person; or (ii) resulted in serious harm to another person: PSA (n 5) s 161B(4). The term 'serious harm' is defined in section 4 to mean: ' any detrimental effect of a serious nature on a person's emotional, physical or psychological wellbeing, whether temporary or permanent'.

290 *Corrective Services Act 2006* (Qld) s 182 ('CSA').

291 PSA (n 5) s 161B. See also n 289 regarding a discretion to make a declaration for any offence, or for a Schedule 1 offence where the sentence is under 5 years provided certain conditions are met.

- **Mandatory sentences for repeat 'serious child sex offences'** which requires a court to impose a life sentence or an indefinite sentence[292] with a 20-year minimum non-parole period[293] for certain repeat 'serious child sex offences'. This applies to an adult offender convicted of a 'serious child sex offence'[294] committed after 19 July 2012,[295] who has a prior conviction (as an adult) for a relevant 'serious child sex offence'.[296] Rape and aggravated sexual assault (liable to life imprisonment) are both prescribed offences under the scheme.
- **A mandatory cumulative sentence in some circumstances:** where a person has been convicted of certain listed offences (or of counselling, procuring, attempting or conspiring to commit it) and the person committed the offence while in prison serving a term of imprisonment, on parole or during other post-prison community-based release, on a leave of absence from prison, or unlawfully at large after escaping from lawful custody under a sentence of imprisonment.[297] Any sentence of imprisonment imposed for the listed offence must be ordered to be served cumulatively (one after the other) with any other term of imprisonment the person is liable to serve. Both sexual assault and rape are listed offences.[298]

Issues regarding the ordering of cumulative versus concurrent sentences are explored in **Chapter 15**.

Mandatory and presumptive sentencing schemes for sexual offences in other jurisdictions

Other Australian and overseas jurisdictions have taken different approaches to remedying what have been viewed as inadequate sentencing levels.

In **Appendix 10**, we consider developments in Victoria as a case study of how sentencing reforms have come about and relevant evaluations of their impacts.

Mandatory sentencing schemes do not allow for any departure from required sentence type of sentencing levels. For example, they may provide that a sentencing court must impose:

- imprisonment of a certain fixed or set length (such as the mandatory life sentence in Queensland that applies to murder and repeat serious child sex offences);
- a sentence that is at least the minimum specified length, but allowing for the court to decide if the sentence should be longer;
- a certain type of penalty (usually imprisonment), but otherwise giving courts discretion to decide the sentence length;
- a non-parole period that is at least the minimum specified period, either framed as a fixed percentage of the head sentence or as a specified minimum term (e.g. 2 years).

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292 Ibid ss 161E(2), 161E(3).
293 CSA (n 290) s 181A.
294 PSA (n 5) s 161D and sch 1A. A serious child sex offence is an offence against a provision mentioned in schedule 1A, or an offence that involved counselling or procuring the commission of an offence mentioned in schedule 1A, committed – (a) in relation to a child under 16 years; and (b) in circumstances in which an offender convicted of the offence would be liable to imprisonment for life.
295 Date of assent and commencement.
296 It does not matter whether the first offence was committed, or the offender was convicted of the first offence, before or after the commencement of the Bill. The second offence must be committed after the conviction of the first offence: PSA (n 5) s 223.
297 Ibid s 156A, sch 1.
298 Ibid sch 1.

Presumptive sentencing schemes provide courts with discretion. The discretion provided under these schemes is on a continuum from those schemes that retain a high level of discretion to those that set fixed sentences or non-parole periods from which a court can depart in very limited circumstances. As for mandatory sentencing schemes, they are similarly varied in nature and include, for example:

- presumptive imprisonment or order requiring supervision;
- presumptive minimum sentencing levels;
- presumptive minimum non-parole periods;
- a presumptive requirement for sentence cumulation.

For example, with respect to a requirement to order a person to serve imprisonment when sentencing for sexual offences, mandatory and presumptive sentence provisions in other jurisdictions include the following:

- In the Northern Territory: a requirement for courts to record a conviction and impose either a term of actual imprisonment or a partly suspended prison sentence when sentencing an offender for a sexual offence.[299]
- In Victoria: mandatory imprisonment (which must not be imposed in addition to making a community correction order)[300] which applies to 23 'Category 1 offences' (including rape, rape by compelling sexual penetration and sexual penetration with a child offences),[301] providing the offence was committed by a person aged 18 years or more at the time the offence was committed.[302]

299 *Sentencing Act 1995* (NT) s 78F(1). A 'sexual offence' to which this section applies means an offence specified in sch 3: s 3 and included offences against *Criminal Code Act 1983* (NT) sch 1, ss 188(2)(k) (indecent assault) and 192 (sexual intercourse and gross indecency without consent). A court can also make a home detention order after service of part of a term of imprisonment under a partially suspended sentence, meaning that this is a sentencing option that is available in these cases: *R v Bennett* [2021] NTCCA 2.

300 *Sentencing Act 1991* (Vic) s 5(2G). There are some limited exceptions to this. See ss 5(2GA), 10A.

301 Ibid s 3(1) (definition of 'Category 1 offence').

302 Ibid.

- In New South Wales: a requirement, when sentencing a person found guilty of a domestic violence offence (including a sexual offence committed in the context of domestic violence),[303] for a court to impose either a sentence of full-time detention or a supervised order[304] unless satisfied that a different sentencing option is more appropriate in the circumstances.[305]
- In New Zealand: a presumption of imprisonment in circumstances where a person is convicted of sexual violation by unlawful sexual connection or rape.[306] The court can impose a sentence other than imprisonment if, having regard to the particular circumstances of the person convicted and the offence (including the nature of the conduct involved), it thinks that the person should not be sentenced to imprisonment.[307] This is not limited to offences committed in relation to children.
- In Canada: mandatory minimum prison sentences apply to offences of sexual assault in certain cases. Where the offence was committed against a child under the age of 16 years, these are fixed at one year for an indictable offence and 6 months for an offence dealt with summarily.[308] Higher minimum sentences apply for aggravated sexual assault.[309]

These schemes and other forms of mandatory and presumptive schemes are discussed in more detail in Chapter 10 of our **Consultation Paper: Background**.

303 A 'domestic violence offence' for this purpose has the same meaning as in the *Crimes (Domestic and Personal Violence) Act 2007* (NSW) ('CDPV Act'): *Crimes (Sentencing Procedure) Act 1999* (NSW) s 3. A 'domestic violence offence' is defined in s 11 of the CDPV Act and includes 'an offence committed by a person against another person with whom the person who commits the offence has (or has had) a domestic relationship' which is also a 'personal violence offence'. The definition of a 'personal violence offence' in s 4 of the Act includes several sexual offences under the *Crimes Act 1900* (NSW) including sexual assault (s 61I), aggravated sexual assault (s 61J), aggravated sexual assault in company (s 61JA), sexual touching (s 61KC), aggravated sexual touching (s 61KD), sexual act (s 61KE), aggravated sexual act (s 61KF), sexual intercourse with a child under 10 (s 66A), sexual intercourse with a child between 10 and 16 years (s 66C) as well as sexual touching and sexual act offences where committed against a child (ss 66DA–DF), persistent sexual abuse of a child (s 66EA) and incest (s 78A).

304 This includes an intensive correction order, a community condition correction order or a conditional release order that includes a supervision condition: see *Crimes (Sentencing Procedure) Act 1999* (NSW) ss 4A(1), 4(A)(3).

305 Ibid s 4A(2).

306 *Crimes Act 1961* (NZ) s 128B(2). 'Sexual violation' for these purposes is defined in s 128.

307 Ibid ss 128B(2)–(3).

308 *Criminal Code,* RSC 1985, c C-46, s 271.

309 Ibid s 273(2).

The effectiveness of mandatory and presumptive sentence schemes

Mandatory sentencing laws restrict the discretion of judicial officers to impose a 'just' sentence in all the circumstances and can have unintended consequences for the justice system. For this reason, such forms of sentencing schemes have attracted strong criticism from legal scholars and some practitioners, and on occasion have been referred to as a 'fundamentally bad idea'.[310] Concerns have been raised that:

> Mandatory minimum sentences have few, if any, discernible deterrent effects and, because of their rigidity, result in unjustly harsh punishments in many cases and wilful circumvention by prosecutors, judges, and juries in others.[311]

These types of mandatory laws have also been criticised in the context of sexual violence offending. For example, in 2021, the NT Law Reform Committee ('Committee') examined mandatory sentencing and community-based sentencing options. With respect to the requirement to impose an actual term of imprisonment for a sexual offence, it reported:

> In practice, it has not been uncommon for courts to resort to the imposition of "rising of the court" sentences to avoid any injustice the requirement in s 78F(1)(a) [that the offender must serve a term of actual imprisonment] may cause.[312]

The Committee was concerned that 'such practices can tend to impair confidence in the integrity of the criminal justice system', suggesting it was preferable that 'courts be empowered to impose just sentences other than in a manner that may appear to be inconsistent with the intent of the legislature'.[313]

In considering the effectiveness of the mandatory sentencing laws in deterring sexual violence offending, The Committee pointed to the low rates of reporting, prosecution and convictions as evidence such reform had had little, if any, impact.[314] Its conclusion was that these provisions should be repealed.[315] Similar calls have been made for repeal of mandatory provisions that apply to sexual offences elsewhere,

Legislation that has a mandatory element in respect of sentencing, can be viewed as limiting human rights. For example, the requirement for a judge to impose a life sentence or indefinite sentence for a 'repeat serious child sex offence', which now exists in Queensland, may infringe the right to liberty and the right to not be subjected to arbitrary detention.[316]

At the time the mandatory penalty was introduced in 2012, the Explanatory Notes acknowledged:

> A mandatory sentence that cannot be mitigated represents a significant abridgment of traditional rights. However, the effect on the individual must be balanced against the need for community protection. Child sex offenders victimise one of the most vulnerable groups in the community. It is incumbent on the community to provide adequate protection from harm to this group, as they are inherently unequipped to protect themselves from such predation.
>
> The new mandatory sentencing regime is necessary to: denounce repeat child sex offenders; provide adequate deterrence for this cohort of offenders; protect one of the most vulnerable groups of the community; and to enhance community confidence in the criminal justice system.[317]

310 Michael Tonry, 'Fifty Years of American Sentencing Reform: Nine Lessons' *(*2019) 48 *Crime and Justice* 1, 6.
311 Ibid.
312 Northern Territory Law Reform Committee, *Mandatory Sentencing and Community-based Sentencing Options: Final Report* (Report No 47, 2021) 56.
313 Ibid 56-57.
314 Ibid 57.
315 Ibid 59, recs 4-4, 4-5.
316 *Human Rights Act 2019* (Qld) s 29 ('HRA').
317 Explanatory Notes, Criminal Law (Two Strike Child Sex Offenders) Amendment Bill 2012 (Qld) 2–3.

The Queensland Human Rights Commission has made previous submissions to this Council that comment on mandatory penalties, drawing attention to the need for significant evidence 'to demonstrate that mandatory minimum sentences are the least restrictive manner of achieving the purposes' of sentencing.[318]

It is difficult to determine whether the mandatory penalty is deterring would-be child sexual offenders from committing these offences, although there is little doubt that this provide a strong denunciatory aspect and, through the incapacitation of these individuals (for a minimum period of 20 years prior to parole eligibility),[319] the prevention of reoffending.

Concerns about these types of laws in the past have included that, to the extent the consequences are known, may impact on people's willingness to plead guilty, potentially reducing rates of conviction, resulting in plea negotiations to lesser charges and, more concerningly, risking child sex offenders going to extreme lengths to avoid detection, exposing to children to an even greater risk of harm.[320]

A review of this scheme falls outside the scope of the Council's current review, and for this reason we have not considered its operation further.

Presumptive sentencing provisions typically attract fewer criticisms than mandatory ones, as they retain some discretion for courts to impose a just and appropriate sentence.

Relevant evaluations of these reforms are explored in Chapter 10 of our **Consultation Paper: Background**.

8.6.3 Standard sentencing and non-parole period schemes

Another type of special scheme introduced to increase guidance to court in sentencing is standard non-parole periods in NSW and standard sentences in Victoria.

NSW standard non-parole period scheme

The NSW standard non-parole period ('SNPP') scheme was introduced in 2003[321] and applies to a range of serious offences, including several sexual offences.[322] The scheme's introduction was justified on the basis that it would provide judges with 'a further important reference point' when sentencing offenders for SNPP offences.[323]

An SNPP represents the non-parole period for an offence that 'is in the middle of the range of seriousness', 'taking into account only the objective factors affecting the relative seriousness' of that offence.[324] The SNPP operates as a 'legislative guidepost' in sentencing, along with the maximum penalty.[325] When

318 Queensland Human Rights Commission, Preliminary submission 3 to Queensland Sentencing Advisory Council, *Penalties for Assaults on Public Officers* (9 January 2020) 9 [31].
319 CSA (n 290) s 181A.
320 See, for example, Thomas B Marvell and Carlisle E Moody, 'The Lethal Effects of Three Strikes Laws' (2001) 30 *The Journal of Legal Studies* 89; and Anthony M Doob, Cheryl Marie Webster and Rosemary Gartner, 'Issues related to Harsh Sentences and Mandatory Minimum Sentences: General Deterrence and Incapacitation' (Centre for Criminology and Sociolegal Studies, University of Toronto,February 2014) Research Summary from *Criminological Highlights*.
321 Part 4, Division 1A of the *Crimes (Sentencing Procedure) Act 1999* (NSW) was inserted by the *Crimes (Sentencing Procedure) Amendment (Standard Minimum Sentencing) Act 2002* (NSW).
322 *Crimes (Sentencing Procedure) Act 1999* (NSW) ss 54A–54D.
323 NSW Law Reform Commission, *Sentencing: Interim Report on Standard Minimum Non-parole Periods* (Report 134, 2012) [1.14] ('*Sentencing: Interim Report*').
324 *Crimes (Sentencing Procedure) Act 1999* (NSW) s 54A(2).
325 *Muldrock v The Queen* (2011) 244 CLR 120, [27] (French CJ, Gummow, Hayne, Heydon, Crennan, Kiefel and Bell JJ) ('*Muldrock*').

sentencing an offence to which an SNPP applies, the court must also consider other legislated and common law sentencing considerations.[326]

The offences under the scheme and associated SNPPs are set out in a Table to Part 4, Division 1A of the *Crimes (Sentencing Procedure) Act 1999* (NSW). When originally introduced, the scheme applied to more than 20 categories of serious indictable offences, including a range of violence, sexual violence and drug offences. The number of offences under the scheme has since expanded to over 30, and the offence categories 'cover the majority of serious crimes that have a relatively high volume'.[327]

SNPPs are expressed as a number of years. For example, the SNPPs for NSW's rape equivalent offences are:

- aggravated sexual assault in company is 15 years (life imprisonment);
- aggravated sexual assault is 10 years (20 years); and
- sexual assault simpliciter is 7 years (14 years).

The levels at which the SNPPs were originally set 'generally were at least double the median non-parole period between 1994 and 2001, and in some cases, including for sexual offences, they were nearly triple the existing median periods'.[328] The SNPP is based on the seriousness of the offence, the maximum penalty and sentencing trends for the offence.[329]

The court must give reasons for setting a NPP that is longer or shorter than the SNPP and outline each factor that was taken into account when making this determination.[330]

Victorian standard sentence scheme

The standard sentencing scheme is established under sections 5A and 5B of the Victorian *Sentencing Act 1991*.

The scheme was established based on recommendations made by the Victorian Sentencing Advisory Council ('VSAC') in its 2016 report, *Sentencing Guidance in Victoria*.[331] While the Council preferred increased use of guideline judgments, it also presented advice about the form of standard sentence scheme that should be adopted should such a scheme be introduced.[332]

VSAC was asked for advice on legislative mechanisms for sentencing guidance in Victoria, and specifically to provide an alternative to the baseline sentencing provisions,[333] which the Victorian Court of Appeal had found to be 'incapable of being given any practical operation'.[334]

326 *Crimes (Sentencing Procedure) Act 1999* (NSW) s 54B(2).
327 *Sentencing: Interim Report* (n 323) [1.21].
328 Ibid [1.16].
329 NSW Sentencing Council, *Standard Non-parole Periods: Final Report* (2013) 3 citing the Second Reading speech in the NSW Parliament on 23 October 2002.
330 *Crimes (Sentencing Procedure) Act 1999* (NSW) s 54B(3).
331 Sentencing Advisory Council (Victoria), *Sentencing Guidance in Victoria* (Report, 2016).
332 Ibid.
333 A 2014 scheme introduced to set median prison sentence lengths for certain serious offences. It was repealed and replaced with the standard sentence scheme.
334 *DPP v Walters (a Pseudonym)* [2015] VSCA 303 (17 November 2015).

It was asked specifically to advise on 'the most effective legislative mechanism to provide sentencing guidance to the courts in a way that promotes consistency of approach in sentencing offenders and promotes public confidence in the criminal justice system'.[335]

The government's expectations at the time of the new scheme's introduction were that sentences would increase for standard sentence offences, 'bringing sentencing for the most serious offences in line with community expectations',[336] and also send 'a strong message to perpetrators that they can expect longer terms of imprisonment if they commit serious offences'.[337]

The standard sentencing scheme closely resembles the NSW defined-term SNPP scheme, but with the period set as the 'standard sentence' in this case applying to the setting of the head sentence, rather than to the setting of the NPP.

An offender aged 18 years or older who commits a prescribed offence on or after 1 February 2018 is subject to the standard sentencing scheme.[338] The court must consider the standard sentence when sentencing a person for 12 serious offences, including rape, sexual penetration of a child under the age of 16, sexual penetration of a child under the age of 12 and other sexual offences against children.

Consistent with the NSW model, the standard sentence operates as a 'legislative guidepost',[339] being the sentence for an offence that, taking into account only the objective factors affecting its relative seriousness, is in the middle of the range of seriousness.[340] In determining the objective factors, a court must consider only the nature of the offence and not the personal circumstances of the offender.[341] When sentencing a person under this scheme, the court must state how the sentence imposed on a standard sentence offence relates to the prescribed standard sentence.[342]

The standard sentence is just one factor to be considered by the court, alongside all other relevant sentencing principles and factors. The standard sentence is not more important than other factors, and it does not affect instinctive synthesis nor does it permit 'two-stage sentencing'.[343]

Courts must only have regard to sentences previously imposed for the offence if the standard sentence offence scheme applied to them.[344]

The standard sentence scheme also includes presumptive NPPs, which can be departed from if 'it is in the interests of justice' to do so.[345] For sentences of 20 years or more, the statutory NPP is 70 per cent and for sentences under 20 years, the statutory NPP is 60 per cent. The Victorian Court of Appeal has clarified that the standard sentencing scheme 'does not in any way diminish the importance of giving proper weight to mitigating factors' including 'the personal circumstances of the offender, his or her prospects of rehabilitation and, where appropriate, the need to give due weight to a plea of guilty (particularly if coupled with remorse)'.[346]

335 Parliament of Victoria, *Parliamentary Debates*, Legislative Assembly, 25 May 2017, 1508 (Martin Pakula, Attorney-General).
336 Ibid 1509.
337 Ibid.
338 *Sentencing Act 1991* (Vic) ss 5A, 5B.
339 *Brown v The Queen* (2019) 59 VR 462, 464–5 [4] ('*Brown*').
340 *Sentencing Act 1991* (Vic) s 5A(1)(b).
341 Ibid s 5A(3).
342 Ibid ss 5B(4)–(5).
343 *Brown* (n 339) [4], [44], [106].
344 *Sentencing Act 1991* (Vic) ss 5B(2)(b).
345 Ibid s 11A(4).
346 *Lockyer (a pseudonym) v The Queen* [2020] VSCA 321, [67] (Priest and Weinberg JJA).

Assessing the effectiveness of the standard non-parole period and sentences schemes

Reviews of the NSW SNPP scheme

The Judicial Commission of New South Wales reviewed the impact of the SNPP scheme on sentencing patterns in 2010.[347] It concluded that the scheme has 'generally resulted in greater…consistency in, sentencing outcomes' but has also had led to:

> an increase in the severity of penalties imposed and the duration of sentencing of full-time imprisonment. This is, in part, a result of the relatively high levels at which the standard non-parole periods were set for some offences. However, the study also found significant increases in sentences for offences with a proportionally low standard non-parole period to maximum penalty ratio.[348]

This evaluation occurred prior to the High Court's decision in *Muldrock v The Queen,*[349] which clarified that courts are not to give the SNPP 'primary, let alone determinative significance'.[350]

In 2012 and 2013, the NSW Sentencing Council and the NSW Law Reform Commission ('NSWLRC') both examined the SNPP scheme. One of the main criticisms was the 'absence of any consistent pattern in the relationship between the maximum penalties for the offences that are included in the SNPP Table and the SNPPs nominated for these offences',[351] and absence of transparency in relation to the reasons for which the individual SNPP offences were selected for the scheme, or in relation to the way in which the relevant SNPP levels were set'.[352]

When the NSWLRC examined the SNPP as a percentage of the maximum penalty, it found significant variation between offences. This included offences with the same maximum penalty having different SNPPs, and offences having the same ratio of SNPP to maximum penalty, despite one being the aggravated form of an offence.[353] The NSWLRC also noted that the 'proximity of the SNPP to the maximum sentence for some offences causes problems in applying the scheme and can result in sentencing outcomes that would be inconsistent with general sentencing practice'.[354]

Both bodies recommended retaining the scheme,[355] along with recommending changes to provide more structure to the scheme.

Review of the Victorian sentencing reforms

In 2021, VSAC reported on the impact of 3 sentencing reforms to sentences imposed from 2010 to 2019.[356] VSAC's review investigated the effect of: (1) the Category 1 classification of certain offences committed and sentenced on or after 20 March 2017; (2) the standard sentence scheme for relevant offences committed and sentenced on or after 1 February 2018; and (3) calls to uplift sentencing

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347 Patrizia Poletti and Hugh Donnelly, *The Impact of the Standard Non-Parole Period Sentencing Scheme on Sentencing Patterns in New South Wales* (Research Monograph 33, Judicial Commission of NSW, 2010).
348 Ibid 60.
349 *Muldrock* (n 325).
350 Ibid [26].
351 *Sentencing: Interim Report* (n 323) [2.5], [2.34].
352 Ibid [2.34].
353 Ibid Appendix A. For example, attempted murder has a maximum penalty of 25 years and an SNPP of 10 years (40%), compared with wounding with intent to do bodily harm which has the same maximum penalty of 25 years, but a SNPP of 7 years (28%), and sexual assault and aggravated sexual assault both have an SNPP ratio of 50% despite having a different maximum penalty. These differences remain today.
354 Ibid [2.11]–[2.13].
355 Ibid xi–xiii. The NSW Government adopted the recommendation made by the NSWLRC in that report.
356 Victorian Sentencing Advisory Council, *Sentencing Sex Offences in Victoria: An Analysis of Three Sentencing Reforms* (June 2021).

practices for incest offences in the *Dalgliesh* decisions by the High Court[357] and the Victorian Court of Appeal.[358]

VSAC reported that the standard sentencing scheme appeared to 'have had a tangible effect on the length of prison sentences imposed, as intended'.[359] Its analysis of sex offences found that in 2019 'the average prison sentences were uniformly longer for standard sentence offences of the relevant sex offences than for non-standard sentence versions of the same offences'.[360] VSAC thought this difference could be:

> due to the 'anchoring effect' arising from the numerical guidance provided by the standard sentence set for each offence or it could be due to courts being prohibited from considering sentencing practices in cases in which the offence was a non-standard sentence offence - or a combination of the two.[361]

For example, the average prison sentence imposed for rape in the higher courts in 2019, which carries a 10-year standard sentence, was 6 years and 8 months for standard sentence offences, and 5 years and 8 months for non-standard sentence offences (that is, offences committed prior to the commencement of the standard sentence provisions).[362]

VSAC found that of the offences examined, incest offences experienced the greatest shift in sentence lengths, resulting in longer prison sentences, with it being acknowledged that this offence was also subject to the most reform over the period examined (being classified as a standard sentence offence, directly impacted by the *Dalgleish* decisions, and the ability to charge incest as a course of conduct offence).[363]

VSAC also reported an increase in average prison sentences for some child sex offences that were non-standard sentence offences. It viewed this as being: 'likely, at least in part, due to the requirement that when sentencing non-standard sentence offences, courts consider all current sentencing practices … including sentences imposed for standard sentence offences'.[364]

While it found that each of the reforms appeared to have influenced sentencing practices for sexual offences, particularly against children, this might be a consequence of 'changing community expectations about, and judicial understanding of, the effect of sex offending on victims', not simply law reform.[365]

8.6.4 Stakeholder views

In our Consultation Paper, we invited feedback on:

- whether current forms of sentencing guidance are adequate to guide sentencing for rape and sexual assault, and any problems or limitations with these (Q.4); and
- whether current guidance for courts in deciding what type of sentencing order to make was appropriate and if any changes should be made (Q.14).

Many aspects of the feedback in response to the first question posed concerned principles and factors under section 9, and are discussed in section 8.4.8 above.

357 *Dalgliesh* (n 3).
358 *DPP v Dalgliesh (A Pseudonym)* [2016] VSCA 148; *DPP v Dalgliesh (A Pseudonym)* [2017] VSCA 360.
359 Victorian Sentencing Advisory Council (n 356) xii.
360 Ibid.
361 Ibid 78 [9.6].
362 Ibid 22.
363 Ibid xi.
364 Ibid 78 [9.7].
365 Ibid xii.

Feedback received about the use of specific forms of orders and guidance required with respect to this is discussed in **Chapter 11**.

As discussed in detail in **Chapter 5**, a number of aspects of sentencing were viewed as inadequate and there was a strong view by victim survivors and support and advocacy services that sentences are not sufficient given the significant harm caused by these offences, with calls for these to be increased.

Submissions and feedback received that specifically referred either to limiting discretion or calls not to do so are discussed below.

Submissions from victim survivor support and advocacy stakeholders

FACAA, in a preliminary submission, recommended 'mandatory minimum sentences for penetrative rapes of 10 years for first offences and up to 14 years for aggravating circumstances such as the victim being under the age of 12'.[366] In its submission in response to the consultation paper, it expressed strong support for Queensland's current repeat serious child sex offence scheme, but was concerned about the use of plea negotiations to avoid their application, submitting that

> there are too many ways around these mandatory minimum sentences. Public defenders or police prosecutors can make deals with the perpetrators to get charges downgraded, judges can downgrade charges to help get guilty pleas or because they feel the charge was too "harsh" there are several ways perpetrators can get around the mandatory life sentences. These loopholes need to be closed immediately to prevent these good and just laws going to waste.[367]

Reflecting comments made in its earlier submission it suggested: 'The very simple solution to [victim survivors' dissatisfaction with current sentencing levels] is to make a mandatory custodial sentence for anyone found guilty of a penetrative rape offence particularly against a child.'[368]

QSAN referred to victim-survivors and the community expecting 'offenders to serve their whole sentence or at least most of it' and told us that '[v]ictim-survivors are shocked to find out they may only serve a fraction of their sentence.'[369] They referred to only a small number of SVO declarations being made as contrary to victim-survivors' perceptions of these offences as being serious violent offences and suggested this evidence showed a need for 'a system that is transparent as possible about its decision making'.[370]

Respect Inc and the Scarlet Alliance referred to a consequence of mandatory sentencing being that it 'removes the ability to recognise intergenerational trauma experienced by Aboriginal & Torres Strait Islander people and would result in longer sentences for an already over-incarcerated population'.[371]

Submissions from legal stakeholders

LAQ cautioned against any further restrictions being placed on sentencing for sexual offences, telling us:

> 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.[372]

366 Preliminary submission 17 (Fighters Against Child Abuse Australia).
367 Submission 15 (Fighters Against Child Abuse Australia).
368 Ibid.
369 Submission 24 (Queensland Sexual Assault Network).
370 Ibid.
371 Submission 25 (Respect Inc and Scarlet Alliance).
372 Submission 23 (Legal Aid Queensland).

It submitted that: '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.'[373] It referred to existing examples as being 'mandatory life imprisonment for "repeat serious child sex offences", and serious violent offence declarations'.[374] Its strong view was that:

> 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.[375]

YAC similarly expressed strong opposition to mandatory sentencing, telling us:

> YAC does not support a prescriptive legislative response that implements mandatory sentencing to all types of sexual offences. It will result in sentences focused on deterrence and offenders serving a period of their sentence in prison. Imprisonment does not effectively reduce re-offending or contribute to meaningful rehabilitation.[376]

It considered judicial discretion was 'important to ensure the punishment reflects the broad spectrum of sexual offending behaviours balancing the mitigating and aggravating features of each case'.[377] YAC's view was that: 'Sentences must vary to reflect ‘differences related to the severity, frequency, and form of their use of violence.'[378]

These views were shared by Sisters Inside, which opposed the use of mandatory sentencing of any kind, advocating for judicial discretion to 'account for nuance, complexity and circumstance' in each case.[379]

ATSILS referred to the need to consider commitments under the National Agreement on Closing the Gap (NACTG),

> such that any proposed amendments to the existing regime do not inadvertently worsen progress towards targets to reduce incarceration rates of Aboriginal and Torres Strait Islander individuals and that, where possible and appropriate, opportunities are taken to improve the current regime to promote alternatives to incarceration.[380]

It noted that the causes of over-representation 'are complex and multi-faceted' but that: 'Appropriate consideration of such matters upon sentencing is consistent with the principles of individualised justice, proportionality in sentencing and substantive equality before the law.'[381]

The potential for 'extending mandatory sentencing and/or removing the ability for the judge to exercise discretion in relation to personal circumstances' was also raised by Legal Aid as a concern on the basis that it

> 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).[382]

Justice reform and advocacy bodies

The Justice Reform Initiative cautioned that mandatory sentencing or punitive sentences might have negative impacts across the system, including on victim survivors:

373 Ibid.
374 Ibid.
375 Ibid.
376 Submission 30 (Youth Advocacy Centre).
377 Ibid.
378 Ibid.
379 Preliminary submission 28 (Sisters Inside Inc).
380 Submission 28 (ATSILS).
381 Ibid.
382 Submission 23 (Legal Aid Queensland).

> more punitive sentencing regimes, systems of mandatory sentencing, and increasing maximum sentencing limits for particular offences increases the likelihood that an accused person will elect to plead not guilty to an offence. There is little value for an accused person to plead guilty in the hope of a reduced sentence where the relevant legislative sentencing provisions have been made more punitive. They will be more likely to robustly defend the charges and defence counsel are likely to cross examine victim witnesses with a view to undermining their credibility. This is likely to subject victims to further trauma. A more punitive sentencing regime is not a trauma-informed framework that will benefit victims of crime.

Subject matter expert interview participants

Legal stakeholders who participated in subject matter expert interviews told us that the retention of some degree of discretion was important.[383]

Some referred to the case law about factors relevant to considering if there are exceptional circumstances as being clear[384] and resulting in a consistent approach.[385] It was thought that a judge finding exceptional circumstances was 'close to an impossibility'[386] for rape offences.[387] The Council's data findings suggest this is the case with only 24 cases over the 18-year data period receiving a non-custodial penalty for rape (MSO) — and most of these involving offences people committed when they were a child.[388]

One practitioner interviewed described mandatory sentencing as being 'very difficult', with reference to the exceptional circumstances requirement and acknowledged that the impact of going to prison is significant.[389] Another practitioner thought the exceptional circumstances provision should be extended 'to all sexual offences, not just sexual offences committed against a child'.[390]

One participant expressed the view that while they would support

> mandatory supervision like mandatory probation … a mandatory custody … it just doesn't allow for the examples that people will come up with that do happen where clearly going to custody is not within anyone's best interest and doesn't really assist anyone.[391]

Another participant supported flexibility in sentencing: 'the greater the options the better the justice, I think. We can design penalties that meet the situation best when we have more options.'[392]

Consultation events

At the Brisbane consultation event,[393] some groups were strongly opposed to mandatory sentencing, due to concerns that judges need more flexibility to impose orders that are most appropriate in the circumstances of the case, not less – for example, by extending the availability of intensive correction orders and reforming suspended sentences of imprisonment. There was a view by some participants that sentencing should be individualised, given that the circumstances of every offence and the context in which it has occurred, as well as the circumstances of the person sentenced and the victim survivor, are different. An example was given where the victim might not be seeking a severe penalty in circumstances where the person being sentenced is remorseful and has accepted responsibility for their actions.

383 See, for example, SME Interviews 3, 6, 9.
384 SME Interviews 7, 10.
385 SME Interview 7.
386 Ibid.
387 SME Interview 13.
388 See Appendix 4 for more information.
389 SME Interview 8.
390 SME Interview 17.
391 SME Interview 25.
392 SME Interview 6.
393 Brisbane Consultation Event, 11 March 2024.

Similar comments were made by some participants at the Cairns consultation event, although overall they considered that most victim survivors are of the view that the sentences imposed do not sufficiently reflect the harm they have suffered and are seeking more punitive sentences.[394]

Representatives of organisations who worked with victim survivors across all consultation sessions noted that what victim survivors want and expect is different, and depends on the individual person. Some victim survivors are concerned about the length of sentence imposed and the person receiving a sentence as a punishment and deterrent, while for others, it may be more about the process and acknowledging the harm caused.

Some participants thought the completion of rehabilitation programs should be mandatory.[395]

At one of our online consultation events, a participant pointed to concerns about community safety, supporting a view by victim survivors that long periods of detention are required – especially where offences against children are concerned.[396] Another participant considered that a requirement for the person to serve at least 80 per cent of their sentence in custody would also go some way towards recognising the harm caused to victims by allowing the victim survivor more time to recover and build safety without concerns that the person might soon be released.[397] Others supported rehabilitation being the focus, noting the significant costs associated with imprisonment.[398]

Increasing the certainty of conviction and the consequences of this was viewed by one participant as more important from a deterrence perspective than increasing sentencing levels.[399] The observation was made that many states in the United States still have the death penalty, but this has not reduced rates of offending: 'People who do horrible things are not thinking rationally.'[400]

8.7 Structure of current offences and maximum penalties

8.7.1 Introduction

In the preceding chapters of the report, we discussed the broad range of conduct captured with the offence of sexual assault under section 352 of the *Criminal Code* (Qld), as well as the different types of penetrative conduct captured within the offence of rape.

The way offences are structured and the maximum penalties that apply are another form of sentencing guidance as they define the scope of conduct captured within specific offences or their aggravated forms, and the relative seriousness of specific forms of conduct in comparison to other types of conduct.

In this section, we consider the role of maximum penalties as a mechanism of sentencing guidance and differences between the approach in Queensland and in other jurisdictions regarding offence structure and maximum penalties.

8.7.2 The role of maximum penalties

The maximum penalty for an offence reflects the views of Parliament (and therefore the community) about the seriousness of that offence, relative to other offences. It must be taken into account when

394 Cairns Consultation Event, 21 March 2024.
395 Brisbane Consultation Event, 11 March 2024.
396 Online Consultation Event, 4 April 2024.
397 Ibid.
398 Ibid.
399 Online Consultation Event, 16 April 2024.
400 Ibid.

sentencing,[401] and sets 'the outer or upper limits of the punishment that is proportionate to the offence'.[402] The highest maximum penalty in Queensland is a life sentence, which applies to all types of rape and to sexual assault offences with a circumstance of aggravation charged under section 352(3).[403]

If the maximum penalty is changed, 'that is a significant matter for sentencing'.[404] Increasing maximum penalties could be a signal from Parliament to courts and the community that rape and sexual assault are considered more serious than they were previously and 'is an indication that sentencing levels for that offence should be increased'.[405]

As the maximum penalty is already life imprisonment for rape and aggravated sexual assault (*Criminal Code* (Qld) s 352(3)), there is no scope to increase the maximum penalty to achieve an uplift in sentencing practices.

However, for non-aggravated sexual assault, which has a maximum penalty of 10 years, and the aggravated form of sexual assault with a 14-year maximum penalty (*Criminal Code* (Qld) s 352(2)), changes could be made to increase the penalty that applies, with a likely increase in sentencing levels.

8.7.3 The UniSC findings

As discussed in **Chapter 7**, the findings from UniSC's research and community rankings of offence seriousness when we compared this with the median sentencing outcome, suggest that the maximum penalty does not align with community views of offence seriousness for these offences:

- Participants ranked sexual assault (non-aggravated) and sexual assault (aggravated, 14-year maximum) scenarios as more serious than a man breaking into a house at night taking property while the occupants were asleep (74.2% v 21.3% and 93.3% vs 3.4% respectively) (burglary, life imprisonment maximum).
- A sexual assault (aggravated, 14-year maximum) offence involving a teacher fellating a student was viewed as more serious by the community compared with a sexual assault (aggravated, life imprisonment maximum) against an adult woman forced to self-penetrate her vagina with a sex-toy (86.5% vs 7.9%).

This is evidence of the existence of a sentencing problem.

8.7.4 Problems with the structure of sexual assault

Inconsistencies in treatment of different non-consensual penetrative acts

A potential inconsistency exists between the treatment of penetrative acts captured within the offence of rape and indecent assaults charged and sentenced under section 352(2). This is because non-consensual fellatio (oral stimulation of the male genitals) performed on victim survivors would be charged and sentenced under section 352(2), to which a lower 14-year maximum penalty applies. In contrast, penetrative acts involving mouth to genital contact charged as rape (involving the penetration of victim's

401 PSA (n 55) s 9(2)(b); *Sentencing Act 1991* (Vic) s 5(2)(a); *Sentencing Act 1995* (WA) s 6(2)(a); *Sentencing Act 1995* (NT) s 5(2)(a).
402 Sentencing Advisory Council (Victoria), *Maximum Penalties: Principles and Purposes—Preliminary Issues Paper* (2010) vii. See also *Ibbs v The Queen* (1987) 163 CLR 447, 451-2.
403 *Criminal Code* (Qld) (n 75) s 352(3).
404 *R v Stable* (n 57) 14 [37] (Sofronoff P, and Fraser and Philippides JJA agreeing).
405 See also *Muldrock* (n 325) 133 [31].

vulva, vagina or anus by the perpetrator's mouth or tongue) carries a maximum penalty of life imprisonment. The objective seriousness of both types of conduct could reasonably be assessed as equivalent, as they both involve the violation of the victim's autonomy, bodily and sexual integrity and sexual identity by an offender involving similar types of conduct.

This highlights a potential gendered difference between male and female victim survivors. A male victim's experience of having their genitals taken into the mouth of a perpetrator without consent (an act of compelled oral penetration) is treated as a less-serious form of offending than conduct involving penetration of a female victim survivor, given the significant difference in maximum penalties.

Inappropriate emphasis being placed as to whether similar acts involve 'actual' penetration

The current structure of the offences of sexual assault and conduct captured within section 352(2) also could be criticised as placing undue emphasis, both at trial and in the course of plea negotiations, on determining whether there was 'actual penetration' (i.e. the tongue in the vagina or anus), which would support a conviction for rape.[406] From a victim's perspective, this may be immaterial to their experience.

Impact on sentencing practices

There is little doubt that the way acts of non-consensual fellatio and cunnilingus are classified under the *Criminal Code* (Qld) impacts on the sentences imposed. Courts must sentence in accordance with the lower 14-year maximum penalty that applies to such conduct charged under section 352(2) compared with rape, which carries a maximum penalty of life imprisonment:

- Although there were an insufficient number of cases of oral rape (coded for our purposes to include penile-mouth and lingual-vaginal or lingual-anal rapes)[407] involving adult victim survivors, the median custodial sentence for child victim oral rape cases was 4.0 years (with the assumption that the median sentence for offences against adult victim survivors would have been lower).
- In comparison, the median custodial sentence for aggravated sexual assault offences charged under section 352(2) was 1.5 years.

As Callaghan J commented in *R v Mogg*,[408] the existence of this statutory regime

> does not mean that there is a sharp dividing line between the sentencing range applicable to….sexual offences punishable by 14 years imprisonment and that which is applicable in cases of rape … it is nonetheless always essential to acknowledge the significance of the maximum penalty and in particular the fact that the element of penetration creates a regime with a higher maximum penalty of life imprisonment.[409]

The Women's Safety and Justice Taskforce's recommendations

Relevant to this review, the Women's Safety and Justice Taskforce ('Taskforce') found the law in Queensland was 'currently sending inconsistent and confusing messages about when children have the capacity to consent to sexual activity'.[410]

406 See, for example, *R v Silcock* (2020) 4 QR 517, where there was extensive discussion during the trial as to whether licking the victim survivor's clitoris constituted penetration.
407 There were no lingual-anal rapes in the 3 years of data analysed.
408 *R v Mogg* [2024] QCA 125, [41] (Callaghan J, dissenting as to the outcome).
409 Ibid [41]–[42].
410 Women's Safety and Justice Taskforce, *Hear Her Voice – Report Two: Women and Girls' Experiences Across the Criminal Justice System* (2022) vol 1, 212.

In its 2022 report, the Taskforce recommended that Chapter 22 (Offences against morality) and Chapter 32 (Rape and sexual assaults) should be reviewed and amended where necessary to ensure that the *Criminal Code:*

- treats the capacity of children aged 12 to 15 years old to consent to sexual activity in a way that is trauma informed and consistent with community standards;
- addresses sexual exploitation of children and young people aged 12 to 17 years old by adults who occupy a position of authority over those children; and
- provides internal logic across the two chapters so that the applicable maximum penalties reflect a justifiable scale of moral culpability.[411]

Some reforms recommended by the Taskforce were progressed in the *Criminal Justice Legislation (Sexual Violence and Other Matters) Amendment Act 2024* (Qld) by the former government, although the amendments to the *Criminal Code* (Qld) are yet to be proclaimed. They include:

- the introduction of a new standalone offence in the *Criminal Code* (Qld) under a new section 210A 'Sexual acts with a child aged 16 or 17 under one's care, supervision or authority'; and
- the introduction of a second limb to the existing offence of 'Repeated sexual conduct with a child' in section 229B of the *Criminal Code* (Qld).

The proscribed acts for the purposes of these new provisions were modelled on the physical elements of the offences of rape, engaging in penile intercourse with a child under 16, and indecent treatment of a child under 16.[412] The rape equivalent conduct under the new standalone offence will be subject to a 14-year maximum penalty, while other acts of indecent assault and gross indecency will carry a maximum penalty of 10 years. The maximum penalty for the new limb of section 229B will be life imprisonment.

The stated intention of the amendments is 'to capture and deter members of the community who may use the influence, trust and power that is vested in them when a young person is under their care, supervision or authority', thereby providing 'a protective function for young people over the age of consent but under the age of 18 years'.[413]

What other jurisdictions do

The approach in Queensland is in contrast to that in several other Australian and international jurisdictions. For example, in NSW, SA, WA, the ACT and the NT, rape (or its equivalent) is defined to include not only acts of penile–vaginal, penile–anal and penile–oral penetration, or penetration of the vagina or anus by another body part or object, but also fellatio and cunnilingus.[414]

In Western Australia, the offence of 'sexual penetration without consent'[415] includes engaging in fellatio and cunnilingus even if there is no penetration.[416] The definition applies regardless of which party performs which aspect of the sexual act.

The Western Australian Law Reform Commission recently completed a review of sexual offences and recommended both forms of conduct continue to be regarded as sexual penetration without consent:

411 Ibid 216, rec 42.
412 Explanatory Notes, Criminal Justice Legislation (Sexual Violence and Other Matters) Amendment Bill 2024 (Qld) 5.
413 Ibid 4.
414 See Appendix 15.
415 *Criminal Code Act Compilation Act 1913* (WA) sch ('*Criminal Code* (WA)') s 325 (Sexual penetration without consent). Separate offences are established for offences against children (see ss 320 and 321).
416 Ibid s 319 (definition of 'to sexually penetrate').

The accused performs an act of non-penetrative oral sex (i.e., fellatio or cunnilingus) on the complainant;

The accused substantially causes the complainant to perform an act of non-penetrative oral sex on the accused.[417]

In Victoria, of the offence of 'rape by compelling sexual penetration', which has the same maximum penalty as rape (25 years), includes indecent assaults performed on a male victim involving non-consensual acts of fellatio.[418]

Maximum penalties

The maximum penalties for sexual penetration without consent offences also vary by jurisdiction.[419]

While in some jurisdictions these offences attract a maximum penalty of life imprisonment (such as in the NT, SA, and NSW for aggravated sexual assault in company), there is significant variation by jurisdiction. For example, in Victoria the maximum penalty is 25 years for rape and sexual penetration with a child under 12, while the ACT and WA have tiered penalties ranging from 12 years in the ACT and 14 years in WA for a non-aggravated offence and up to 18 years in the ACT and 20 years in WA for certain aggravated forms.[420]

Maximum penalties in the international jurisdictions examined similarly vary from life imprisonment in England and Wales, Scotland and Canada (for certain aggravated sexual assaults only) to 20 years in New Zealand down to 10 years in Canada for non-aggravated forms of sexual assault (which includes non-consensual penetrative conduct) and even lower on summary conviction.

For more information, see **Appendix 15**.

The Model Criminal Code Committee recommendations

The Model Criminal Code Officers Committee made recommendations regarding the framing of an offence of unlawful sexual penetration (in place of 'rape') and the definition of 'sexually penetrate', which also would have the effect of acts of fellatio performed on a male victim falling within the new 'rape' offence.[421] This is because the Committee recommended that 'sexually penetrate' includes an act involving penetration (to any extent) of the mouth of a person by the penis of a person' (without specifying who is the victim and who is the perpetrator).

The Committee recommended that the maximum penalty for unlawful sexual penetration should be 15 years for a 'basic' offence and 20 years for an 'aggravated offence'.[422] The Committee's recommended circumstances of aggravation were that the offence involved the use or threatened use of a weapon, was committed by the person in the company of another person, was committed during torture, was committed in circumstances involving the victim being caused 'serious harm' or threatened with serious harm or death, was committed against a child under the age of consent, or was committed against a person in abuse of a position of trust or position of authority.[423]

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417 Law Reform Commission of Western Australia, *Sexual Offences: Final Report* (Project 113, October 2023) 186 ('*Sexual Offences: Final Report*').
418 *Crimes Act 1958* (Vic) s 39.
419 See Christopher Dowling et al, *National Review of Child Sexual Abuse and Sexual Assault Legislation in Australia* (Australian Institute of Criminology, 2024).
420 The Western Australian Law Reform Commission recommended the maximum penalties be increased for penetrative and non-penetrative sexual offences against adults and children: *Sexual Offences: Final Report*, recs 116 - 121.
421 Model Criminal Code Officers Committee of the Standing Committee of Attorneys-General, *Model Criminal Code – Chapter 5: Sexual Offences Against the Person Report* (May 1999) 5.2.1. Queensland was not represented on the Committee.
422 Ibid 5.2.6.
423 Ibid 5.2.36.

8.8 The Council's view

8.8.1 Key findings

Key Finding

6. **Legislative sentencing guidance is not adequate and requires enhancement**

Existing forms of legislative sentencing guidance regarding principles and factors under the *Penalties and Sentences Act 1992* (Qld) are not adequate and require enhancement to:

- reinforce that sexual violence offences committed against children are more serious due to the higher level of harm experienced by child victim survivors and the greater culpability of perpetrators in targeting a vulnerable victim; and
- respond to issues identified in this report regarding the use of 'good character' evidence.

See **Recommendations 1, 2 and 5**.

Taking into consideration the information and evidence gathered, we have concluded that existing forms of legislative sentencing guidance regarding principles and factors under the PSA are not adequate and require enhancement to:

- reinforce that sexual violence offences committed against children are more serious due to the higher level of harm experienced by child victim survivors and the greater culpability of perpetrators in targeting a vulnerable victim; and
- respond to issues identified in this report regarding the use of 'good character' evidence.

We discuss our reasons regarding the need to reinforce the seriousness of sexual assault and rape offences and our recommendation for reform below.

Issues regarding the use of 'good character' evidence are explored in **Chapter 9.**

Key Finding

7. **Current sentencing purposes do not adequately recognise the harm caused to victim survivors**

The current purposes of sentencing under section 9(1) of the *Penalties and Sentences Act 1992* (Qld), while broad, do not adequately recognise the need to hold the perpetrator accountable for harm done to the victim survivor and to promote in the perpetrator a sense of responsibility for, and acknowledgement of, that harm as an important aspect of sentencing.

See **Recommendation 2**.

The Council has further concluded that while the current sentencing purposes under section 9(1) of the PSA are broad, they do not adequately recognise victim harm as an important aspect of sentencing (**Key Finding 7**).

We note existing provisions within section 9 of the PSA require courts to consider not only the harm to the victim, and any victim impact statement, but the surrounding contextual factors of the offending that

may also speak to the experience of harm.[424] While the operation of these provisions aims to ensure that victim harm is acknowledged in the sentencing process, in our view legislating to make recognition of victim harm an express purpose of imposing sentence will enhance its visibility for both the judiciary and the community at large.

We acknowledge that this finding goes beyond sentencing purposes that apply to sexual assault and rape offences, but we consider this change justified given the importance of recognition of victim harm in imposing sentence. We discuss our reasons in more detail below.

In **Chapter 7** we also found evidence that sentencing outcomes for sexual assaults are inadequate due to how offence seriousness is determined and the current structure of the offence (**Key Finding 5**).

We note the structure of offences and the maximum penalties that apply to different forms of conduct can impact sentencing outcomes in significant ways. It also has the potential to impact community confidence in circumstances where the scope of offences is broad capturing a wide spectrum of conduct, but with the same maximum penalty applying to all forms of that conduct.

8.8.2 Introduction of a new aggravating factor for offences against chidlren

Recommendation

1. Sentencing guidance reforms – new aggravating factor for offences against children under 18 years

The Attorney-General and Minister for Justice progress amendments to section 9 of the *Penalties and Sentences Act 1992* (Qld) to require a court to treat the fact an offence of rape or sexual assault was committed in relation to a child as aggravating.

Such amendments should be progressed in the context of a broader review of section 9 (see **Recommendation 3**).

As discussed in **Chapter 7**, we have concluded that penalties imposed for rape are not adequate due to the failure to reflect the seriousness of this form of offending and the important purposes of sentencing, including punishment, denunciation and community protection – particularly as these relate to offences against children (**Key Finding 4**).

With respect to offences against children, we found that sentencing levels do not match the higher level of seriousness with which the community views these offences. In particular, as discussed in **Chapter 7**, the digital–vaginal rape of a child was ranked by a majority of participants of the UniSC's community views research as being more serious than every other type of rape conduct committed against adult victim survivors. This included an in-company rape offence involving two counts of rape.

We also found the community viewed an offence of aggravated sexual assault involving a 16-year-old male victim as more serious than other offences carrying higher maximum penalties and resulting in higher sentences.

We consider the best way to explicitly acknowledge that a victim is more vulnerable and a person is more culpable for the offending if the victim is under 18 years is to require a court to treat the fact that an offence of rape or sexual assault was committed in relation to a child as aggravating. Importantly, it is an

[424] For any offence, a court must take into account 'the nature of the offence and how serious the offence was, including … any physical, mental or emotional harm done to a victim': PSA (n 5) s 9(2)(c)(i). In particular, for an offence of violence, see ss 9(3)(c)–(e) and for an offence of a sexual nature committed in relation to a child under 16 years, see ss 9(6)(a), (c).

option that can simultaneously achieve symbolic recognition, limit complexity, and maximise judicial discretion and legislative consistency.

Applying the Council's fundamental principles

Applying the Council's fundamental principles guiding the review[425] to the issues raised in considering sentencing guidance and to address **Key Finding 6** guided us in making a recommendation:

- **Principle 1: Reforms to sentencing laws should be evidence-based with a view to promoting public confidence:** The Council has drawn on findings from community views research, data analysis, observations sentencing submissions and remarks, appeal decisions, past reviews and research, as well as extensive consultation. We have found that while sentencing practices reflect current sentencing principles and case authorities, current sentencing levels for rape and sexual assault appear to be out of step with community views of offence seriousness as these relate to offences against children.[426]
- **Principle 3: Sentencing outcomes for sexual assault and rape offences should reflect the seriousness of these offences, including their impact on victims, while not resulting in unjust outcomes.** We are mindful that median sentences for rape generally have remained stable over the past 18 years.[427] While the PSA provides primary sentencing principles and factors for where the victim is a child under 16 years, our research of current sentencing trends in the last 3 years of data, when custodial sentence lengths for rape of a child are compared to rape of an adult by conduct type, the increase or 'premium' that offences against children attract appears relatively modest.[428] While there are a large number of potentially relevant case features that might be used to explain the sentencing trends, at an aggregate level the data suggests that without legislative reform, sentencing levels for offences against children cannot be expected to increase. It is clear to us that a sentencing 'uplift' is required for offences committed against children. In our view, higher sentences for rape and sexual assault of child victims are warranted given the improved understanding of the significant long-term impacts of child sexual abuse. While the court must take into account any 'effect of the offence on a child under 16 years'[429] and 'any physical harm or the threat of physical harm to the child' under 16 years,[430] creating an aggravating factor recognises a child under 18 is vulnerable and this increases the culpability of the perpetrator, which should mean the person receives a higher sentence while retaining judicial discretion.
- **Principle 5: Sentencing inconsistencies, anomalies and complexities should be minimised.** This recommendation is only intended to apply to sexual assault and rape sentenced under the PSA.[431] We acknowledge section 9(10A) of the PSA also recognises the higher level of seriousness of offences committed in the context of a family relationship by requiring a court to treat the fact an offence is a domestic violence offence as aggravating unless it is not reasonable because of the exceptional circumstances of the case.[432] We consider this is a conceptually different consideration to an aggravating factor based on a victim's vulnerability because of their age and

425 For a full list of the fundamental principles, see Chapter 3.
426 For a discussion on UniSC findings see Chapter 7, section 7.4.1.
427 As discussed in Appendix 4.
428 See Chapter 7, section 7.3.1.
429 PSA (n 5) ss 9(2)(c)(ii), 9(6)(a).
430 Ibid s 9(6)(c).
431 No similar provision is recommended to be inserted into the YJA (n 42).
432 See also *R v MDZ* [2024] QCA 139 [16] (Dalton JA, Bradley and Hindman JJ)

it will apply in all cases of sexual assault and rape involving a child under 18 years, regardless of the relationship. Similar to the operation of section 9(10A) of the PSA, as its own subsection it will complement other sentencing considerations and does not need to be a 'primary' factor listed in subsection 9(3) or 9(6).[433] Its aim is to ensure consistency in the approach of all judicial officers to the aggravating effect of a victim to sexual assault or rape being a child.

- **Principle 6: Reforms should take into account the likely impacts on the disproportionate representation of Aboriginal and Torres Strait Islander peoples in the criminal justice system.** The potential impacts on Aboriginal and Torres Strait Islander persons as defendants and victims are considered. It is envisaged this reform will benefit child victim survivors. It may impact changing sentencing outcomes for those sentenced for these offences where the child is a victim.
- **Principle 7: The circumstances of each person being sentenced, the victim survivor and the offence are varied. Judicial discretion in the sentencing process is fundamentally important.** While it does not increase maximum penalties, the aggravating factor would operate in cases of sexual assault where the ordinary statutory presumption against imprisonment applies. This recommendation would complement existing sections 9(3) and 9(6) (although it would not be considered a 'primary' factor) but would operate in a similar way to section 9(10A) of the PSA. Judicial discretion would be retained, and the factor would permit a thorough consideration and weight to be given to this factor. As with any aggravating factor, the degree of weight to be given to it will depend on the quality of evidence establishing it as well as its relevance in a given case.
- **Principle 10: Any reforms should aim to be compatible with the rights protected and promoted under the *Human Rights Act 2019* (Qld) ('HRA') or be reasonably and demonstrably justifiable as to limitations.** The Council considers a new aggravating factor may limit the right not to be deprived of liberty in section 29 of the HRA because a more severe sentence may be imposed. When considering the nature of the limitation, we consider it make clear to the community that offences of sexual assault and rape involving a child under 18 years will be treated by courts in sentencing as more serious, thereby serving an important communicative function. It will also promote the protection of children under section 26(2) of the HRA. Although it limits a right, this is justifiable as it is one of many considerations that will be relevant in any given sentence proceeding.

We do not recommend an exceptional circumstances exception should apply

Legislated aggravating factors can be subject to a qualification that these apply 'unless it is not reasonable because of the exceptional circumstances of the case'.[434] We acknowledge there can be legitimate reasons for providing for this legislative exception to avoid any unintended consequences of a mandatory aggravating factor.[435]

In this case, we are concerned that to legislate the new aggravating factor with such an exception would be to accept that there will be cases in which it would be unjust or unfair to treat acts of rape and sexual assault committed against a child as being more serious. We disagree with this proposition.

433 See PSA (n 5) ss 9(3), (6).
434 Ibid ss 9(9C), (10A), (10F) cf s 9(9B).
435 See, for example, ibid s 9(10A): the aggravating factor may not apply where the victim of the offence has previously committed an act of serious domestic violence, or several acts of domestic violence, against the offender or it is manslaughter under section 304B under the *Criminal Code* (Qld).

This is not to suggest that we consider all cases should be treated alike or that the aggravating factor should be applied a blunt fashion. As with other legislated aggravating factors, such as section 9(10A) of the PSA:

> the application of the amending sentencing principles in the sentencing discretion 'may' result in a more punitive sentence than may have occurred prior to the amendments, it remains that the sentencing discretion must be exercised having regard to the individual circumstances of the case.[436]

We acknowledge, for example, that there could be circumstances where an offender may not have reasonably known a victim was under 18 years, where a person's behaviour was affected by a mental illness, or where a person may be young and immature, meaning their culpability is reduced.[437] Such circumstances may mean it is appropriate to give less weight to the aggravating factor rather than that it should be given no weight at all.

Applying an aggravating factor to child victims and not adults

As discussed in **Chapter 7**, we do not consider that there is the same need to legislate to address issues we have identified with sentencing levels for rape offences against adults.

In limiting our recommendation to sexual assault and rape committed against a child, we acknowledge that many victim survivors and sexual assault services with whom we met who made submissions did not consider sentences for rape and sexual assault involving adult victims to be adequate or appropriate in light of the significant harm caused by this form of offending. We have sought to respond to these concerns in other sections of this report, including with respect to:

- elevating the recognition of victim harm as an express purpose of sentencing (**Recommendation 2**);
- providing courts with guidance regarding the permitted uses of 'good character' evidence, limiting its use to where this is linked to assessing the person's prospects of rehabilitation or the risks they pose to the community (**Recommendation 5**);
- reforms to the current range of sentencing orders available to courts to ensure appropriate levels of supervision to reduce risks of reoffending (**Recommendation 8**);
- creating a presumptive scheme where people sentenced for rape and aggravated sexual assault serve a greater proportion of their head sentence in custody (between 50 and 80%) prior to being eligible for parole by making changes to the current serious violent offences scheme (**Recommendation 10**); and
- enhancing the resources available to judicial officers and legal practitioners to inform sentence (**Recommendations 6.1 and 6.2**), ensuring training and resources for prosecutors and criminal defence practitioners promotes recognition of the objective seriousness of this form of offending and the significant impacts it has on victim survivors (**Recommendations 19 and 20**), and ensuring judicial officers have access to ongoing professional development focused on sexual violence (**Recommendation 18**).

As highlighted in **Key Finding 3** discussed in **Chapter 7** of this report, we also acknowledge that unhelpful distinctions are often made when determining offence seriousness based on the type of conduct alone,

436 See *RBO* (n 104) [119]–[120] (Henry J, Mullins P and Brown JA agreeing) citing *Pham* (n 108) [7].
437 As to the impact of a person's mental illness on a court's assessment of culpability, see *Verdins* (n 184); *Tsiaras* (n 184); *Yarwood* (n 184).

contrary to a clear direction by the Queensland Court of Appeal that the seriousness of each individual case must be determined based on its own particular circumstances.[438]

This reflects the tendency of prosecutors and defence practitioners in making submissions on sentence to rely on comparative cases involving the same type of rape conduct (for example, cases involving digital–vaginal rape of an adult in making submissions on sentence in a case involving a digital–vaginal rape) rather than focusing on other factors relevant to the assessment of offence seriousness. This appears to have resulted in the development of accepted sentencing 'ranges' based on penetration type alone, with other considerations, such as victim vulnerability, being treated as secondary considerations.

The Court of Appeal has provided clear guidance that such 'compartmentalisation' of rape conduct is to be avoided.

Given the significant impact this current approach has on sentencing levels for rape, we have identified a need for the current focus on conduct type as the principal or a primary determinant of offence seriousness as an issue that should be monitored over time following the delivery of this report (see **Recommendation 7**). Our intention is to enable a change in practice to occur in response to Court of Appeal guidance rather than recommending a short-term legislative 'fix' that, in practice, would be very difficult to implement. Further, the additional step of recommending changes to legislation in our view should only be taken where it is not possible to achieve the desired change to sentencing practice without legislative reform.

The development and enhancement of existing resources for prosecutors, defence practitioners and judicial officers is also important in support of these practice changes. We discuss this further in **Chapter 10**.

Systemic disadvantage considerations

Sentencing guidance can play an important role in the sentencing of Aboriginal and Torres Strait Islander persons in directing courts to consider the complex experiences of intergenerational trauma and other cultural considerations that are relevant to their offending.

We considered sentencing outcomes in cases sentenced for rape (MSO) from 2020–21 to 2022–23 by Aboriginal and Torres Strait Islander status and non-Indigenous status where the victim was a child.[439] While Aboriginal and Torres Strait Islander people are over-represented (17.4%, n=70/403),[440] we found no significant difference in the proportion of cases involving a child victim when compared with non-Indigenous people sentenced (45.7%, n=32 for Aboriginal and Torres Strait Islander person; 51.2% n=170 for non-Indigenous persons).[441] We also found no significant difference in the proportion of people receiving a custodial penalty based on Aboriginal and Torres Strait Islander status[442] or any difference in the type of penalty type outcomes imposed.[443] ATSILS was concerned that any proposed amendments 'do not inadvertently worsen progress towards targets to reduce incarceration rates of Aboriginal and

438 See *R v Wark* [2008] QCA 172 [2] (McMurdo P) [13]–[14] (Mackenzie AJA), [36] (Cullinane J), referred to with approval in *R v Wallace* [2023] QCA 22, 5 [13] (Bowskill CJ). See also *R v RBG* [2022] QCA 143, [4] (Dalton JA) referring to *R v Smith* [2020] QCA 23, [34]–[37] (Morrison JA).

439 See Appendix 4. This analysis was not undertaken for sexual assault as the number of people sentenced where the victim was child was too small for analysis (n=21 non-Indigenous; n=3 Aboriginal and Torres Strait Islander status).

440 Aboriginal and Torres Strait Islander status was not known for one person.

441 Pearson's Chi-Square Test: $\chi 2(2)=1.70$, $p=0.4264$, V=0.06.

442 Some 93.8 per cent of Aboriginal and Torres Strait Islander people sentenced for rape of a child (MSO) received a custodial penalty, compared with 97.1 per cent of non-Indigenous people sentenced for rape of a child (MSO). Pearson's Chi-Square Test: $\chi 2(1)=0.88$, $p=0.3478$, V=-0.07.

443 Pearson's Chi-Square Test: $\chi 2(5)=1.79$, $p=0.8772$, V=0.09.

Torres Strait Islander individuals'.[444] Based on our analysis, we do not anticipate any further disproportionate impact on Aboriginal and Torres Strait Islander persons among those sentenced for sexual assault and rape of a child to be significant.

Members of the Council's Aboriginal and Torres Strait Islander Advisory Panel supported the aggravating factor as this recognises a child victim is more vulnerable and highlighted the longevity of trauma experienced by a child victim. They also considered important the way recognition of victim harm and perpetrator accountability is communicated and given effect to in sentencing, with a view to ensuring this is done in a culturally safe and appropriate way for both victim survivors and those sentenced for such offences. In **Chapter 15**, we discuss the importance of language and communication in the context of sentencing.

Human rights considerations

Any reforms to section 9 to the extent that they goes beyond a re-statement of the current position at common law need to be considered in light of the right to protection against the operation of retrospective criminal laws. Significantly, the Court of Appeal has considered that amendments to section 9 of the PSA are generally procedural in nature as opposed to substantive and thus apply to a person as at the time of sentence as opposed to when the offence was committed.[445]

An aggravating factor may limit the right of a person not to be deprived of liberty[446] because it directs courts to treat offences committed with these features as being more serious, potentially justifying a more severe sentence being imposed. Including an exception may moderate the potential for any unfair impacts.

To the extent that the new aggravating factor may be viewed as limiting a person's right not to be deprived of liberty, we consider it to be reasonably justified. It is important that sentencing laws protect the rights of children not to be subjected to acts of rape and sexual assault and that the seriousness of this conduct is appropriately recognised in the sentences imposed. Further, courts will retain discretion to determine the appropriate sentence, taking into account all the facts and circumstances of the case.

Other options considered, but not recommended

The Council considered several other options, including:

- **Option 1:** insert additional factors to sections 9(3) and 9(6) of the PSA which expressly acknowledge denunciation and the recognition of victim harm are primary sentencing considerations. For example, insert 'The need to denounce the conduct of the offender and recognise any harm caused to the victim, including any psychological or emotional harm' and/or modify section 9(6)(b) to add the words 'and their vulnerability' after 'the age of the child'.

444 Citing commitments under the National Agreement on Closing the Gap. Submission 28 (Aboriginal and Torres Strait Islander Legal Service) 2.
445 See *R v Truong* [2000] 1 Qd R 663 ('*Truong*'); *Hutchinson* (n 97).
446 HRA (n 316) s 29.

- **Option 2:** insert a new subsection in section 9 with primary sentencing principles when sentencing a person for sexual assault and rape, following the approach used in Victoria which includes express statements of Parliament's intent with respect to certain matters.[447]
- **Option 3:** insert a list of aggravating factors in section 9 of the PSA to direct courts to treat specific factors as aggravating, such as the age and vulnerability of the child; whether there was an abuse of trust or a parental or protective relationship; whether there was more than one victim; the physical and psychological effect of the offence on the child; whether there was evidence of emotional blackmail or other manipulation.

Option 1 would apply to more offences than just sexual assault and rape.

Option 2 would act as a legislative restatement of principles otherwise recognised under case law in Queensland and/or in other jurisdictions and would be intended to operate alongside other principles and factors. It would address concerns that courts do not adequately reflect the harm caused by these offences in sentencing outcomes.

Option 3 was informed by other jurisdictions including Tasmania and New Zealand and would largely reflect the aggravating factors in *R v SAG*[448] and *R v BBY*.[449] The purpose is to direct courts to treat specific factors as aggravating and therefore, over time, to increase sentences.

The Council does not consider that these options offer the best solution, as there is a real risk of them simply being viewed as declaratory, rather than making a clear statement about the seriousness of these offences in a way that is likely to achieve an uplift in sentencing levels. They are also likely to contribute even more complexity to an already very complex section.

As the Council considers that there needs to be a complete review of section 9 of the PSA (discussed below), we consider **Recommendation 1** to insert an aggravating factor that the victim was a child is the more appropriate mechanism to simultaneously achieve symbolic recognition that recognises the vulnerability of child victims, limit complexity and maximises judicial discretion and legislative consistency until a further review of section 9 is undertaken.

8.8.3 Recognition of victim harm in the purposes of sentencing

Recommendation

2. **Recognition of victim harm in the sentencing purposes**

The Attorney-General and Minister for Justice progress amendments to section 9(1) of the *Penalties and Sentences Act 1992* (Qld) to include recognition of the harm done to victim survivors.

Such amendments should be progressed in the context of a broader review of section 9 (see **Recommendation 3**).

The Council has concluded that while the current sentencing purposes under section 9(1) of the PSA are broad, they do not adequately recognise the need to hold the perpetrator accountable for harm caused

447 See, for example, section 37B of the *Crimes Act 1958* (Vic), which sets out guiding principles to which courts must have regard in interpreting and applying provisions relating to the offences of rape and sexual assault, as well as other sexual offences, and sections 5(2GA), 5(2I) 10A(3) *Sentencing Act 1991* (Vic) which provides guidance on Parliament's intention regarding the application of specific sections of that Act.
448 (2004) 147 A Crim R 301.
449 [2011] QCA 69.

done to the victim survivor and to promote in the perpetrator a sense of responsibility for, and acknowledgement of, that harm as an important aspect of sentencing (**Key Finding 7**). We therefore recommend that amendments be progressed to section 9(1) of the PSA to include recognition of the harm done to victim survivors as an important aspect of sentencing.

As noted earlier, this recommendation goes beyond sentencing purposes that apply to sexual assault and rape offences, however we consider this change justified given the importance of recognition of victim harm in imposing sentence.

Applying the Council's fundamental principles

Applying the Council's fundamental principles guiding the review, we determined such a change was consistent with these principles including:

- **Principle 1: Reforms to sentencing laws should be evidence-based with a view to promoting public confidence**: While many legal stakeholders did not see a need to expand current sentencing purposes, the clear view of victim survivors and victim support and advocacy organisations was that victim harm needs to be more clearly recognised throughout the sentencing process. The references made by judicial officers on sentence to victim harm also perform an important function in communicating the wrongfulness of the person's actions and, in doing so, provides victims 'with public vindication of their rights and an acknowledgment both of the wrong done to them and the harm they have suffered'.[450]
- **Principle 2: Sentencing decisions should accord with the purposes of sentencing as outlined in section 9(1) of the PSA**: While not an existing sentencing purpose, recognition of victim harm can be viewed as closely related to other sentencing purposes, such as just punishment and denunciation.
- **Principle 3: Sentencing outcomes for sexual assault and rape offences should reflect the seriousness of these offences, including their impact on victim survivors, while not resulting in unjust outcomes**: The proposed reform will encourage greater recognition of the impact of sexual assault and rape on victim survivors while preserving judicial discretion.
- **Principle 5: Sentencing inconsistencies, anomalies and complexities should be minimised:** To the extent that sentencing purposes encourage consistency of approach in sentencing, the inclusion of a new sentencing purpose may promote consistent reference being made to victim harm as an important aspect of sentencing. While some courts might mention this as a feature of punishment and/or denunciation, this is not uniformly the case.
- **Principle 6: Reforms should take into account the likely impacts on the disproportionate representation of Aboriginal and Torres Strait Islander peoples in the criminal justice system:** The potential impacts on Aboriginal and Torres Strait Islander persons as defendants and victims are considered below. It is envisaged this reform will benefit victim survivors while having a minimal impact in terms of changing sentencing outcomes for those sentenced for these offences.

450 Warner, Davis and Cockburn, (n 208) 80. This comment was made in the context of research on current sentencing practices, with the authors finding denunciation often sought to highlight this and other aspects, thereby going 'beyond symbolism'.

- **Principle 7: The circumstances of each person being sentenced and offence are varied. Judicial discretion in the sentencing process is fundamentally important**: The inclusion of recognition of victim harm as a sentencing purpose will not limit a court's ability to take the personal circumstances of the person being sentenced into account and is consistent with the principles of individualised justice.
- **Principle 10: Any reforms should aim to be compatible with the rights protected and promoted under the HRA or be reasonably and demonstrably justifiable as to limitations**: Given that victim harm is a matter that is already required under section 9(2)(c) of the PSA to be taken into account on sentence for all offences, we do not consider this reform will result in any limitations on a person's human rights. In any case, the Council considers elevating recognition of victim harm to a sentencing purpose is reasonable and justifiable under the HRA, taking into account that sexual assault and rape, in particular, result in significant infringements on the human rights of victim survivors (see **Chapter 7** and **Key Finding 1**).
- **Principle 11: The Council will, as far as possible, ensure consistency with previous positions and recommendations**: During our earlier review of sentencing for child homicide, we advised that no changes were required to the sentencing purposes under section 9(1) of the PSA.[451] This advice was provided in the context of that review and partly out of concern it would create a specialist approach to sentencing for child homicide when similar issues might apply to other offences of violence.[452] Different issues have been raised during the current review and, for this reason, we consider a departure from our earlier position is justified. During that earlier review, we also suggested that there is some benefit to be gained in the sentencing remarks articulating the purpose or purposes of sentencing, given that these are an important means of communicating to the offender, and the broader community, the purposes for which the sentence is being imposed to promote public confidence and understanding of sentencing. This remains our position.

Different legislative models

We considered the merits of adopting the Canadian approach, which might better articulate the concept of 'denunciation' by making a clearer connection under the PSA between denunciation and recognition of victim harm. Relevantly, section 718 of the Canadian *Criminal Code* expresses as a sentencing purpose 'to denounce unlawful conduct and the harm done to victims or to the community that is caused by unlawful conduct'.

Denunciation reflects the moral outrage of the community regarding the harm caused by offending.[453] Expressly linking these concepts would have the advantage of not only promoting greater visibility of victim harm, but further clarifying the concept of denunciation itself in a way that is accessible for the community at large. However, equally, this express linking may be unnecessary and might limit the consideration of victim harm to the concept of denunciation instead of enabling it to operate in support of other sentencing purposes, such as just punishment. In contrast to Queensland, in Canada, punishment is not an express legislated purpose of sentencing.

451 Queensland Sentencing Advisory Council, *Sentencing for Criminal Offences Arising from the Death of Child* (October 2018) Advice 1.
452 Ibid 49.
453 *O'Sullivan* (n 31) 202–3; 242–3 [145]–[146] (Sofronoff P, Gotterson JA, Lyons SJA).

The New Zealand model, discussed below, provides another example of how victim harm might be coupled with the concept of perpetrator accountability and acknowledgment of that harm.

Whatever model is ultimately preferred by government, we acknowledge the importance of the statement of legislative sentencing purposes, whatever form is adopted, being framed in a way that promotes community understanding by reflecting contemporary views and language, ensuring they remain relevant rather than solely 'the domain of philosophers and rhetoricians'.[454]

Systemic disadvantage considerations

As the court is required to take into account the harm caused to victims under section 9(2)(c) of the PSA, we do not anticipate the impact on the disproportionate representation of Aboriginal and Torres Strait Islander persons among those sentenced for sexual assault and rape to be significant.

This recommended approach is in contrast to the alternative approach (discussed below) of elevating certain purposes as 'primary sentencing considerations', which may change the assessed relevance of specific sentencing factors and the weight given to these factors in an individual case.

Members of the Council's Aboriginal and Torres Strait Islander Advisory Panel supported recognising victim harm as a sentencing purpose, further acknowledging that the purposes of sentence in an individual case are likely to be mixed: 'You want to try and rehabilitate the person for the crime committed to stop them from reoffending, but also to punish them for the harm caused to the victim. There is a lot of healing required.'[455] The Panel considered that, 'The overarching question should be: "How can we ensure public safety and what will be effective in achieving rehabilitation to stop people from offending?"'[456]

In addressing the adequacy of the current purposes, ATSILS submitted that emphasis should be placed on rehabilitation and addressing offenders' underlying trauma and noted a paucity of services in this area.[457] ATSILS also sought to emphasise the importance of imposing sentences that align with principles of 'individualised justice, proportionality in sentencing and substantive equality before the law'.[458]

Participants in the Cairns consultation observed that denunciation carries significant weight for Indigenous communities and is therefore more effective when offenders are sentenced in the community in which they live. Stakeholders more generally noted the need for better communication with Aboriginal and Torres Strait Islander peoples, as both offenders and victim survivors, and for greater cultural sensitivity.

Also considered important was the way recognition of victim harm and perpetrator accountability is communicated and given effect to in sentencing, with a view to ensuring this is done in a culturally safe and appropriate way for both victim survivors and those sentenced for such offences. In **Chapter 14** and **Chapter 15**, we discuss the importance of language and communication in the context of sentencing.

Human rights considerations

The current sentencing purposes represent high-level guidance to sentencing courts, and thus have limited interaction with the provisions of the HRA, which operate more to safeguard specific rights.

454 Warner, Davis and Cockburn, (n 208).
455 Aboriginal and Torres Strait Islander Advisory Panel meeting, 18 April 2024.
456 Ibid.
457 Submission 28 (Aboriginal and Torres Strait Islander Legal Service) 4.
458 Ibid.

Beyond the existing purposes, any reform of section 9 of the PSA to an extent that goes beyond a reflection of the current position would need to be considered in light of the right to protection against retrospective criminal law (including that a penalty must not be imposed for an offence than is greater than the penalty that applied to the offence when it was committed).[459] Significantly, the Court of Appeal has considered that amendments to section 9 of the PSA are generally procedural in nature as opposed to substantive and, as such, apply to a person as at the time of sentence as opposed to when the offence was committed.[460]

Greater recognition of victim survivors' experiences in the sentencing process is consistent with the right enshrined within the Charter of Victims' Rights to be treated with 'courtesy, compassion, respect and dignity, taking into account the victim's needs'.[461] Victims survivors' rights and the Council's recommendations for reform are discussed in **Chapter 13** and **Chapter 14**.

Other options considered

In considering the need for reform, the Council considered several options including:

- **Option 1:** recommending no change be made to the current sentencing purposes, given the broader application of these sentencing purposes across all offences;
- **Option 2:** acknowledging community harm as an element of, and related to, the existing sentencing purpose of denunciation.
- **Option 3:** acknowledging perpetrator accountability as a purpose of sentencing

Option 1: Recommending no change

We considered whether to recommend no change to sentencing purposes, having regard to the existing provisions within section 9 of the PSA, which require courts to consider not only the harm to the victim and any victim impact statement, but also the surrounding contextual factors of the offending that may also speak to the experience of harm.[462] While the operation of these provisions aims to ensure that victim harm is acknowledged in the sentencing process, we found that recognition of victim harm as an express purpose of sentencing enhances its visibility for both the judiciary and the community at large.

Option 2: Recognition of harm to the community

As discussed above in section 8.5.9, jurisdictions that recognise victim harm as a sentencing purpose also incorporate recognition of the harm caused to the broader community.

In Queensland, the definition of a 'victim' for the purposes of the making of a victim impact statement[463] allows for parents, caregivers and family members of a sexually victimised adult or child to be recognised as victims in their own right. In this way, the PSA recognises that the harm arising from an offence is broader than just the harm experienced by the direct victim of the offence.

The Council acknowledges that sexual offending has significant costs and consequences for the broader community. The harms of such offending extend beyond those that can be quantified (such as lost

459 HRA (n 316) s 35. See also *Criminal Code* (Qld) (n 75) s 11.
460 See *Truong* (n 445); *Hutchinson* (n 97).
461 *Victims' Commissioner and Sexual Violence Review Board Act 2024* (Qld) sch 1.
462 For any offence, a court must take into account 'the nature of the offence and how serious the offence was, including … any physical, mental or emotional harm done to a victim': PSA (n 5) s 9(2)(c)(i). In particular for an offence of violence see s 9(3)(c)–(e) and for a sexual offence committed in relation to a child under 16 years see ss 9(6)(a), 9(6)(c).
463 *Victims of Crime Assistance Act 2009* (Qld) s 5; PSA (n 5) s 179I.

productivity, costs to the social or health system), which can undermine efforts to achieve gender equality and the full participation of women in economic and public life.[464]

These broader community impacts can be even more pronounced for some victim-survivor groups, compounded by the effects of discrimination, racism and other historical factors.[465] For example, for Aboriginal and Torres Strait Islander women, sexual assault and abuse, and family violence have been identified as major causes of family and community breakdown and social fragmentation, compounded by the effects of colonisation and racism.[466]

The Supreme Court of Canada, in *R v Friesen*,[467] referred to the real risk that sexual violence against children can 'fuel a cycle of sexual violence that results in the proliferation and normalization of the violence in a given community'.[468] It acknowledged '[w]hen children become victims of sexual violence, "[s]ociety as a whole is diminished and degraded"'.[469]

While we do not discount the significant impacts of sexual offending on the community, given that our review is focused on just two offences, and that any reforms will apply to all offences sentenced under the PSA, we consider this aspect of recognition of harm to the community requires further consideration and consultation.

For the purposes of our current review, it may be that the broader impacts of rape and sexual assault on the community can be thought of as a reason to ensure a 'strongly deterrent sentencing response'[470] and for appropriate just punishment alongside denunciation, while not expressly stated as a sentencing purpose. We further acknowledge that the far-reaching consequences of offending, quantifying and articulating the harm to the community may prove challenging.

Option 3: Perpetrator accountability

The Council notes some jurisdictions have holding perpetrators to account and promoting accountability as a separate sentencing purpose.

We agree this is a critical part of the sentencing process for sexual violence offences. Informed by New Zealand's approach, **Key Finding 7** links recognition of victim harm to both 'hold the offender accountable for harm done to the victim and the community by the offending' and 'promote in the offender a sense of responsibility for, and an acknowledgment of, that harm'. This provides a potential model as to how both recognition of victim harm and encouraging the person being sentenced to take responsibility for that harm might be accommodated within any reframed purposes.

We note the objective of promoting accountability of the person for their actions is also arguably captured within the existing sentencing purpose of 'just punishment'.

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464 World Health Organization, *'Violence against women'* (Web page 25 March 2024) <https://www.who.int/news-room/fact-sheets/detail/violence-against-women>.

465 Australian Institute of Health and Welfare, *'Family, domestic and sexual violence'* (Web page, updated 19 July 2024) < https://www.aihw.gov.au/family-domestic-and-sexual-violence/types-of-violence/sexual-violence#impacts>.

466 Ibid.

467 *R v Friesen* [2020] 1 SCR 424.

468 Ibid [64] referencing the report of the Standing Senate Committee on Human Rights, *The Sexual Exploitation of Children in Canada: The Need for National Action* (November 2011) 10, 30, 41.

469 Ibid quoting *R v Hajar* [2016] ABCA 222, 39 Alta. L.R. (6th) 209 [67].

470 See *R v MJJ; R v CJN* [2013] SASCFC 51, 117 SASR 81, [84] (Kourakis CJ).

8.8.4 Other issues with section 9 and the need for a review

Recommendation

3. Review of section 9 of the Penalties and Sentences Act 1992 (Qld)

The Attorney-General and Minister for Justice ask the Council, the Department of Justice or another appropriate entity to undertake a review of the principles and factors set out in section 9 of the *Penalties and Sentences Act 1992* (Qld) to ensure section 9 and related provisions of the Act provide a clear and coherent sentencing framework for courts and to promote community understanding of sentencing.

In addition to the issues discussed above, and the use of 'good character' evidence discussed in **Chapter 9**, we have identified several examples of inconsistencies and anomalies in the application of current sentencing factors in section 9 as well potential gaps in the identification of factors that might be important in sentencing for sexual violence offence.

Ultimately we have determined that further additions and changes should not be made until such time as there has been a comprehensive review of this section.

As the primary source of sentencing guidance, section 9 of the PSA has been a convenient focus of law reform since it was first introduced in 1992, and in the last 32 years, the sentencing factors in this section have been amended, created, repealed or reintroduced on 29 separate occasions. Currently, it comprises 11 pages with 24 subsections (**Appendix 11**).

Legal stakeholders told us the length and complexity of section 9 is increasingly becoming a problem. They were of the view that any additional reforms to respond to the issues we identified during this review would further contribute to a section that is already complex and lengthy.

As discussed in section 8.4.6, while such amendments may be made on a well-reasoned basis to respond to changes in community views and issues identified by parliament requiring further statutory guidance, frequent and numerous changes can make the law difficult to navigate and understand.[471] This can create an unnecessary burden on the criminal justice system, impact efficiency by resulting in delays or unnecessary appeals and impact public confidence.[472]

We agree that 'public confidence is diminished when the process of sentencing, and the law applicable to it, is inaccessible and incomprehensible'.[473]

It is important, in our view, that section 9 of the PSA, as the primary source of legislative sentencing guidance in Queensland, be reviewed to ensure that it provides a useful, clear and coherent sentencing framework for courts in sentencing. This is important both to promote consistency of approach and to promote community understanding of sentencing, which are an important objectives of the Act.[474]

We therefore have concluded that a broader review of section 9 is needed to ensure the sentencing principles and factors in section 9 are appropriate and support the PSA to meet its intended purposes both now, and into the future before any further amendments are made.

471 *The Sentencing Code* (n 88) 7 [1.15].
472 Ibid 8–9 [1.16] – [1.21].
473 Ibid 11 [1.32].
474 PSA (n 5) ss 3(d) and (h).

Applying the Council's fundamental principles

Applying the Council's fundamental principles guiding the review[475] has guided us in making a recommendation that section 9 of the PSA be reviewed:

- **Principle 1: Reforms to sentencing laws should be evidence-based with a view to promoting public confidence:** As discussed above, an important purpose of the PSA is to provide for sentencing principles designed to promote a consistent approach by courts to the sentencing of offenders and to promote public understanding of sentencing practices and procedures. We have heard from legal stakeholders that section 9 is becoming increasingly complex, lengthy and unwieldy. It has also been acknowledged that the language used may be difficult for community members to understand. A review of this section will ensure the objectives of the Act can better be met.
- **Principle 5: Sentencing inconsistencies, anomalies and complexities should be minimised.** The aim of a review of 9 should be to ensure that the principles contained in section 9 provide a useful, clear and coherent sentencing framework for courts. As discussed below, although our review was confined to the principles as these apply to sexual assault and rape, we have found examples of inconsistencies and anomalies in the interpretation and application of relevant sentencing factors. There are also potential inadequacies in the way primary sentencing factors that must be applied for specific purposes, such as under section 9(3), are currently framed.
- **Principle 7: The circumstances of each person being sentenced, the victim survivor and the offence are varied. Judicial discretion in the sentencing process is fundamentally important.** The Council recognises that the circumstances of each person being sentenced, each victim and each offence, are varied. A review of section 9 will consider whether the principles contained in section 9 are appropriately flexible to meet the varied circumstances of offences, each person sentenced and the victim survivor, and maintains judicial discretion.
- **Principle 10: Any reforms should aim to be compatible with the rights protected and promoted under the HRA or be reasonably and demonstrably justifiable as to limitations.** A review of section 9 could support rights protected under the HRA by ensuring that existing and newly added principles contained in section 9 are compatible with human rights or to the extent that rights are limited, these limitations are reasonable and demonstrably justified.
- **Principle 11: The Council will, as far as possible, ensure consistency with previous positions and recommendations.** In our previous review of community-based sentencing orders, imprisonment and parole options, we recommended that section 9 of the PSA should be reviewed by the Council or by another appropriate entity to consider whether the current legislative exceptions to the principles set out in section 9(2)(a), including under subsections (2A) and (4), are appropriate and should be retained.[476] We recommended that this review should occur if the Council's recommended reforms to community-based sentencing orders (including the proposed introduction of a new intermediate sanction, a 'community correction order', or CCO) were to be adopted.

475 For a full list of the fundamental principles, see Chapter 3.
476 Queensland Sentencing Advisory Council, *Community-based Sentencing Orders Imprisonment and Parole Options: Final Report* (2019) rec 2.

In the following sections we identify some of the issues we have identified during this review and reforms considered.

An offence of personal violence: application of section 9(2A) indecent assaults

As a result of our review, we found there is inconsistent application of section 9(2A) of the PSA when sentencing indecent assaults charged under section 352 of the *Criminal Code* (Qld).[477]

While we recognise the benefit and need for a broad definition for an offence of 'personal violence', particularly in circumstances where there is a wide range of conduct and the consequences of such a finding increase the likelihood of imprisonment, our view is that all indecent assaults, whether accompanied by additional acts of physical violence or not, are by their very nature offences 'which involve the use of … violence against another person'.[478] However, we do not consider displacement of the principle of imprisonment as a sentence of last resort is appropriate when sentencing for all such assaults. For this reason, we do not recommend that amendments be made to section 9(2A) to automatically bring all indecent assaults within its scope.

It is evident to us that in many cases of sexual assault (non-aggravated), the existence of a legislative presumption that the person should be sentenced to imprisonment (or rather eroding of the principle that a sentence of imprisonment should not be imposed unless absolutely necessary) will serve little practical purpose, and might actually contribute to the person being at greater risk of reoffending. Particularly where the person is young and has no criminal history, and the nature and seriousness of the offence do not require actual imprisonment, the availability of alternative community-based options that involve conditions such as counselling, a requirement to participate in programs and supervision might offer better long-term outcomes in terms of community safety than a short sentence of immediate imprisonment or a wholly suspended prison sentence.[479] Further, a longer period of supervision on probation, rather than a short period under parole supervision, is likely to be more conducive to promoting rehabilitation.[480]

It remains our view that alternatives to imprisonment that can be better tailored to the individual circumstances of the person being sentenced and their risk factors, while ensuring these orders also meet other purposes of sentencing, including denunciation, community protection and just punishment, should be explored (see **Recommendation 8**).

Amending sections 9(4)–(6A) to apply to an offence of a sexual nature against a child aged 16 and 17

Consistent with **Recommendation 1**, the vulnerability of the child victim of rape or sexual assault in our view requires special recognition.

Currently, section 9(6) sets out primary factors to which a court must have regard when an offence is committed against an offence of a sexual nature committed in relation to a child victim aged under 16 years. Sections 9(4) and 9(6A) also set out special principles that a court must apply when sentencing a person for these offences.

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477 For example, see *Singh* (n 52) and *Biswa* (n 43).

478 PSA (n 5) s 9(2A)(a).

479 See *R v Rogan* [2021] QCA 269, [16]–[18]: 'A very short term of imprisonment can have large effects. Apart from the stigma which imprisonment carries, it may affect present and future employment, housing arrangements and all kinds of financial arrangements. The effects of prison extend to whatever experiences are undergone in prison, which may occur even within a short period. Consequently, the imposition of a very short term of imprisonment is not just a matter of the loss of liberty for a particular period. … an actual period of imprisonment is not always required in cases [of non-aggravated sexual assault]'.

480 See Day, Ross and McLachlan (n 187).

We considered whether those subsections should be extended to also apply to offences committed against children aged 16 and 17 years. The adoption of this broader definition of who is a 'child' for these purposes would have the benefit of being consistent with the approach taken by other Queensland legislation that has a protective focus, such as the CPOROPO Act. It would also be consistent with the definition of who is a 'child' for the proposes of the *Youth Justice Act 1992* (Qld)[481] ('YJA') – taking into account the extension of the principles under this Act to children aged 17 was made on the basis that: 'Children and young people's neurological and cognitive development is immature and incomplete to a degree.'[482] We also acknowledge amendments proposed to be made to the *Criminal Code* (Qld) will establish new specific sexual offences that apply to children in this older age category, recognising that children of this age are still highly vulnerable to this form of sexual violence and the impacts can be greater than for adults victim survivors.[483]

While we support greater recognition of the vulnerability of child victims aged 16 and 17, and the objective of reducing any inconsistency in the law regarding the protection of children, we have ultimately determined changes should not be made to extend the operation of sections 9(4)–(6) of the PSA. We are particularly concerned about the potential impacts of extending section 9(4)(c) of the PSA which would require the court to impose a sentence of actual imprisonment, unless there are exceptional circumstances, to cases of non-aggravated sexual assault in circumstances where the person might be young and have no prior history of offending. As discussed above, we are concerned in this case that the existence of a legislative presumption that the person must be sentenced to serve an actual term of imprisonment unless there are exceptional circumstances, may be counterproductive and contribute to the person sentenced being at even greater risk of reoffending.[484]

We have fewer concerns about the application of the primary sentencing principles and factors set out in section 9(6), or of section 9(6A) regarding the treatment of 'good character' as, in our view, these principles and factors are equally as relevant in cases involving sexual offences committed against older children as they are in cases of offences committed against children under 16 years.

However, in our view, it is better for a broader review to be undertaken rather than to make these provisions even more complicated by applying some subsections of section 9 to some offences only, which would involve a more substantial redrafting exercise.

Elevation of denunciation and recognition of victim harm as primary sentencing considerations under sections 9(3) and 9(6) of the PSA

As discussed above, we considered as an alternative to **Recommendation 2** or in addition to **Recommendation 1** recommending that denunciation and recognition of victim harm be included in the list of primary sentencing considerations set out in sections 9(3) and 9(6) of the PSA.

A Bill introduced to Parliament similarly proposes to amend the YJA to provide that:

> (1AB) In sentencing a child for an offence, a court must have primary regard to any impact of the offence on a victim, including harm mentioned in information relating to the victim given to the court under the *Penalties and Sentences Act 1992*, section 179K.[485]

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481 Both adopt the definition of 'child' as a person under 18 years: *Acts Interpretation Act 1954* (Qld) sch 1. *Youth Justice and Other Legislation (Inclusion of 17-year-old Persons) Amendment Act 2016* (Qld).

482 Explanatory Notes, Youth Justice and Other Legislation (Inclusion of 17-year-old Persons) Amendment Bill 2016 (Qld) 1.

483 *Criminal Justice Legislation (Sexual Violence and Other Matters) Amendment Act 2024* (Qld) ss 8–9 inserting into the *Criminal Code* (Qld) a new s 210A: sexual acts committed against children aged 16 years or older who are under the person's care, supervision or authority and 229B(1A).

484 See n 479 with reference to the impacts of short terms of imprisonment citing *R v Rogan* [2021] QCA 269 [16]–[18].

485 Making Queensland Safer Bill 2024 (Qld) cl 15.

As we have recommended a change to sentencing purposes, and that a broader review of section 9 is warranted, we ultimately determined that separate recognition of victim harm and denunciation as primary sentencing considerations in the context of the operation of these subsections may be unhelpful and unnecessary until a broader review can be undertaken.

We also note that the application of these provisions extends beyond sentencing for the two offences of rape and sexual assault and may benefit from further consultation.

Primary factors in section 9(3) of the PSA

A secondary concern we identified was that the factors listed in section 9(3) of the PSA are framed in a way that places a strong focus on the existence and reduction of the risk to members of the community of physical violence, rather than the concern to protect community members (most usually women and girls) from psychological and emotional harm that is more relevant in the case of sexual assault and rape.

While we might have been inclined to recommend changes to the existing factors in section 9(3) of the PSA, as discussed above, it is our view that no further changes should be made at this time. Our concern with the number of 'add ons' and modifications made to section 9 of the PSA over time is that they have significantly complicated this section and made its application increasingly difficult. A review of section 9 could adopt a more holistic review of the principles and factors that apply to all offences.

Serious vilification and hate crimes

We note there recent amendments have come into effect establishing a circumstance of aggravation under section 52B of the *Criminal Code* (Qld), which applies if the offender was wholly or partially motivated to commit the offence by hatred or serious contempt for a person or group of person in relation to race, religion, sexuality, sex characteristics or gender identity. These reforms, when legislated, were not extended to the offence of sexual assault or other sexual offences.

We considered whether to recommend extending the new circumstance of aggravation to rape and sexual assault, or including this as an aggravating factor under the PSA, but decided not to do so, noting that the Legal Affairs and Safety Committee on its report on the amendment Bill recommended that

> the Queensland Government conducts a review within 24 months of the commencement of the Bill to ensure that the offences to which the circumstance of aggravation apply are adequate to address the serious vilification and hate crimes experienced by members of the Queensland community, with particular consideration to be given to the inclusion of sexual offences and property crimes such as graffiti.[486]

It is better in our view for the operation of the new circumstance of aggravation to be reviewed before any recommendations are considered for its extension.

The absence of a legislated circumstance of aggravation or aggravating factor does not, however, prevent a court from taking relevant factors into account in the proper exercise of a court's sentencing discretion. This includes sexual offending, which is motivated by hate or, for example, by misogynistic attitudes and beliefs.

Other issues

We know sexual violence can occur in the workplace, which increases a victim's vulnerability due to a power imbalance and may make reporting difficult.[487]

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486 Legal Affairs and Safety Committee Report (n 84).
487 Submission 19 (Basic Rights Queensland).

We note the recent introduction of sections 9(10E)–(10G) of the PSA providing an offence is aggravating if it occurs in the context of the victim's employment,[488] which was legislated in response to a previous recommendation made by the Council.[489] For the aggravating factor to apply, the offence must be one sentenced under section 9(2A) of the PSA.

Due to the recent introduction of these provisions, we do not yet know their impact, but we note sexual assault is not consistently sentenced under section 9(2A). This may be a barrier to the application of this new aggravating factor but, as for offences motivated by hatred or serious contempt for a person or group, a court can consider this factor as aggravating despite this not being legislated.

We also do not consider it necessary to further define what constitutes 'exceptional circumstances' for the purposes of section 9(4) of the PSA as a reason to depart from the requirement to impose actual imprisonment for a sexual offence against a child under 16 years.

Similarly, we do not consider there is sufficient evidence to justify expanding section 9(4)(a), which requires a court to have regard to the sentencing practices, principles and guidelines applicable when the sentence is imposed rather than when the offence was committed against an adult victim and we received very little feedback on this issue to suggest the absence of such a provision was impacting current sentencing outcomes.

ATSILS recommended we consider whether to legislate the principle in *Bugmy* that 'the effects of profound childhood deprivation do not diminish with the passage of time or repeat offending'.[490]

As our Terms of Reference were limited to two offences of sexual assault and rape, we consider this would require further investigation.

Should our recommendation that section 9 be comprehensively reviewed be accepted (**Recommendation 3**), these issues can be considered further.

8.8.5 The structure of sexual assault (section 352, *Criminal Code* (Qld))

Recommendation

4. **Structure of the offence of sexual assault (*Criminal Code* (Qld) s 352)**

The Attorney-General and Minister for Justice continue the review of Chapter 22 (Offences Against Morality) and Chapter 32 (Rape and Sexual Assaults) of the *Criminal Code* (Qld) in response to recommendation 42 of the Women's Safety and Justice Taskforce, *Hear Her Voice – Report Two: Women and Girls' Experiences Across the Criminal Justice System* (2022).

The review should further include consideration of whether:

- the structure of conduct captured within section 352(1) is too broad and should instead be structured in a way that better distinguishes different forms of non-aggravated sexual assault with the potential for graduated penalties to be applied;
- the conduct under section 352(2) is appropriately categorised as a lesser form of aggravated offending, particularly with respect to male victims of what would otherwise constitute rape if the victim were forced to perform the same act (fellatio) on the perpetrator;
- conduct in section 352(3) involving self-penetration or being forced to penetrate another person should constitute a separate offence.

488 *Respect at Work and Other Matters Amendment Act 2024* (Qld) s 70.
489 Queensland Sentencing Advisory Council, *Penalties for Assaults of Public Officers: Final Report* (2020) recs 10–11 ('*Penalties for Assault of Public Officers*').
490 *Bugmy* (n 135) 572 (French CJ, Hayne, Crennan, Kiefel, Bell and Keane JJ). See Submission 28 (Aboriginal and Torres Strait Islander Legal Service Inc) 5–6.

Taking community views into account, in conjunction with our own assessment of the objective seriousness of sexual assault and how it is categorised in other jurisdictions, we recommend a review of the current structure of the offence of sexual assault.

Specific problems we have identified include the following:

- The breadth of conduct captured ranges significantly in terms of both seriousness and the type of acts captured. This has potential to undermine community confidence in sentencing levels when what appear to be very low sentences are imposed for an offence that varies in seriousness from a momentary touching of an adult victim's buttocks over clothing to a person rubbing their exposed penis on a victim's bare genitals.
- The treatment of non-consensual fellatio performed by a perpetrator on a male victim as aggravated sexual assault, which has a 14-year maximum penalty, when compared to penile-oral rape, which carries a maximum penalty of life imprisonment is anomalous. In contrast to Queensland, this conduct is treated as equivalent to rape conduct in the ACT, NSW, SA, the NT and WA. In Victoria, this falls within the offence of 'rape by compelling sexual penetration', which carries the same maximum penalty as rape (25 years) (see further **Appendix 15**).
- Inconsistencies exist between the structuring of sexual assault in Queensland the approach adopted in some other jurisdictions, which separates acts involving self-penetration or being forced to penetrate another person as a separate offence. For example, conduct involving a victim compelled or forced to penetrate themselves is captured in SA within the offence of rape (life imprisonment), in Victoria under the offence of 'rape by compelling sexual penetration' (25 years) and in WA as 'sexual coercion' (14 years).

While it is beyond scope of this review to consider changes to the substantive criminal law in Queensland, as discussed in **Chapter 7**, we acknowledge developments in jurisdictions such as Canada to not distinguish between penetrative and non-penetrative sexual acts in the structure of their offences or, as discussed above, to include acts that are currently defined as 'sexual assault' in Queensland under section 352(2) as forms of 'sexual intercourse' falling within rape offence equivalents. These developments signal a clear and intentional move away from a focus on the act involved to an assessment of culpability of the person responsible and the nature and level of harm caused, taking into account the significant infringement involved of a victim survivor's human rights.

We note work underway in response to the Women's Safety and Justice Taskforce's recommendations and suggest that work in response to the Taskforce's report and issues raised should continue with an expansion in scope to consider issues during this review with respect to the offence of sexual assault.

Further, while not identified as a specific problem, we note that the extent to which circumstances of aggravation increase the maximum penalty that would otherwise apply to offences in the *Criminal Code* (Qld) are inconsistent, which may also lead to sentencing issues. For example, the circumstances of aggravation for sexual assault (s 352(3)) are having or pretending to have a weapon or being in company, and they increase the maximum penalty for conduct that would otherwise attract a maximum penalty of 10 years' or 14 years' imprisonment to life imprisonment. In contrast, for the offence of assault occasioning bodily harm, the same factors are also circumstances of aggravation but they only increase the maximum penalty by 3 years (from 7 years' to 10 years' imprisonment).[491] For burglary, those circumstances, as well as the fact that the person committed the offence at night, used or threatened to

491 *Criminal Code* (Qld) s 339.

use actual violence, or damaged or threatened to damage property, increase the usual 14-year maximum penalty to life imprisonment. This is beyond the scope of the Council's current Terms of Reference; however, these variations may lead to sentencing inconsistencies.

As part of an earlier review, the Council declined to recommend changes to the maximum penalty of 14 years that applies to aggravated serious assault on the basis that:

> the classification of offences and setting of statutory maxima – as a general proposition – is best undertaken as a holistic exercise. This enables an assessment to be made of the seriousness of individual offences and conduct captured relative to other similar offences and is therefore more likely to promote a penalty framework that is internally consistent and coherent.[492]

This remains our position.

The appropriate maximum penalties that should be applied will depend on the overall structure of offences and conduct captured within them. We have undertaken a review of offence provisions in other jurisdictions as required under the Terms of Reference to inform this consideration (see **Appendix 1**).

We are further aware that the ALRC is undertaking a separate inquiry into justice responses to sexual violence. While the focus of this review is not on the structure of relevant offence provisions, there may be opportunities to leverage off this work and discussions that may follow at a national level to better harmonise laws with respect to this form of conduct.

The ALRC is due to provide its final report to the Attorney-General by 22 January 2025.

492 *Penalties for Assaults on Public Officers* (n 489) xxvii, 207.

Chapter 9 – Evidence of 'good character' in sentencing for sexual offences

9.1 Introduction

The Terms of Reference ask us to review sentencing practices for sexual assault and rape.[1] They require us to consider several things when undertaking our review, including the need to: protect victims; hold those who commit these offences to account; maintain judicial discretion; and promote public confidence in the criminal justice system. These principles have helped guide our approach to the question of what role, if any, 'good character' evidence should play in sentencing for sexual assault and rape offences and its permitted uses.

In this chapter, we examine the use of 'good character' evidence in sentencing for sexual offences.[2] We discuss the current approach to the use of this evidence, what we mean by 'good character', and how this evidence can be relevant to sentencing. We consider how courts take this evidence into account, both generally and specifically, when sentencing for sexual assault and rape as well as what happens in other jurisdictions. We also present our key findings and recommendation for reform for the use of 'good character' evidence in sentencing in Queensland.

Our recommendation is broader that just the use of this form of evidence for sexual assault and rape. This is in response to a specific request that we 'have regard to the use of good character evidence in sentencing for sexual offences and, if appropriate, recommendations for reform'.[3]

9.2 The current approach

The *Penalties and Sentences Act 1992* (Qld) ('PSA') requires a court to consider the character of the person being sentenced in determining sentence.[4] A person's 'character' is one of the factors to which a court must have primary regard if the offence involved the use (or threatened use) of violence, physical harm, sexual offending against a child under 16 or a child exploitation material offence.[5] The PSA also requires a court to have to regard to 'the presence of any aggravating or mitigating factor concerning the offender'.[6] A person's 'otherwise good character' is an established mitigating factor at common law.[7]

1 Appendix 1, Terms of Reference.
2 Evidence of 'good character' can also be raised during a trial which is a separate issue. Our discussion of 'good character' in this section is confined to sentencing and we do not make any recommendation in respect to its use in trials. For further information on how 'character' evidence is used in a trial, see: *Evidence Act 1977* (Qld) s 15; Supreme Court of Queensland, 'Good character/Bad Character' in *Supreme and District Courts Criminal Directions Benchbook*, (March 2017) 42.1–2 <https://www.courts.qld.gov.au/court-users/practitioners/benchbooks/supreme-and-district-courts-benchbook>; *Melbourne v The Queen* (1999) 198 CLR 1 ('*Melbourne*').
3 Letter from The Hon Yvette D'Ath MP (Attorney-General and Minister for Justice) to the Hon Ann Lyons AM (Chair, Sentencing Advisory Council, 25 September 2024.
4 *Penalties and Sentences Act 1992* (Qld) ('PSA) ss 9(2)(f), (3)(h), (6)(h) with the exception in (6A), (7)(d) with exception in (7AA).
5 Ibid ss 9(3)(h), (6)(h) with the exception in (6A), (7)(d) with exception in (7AA).
6 Ibid s 9(2)(g).
7 *Ryan v The Queen* (2001) 206 CLR 267, 277 [31] (McHugh J) ('*Ryan*').

However, when sentencing a person for a sexual offence against a child aged under 16 years[8] or for a child exploitation offence, a court '*must not* have regard to the offender's *good character* if it assisted the offender in committing the offence'.[9] This limitation was introduced in September 2020[10] and, while its impact is yet to be formally evaluated, responses to the Council indicate that there is still dissatisfaction with the use of evidence of 'good character' in sexual offence cases.

9.2.1 What is 'character' evidence?

Under section 11 of the PSA, when considering a person's 'character'[11] a court may consider any prior convictions (and their nature), community contributions, history of domestic violence and any other relevant matter.[12] There is no uniformly accepted definition of 'character' or 'good character', and these terms are not defined under the PSA. The *Macquarie Dictionary* defines 'character' to include 'qualities that distinguish one person', 'moral constitution', 'reputation', 'good repute' or a person's 'qualities'.[13]

The High Court has explained that 'good character' is complicated by having a positive and negative aspect:

> [T]here is a certain ambiguity about the expression 'good character' [in the sentencing context]. Sometimes it refers to only an absence of prior convictions and has a rather negative significance, and sometimes it refers to something more of a positive nature involving a history of good works and contribution to the community.[14]

The *Macquarie Dictionary* also defines 'out of character' to mean 'inconsistent with what is known of previous character, behaviour etc'.[15]

9.2.2 How does a court accept evidence of 'good character'?

Evidence of 'good character' can take many forms, including a character reference from a family member, friend, employer or work colleague giving an opinion or attesting to the person's traits, qualities or work ethic. There are no formal requirements for this evidence[16] and an author of a character reference does not usually have to attend court and give evidence.[17] It can include submissions from a lawyer or a

8 A 'sexual offence against a child under 16' is not defined. For the application of sentencing principles in the PSA, courts have held offences are not confined to those under the definition of 'sexual offence' in respect of parole provisions in the PSA (n 4) div 3; *Corrective Services Act 2006* (Qld) sch 1. See *R v HYQ* [2024] QCA 151 [38] (Bowskill CJ, Dalton JA and Wilson J agreeing).

9 PSA (n 4) ss 9(6A), (7AA) (*emphasis added*). This section was introduced following recommendation 74 by the Royal Commission into Institutional Responses to Child Sexual Abuse, *Criminal Justice Report Parts VII - X and Appendices* (2017) 299 ('*Criminal Justice Report Parts VII – X')*. The Queensland provision goes further than the Royal Commission's recommendation by providing good character cannot be taken into account *at all* if it assisted the person committing the offence: see PSA (n 44) s 9(6A).

10 Inserted by *Criminal Code (Child Sexual Offences Reform) and Other Legislation Amendment Act 2020* (Qld) s 53(5). Commenced on the day after the date of assent (15 September 2020). Prior to the amendment, the Legal Affairs and Community Safety Committee was told by knowmore that the word 'assisted' would result in a narrow application. The Queensland Law Society submitted that the amendment could undermine the sentencing principle of rehabilitation and undermine judicial discretion. Despite concerns, the Committee recommended the legislation be passed without amendment: see Legal Affairs and Community Safety Committee, *Criminal Code (Child Sexual Offences Reform) and Other Legislation Amendment Bill 2019* (Report 59, 56th Parliament, February 2020), 32–4.

11 PSA (n 4) ss 9(2)(f), (3)(h), (6)(h) with the exception in (6A), (7)(d) with exception in (7AA).

12 Ibid s 11(1).

13 *Macquarie Dictionary* (online at 22 May 2024) 'character' (def 1–6). For other definitions see: *Encyclopaedic Australian Legal Dictionary* (online at 10 October 2024) 'good character' (def) 'Admirable disposition or qualities such as honesty and reliability'. Courts have adopted a similar definition, although 'reputation' is considered separate: see *Ryan* (n 7) 276 [28] (McHugh J) citing *Melbourne* (n 2) 15 [33].

14 *Ryan* (n 7) 276 [27] (McHugh J) citing *R v Levi*, Court of Criminal Appeal (NSW) (Unreported, 15 May 1997) 5 (Gleeson CJ).

15 *Macquarie Dictionary* (online at 22 May 2024) 'character' (def 24).

16 For example, there is no requirement for it to be a Statutory Declaration under the *Oaths Act 1867* (Qld) ss 13C, 13E, 14.

17 An exception can be if the matter has been listed for a contested sentence.

criminal history showing no prior convictions. Legal commentators have suggested that 'if character matters, it must relate to an instrumental objective such as rehabilitation or incapacitation'.[18]

Under the PSA, the court 'may receive any information … it considers appropriate to enable it to impose the proper sentence'.[19] It is common in Queensland to rely on hearsay evidence in sentencing.[20] When information is submitted for consideration at sentence, there are rules about fact finding.[21] If a fact is admitted and not challenged, a court may act on this evidence.[22] Therefore, if a person being sentenced raises evidence of 'good character' as mitigating, a court may act on those facts if they are not challenged by the court or prosecution. If challenged, the person must satisfy a sentencing judge or magistrate that it is true on the balance of probabilities.[23] With respect to the limitation to 'good character' evidence when the victim is a child, courts in other jurisdictions have considered that the onus is on the prosecution (discussed further in section 9.3).

The Queensland *Director of Public Prosecution's Guidelines* states that a prosecutor has a 'duty to do all that can reasonably be done to ensure that the court acts only on truthful information'.[24] This includes making inquiries with an author of a character reference to confirm its content, knowledge of the offence and use of the reference. The *Guidelines* also recognise that a victim survivor can have a good knowledge of the person being sentenced and encourage prosecutors to ask victim survivors to be present at the sentence to inform them of anything said which they know to be false.[25] A court may reopen sentencing proceedings to correct 'a clear factual error of substance'.[26]

9.2.3 The rationale: Why is evidence of 'good character' a relevant sentencing consideration?

A court must consider matters relevant to the offence and to the person being sentenced,[27] including a person's 'character'.[28] Evidence of 'good character' may assist the sentencing court to determine a person's prospects of rehabilitation,[29] risk of reoffending[30] and the relevance of sentencing purposes.[31] Evidence of 'good character' can be relevant to:

18 Julian V. Roberts (ed), *Mitigation and Aggravation at Sentencing* (Cambridge University Press, 2011) 45.
19 PSA (n 4) s 15.
20 *R v Bassi* (2021) 293 A Crim R 149 [70] (Sofronoff P) ('*Bassi*').
21 *Evidence Act 1977* (Qld) s 132C.
22 Ibid s 132C(2). The person is also entitled to assume it is accepted: *Bassi* (n 20) [72] (Sofronoff P) citing *R v Lobban* (2001) 80 SASR 550.
23 Ibid s 132C(3). Where an allegation of fact is not admitted or challenged, the standard of proof is a civil standard (on the balance of probabilities), although the level of satisfaction varies (known as the *Briginshaw* test): see *Briginshaw v Briginshaw* (1938) 60 CLR 336, 362–3. This means the greater the consequences, the higher the standard of 'satisfaction' required, see, for example, *R v Lacey and Lacey* [2010] QDC 344; *R v Ta* [2019] QCA 53 [12]–[13]; *R v Cumner* [2020] QCA 54 [53]. The onus (responsibility) is on the sentenced person to provide evidence: see e.g. *Bugmy v The Queen* [2013] 249 CLR 571, 572 [41]: Where 'it is sought to rely on an offender's background of deprivation in mitigation of sentence, it is necessary to point to material tending to establish that background'.
24 Queensland, Office of the Director of Public Prosecutions, *Director's Guidelines* (as at 30 June 2023) 51.
25 Ibid 52.
26 PSA (n 4) s 188(1)(c).
27 See, for example, *R v Misi; Ex parte A-G (Qld)* [2023] QCA 34 [31] (Mullins P, Dalton and Flanagan JJA)
28 PSA (n 4) ss 9(2)(f), (3)(h), (6)(h) with the exception in s 9(6A), (7AA); *Ryan* (n 7) 299–300 [110] (Kirby J).
29 Arie Freiberg, *Fox and Freiberg's Sentencing: State and Federal Law in Victoria* (Law Book Co, 3rd ed, 2014) 350 [5.45] ('*Fox and Freiberg's Sentencing Law*') ; *R v Knoote-Parke* [2016] 125 SASR 13, 28 [77] (Doyle J) ('*Knoote-Parke*') cited with approval in *R v BI (No 4)* [2017] ACTSC 71 [65]–[70] (Refshauge J).
30 See *R v Rogan* [2021] QCA 269 [15] (Sofronoff P) ('*Rogan*'); *Ryan* (n 7) 276 [28]–[29] (McHugh J), 288 [68] (Gummow J); *Knoote-Parke* (n 30).
31 *Criminal Justice Report Parts VII - X* (n 9) 288.

- support the important principle of individualised justice by allowing a court to consider a person being sentenced as 'a whole person and not solely under the shadow of their crimes'.[32] This ensures a sentence reflects more than a one-dimensional view of the person;[33]
- demonstrate that a person has, despite the offence, 'done things and earned a reputation that redounds to the offender's credit'[34] when considering the sentence to impose;
- consider whether specific deterrence (deterrence directed at the person being sentenced) is needed or rehabilitative measures could reintegrate the person into society.[35]
- suggest that the offence may have been 'an isolated lapse representing human frailty' where the offence is one of strict liability.[36] A person's character in these cases may indicate they have the capacity to appreciate the censure of the criminal process and is unlikely to reoffend.[37] Similarly, for a first-time offender, the behaviour might be considered 'exceptional, atypical and out of character'.[38]
- determine whether the person is more or less deserving of punishment. If the court considers evidence of 'good character' shows the 'inherent moral qualities of the person',[39] this could be relevant to considering whether a 'morally good' person is less deserving than a 'morally bad' person of punishment.[40]

The rationale for using evidence of 'good character' is not universally accepted and there are critiques about its use (see section 9.4.1).

9.2.4 'Good character' and the decision in *Ryan v The Queen*

In *Ryan v The Queen* (*'Ryan'*),[41] a NSW Catholic priest pleaded guilty to 14 offences involving sexually abusing 12 young boys over a 20-year period. He also admitted to 39 sexual offences involving 16 other victim survivors. He was sentenced to 16 years' imprisonment with a minimum non-parole period of 14 years' imprisonment.[42] At sentence, the judge discussed Ryan's character and concluded his 'unblemished character and reputation does not entitle him to any leniency whatsoever':[43]

> I appreciate that, to other priests, and to others within his congregation, the prisoner was a good man who did positive things and who achieved much. This is shown by [various testimonials]. But *whatever he had done and achieved, he is not a good man*. The prisoner is a man who preyed upon the young, the vulnerable, the impressionable, the child needing a friend or a father figure and the child seeking approval from an adult. And for what? For his own sexual gratification, without thought or concern for the feelings or the sexual development of his victims. How can a man, who showed a kind and friendly face to adults, but who sexually abused so many young boys in so many ways over such a long period of time, be considered to be a good man? I accept that to some people there is good in everyone, but *I cannot see any good in the prisoner*.[44]

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32 *Ryan* (n 7) 299 [108] (Kirby J). His Honour went on to say 'Such an approach would equalise the cruel, slothful, indifferent or impenitent offenders with one who can demonstrate conduct over many years, in other aspects of life.'
33 *Weininger v The Queen* (2003) 212 CLR 629, 649 [62] (Kirby J) ('*Weininger*').
34 *Ryan* (n 7) 297 [101] (Kirby J).
35 *Fox and Freiberg's Sentencing: Law* (n 29) 350 [5.45].
36 *Ryan* (n 7) 288 [68] (Gummow J).
37 Ibid (Gummow J).
38 *Fox and Freiberg's Sentencing:* Law (n 29) 350 [5.45] citing Kate Warner, 'Sentencing Review 2008-2009' (2010) 34(1) *Criminal Law Journal* 16.
39 *Melbourne* (n 2) [33].
40 *Ryan* (n 7) 276–7 [30] McHugh J.
41 Ibid.
42 This was cumulative on a previous sentence, making the total effective imprisonment 22 years imprisonment. ibid [165].
43 Ibid 274 [20] (McHugh J) quoting Judge Nield.
44 Ibid 273–4 [19] (McHugh J) quoting Judge Nield (emphasis in original).

The NSW Court of Appeal did not consider that there was an error in the sentencing judge's approach and no weight given to the 'good character' evidence, but a majority of the High Court of Australia (3:2) disagreed.[45]

If a court decides a person is of 'otherwise good character', it is bound to give it some weight

McHugh J found there are 2 distinct stages in the sentencing process regarding 'good character':

1. The judge must decide whether the person being sentenced is of '*otherwise good character*' without considering the offences the person is being sentenced for.[46]
2. If a person is of 'otherwise good character', 'the sentencing judge is *bound* take that into account in the sentence he or she imposes.'[47] The weight given will vary according to all the circumstances of the case.[48]

Assessments of whether a person is of 'otherwise good character' will vary, and 'it is impossible to state a universal rule'.[49]

Offence seriousness can reduce the mitigating effect of 'good character'

While factors in mitigation must be given appropriate weight, they should never result in a sentence that is disproportionate to the gravity of the offence.[50] The weight of a mitigating factor can be reduced because of the nature and seriousness of the offence, which 'is a countervailing factor of the utmost importance'.[51] Based on the facts in *Ryan*, McHugh J commented on factors which may reduce the weight of 'good character' evidence:

> First, there were multiple offences involving repeated acts committed over a number of years. They were not isolated incidents which might be said to be out of character. Second, the appellant was … leading a double life. Over many years, the appellant was doing 'good works' while he was committing grave offences. This contradiction indicates that the appellant's otherwise good character was a minor factor to be weighed. Third, the appellant committed the offences in the course of his priestly duties and it was as a priest that he did the 'good works' which are at the heart of his claim of good character. This reduces the weight that ought to be given to his otherwise good character. Fourth, and related to the third point, the offences involved breaches of trust.[52]

The matter was remitted to the to the NSW Court of Appeal and the sentence was reduced by one year as the Court of Appeal found 'good character' warranted some, but not significant, leniency.[53]

The High Court Justices do not all agree 'good character' should always be given weight

In *Ryan*, there was not unanimous agreement that evidence of 'good character' should always carry some weight.[54] Hayne J, in dissent, observed a person's 'character' and 'reputation' is not inevitably aggravating

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45 Ibid 267 (McHugh, Kirby and Callinan JJ agreeing, Gummow and Hayne JJ dissenting).
46 Ibid 275 [23] (McHugh J) (*emphasis in original*). It was explained at [24]: 'If an offender's character was determined by reference to the offences for which he or she is being sentenced, he or she would seldom be "of good character".'
47 Ibid 275–6 [25] (McHugh J) (emphasis in original).
48 Ibid.
49 Ibid 277 [31] (McHugh J).
50 *Munda v Western Australia* (2013) 249 CLR 600 [53] (French CJ, Hayne, Crennan, Kiefel, Gageler and Keane JJ agreeing) citing *Veen v The Queen [No 2]* (1988) 164 CLR 465, 477; *Commonwealth Director of Public Prosecutions v CCQ* [2021] QCA 4 [190] (Morrison JA, Philippides JA and Crow J agreeing). [197] (Philippides JA).
51 Ibid 278 [33] (McHugh J).
52 *Ryan* (n 7) [34] McHugh J.
53 *R v Ryan (No 2)* [2003] NSWCCA 35, [44]–[45] (Mason P).
54 *Ryan* (n 7) 267 (McHugh, Kirby and Callinan JJ); 288 [70] (Gummow J in dissent) and 311 [147] (Hayne J in dissent),

or mitigating, as that is the task of the sentencing judge or magistrate to determine.[55] His Honour considered a person's 'character and reputation may intersect with the purposes of criminal punishment in more than one way'.[56] His Honour considered the criminal law has tended to treat people in a one-dimensional way and with a single label as having either 'good' or 'bad' character' but this cannot be accepted 'without qualification'.[57] The High Court in *Weininger v The Queen*,[58] found a more holistic view should be taken of what is known of the offence and the person being sentenced.[59]

9.2.5 Queensland Court of Appeal decisions

We reviewed Queensland Court of Appeal cases to consider how evidence of 'good character' is discussed in sexual assault and rape appeals, in conjunction with reviewing sentencing remarks. As courts apply an 'instinctive synthesis' approach to sentencing,[60] the precise extent or sentencing adjustment given to evidence of 'good character' in sentencing it is not always known, as it is one factor considered with other aggravating and mitigating factors to arrive at a sentence that is balanced in all the circumstances. We also note that, as section 9(6A) of the PSA was introduced in September 2020, cases involving a child victim may not be discussed the same way as it would if it were sentenced today. However, Court of Appeal commentary illustrates how 'good character' evidence is accepted and applied.

Rape

Evidence of 'good character' may be one factor taken into account in sentencing for rape,[61] and in some cases may support a decision to partially suspend an imprisonment sentence instead of ordering a parole eligibility date.[62] For example, in *R v Ruiz; Ex parte Attorney-General (Qld)*,[63] the Court of Appeal dismissed the Attorney-General's appeal to increase a 3-year sentence, suspended after 12 months with an operational period of 3 years for one count of penile-oral rape and 2 counts of indecent treatment of a child under 16 who was under 12 years of age. The victim was an 8-year-old girl and Ruiz, who was 32 years old at the time of the offence, was a family friend. Ruiz's remorse and 'good character' were some of the factors relied on to find the sentence was not manifestly inadequate:

> These were loathsome offences, but until he committed them, [Ruiz] had led a stable and normal family life with his wife and children. He had been a respected member of his community. He possessed skills that made him eminently employable. He had committed no previous offences and had committed no offences from the time he committed these offences until his arrest.[64]

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55 Ibid 309–10 [144]–[145] (Hayne J).
56 Ibid [144] (Hayne J).
57 Ibid, citing *Melbourne* (n 2) [34].
58 *Weininger* (n 33).
59 Ibid [27] (Gleeson CJ, McHugh, Gummow and Hayne JJ agreeing).
60 *Markarian v The Queen* (2005) 228 CLR 357, 388–90 [76]–[83] (McHugh J) ('*Markarian*').
61 See *R v McConnell* [2018] QCA 107 [11] [22] (Fraser J, Sofronoff P and Philippides JA agreeing) ('*McConnell*'); *R v HCI* [2022] QCA 2 [15]–[16], [41] (Fraser JA, Bond JA and Daubney J agreeing); *R v Bouttell* (2018) 272 A Crim R 41 [5]–[6] (Holmes CJ in dissent); *R v Davidson* [2019] QCA 120 [25] (Gotterson JA); *R v BAS* [2005] QCA 97 [140] (Fryberg J); *R v NH* [2006] QCA 476 [13] (Jerrard JA, Holmes JA and Mullins J) ('*NH*'); *R v MCM* [2017] QCA 187 (Sofronoff P, Boddice and Flanagan JJ agreeing).
62 See *R v RUJ* (2021) 7 QR 765, [48], [54] (McMurdo JA, Sofronoff P and Mullins JA agreeing); *R v RBG* [2022] QCA 143 [27] (Davis J) ('*RBG*'); *R v Enright* [2023] QCA 89 [84]–[89] (Mullins P, Bond JA and Boddice AJA agreeing); *R v Kelly* [2021] QCA 134 [37]–[38] (Sofronoff P, Morrison JA and Flanagan J agreeing); *R v Morrison Lee* [2022] QDCSR 1243, 4–5 (Jarro DCJ); *R v DMN* [2023] QDCSR 491, 2-3 (Rackemann DCJ). Decisions involving a child victim prior to the application of section 9(6A) of the PSA (n 4): *R v Ruiz; Ex parte A-G (Qld)* [2020] QCA 72 ('*Ruiz*'); *R v Theohares* [2016] QCA 51 [31] (Philippides JA. Holmes CJ and McMurdo JA agreeing) ('*Theohares*'); *R v SAH* [2004] QCA 329 [14] (Williams JA, McPherson JA and Holmes J agreeing).
63 *Ruiz (*n 62)
64 Ibid [20]. The Court also considered it was relevant that Ruiz would be subject to the *Child Protection (Offender Reporting and Offender Prohibition Order) Act 2004* (Qld) when dismissing the appeal.

In *R v RBG*,[65] the appellant was convicted by a jury of attempted penile-oral rape and 3 counts of sexual assault[66] of his wife while they were ending their marriage but still living together. He was sentenced to 3-year partially suspended imprisonment sentence, reduced to 2 years' suspended imprisonment after 12 months served.[67] Davis J considered his 'good character':

> The offending was violent and disgusting. However, it gave rise to the applicant's only convictions. The offending occurred against the context of a marital break-up and the heightened emotions which that brings. While that is by no means any excuse for the offending, it gives force to the applicant's submission that this offending was an aberration by a person who had otherwise established good character over a long period.[68]

In other cases, character references have been used to evidence remorse.[69] In *R v McConnell*,[70] the 18-year-old applicant raped (penile-oral, penile-vaginal), assaulted and deprived the liberty of his 17-year-old ex-girlfriend after they broke up but still lived in the same share house (domestic violence offence). Character references were used to demonstrate remorse:

> Seven favourable references about the applicant, all dated shortly before the sentence hearing, were tendered. Three of the references – by the applicant's mother, his current partner and a close family friend – described the applicant's remorse for his offences. Another reference also referred to the applicant taking responsibility for his behaviour at all levels.[71]

Evidence of 'good character' has also been described as a 'powerful factor' in mitigation. In *R v NH*,[72] the applicant was convicted after trial of 2 digital-vaginal rapes and an indecent treatment of a child under the age of 16. He was a family friend, helping to mind the child victim. The Court noted his higher education, work as a teacher, community service and references tendered on his behalf:[73]

> In the present case, having regard to a number of factors – that the child was only eight, that the applicant was in a position of trust (although not charged as a circumstance of aggravation and thus not giving rise to the higher penalty), that he threatened to tell others about her father's imprisonment if she disclosed what he had done, and that the offences occurred on three different occasions – a significant sentence was warranted. On the other hand, the applicant's previous good character and exemplary working history were powerful factors in mitigation.[74]

Sexual assault

For sexual assault, a court's assessment that behaviour was 'out of character' can be a significant factor when determining if actual imprisonment is required.[75] For example, in *R v Rogan*,[76] with reference to

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65 *RBG* (n 62).

66 All were domestic violence offences. He attempted to forcibly kiss her, force his hands into her pants and try to penetrate her vagina with his fingers before he climbed on top her. He exposed his penis and slapped her in the face with it. He then masturbated and attempted to force his penis into her mouth. The victim gave evidence his penis pushed past her lips but she kept her teeth clenched (the jury found him guilty of sexual assault rather than rape or attempted rape). He continued masturbating until he ejaculated on her face.

67 *RBG* (n 62) [38] (Davis J).

68 Ibid [27] (Davis J, Dalton JA and Kelly J agreeing) citing *R v L; Ex parte A-G (Qld)* [1996] 2 Qd R 63 approved in *R v HCl* [2022] QCA 2 [6]. See also [6], [8] (Dalton JA, Kelly J agreeing)

69 For a discussion on how evidence of remorse may be evidence to infer there is a reduced the risk of reoffending and its relationship to community protection and denunciation see *R v O'Sullivan; Ex parte A-G (Qld)* (2019) 3 QR 196, 237-238 [127]–[130]; *Ruiz* (n 62) [21]–[25] (Sofronoff P, McMurdo and Mullins JJA agreeing); *Theohares* (n 62) (Philippides JA, Holmes CJ and McMurdo JA agreeing).

70 *McConnell* (n 61).

71 Ibid [11] (Fraser J, Sofronoff P and Philippides JA agreeing), also see [12]–[14] and [22]. .

72 *NH* (n 61). We note this was a decision involving a child victim prior to the application of section 9(6A) of the PSA (n 44).

73 Ibid [6].

74 Ibid [13].

75 *Rogan* (n 30) [18] (Sofronoff P, McMurdo JA and Williams J agreeing); *R v Fahey* [2021] QCA 232 [36] and [44] (Fraser JA, McMurdo and Mullins JJA agreeing); *R v Demmery* [2005] QCA 462 [9], [26] (Jerrard JA, Williams JA and Chesterman J agreeing); *R v Owen* [2008] QCA 171 [11] (McMurdo P, Mackenzie AJA and Daubney J agreeing) ('*Owen*').

76 *Rogan* (n 30). Rogan and the victim had known each other for 3 years and both attended a party of a mutual friend. They stayed at the house after the party and slept in the lounge room on pull-out sofa beds. Rogan sexually assaulted the victim

previous cases, the Court found 'a sentence that includes an actual period of imprisonment is not always required', including in a case where the actual imprisonment is for a short term, 'in which an offender's criminal acts are out of character' and 'there is real remorse' in addition to a 'timely plea of guilty'.[77]

In *R v Owen,*[78] a massage therapist was found guilty by a jury of sexual assault against a patient[79] and sentenced to 9 months' imprisonment. The sentence was varied on appeal to the extent that it was suspended after 25 days served. The Court of Appeal found:

> The tendered references demonstrate that he is a man of otherwise good reputation in the local … community. He supports his wife and their four children and his aged mother. The publicity surrounding Mr Owen's court appearances and subsequent conviction and sentence in open court must have been humiliating for him and, indeed, for his innocent family. This has, of course, detrimentally affected his massage business.[80]

More recently, in *R v Singh*,[81] a case involving a taxi driver who sexually assaulted an 18-year-old intoxicated passenger, evidence of 'good character' in the form of character references was used to show 'that he is a devoted husband and father, with a good work ethic, familial support and that he has previously undertaken charity work'. The Court found that this, together with other mitigating factors, did not support his argument that actual imprisonment (4 months to serve before being partially suspended) was manifestly excessive.[82]

Historical sexual offences

In cases of historical sexual offence matters, there is no unanimous agreement on the weight that 'good character' has.[83] For example, in *R v D'Arcy*,[84] the applicant was sentenced for 18 counts of child sexual abuse (including 3 of rape), committed 30 years earlier when he was a primary school teacher. He later became a Member of the Queensland Parliament.[85] At sentence, over 100 references were tendered on his behalf attesting to his 'good character'.[86] Chesterman J found D'Arcy's conduct in the 30 years between the offending and convictions was indicative of rehabilitation,[87] whereas McMurdo P and McPherson JA (in separate reasons) did not consider that his 'unblemished record' or 'good character'

by straddling her, forcing open her dress, pulling out her breast and sucking on it, licking her face and inserting his tongue into her mouth. She protested and tried to push him off but he continued to touch her under her dress between her legs over her underwear. He unzipped his jeans and put his penis onto her pelvic area. She screamed, another person came into the room and the offending stopped. Later, Rogan asked his friend to ask the victim to withdraw her complaint. He was sentenced to 12 months' imprisonment suspended after 2 months for an operational period of 2 years. The appeal was allowed on the basis he should not have been ordered to serve actual imprisonment of 2 months.

77 Ibid [18].

78 *Owen* (n 75).

79 Owen was found not guilty of one rape and two counts of sexual assaults. The facts of the sexual assault were that he was a massage therapist who had been engaged to attend the home of the victim to give a massage. During the massage, she felt his lips brush her pubic hair but they did not touch her skin.

80 *Owen* (n 75) [10]–[11] (McMurdo P, Mackenzie AJA and Daubney J agreeing).

81 [2024] QCA 50.

82 Ibid [39].

83 For a discussion on delay and its relevance to sentencing see *R v Law; Ex parte A-G (Qld)* [1996] 2 Qd R 63, 4–5 (Pincus JA, Davies JA and Demack J); *HYQ* (n 8); *R v Pike* [2021] QCA 285 [48]–[51] (Bradley J, Fraser and McMurdo JJA agreeing)

84 [2001] QCA 325 ('*D'Arcy*').

85 Ibid [2] (McMurdo P).

86 Ibid [133] (McMurdo P). At the sentencing, the judge considered the seriousness of the offending meant the character references could only be 'a small mitigating factor in the sentencing process': [134] However, acknowledged character evidence was an 'advantage' to him when considering the sentences imposed in other cases: [142] comparing the sentence given in *R v Schloss* (1998) 100 A Crim R 80: 'The offences involved only one complainant whereas [D'Arcy] interfered with four children; on the other hand, [D'Arcy] had the advantage of character evidence.'

87 Ibid 34 [164], 36 [169] Chesterman J citing *Duncan v The Queen* [1983] 47 ALR 746, 749 with approval (Chesterman J and McMurdo P agreeing).

carried much weight and, in light of the gravity of the offending, determined that this 'can only be a small mitigating factor'.[88]

Evidence of good character does not always carry a lot of weight

The Council also observed there are cases where evidence of 'good character' does not carry significant weight in sexual offences, based on the nature and seriousness of the offence.[89]

In *R v Sologinkin*,[90] a casino patron who assaulted an employee was convicted after trial and sentenced to four months' imprisonment, wholly suspended. On appeal, the Court discussed evidence of his 'good character' (he was described as a 'committed father of 3 boys' and had 'impressive and extensive involvement in the community through his work with junior rugby league')[91] as needing to be considered in the context of the seriousness of the offence and his lack of remorse:

> The appellant's past good character may be accepted as a fact, but what was conspicuously and seriously lacking was any insight that should have evoked from him, ultimately, an acknowledgment of his wrongdoing after his guilt had been established beyond any reasonable doubt. Her Honour rightly took this into account as a factor.[92]

Evidence of 'good character' is not always accepted.[93] Recently in *R v FVN,*[94] the Court of Appeal noted the sentencing judges' approach to accepting evidence in character references, given the nature and seriousness of the offence:

> In references, his three sisters and a brother-in-law disavowed witnessing any conduct in the nature of the offences. Two sisters described it as completely alien or out of character. However, [the sentencing judge] found:
>
> > 'Your treatment of those [victim] children, to my mind, demonstrates your true character, which you have hidden from other members of your family over many years. Your predatory conduct towards those four young girls over some 22 years for your own sexual gratification suggests that you have a serious sexual deviancy.'[95]

9.2.6 No prior convictions are part of 'character' but is given special treatment

The relevance of having no prior convictions is assessed as part of 'character' but receives special treatment and will usually attract a more lenient sentence.[96] The reason for this was explained in *Ryan:*

> In part, it recognises the fact that a first offender's lapse may be treated as exceptional, atypical and out of character. In part, it also reflects the experience of the criminal justice system that many of those who come before courts for sentencing are repeat offenders who, for that reason, must be treated more seriously because they have been repeatedly shown to be in breach of the law and have repeatedly obliged the mobilisation of the agencies established by society to defend it from crime.

88 *D'Arcy* (n 84) [144] (McMurdo P), [147] (McPherson JA).
89 See e.g. *R v Abdullah* [2023] QCA 189 [12] (Bowskill CJ, Flanagan JA and Buss AJA). For Commonwealth child sex offences and child pornography offences it is well settled that 'good character' carries limited weight: see *R v Horsfall* [2024] QCA 144 [35] (Crowley J, Mullins P and Boddice JA agreeing); *R v KAT* [2018] QCA 306 [41](a) (Morrison JA, Gotterson JA and Henry J agreeing) citing *R v Porte* [2015] NSWCCA 174 [59]-[72] and [126]; *R v Howe* [2017] QCA 7 [25] (Douglas J, Fraser and Philippides JJA agreeing) citing *Mouscas v The Queen* [2008] NSWCCA 181 [37]; *R v Gent* (2005) 162 A Crim R 29 [29] and [43]; *CDPP v D'Alessandro* (2010) 26 VR 477 [21]; *Heathcote (a pseudonym) v The Queen* [2014] VSCA 35 [35].
90 [2020] QCA 271 (Sofronoff P, Philippides JA and Bradley J agreeing).
91 Ibid [24].
92 Ibid [27].
93 See *R v ABG* [2021] QCA 259 [20]–[23], [33] (Holmes CJ, McMurdo and Mullins JJA agreeing).
94 [2021] QCA 88.
95 Ibid [46] (Sofronoff P, Mullins JA and Bradley J).
96 *Weininger* (n 33) [58]–[59] (Kirby J).

> A first offender may, or may not, otherwise have a good character. He or she may simply have been lucky in not having been apprehended before. But this fact does not justify disregard for the separate consideration of a first offender's status as such, apart from any consideration of the character of that offender.[97]

There are 2 circumstances in which an absence of prior convictions generally is not significantly mitigating:

1. where the gravity of the offence overwhelms any significant benefit claimed of prior 'good character'; and
2. where a person's good record is crucial to the commission of the offence. For example, a drug courier is chosen because of their lack of prior history so they will not attract suspicion and be searched.[98]

In sexual violence offences against children, a person's lack of criminal history is relevant but carries limited weight[99] or no weight.[100]

9.2.7 Application of section 9(6A) of the *Penalties and Sentences Act 1992* (Qld)

The Council has not identified any Court of Appeal decision where the application of section 9(6A) of the PSA has been discussed or was a relevant issue considered on appeal for any sexual offence.[101] Only 9 published District Court decisions were identified that referred to this new provision.[102] In *R v Handley*,[103] a 36-year-old police officer committed 2 offences of indecent treatment (described as 'consensual oral sex on each other') against a 15-year-old girl he met who worked at a café he frequented while on duty. The sentencing judge considered his profession was 'an incidental circumstance' and 'there is an insufficient basis to find subsection (6A) is engaged'.[104] While the judge did not consider section 9(6A) applied, there was a discussion on how this might conflict with other sentencing considerations required under the PSA if it did:

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97 Ibid citing *Weininger* (n 33) [58]–[59] (Kirby J). In respect of a conviction appeal: 'People who are mean, greedy, ruthlessly ambitious, devoid of sympathy for the weaknesses or needs of others, exploitative, ungenerous, and unkind, can go through life without any convictions for criminal offences. An absence of them says very little about character'; *R v Soloman* [2006] QCA 244 [24] (Jerrard JA, White and Philippides JJ agreeing), applied in *R v Brisbane Auto Recycling Pty Ltd & Ors* [2020] QDC 113 [71] (Rafter J).

98 *Fox and Freiberg's Sentencing:* Law (n 29) 344–5 [5.20] referring to *R v Leroy* [1984] 2 NSWLR 441, 446–7; *R v Berisha* [1999] VSCA 112 [27]; *Nguyen v The Queen* [2011] VSCA 32 [88].

99 *R v CCT* [2021] QCA 278 [248] (Applegarth J, Sofronoff P and McMurdo JA agreeing); *Commonwealth Director of Public Prosecutions v CCQ* [2021] QCA 4 [8](c), (f) (Morrison JA, Philippides JA and Crow J agreeing) and [197] Philippides JA). It is not an 'unusual' factor in the context of 'exceptional circumstances' see *Fahey* (n 75) [36]–[37]; *R v SDX [No 2]* [2024] QCA 78 [5]–[6] (Mullins P, Crow and Crowley JJ agreeing) cf *R v GAW* [2015] QCA 166; *Theohares* (n 62). It is not identified as a relevant mitigating factor in repeated sexual conduct with a child (s 229B, previously maintaining a sexual relationship with a child) *R v SAG* (2004) 147 A Crim R 301 [20] (Jerrard JA, Atkinson and Philippides JJ agreeing): 'Matters which mitigate the penalty include conduct showing remorse, such as the offender voluntarily approaching the authorities, or seeking help for all the family; co-operation with investigating bodies, admissions of offending, co-operating with the administration of justice, and sparing the victims from any contested hearing.'

100 PSA (n4) ss 9(6A), (7AA).

101 Except in *HCI* (n 61) [40] (Fraser JA, Bond JA and Daubney J agreeing) it was mentioned as a factor to be applied: 'The sentencing judge was obliged to apply the provisions in ss 9(4) – (6A) of the *Penalties and Sentences Act 1992* which are applicable in sentencing an offender for an offence of a sexual nature committed in relation to a child under 16.'

102 A search of '(6A)' and '(7AA)' and 'good character' post 15 September 2020 was undertaken on the Supreme Court Library Queensland website. There were no mention of (7AA) and the following mentioned 6(A) or 'good character', although not all discussed its application: *R v GWS* [2023] QDCSR 773 ('*GWS*'); *R v Pike* [2020] QDCSR 1126 ('*Pike*'); *R v Johnson* [2021] QDCSR 1309 ('*Johnson*'); *R v Manning* [2023] QDCSR 909; *R v Handley* [2023] QDCSR 793 ('*Handley*'); *R v MRS* [2023] QDCSR 850; *R v KCS* [2021] QDCSR 1295; *R v RBR* [2024] QDCSR 520; *R v Elia* [2022] QDCSR 143 ('*Elia*').

103 *Handley* (n 102) (Long DCJ).

104 Ibid 4.

> if [section 9(6A) of the PSA) is] applicable, the consequence is preclusion of attribution of any mitigatory weight upon evidence of good character, including absence of criminal convictions, as a factor in its own right, rather than as circumstances potentially supportive of prospects of rehabilitation or unlikelihood of re-offending.
>
> Such a conclusion would appear to be particularly appropriate in noting the specific application of subsection 6(A) of section 9 of the *Penalties and Sentences Act* to subsection (6)(h), as that provision refers to the offender's antecedents, age and character as a primary consideration to which the Court must have regard in sentencing for an offence of a sexual nature committed in relation to a child under 16 and in otherwise noting the separate reference to prospects of rehabilitation as a further such consideration, in subsection (6)(g).[105]

In another case, 'good character' was taken into account for a 44-year-old man who touched the child's legs just below the buttocks (she was under 12 and was a relative staying at his home).[106] Other District Court decisions illustrate examples of how section 9(6A) of the PSA has been applied. For example, in *R v Pike*[107] the limitation was applied for offending involving 6 victims and in *R v Johnson*[108] it was applied where a guidance councillor sexually offended against a 15-year-old student at the school where she worked.[109] In *R v GWS*,[110] the sentencing judge stated:

> Your good character as a trusted family member did assist you in committing these offences because it facilitated access to the children at your home and in your car and permitted you to be alone with them without arousing suspicion. To that extent your good character is not a matter I have regard to in mitigation.[111]

9.3 What happens in other jurisdictions?

In all Australian jurisdictions, 'character' is a relevant matter that may be taken into account when sentencing any offence.[112] Most Australian jurisdictions have introduced statutory limitations on the use of evidence of 'good character' where this assisted or aided the person in the commission of a sexual offence against a child.[113] For all jurisdictions with a legislative requirement to take 'character' into account, none has removed a court's ability to consider 'good character' evidence without qualification (e.g. limiting its use where it assisted or facilitated the offence). See further **Appendix 16**, Table 1.

In Western Australia, case law provides for the diminished relevance of good character for sexual offending against children.[114] For Commonwealth offences, if a person's 'standing in the community' aided the commission of the offence, this is an aggravating factor.[115] In New Zealand, courts are required to take into account evidence of a person's previous 'good character' as a mitigating factor,[116] although the New Zealand Court of Appeal has said a person may be disqualified from 'any credit for previous good

105 Ibid 3-4.
106 *Elia* (n 102) , 4 (Kefford DCJ).
107 *Pike* (n 102).
108 Johnson (n 102).
109 Ibid 3 (Smith DCJ).
110 *GWS* (n 102).
111 Ibid 11 (Fantin DCJ).
112 *Sentencing Act 1991* (Vic) s 5(2)(f); *Crimes (Sentencing Procedure) Act 1999* (NSW) s 21A(3)(f); *Crimes (Sentencing) Act 2005* (ACT) s 33(m); *Sentencing Act 2017* (SA) s 11(1)(d).
113 *Sentencing Act 1991* (Vic) s 5AA; *Crimes (Sentencing Procedure) Act 1999* (NSW) s 21A(5A); *Crimes (Sentencing) Act 2005* (ACT) s 34; *Sentencing Act 1997* (Tas) s 11A(2)(b); *Sentencing Act 2017* (SA) s 11(4)(c); *Sentencing Act 1995* (NT) s 5(3A) introduced this year: see *Criminal Justice Legislation Amendment (Sexual Offences) Act 2023* (NT) s 29. In the NT, a court may order a non-parole period less than the standard non-parole period if there are exceptional circumstances. 'Good character' and unlikely to reoffend is not to be considered for this purpose: *Sentencing Act 1995* (NT) s 53A(7)
114 See *MAS v The State of Western Australia* [2012] WASCA 36 [86] (Martin CJ, Pullin and Mazza JJA agreeing); *The State of Western Australia v Mojana* [2023] WASCA 189 [32], [57] (Mazza, Vaughan and Hall JJA)
115 *Crimes Act* (1914) (Cth) s 16A(2)(ma). This provision was introduced in 2020 with an intention to 'capture scenarios where a person's professional or community standing is used as an opportunity for the offender to sexually abuse children.' Explanatory Memorandum, Crimes Legislation Amendment (Sexual Crimes Against Children and Community Protection Measures) Bill 2019 (Cth) (2020) [254].
116 *Sentencing Act 2002* (NZ) s 9(2)(g).

character' where sexual offending occurs over an extended period of time, if there are other uncharged offences[117] or if the person has had a trial and 'relied on his good character to give credibility to his lies'.[118]

9.3.1 Case law on the limitation to 'good character' evidence and the evidentiary onus on the prosecution

A review of cases from jurisdictions with a similar legislative limitation to 'good character' to that found in Queensland illustrates how courts have interpreted and applied the provision. In cases where the limitation has applied, the court has held evidence of 'good character' is still considered for other purposes, such as to assess remorse, risk of reoffending and rehabilitation.[119] In South Australia, the Court of Criminal Appeal considered that, even if the court is not allowed to give leniency, 'it does not require the sentencing court artificially to disregard good character when assessing future prospects of rehabilitation'.[120] Sulan J said:

> To prohibit the Court from having any regard to the defendants' prior good character, may have consequences which were never intended. Further to remove one relevant factor of good character, in this case, creates difficulties when considering other relevant factors such as remorse and rehabilitation. When a sentencing judge considers whether an offender is genuinely remorseful for his conduct it is difficult, if not impossible, to disengage that question from his previous good or bad conduct. Similarly, rehabilitation requires a consideration of prior good conduct.[121]

The review of case law from other jurisdictions also illustrates the difficulty of applying the limitation,[122] and cases discuss the evidentiary onus (responsibility) being on the prosecution. For example, in *Director of Public Prosecutions v Ooms*,[123] a female teacher offended against a student and the court found that evidence of 'good character' could be relied on. The Victorian Court of Appeal found the prosecution must show how a person's 'good character' materially contributed and 'could be directly tied to the offending'.[124] The Court said the provision is not solely about whether 'good character' enabled access to the child, but rather 'requires a common sense assessment based on the evidence as to the extent to which good character or an absence of convictions has played in the offending'.[125] Similarly, the NSW Court of Appeal also found that there is an evidentiary onus (responsibility) on the prosecution to point to evidence of how the person's 'good character' 'or lack of convictions will have played some material part in the offender having access to the victim(s)'.[126] In a case involving a family friend who offended against a child while in his care, the Court found there was no evidence led by the prosecution that the person's character or history was considered by the victim's father in allowing the person to care for the child, or actively used to befriend the family or gain access to the child.[127] In another case, the judge considered

117 *King v The Queen* [2015] NZCA 475 [31] (Harrison J, Dobson and Gilbert JJ agreeing). See also *Botha v The Queen* [2015] NZCA 196 [21].
118 Ibid.
119 *Knoote-Parke* (n 29) [2] (Sulan J), [7] (Blue J), [77]–[79] (Doyle J) cited with approval in *Handley* (n 102) 4 (Long DCJ); *DPP v Schulz* [2018] VCC 1058 [88], [74]–[99] (Pullen J).
120 *Knoote-Parke* (n 29) [7] (Blue J).
121 Ibid [2] (Sulan J) considering *Criminal Law (Sentencing) Act 1988* (SA) s 10(3)(ba) (now *Sentencing Act 2017* (SA) s 11(4)(c)).
122 See *R v Hovell* (a pseudonym) [2021] NSWDC 326; *R v NC* [2020] NSWDC 547; *AH v The Queen* [2015] NSWCCA 51 [25] (Hidden J, Beazley P and Fullerton J agreeing) 'Obviously, his relationship with the victim's mother and the trust which that engendered created an environment in which the offences could be committed. It does not appear to me, however, that his good character could be said to have assisted his commission of the offences.'
123 [2023] VSCA 207.
124 Ibid [88] (Niall, Kennedy and Macaulay JJA).
125 Ibid [89].
126 *Bhatia v The King* [2023] NSWCCA 12 [14] (Beech-Jones CJ at CL); [155] (N Adams J).
127 Ibid [128]–[148] (Hamill J); [13]-[15] (Beech-Jones CJ at CL); [155] (N Adams J). In another case, although a court found *Crimes (Sentencing Procedure) Act 1990* (NSW) s 21A(5A) did not apply and 'good character' evidence was lead, it was held to have no weight: *WG v R; KG v R* [2020] NSWCCA 155 [1100] (Bathurst CJ); [1486]–[1494] (Fullerton J); [1718] (Fagan J).

'[the victim] had access to his uncle because he was a relative, not because he was a person of good character'.[128]

9.4 What we know from earlier reviews of 'good character' evidence

9.4.1 NSW Sentencing Council

In 2008, the NSW Sentencing Council considered penalties for sexual assault offences and determined child sexual offences warranted a special approach to 'good character' considerations at sentence.[129] While they found that 'in some circumstances an offender's prior record, standing, reputation and history of positive contributions to the community' can be relevant to risk of reoffending, they considered that 'it is dangerous to draw such a conclusion' for offences involving repeated child sexual abuse, child pornography or to people with paedophilic tendencies.[130] They recommended legislative change to exclude 'good character', reputation and lack of prior history for a child sexual offence and child pornography offence, if it 'better enabled the offender to commit the offence'.[131] They did not consider that there was a need for an exception where the victim was an adult.[132]

9.4.2 The Royal Commission into Institutional Child Sexual Abuse

Consistent with the NSW Sentencing Council recommendation, the Royal Commission into Institutional Child Sexual Abuse (Royal Commission) recommended that evidence of 'good character' should not be mitigating where it facilitated the person to commit a sexual offence against a child.[133]

The Royal Commission noted that the use of 'good character' evidence is distressing for victim survivors.[134] It summarised what it had been told were the problems with evidence of 'good character' in sentencing:[135]

- **Use is based on certain assumptions:** It has been argued that there is no empirical support for the notion that prior good character suggests a low risk of reoffending. Further, prior good character judged by lack of prior convictions can be a fallacy. A lack of prior convictions (especially in child sexual assault) does not necessarily mean a lack of prior bad behaviour.[136]
- **Accepting an offender's otherwise good character may belittle the harm done by the offence:** Acknowledgement of the offender's good character can minimise the 'vindicatory aspects of criminal proceedings if the offender is regarded as not being fully responsible for the offence, and is consequently treated more leniently'. In the eyes of the victim and the community, accepting the offender's good character in mitigation 'potentially deletes the "wrongfulness" message of this crime'.[137]

128 *R v Farrell (a pseudonym)* [2022] NSWDC 695 [59].
129 NSW Sentencing Council, *Penalties Relating to Sexual Assault Offences in New South Wales: Volume 1* (2008) 133 [5.57] (*'Penalties Relating to Sexual Assault Offences in New South Wales: Volume 1'*).
130 Ibid 133–4 [5.58]–[5.59].
131 Ibid 137 recs 38, 39. This led to the amendment in *Crimes Amendment (Sexual Offences) Act 2008* (NSW) inserting *Crimes (Sentencing Procedure) Act 1999* (NSW) s 21A(5A). See also Appendix 16.
132 *Penalties Relating to Sexual Assault Offences in New South Wales: Volume 1* (n 129) 130 [5.48].
133 Royal Commission into Institutional Responses to Child Sexual Abuse, *Criminal Justice Report – Executive Summary and Parts I to II* (2017) 99, rec 74.
134 Royal Commission into Institutional Responses to Child Sexual Abuse, *Criminal Justice Report – Parts VII - X and Appendices* (2017), 296 quoting Transcript of C Hughes-Cashmore, Case Study 46, 28 November 2016, T23886:42-T23887:5 (*'Criminal Justice Report – Parts VII - X and Appendices'*).
135 Ibid 292 (footnotes as in original).
136 *Penalties relating to sexual assault offences in New South Wales- Volume 1* (n 129) 123–5.
137 Arie Freiberg, Hugh Donnelly and Karen Gelb, *Sentencing for Child Sexual Abuse in Institutional Contexts* (Royal Commission into Institutional Responses to Child Sexual Abuse, 2015) 80.

- **Without the offender's good character, the offending would have been less likely to take place:** The offender may have used his or her reputation and good character to facilitate the grooming and sexual abuse of a child and to mask their behaviour. This may be particularly so in matters of institutional child sexual abuse.[138]

The Royal Commission did not recommend legislating 'prior good character' as an aggravating factor.[139] It formed this view having regard to submissions from the NSW Director of Public Prosecutions, New South Wales Young Lawyers Criminal Law Committee and the Law Society of New South Wales, which all submitted that it was unnecessary and may result in a counterintuitive outcome.[140] For example, a person with no criminal history could be dealt with more severely than a person with a criminal history.[141]

While there has not been any formal evaluation on the impacts of the Royal Commission reform, responses to the Council from victim survivor and support and advocacy groups indicate that there is still dissatisfaction with the use of evidence of good character in sexual offending (see section 9.5).

9.4.3 Current petitions to change the treatment of 'good character' evidence in sentencing

The community-led campaign *Your Reference Ain't Relevant* has petitioned for the abolition of character references for people convicted of child sexual abuse in NSW[142] and the ACT.[143] There has been a similar community-led call for 'good character' reform in Tasmania.[144]

9.4.4 Current reviews

The Council is aware that there are other reviews currently underway:

- The Australian Law Reform Commission is currently undertaking a review of Justice Responses to Sexual Violence.[145] They are expected to report to the Attorney-General by 22 January 2025.[146]
- The NSW Sentencing Council is currently considering the use of good character as a mitigating factor in sentencing proceedings in general.[147] It received 84 preliminary submissions and has released a Consultation Paper.[148]

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138 *Penalties Relating to Sexual Assault Offences in New South Wales: Volume 1* (n 129) 131; Sentencing Advisory Council, *Queensland, Sentencing of Child Sexual Offences in Queensland: Final report* (2012) 70.

139 *Criminal Justice Report Parts VII- X and Appendices* (n 134) 299.

140 Ibid.

141 Ibid.

142 E-Petition, '*Remove Good Character References for Paedophiles in the Sentencing Procedure of Child Sexual Abuse Cases*' (web page) <https://www.parliament.nsw.gov.au/lc/pages/closedepetition-details.aspx?q=hjTKTfEbrBjTOpaTYQw-oA>. See also Chantelle Al-Khouri, 'Should character references still be used in Australian courts?' ABC News (Web Page, 13 September 2023) <https://www.abc.net.au/news/2023-09-13/character-witness-harrison-james-sex-violence-danny-masterson/102846370>.

143 Legislative Assembly for the Australian Capital Territory, *Parliamentary Business*, 'Remove the Provision of Good Character References for Paedophiles in the Sentencing Procedure of Child Sexual Abuse Cases' (Web Page, undated) <https://epetitions.parliament.act.gov.au/details/e-pet-02723?_gl=1*12zbbmd*_ga*ODcwNDE1MjQxLjE3MjI1NzUyMTI.*_ga_LWWL3XRS9C*MTcyMjU3NTQ4OC4xLjEuMTcyMjU3NTgzMS40OC4wLjA>

144 Alexandra Humphries, 'Sexual assault victim wants to stop paedophiles from using character references, lawyers' group pushes back', *ABC News* (Web Page, 1 February 2022) <https://www.abc.net.au/news/2022-01-31/paedophile-john-wayne-millwood-victim-battle-characterwitness/100793004>

145 An Issues Paper was recently released: Australian Law Reform Commission, *Justice Responses to Sexual Violence* (Issues Paper, April 2024).

146 Australian Law Reform Commission, *Terms of Reference* (web page, 23 January 2024) <https://www.alrc.gov.au/inquiry/justice-responses-to-sexual-violence/terms-of-reference>.

147 NSW Sentencing Council, 'Good character in sentencing' (web page, 10 July 2024) <https://sentencingcouncil.nsw.gov.au/our-work/current-projects/good-character-in-sentencing.html>.

148 NSW Sentencing Council, *Good character at sentencing* (Consultation Paper, December 2024).

- The Justice and Community Safety Directorate (ACT) is currently consulting with stakeholders.[149]
- The Scottish Sentencing Council is currently preparing guidelines on the offence of rape and the rape of a young child.[150]

9.4.5 Critiques of the use of 'good character' evidence in sentencing

Despite the powerful influence and impact of aggravating and mitigating factors on a sentencing outcome, there has been limited consideration of the theoretical rationale, definition, scope and weight or adjustment that should be given to them in sentencing.[151] Several legal academics have questioned, in particular, the theoretical rationale for some types of 'good character' evidence, such as 'social contributions'. Von Hirsch and others, including Ashworth and Roberts, argue that this can result in 'illegitimate social accounting that weigh a person's lifetime behaviour in the balance rather than punishing them for the crime committed'.[152] These criticisms have been accepted by prominent Australian academics, such as Kate Warner,[153] who suggests such an approach not only constitutes a form of 'moral accounting' but also raises concerns that this factor may promote privilege and infringe equity before the law. She concludes: 'An offender should neither be sentenced more favourably, nor more harshly because of their social status, reputation, respectability or social contributions.'[154]

Warner considers, however, that character references may still serve a useful purpose in respect of a person's prospects of rehabilitation and may benefit a person to know they have support in the community.[155] She argues evidence of 'good character' should be limited in sentencing proceedings to only an absence of prior convictions.[156]

In later research, Warner et al. explored jurors' perceptions of sentencing factors in sex offence cases, including the assessed relevance of 'good character' evidence. The authors concluded:

> While there are strong arguments to support excluding good character as a mitigating factor in all but its negative aspect of a lack of prior convictions, there seems to be public support for leaving judges with a discretion. However, if judges wish to better align their approach to public views, these results suggest there is room for giving good character less weight than judges generally do. In the alternative, these findings may suggest the need for judges to more clearly articulate their rationales for giving this factor significant weight.[157]

149 ABC News, 'ACT Bar Association rejects proposal to scrap good-character references in sentencing convicted child sexual abusers' (web page, 6 February 2024) <https://www.abc.net.au/news/2024-02-06/act-bar-association-child-sexual-abuse-good-character-reference/103429558>

150 Scottish Sentencing Council, *Sentencing rape offences: A Scottish Sentencing Council consultation* (July 2024) 35 [104]. The current draft guidelines do not included evidence of 'good character' as a mitigating consideration for the offence of rape as 'the Council does not consider that is it particularly relevant to the offence of rape.'

151 Allan Mason *'Chapter 3: The Search for Principles of Mitigation: Integrating Cultural Demands'* in Julian V. Roberts (ed), *Mitigation and aggravation at sentencing* (Cambridge University Press, 2015). See also Gabrielle Wolf and Mirko Bargaric, *'Nice or Nasty? Reasons to Abolish Character as a Consideration in Australian Sentencing Hearings and Professionals'* (2018) 44(3) *Monash University Law Review* 567, 582–3.

152 Andreas von Hirsch, 'Forward' in Julian V. Roberts (ed), *Mitigation and Aggravation at Sentencing* (Cambridge University Press, 2011); Ian K. Belton and Mandeep K. Dhami, *'The role of character-based personal mitigating in sentencing judgments*' (2024) 21 *Journal of Empirical Legal Studies* 208, 226–7 citing Andrew Ashworth, *Sentencing and criminal justice* (6th ed, Cambridge University Press, 2005); H. Maslen and J. V. Roberts, *'Remorse and sentencing: An analysis of sentencing guidelines and sentencing practice'* in A. Ashworth & J. V. Roberts (eds.) *Sentencing guidelines: Exploring the English model* (Oxford University Press, 2013).

153 Kate Warner, *'Sentencing review 2008-2009'* (2010) 34 *Criminal Law Journal* 16, 19–20, 23–4.

154 Ibid 23.

155 Ibid 23–4.

156 Ibid.

157 Kate Warner et al, 'Comparing Legal and Law Assessments of Relevant Sentencing Factors for Sex Offences in Australia' (2021) 45 *Criminal Law Journal* 57, 70

Wolf and Bagaric argue that evidence of 'good character' should be abolished as a sentencing consideration.[158] They consider a lack of prior history can still be considered, as long as it is not used as evidence of a person's character.[159] They argue that it is unfair for a sentencing court to determine character based on reputation and character references, which is 'the wholly subjective judgment of one or more laypersons that, in turn, is unrelated to any impartial or legally-determined standards'.[160] They suggest the opinions of others 'do not confirm that an individual has particular intrinsic traits or assist in predicting how he or she might behave in different circumstances'.[161] Similarly, evidence of good deeds or contributions to the community do not predict future behaviour, nor is this a reliable indicator of a person's traits.[162] With respect to assessments of offence seriousness, they suggest:

> Assessments of an offender's character have no role to play in courts' application of the principle of proportionality, which requires them to evaluate only the seriousness of the offender's crime and ensure that the severity of the sanction corresponds to it. In addition, there are sufficient appropriate aggravating and mitigating considerations that help courts to assess the gravity of an offence without judges needing to attempt to undertake the impossible task of ascertaining an offender's character for this purpose.[163]

In suggesting reforms to the law and whether the language 'good character' should change, Wolf and Bagaric acknowledge the risk that 'because character has been such a longstanding and popular concept in Western thought, abolishing references to it in the law will inevitably result in it reappearing in some other guise'.[164] In their view, evidence of character should be assessed by reference to an objective and measurable standard.[165]

Belton and Dhami propose that the underlying principles for using personal factors in mitigation, such as 'good character', should be identified and guidance provided for its use in practice.[166] Similarly, when considering character evidence for white collar offences, Rubinstein considered that 'the most sensible way' to rectify the issue 'is by a clear policy decision, preferably from the legislature, to define and clarify the importance that character and reputation should have on sentencing'.[167]

9.4.6 What does the community think about 'good character' as a factor at sentencing?

There is limited empirical research on how sentencing factors are used in practice, and limited evaluation of community or victims views of the use of 'good character' evidence.[168] A series of Australian studies

158 Gabrielle Wolf and Mirko Bargaric, 'Nice or Nasty? Reasons to Abolish Character as a Consideration in Australian Sentencing Hearings and Professionals' (2018) 44(3) *Monash University Law Review* 567, 598.
159 Ibid 598.
160 Ibid 597.
161 Ibid.
162 Ibid.
163 Ibid 598–9.
164 Ibid 599.
165 Ibid 600.
166 Ian K. Belton and Mandeep K. Dhami, 'The role of character-based personal mitigating in sentencing judgments' (2024) 21 *Journal of Empirical Legal Studies* 208, 227.
167 Ivan Rubinstein, 'The use of character and reputation in sentencing white collar criminals: The ultimate contradiction? (2006) 24 *Company and Securities Law Journal* 223, 223–4.
168 Kate Warner et al 'Aggravating or Mitigating? Comparing judges' and jurors' views on four ambiguous sentencing factors' (2018) 28 *Journal of Judicial Administration* 95, 95; Kate Warner et al, 'Comparing legal and law assessments of relevant sentencing factors for sex offences in Australia' (2021) 45 *Criminal Law Journal* 57, 70; Nicole Stevens and Sarah Wendt, 'The "good" child sex offender: Constructions of defendants in child sexual abuse sentencing' (2014) 24(2) *Journal of Judicial Administration* 95, 95–6.

sought to fill this gap, known as the 'Jury Projects', which included a Tasmanian Jury Sentencing Study, a Victorian Jury Sentencing Study and a National Jury Sentencing Study.[169]

In respect of 'good character', the Victorian study found this factor was open to a subjective interpretation, more than other factors such as the fact that the person was a 'first [time] offender' and 'prospects of rehabilitation'.[170] It also found jurors were less likely than judges to suggest 'good character' should be given 'a lot of weight' and more likely to consider it should be given 'no weight'.[171]

Building on the Victorian study, the National Jury Sentencing Study further explored juror and laypeople's perceptions of sentencing factors, specifically in cases involving sexual offences. One finding was that 'jurors were more than twice as likely as judges to give no weight to good character'.[172] However, it was given some weight by jurors in half of the cases and considered mitigating in cases where the judge did not refer to it.[173] The study concluded on this basis that 'there seems to be public support for leaving judges with a discretion.'[174] They highlighted reducing the weight of 'good character' or 'more clearly articulate their rationales for giving this factor significant weight' to be better aligned with public views.[175]

This conclusion is similar to findings by a recent Scottish study on public perception, in which 'participants thought greater transparency was required to understand which factors were considered during sentencing'.[176] While there were mixed views on whether 'good character' should be considered a factor in sentencing, there was a perception it resulted in 'preferential treatment in sentencing'.[177]

9.5 Stakeholder views

We received several preliminary submissions identifying the use of 'good character' evidence as an issue for Council to consider. In the **Consultation Paper: Issues and Questions**, we invited specific feedback from stakeholders and the community about whether there should be any changes to how 'good character' evidence is considered by courts and how this could be improved (Question 6). We also held consultation events, conducted subject matter expert interviews and consulted with victim survivors. A summary of the feedback is presented below.

9.5.1 Submissions from victim survivor support and advocacy stakeholders

In its preliminary submission to the Council, Full Stop Australia was concerned that character references are 'enabling offenders to avoid custodial sentences',[178] can sometimes be used without the author's

169 See University of Tasmania, *The Jury Projects* (web page, 13 February 2024) <https://www.utas.edu.au/law/research/the-jury-projects#:~:text=The%20jury%20projects%20are%20a%20series%20of%20three%20separate%20studies>. The Victorian Jury Sentencing Study and National Sentencing Study compared the responses of judges and jurors in Victoria to the relevance and weight of common aggravating and mitigating factors in 122 real cases. See Kate Warner et al, 'Aggravating and Mitigating Factors in Sentencing: Comparing the Views of Judges and Jurors' (2018) 92 *Australian Law Journal* 374.

170 Ibid 381.

171 Ibid.

172 Kate Warner et al, 'Comparing Legal and Law Assessments of Relevant Sentencing Factors for Sex Offences in Australia (2021) 45 *Criminal Law Journal* 57, 70.

173 Ibid 71.

174 Ibid.

175 Ibid.

176 Hannah Biggs et al, *'Public Perceptions of Sentencing in Scotland: Qualitative Research Exploring Sexual Offences'* (Scottish Sentencing Council, July 2021) 74.

177 Ibid.

178 Preliminary submission 23 (Full Stop Australia), 4 citing Georgia Roberts, 'Canberra rapist Thomas Earle avoids jail time, sentenced to 300 hours of community service,' *ABC News*, 29 April 2023, <https://www.abc.net.au/news/2023-04-29/rapist-thomas-earle-sentenced-to-three-years-ico/102278630>; Phoebe Hosier and Elise Kinsella, 'Questions arise over character references used to help sex offender Jeffrey 'Joffa' Corfe escape jail time', *ABC News*, 8 March 2023,

knowledge or permission[179] and can 'deny justice to victim-survivors.'[180] Full Stop Australia told us many victim survivors report 'they find it incredibly painful and retraumatising to hear reviews of their offender's "good character" during sentencing.'[181] It suggested removing the use of character references for this particular offence group or, alternatively, requiring the authors of these references to attend court and be cross-examined before the court accepts the evidence.[182]

The *Your Reference Ain't Relevant* Campaign told the Council that evidence of 'good character' minimises the seriousness of the offences and does not ensure the offender is held accountable.[183] It was particularly concerned about the use of character references for convicted child sex offenders during the sentencing process:

> While character references serve the noble purpose of offering insight into an offender's background, they inadvertently diminish the gravity of the offences and undermine the pursuit of justice. In cases of child sexual abuse, offenders may exploit their standing in the community to groom victims and gain access to vulnerable individuals. Good character references, often provided by well-meaning acquaintances who remain unaware of the offender's predatory behaviour, contribute to perpetuating harmful stereotypes and misconceptions about perpetrators. These references present offenders in a favourable light, overshadowing the true nature of their crimes and hindering the pursuit of justice for victims.[184]

It noted that the current statutory limitation does not extend to all people who may have used their 'good character' and standing to commit the offence (for example, those with parental responsibilities, other family members or a neighbour).[185] It considered that, for all people convicted of child sexual offence, the 'good character' of a person is part of the crime, 'a weapon in their extensive arsenal of deceit' and used as a 'tool of deception.'[186] It told the Council how 'good character' evidence impacts victim survivors, who 'often experience re-traumatisation, distress and disappointment with the justice system.'[187] It recommended that the Council consider reforming character references not to be considered at sentencing, to 'recognise that such references serve as further evidence of the grooming process employed by perpetrators to gain trust and access to victims.'[188]

A name withheld from the Council supported the *Your Reference Ain't Relevant* Campaign and supported this being extended to all sex offences, including adult victims:

> A perpetrators 'good' character cannot be separated from the evil they commit upon the most vulnerable victims of all: children. This [*Your Reference Ain't Relevant*] campaign should apply in QLD for all sex [offences] that are perpetrated against adults and children.[189]

Fighters Against Child Abuse Australia also supported changes to the use of 'good character' evidence, submitting:

> Good character should play absolutely no part in rape and sexual abuse cases because … *In particular there should never be character references accepted for sexual abuse and rape cases because no matter who someone was*

<https://www.abc.net.au/news/2023-03-08/court-jeffrey-joffa-corfe-sentence-character-reference-alex-case/102070088>.

179 Ibid citing Phoebe Hosier and Elise Kinsella (n 178).
180 Ibid 4.
181 Ibid.
182 Ibid.
183 Submission 14 (Your Reference Ain't Relevant) 3.
184 Ibid.
185 Ibid.
186 Ibid 5.
187 Ibid 4.
188 Ibid 6.
189 Submission 27 (Name withheld) 2.

> *before they were a rapist once they cross that line and commit a sexual offence, they are no longer a person of good character. People of good character do not commit sexual offences especially not against children!*[190]

Rape and Sexual Assault Research and Advocacy ('RASARA') told the Council that sexual assault and rape '[inflict] irreparable harm upon individuals, families, community and society'[191] and:

> The infrequency with which rape and sexual assault are successfully prosecuted means it is vital that, on the rare occasion when a conviction is secured, courts have the correct tools to impose a sentence which adequately reflects the severity of the offender's conduct, recognises the impact of offending and sends a strong message to the community that sexual violence is not acceptable.[192]

In their view, 'good character' should have 'no role to play in sentencing rape and sexual assault' as a sentencing consideration, regardless of the victim's age.[193] The reasons for this include:

- It is not relevant to rehabilitation: A person's employment history, lack of previous convictions or support in the community from family and friends are not relevant as 'these factors did not prevent commission of the offence in the first place.'[194] Taking it into account 'fails to acknowledge sexual offenders' demonstrated ability to maintain a positive public façade'.[195] Excusing the offence as 'a moment of weakness or a lapse of judgement should speak to a lack of accountability for their actions and a terrifying lack of insight into why an offender broke from their "otherwise good character" to perpetrate an offence.'[196]
- It has a paradoxical application: A person uses their character to distinguish the offence from their usual character (describing the offence as being 'out of character') and then relies on their 'good character' to reduce the severity of the sentence.[197]
- It 'waters down any message of denunciation' by the community where it is used to 'justify the application of a more lenient sentence.'[198]
- It 'may even deter survivors from reporting claims for fear of entering what appears to be a personality contest.'[199]
- It retraumatises the victim: 'After having their credibility attacked during cross-examination during the offender's trial, good character evidence risks further traumatising the survivor by requiring they hear evidence of the good person they have accused.'[200]

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190 Submission 15 (Fighters Against Child Abuse Australia) 10 [6]. Emphasis in original.
191 Submission 18 (RASARA) 1.
192 Ibid.
193 Ibid 2.
194 Ibid.
195 Ibid 6–7.
196 Ibid 7.
197 Ibid 3. RASARA provided the Council with many case examples: offence described as 'out of character', 'uncharacteristic' or 'completely alien': see *R v Sologinkin* [2020] QCA 271; *R v Rogan* [2021] QCA 269. Where lack prior convictions are submitted as being mitigating see *R v Abdullah* [2023] QCA 189; *R v FVN* [2021] QCA 88; *R v McConnell* [2018] QCA 107; *R v Williams; Ex parte A-G (Qld)* [2014] QCA 346; lack of offending between commission of the offence being sentence: see *R v HCI* [2022] QCA 2; *R v SDF* [2018] QCA 316. Submissions about their committed family relationships: see *R v Sologinkin* [2020] QCA 271; *R v McConnell* [2018] QCA 107; *R v Williams; Ex parte A-G (Qld)* [2014] QCA 346. Maintaining stable friendships: *R v Rogan* [2021] QCA 269. Community involvement: *R v Abdullah* [2023] QCA 189; *R v Rogan* [2021] QCA 269; *R v Williams; Ex parte A-G (Qld)* [2014] QCA 346. Demonstrated compassion: *R v Rogan* [2021] QCA 269; Positive character references from family: *R v Downs* [2023] QCA 223. Employment: *R v Fahey* [2021] QCA 232; *R v McConnell* [2018] QCA 107; *R v Williams; Ex parte A-G (Qld)* [2014] QCA 346. Performance at school: *R v McConnell* [2018] QCA 107. Good work ethic: *R v Singh* [2024] QCA 50.
198 Submission 18 (RASARA) 7.
199 Ibid.
200 Ibid citing 'Prosecutors are required by the Queensland *Director of Public Prosecution's Guidelines* to ask survivors to be present during sentencing and to immediately inform the prosecutor of any incorrect assertions regarding the offender's character, such that they can be challenged.'

- An absence of prior convictions 'is converted into a positive presumption to the benefit of the offender.'[201]
- The current limitation under section 9(6A) of the PSA 'offers no utility in remedying the inappropriate use of good character evidence.'[202] It referred to decisions in NSW with an equivalent provision, considering it did not provide 'consistency or coherence' and there was confusion as to its application.[203]
- This evidence is subjective and 'influenced by individual perspective', including by sentencing judges.[204]
- The current NSW provision limiting the use of good character is problematic and there has been conflicting application of the NSW provision.[205]

RASARA noted the difficult task of the sentencing court and considered that it 'would be clearer by barring good character evidence from being considered at all.'[206] RASARA recommended that, rather than clarifying the use of evidence of 'good character', section 11(1) of the PSA be amended to state:

> when sentencing an offender, a court may have regard to:
>
> a. the number, seriousness, date, relevance and nature of any previous convictions of the offender, without considering evidence of the offender's lack of previous convictions; and …
>
> b. ~~any significant contributions made to the community by the offender; and~~
>
> c. such other matters as the court considers are relevant, without considering evidence of the offender's good character.[207]

Basic Rights Queensland told the Council it did not support the use of 'good character' references when sentencing for rape, attempted rape or sexual assault. It considered that, by 'providing the accused to draw upon their social capital, connections, and agency to provide testament to their otherwise good nature reasserts the harmful "good bloke" mythology that continues to excuse their crimes.'[208] It told the Council that evidence of good character embeds privilege, as

> Offenders with strong family connections, social networks, professional associations, wealth, and friends and/or family with high social status or belonging to 'respected' professions are providing praise and reports of *their* positive experiences of the accused through this avenue. The system fails to provide the same opportunities and favour to those accused who are socially disadvantaged, lack economic security or capital wealth, who therefore through no fault of their own, often have less social capital to defend their reputation. This process rewards privilege. By their very nature, these reports are biased, in that they are often written by people who have a vested interest in the penalty being reduced and can be motivated by emotion and/or self-interest.[209]

201 Ibid 3–4.
202 Ibid 4.
203 Ibid 4–6. Referring to *Bhatia v The King* [2023] NSWCCA 12, [144]; *R v Farrell* [2022] NSWDC 695. RASARA said at 6, nn 31 'This was a disturbing reversal of the statutory test, suggesting that it was not the offender's acts but those of the victim that matter for the purposes of s 21A(5A).'
204 Ibid 7–8 citing Elisabeth McDonald, 'From "Real rape" to real justice? Reflections on the efficacy of more than 35 years of feminism, activism and law reform' (2014) 45 *VUWLR* 487, 498 and Veronique Valliere, 'Chapter 3: Myth-information, our misinformed beliefs about sexual offenders', in *Unmasking the Sexual Offender* (Routledge, 2023) 40.
205 Ibid 4–6. RASARA gave the Council case law examples to support this: *R v Farrell* [2022] NSWDC 695; *R v Rose* [2022] NSWDC 705; *Cheung v The Queen* [2022] NSWCCA 168; *BR v The Queen* [2021] NSWCCA 279; *R v A* [2021] NSWDC 232; *R v H* [2021] NSWDC 107; *R v Hamilton* [2019] NSWDC 382; *R v Mollel* [2017] NSWDC 36; *R v ND* [2016] NSWCCA 103; *R v van Ryn* [2016] NSWCCA 1.
206 Ibid 8.
207 Ibid.
208 Submission 19 (Basic Rights Queensland) 6.
209 Ibid 7.

TASC (Legal Services) echoed the views of many others who made submissions calling for reforms to be made, reporting that the use of evidence of 'good character' can be retraumatising and distressing for victim survivors, undermines the severity of the sentence and creates a double standard that limits accountability for the person being sentenced.[210] Its use 'perpetuates a culture of impunity for sexual offenders'.[211] TASC (Legal Services) also questioned the accuracy of character references, given their subjectiveness and the nature of sexual assault and rape, which is often committed 'behind closed doors'.[212]

TASC (Legal Services) advocated for legislation to 'explicitly exclude character references as a mitigating factor in sentencing for sexual assault and rape cases' to ensure the respect and dignity of, and justice for, the victim survivor.[213]

Queensland Sexual Assault Network (''QSAN') 'strongly opposed the use of good character references in any sexual violence matters'[214] and was concerned that this is often 'weaponised to deter the victim survivor reporting and to demean, minimise and dismiss the victim survivor's experience.'[215] Sharing the views of many other victim advocacy and support services, QSAN told the Council that evidence of 'good character' is 'highly distressing.'[216]

QSAN also told the Council that evidence of 'good character' can be used to support a court deciding not to record a conviction. When a court focuses on the future work and opportunities of the sentenced person, this disregards the impact of the offending on victim survivors.

Respect Inc and Scarlet Alliance told the Council that 'good character' evidence has particular impacts on victims who are sex workers and are sexually assaulted, due to the messages this sends, thus reinforcing disadvantage:

> Good character references contribute to reinforcing inequity between sex workers, members of a highly stigmatised community, and other members of the community. Class, race, and cultural divides are reinforced by good character references whereby defendants that are members of a socially privileged group are judged more favourably.[217]

Consultation with victim survivors

The Council consulted with victim survivors.[218] Regarding 'good character', victim survivors told the Council about their experience hearing 'good character' at the sentence:

> His sister gave him a character reference, which really made me angry because they lied in it and it was still used in court. Because they said to the judge, 'Oh he's held jobs all of his life.' He's never worked a day in his life … And then they made the remark that he had a hard upbringing because his father spent eight years in jail for rape. Well, that doesn't say that it gives him a right to do what he done. That's not a very good character reference, if you ask me. (Victim Survivor (rape) Interview 2)

210 Submission 22, Chapter 1 (TASC Legal and Social Services) 7.
211 Ibid.
212 Ibid.
213 Ibid 8 (emphasis removed from original).
214 Submission 24 (QSAN) 10.
215 Ibid.
216 Ibid.
217 Submission 25 (Respect Inc and Scarlet Alliance) 2. It provided examples of what their staff have observed when supporting victim survivors: 2–3.
218 See Chapter 4 for methodology and further details on this consultation activity.

> I think it was all bullsh*t. Because I don't care what he's doing now and how he's fixing himself. I want to hear about how [the court is] going to punish him for what he did. What he did, not what he's doing. (Victim Survivor (intercourse of child under 13) Interview 1)
>
> You know him being spoken about like that, like I was made to feel like [****], yeah. (Victim Survivor (rape) Interview 6)
>
> [Submissions made about the offender's] community connection, his family and that he would likely not be able to practice again and therefore he shouldn't go to prison and that is the biggest misconception. (Victim Survivor (sexual assault) Interview 7)
>
> I mean, you're going to go to the people who you are going to get the character references, it's not like there's a baddie out in the world who is doing all these bad things, it's ... the regular person who then chooses to do this and gets away with it because people say, "he would never do it". So character references sure served him ... It's sort of irrelevant because you're a health practitioner, you're a CEO, you're teaching all about health, you're seeing clients. Ok, so your kids think you're great but you're still, you're sexually assaulting [in] the community. (Victim Survivor (sexual assault) Interview 7)

One victim survivor told the Council she was never given a copy of the character reference to provide her view on whether there were lies. She also said how confusing it was when, after experiencing a trial and her character being 'completely pulled apart. I was called a liar multiple times' and then at sentence the person could 'be put out to be this beautiful person, when really there's nothing?' (Victim Survivor (rape) Interview 2).

A support person told the Council what they had witnessed in court:

> Then she had to sit there listening to all of the things like ... how [a conviction is] going to affect his work ... his promotion ... He was a person that worked for Queensland Health. Senior people in Queensland Health wrote him character references on Queensland Health letterhead, including doctors. And [the victim survivor is] sitting there listening to what a great person he is, after he's already admitted [the offence]. And then [the judicial officer] said 'no conviction recorded'. Wow, there was the screaming and yelling, and we had to get out of court. [The victim survivor] just collapsed straight to the ground screaming ... How can you plead guilty to a crime, say I'm guilty, but not be convicted of that crime? It doesn't fit with what the community thinks happens in the system ... When they get convicted, but it's just not recorded. And there's no history of it that they need to disclose, and it impacts on a lot of things. And [the sentenced person] almost walk[s] out of it feeling like they weren't convicted. (Victim Survivor Support Person Interview 3)

When asked how it could be improved, they did not consider 'good character' references to be relevant:

> [Good character references] can be manipulated and it does depend on, like I don't know how you contain what the content is and who writes that and who's considered. I just struggle to find its relevance. ... 'I know you as a good guy.' It doesn't mean that you're not a rapist, it doesn't mean you didn't rape these people. You just know them to be someone else because they've presented that version of themselves to you ... I just don't think a good character reference is relevant at all in those cases. (Victim Survivor Support Person Interview 3)

Another victim survivor support person questioned the theoretical basis for 'good character' evidence to be relevant in the sentencing process:

> What sort of philosophical position is [accepting 'good character' evidence] based on? Is it like ... A man of such good character would never do such a thing? Some of these other sort of belief systems that continue to exist in the community, maybe not necessarily as strong as what they've been in the past, but I think there's still that element. It's also the timing of doing that. So doing it at the [sentence], when victims are there, is not the appropriate time to do that. (Victim Survivor Support Person Interview 1 – group)

When talking about the standard of proof and process, the victim survivor support worker told the Council:

> When you have evidence, it has to be tangible, it has to be there ... So a character reference is potentially hearsay. Because there's no evidence to say that this person is an upstanding ... just because you said, it's hearsay ... It's almost like it needs to be able to be cross-examined. Yeah. Or substantiated. And if that person is writing a letter, that person should ... they need to be there [to be cross-examined].

> It's the timing of everything in relation to sentencing that is actually challenging for them to get fully across all of that detail … So to be able to really thoroughly think about them and whether or not they need to challenge something, that's quite difficult. (Victim Survivor Support Person Interview 1 – group)

9.5.2 Submissions from legal stakeholders

The Youth Advocacy Centre ('YAC') did not recommend any substantial change to section 9(6A) of the PSA, other than to apply to a victim under 18, unless there were exceptional circumstances, to ensure consistency in the law.[219] In cases where section 9(6A) did not apply, YAC did not consider a person's lack of criminal history should be removed as a consideration.[220] YAC considered the weight evidence of 'good character' more relevant where the person has no criminal history or the offending was not premeditated, and considered that courts 'thoroughly scrutinise the integrity of character references.'[221]

Legal Aid Queensland ('LAQ') did not advocate for any changes to the law with respect to evidence of 'good character'.[222] It considered that taking a lack of prior history into account serves the legitimate need to distinguish people who have reoffended.[223] It provided the Council with a summary of case law supporting 'good character' as:

- a factor balanced against other factors;[224]
- in child sexual offences, 'not without relevance but can have little weight';[225] and
- given weight based on the nature of the offence: 'Some offences are of such a nature and seriousness that the previous good character of the offender is of little weight.'[226]

LAQ observed that it is appropriately scrutinised and taken into account (together with other aggravating factors, including a breach of trust).[227] It told the Council that it is important for the sentencing court to be able to have regard to all the circumstances of the case when imposing a sentence.[228] It considered that section 9(6A) of the PSA provides for where 'good character' cannot be taken into account and warned 'further amendments would curtail further the ability of judges to engage in the process of instinctive synthesis.'[229]

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219 Submission 30 (Youth Advocacy Centre) 4, citing *R v Manser* [2010] QCA 32 and Criminal Justice Legislation (Sexual Violence and Other Matters) Amendment Bill 2024, which proposed an amendment to the *Criminal Code* (Qld) to introduce section 210A: Sexual acts with a child aged 16 or 17 under one's care, supervision or authority and amend section 229B: 'Any adult who has a child of or above the age of 16 under their care, supervision or authority and maintains an unlawful sexual relationship with the child commits a crime.' Defences include if the adult believed the child was at least 18 years of age. At the time of the submission this was a Bill. It has since passed on 19 September 2024: *Criminal Justice Legislation (Sexual Violence and Other Matters) Amendment Act 2024* (Qld).

220 Ibid.

221 Ibid.

222 Submission 23 (Legal Aid Queensland) 4.

223 Ibid 4(iii).

224 Ibid 37 citing *R v Wruck* [2014] QCA 39 [36].

225 Ibid 37–8 citing *Dick v The Queen* (1994) 75 A Crim R 303 citing *R v Petchell* (Unreported, WA Court of Criminal Appeal, No 157 of 1992).

226 Ibid 40 citing *R v Smith* (1981) 7 A Crim R 437.

227 Ibid 4–5. Referring to Annexure 1: *R v Wruck* [2014] QCA 39 [36] (Holmes CJ); *Dick v The Queen* (1994) 75 A Crim R 303; *R v Reid; Ex parte A-G (Qld)* [2001] QCA 301; *R v D'Arcy* [2000] QCA 425; *Ryan* (n 7); *R v Smith* (1981) 7 A Crim R 437.

228 Ibid 4.

229 Ibid.

The Queensland Law Society did not recommend any changes be made to the PSA with regard to 'good character' evidence, considering it relevant to the sentencing purpose of rehabilitation.[230] It did consider that there could be an opportunity to educate the profession on terminology and language used.[231]

Subject matter expert interviews participants

Many participants told us any 'good character' evidence is considered and balanced against other factors in a case and generally doesn't carry much weight.[232] We were told the nature and seriousness of the offending would 'override any good character information'.[233]

Character references

Several participants considered limited weight was placed on references from friends and family members.[234] A reference simply stating the offending was 'out of character' or the person was remorseful 'is of limited value to the court'.[235] Similarly, weight will not be given if the author does not state they are aware of the charges.[236] It was viewed as important that there be 'substantial proof of good character evidence' by 'people independent who are well-informed about the allegations and who have the ability to bring an independent mind to the proceedings'.[237]

Character references were viewed as most relevant to a person's prospects of rehabilitation.[238] The character reference should provide evidence of 'how [the person being sentenced has] conducted themselves' and 'about rehabilitative steps and expressions of remorse, which is different from [suggesting] "He is a good guy"'.[239] References could demonstrate to the court 'the rehabilitation that [the person has] tried to engage in and that is a sign indirectly of good character because it shows how seriously they're taking these matters'.[240] It could be 'objective … from an organisation where they've been doing a program, an anger management program, a domestic violence program, and they say that they were doing really well on the program … [p]ositively contributed and motivated and seemed to be learning.'[241]

No prior criminal history

Generally, participants thought a person was entitled to have a lack of prior criminal history taken into account.[242] We were told that while having no prior history is common for sexual assault and rape, 'it doesn't detract from the gravity of the offending conduct in and of itself. But of course, inevitably someone is going to be sentenced differently to someone who has a significant and relevant history of that sort of offending.'[243] An absence of prior convictions might suggest the person has good prospects of rehabilitation,[244] although this will depend on the individual circumstances of the case.[245] Two

230 Meeting with Queensland Law Society, 9 July 2024.
231 Ibid.
232 SME Interviews 1, 4, 5, 7, 10, 13, 15, 25.
233 SME Interview 4. Similar remarks were made in SME Interviews 1, 5, 7, 13, 15, 16, 21,
234 SME Interviews 3, 5, 6, 7, 9, 11, 14, 16, 22.
235 SME Interviews 2, 3, 4, 11.
236 SME Interviews 8, 10, 11, 16, 17.
237 SME Interview 11.
238 SME Interviews 2, 11, 24, 26.
239 SME Interview 2.
240 SME Interview 24.
241 SME Interview 9.
242 SME Interviews 10, 12, 13,
243 SME Interview 15. Similar remarks were made in SME Interviews 1, 9, 10.
244 SME Interview 7.
245 SME Interview 9. For example, there is a difference between a teenage boy who goes to a party and gets drunk for the first time and commits an offence compared to someone who, in a premeditated way, goes out and targets a victim and commits an offence.

participants thought a lack of prior criminal history should be regarded as 'the absence of an aggravating factor' – that is, as neutral – rather than as mitigating.[246]

Application of section 9(6A) of the PSA and whether to extend the limitation

Many participants told us they had no experience of section 9(6A) of the PSA being applied in practice or discussed on appeal.[247] Four participants discussed the scope and application of the provision. One participant told us it was helpful to have 'legislative force' behind a submission that 'good character' was not relevant.[248] However, another considered the section to have a narrow scope.[249] One participant told us its application was rare and considered it a 'grey area' where the perpetrator was a family friend and it was a 'breach of trust category'.[250] In this situation, it was 'less about the good character and more about access. So, generally, the courts will still place some weight on the mitigating aspects … because it doesn't attach to facilitation.'[251]

Similarly, another participant commented on its mixed application where a perpetrator had access to a child because they were a family member as opposed to access because of their profession.[252] They considered that people committing sexual assault and rape can manipulate situations to enable the offence to occur (for example, creating an opportunity to be alone with the victim, such as waiting for a parent to go to sleep), so did not understand why this was different from where 'good character' had assisted a person in a professional capacity.[253]

Generally, participants were cautious about extending the provision to adult victims as courts always have 'regard to the circumstances in which the offence is committed' and will always take into account 'if a person has abused a position of trust'.[254]

9.5.3 Consultation events

At our consultation events, we were told:

> It's really important to differentiate between the person and the behaviour … While someone's character is relevant, good character shouldn't outweigh the harm.[255]

> You have to separate the person from the offence. The success of rehabilitation is very dependent on whether the offender takes responsibility and believes they've done wrong.[256]

> What makes a 'good character'? … Quite often defendants seek references from those they know will give a good character reference, is quite superficial and sought of people who know them less well.[257]

When asked what should be changed about sentencing for sexual assault and rape, one participant suggested that, 'No character references should be allowed for [defendants] during proceedings.'[258]

246 SME Interview 19. Similar remarks made by SME Interview 1.
247 SME Interviews 11, 12, 15, 16, 17, 22, 26.
248 SME Interview 21.
249 SME Interview 17.
250 SME Interview 23. Similar remarks made in SME Interview 14.
251 Ibid.
252 SME Interview 19.
253 SME Interview 19.
254 SME Interview 10. Similar remarks made in SME Interviews 22, 26.
255 Online Consultation Event, 16 April 2024, Group 2.
256 Ibid.
257 Online Consultation Event, 16 April 2024, Group 1.
258 Online Consultation Event, 3 April 2024 Group 2. Others agreed with this.

9.6 Sentencing remark analysis

9.6.1 Sentencing remarks data analysis

Studies have explored the use of personal mitigating factors in sentencing, which provide a useful insight into how courts approach the issue of good character evidence. Belton and Dhami note that a significant limitation of these studies, however, is that they do not provide detail about how a mitigating factor has been interpreted or applied.[259] Noting the limitation of previous studies, the Council reviewed sentencing remarks to gauge the extent to which evidence of 'good character' was raised and, if so, how this appeared to impact or influence the sentence.

This review of sentencing remarks adopted a similar methodology to that undertaken by Kate Warner et al, which compared legal and lay assessments of relevant sentencing factors for sex offences in Australia, including good character.[260] However, Warner et al did not use a 'neutral' code (discussed below) and, in contrast to Warner et al's approach, the Council was reliant on those factors specifically referred to by the sentencing judge or magistrate at sentence in their sentencing remarks as a basis for considering the extent to which they were considered and taken into account.

Analysing sentencing remark data by reviewing and coding for specific expressed 'factors' can have significant shortcomings and limitations which are discussed in Chapter 4.

The Council reviewed the following sentencing remark data (which differed for each offence):

- **rape:** all sentencing remarks for rape cases (MSO) sentenced from July 2022 to June 2023 in the District Court (n=131);[261]
- **sexual assault:** a selection of 75 cases randomly selected from all sexual assault (MSO) cases sentenced between 2020–21 and 2022–23 across the Magistrates and District Court (n=75).[262]

The Council observed that the common 'good character' factors a judge or magistrate would consider were:

- no criminal history;
- no relevant criminal history;
- a statement the person was of 'otherwise good character';
- a statement the offence was 'out of character';
- employment or employment prospects;
- comment on the person's reputation such as good work ethic, trustworthy, a 'good guy';
- support from family and or friends;
- has made contributions to the community, such as good deeds, volunteer work, community involvement.

259 Ian K. Belton and Mandeep K. Dham, 'The role of character-based personal mitigation in sentencing judgments' (2024) 21 *Journal of Empirical Legal Studies* 208, 213.
260 Kate Warner et al, 'Comparing Legal and Lay Assessments of Relevant Sentencing Factors for Sex Offences in Australia' (2021) 45 *Criminal Law Journal* 57.
261 This was a more robust way to consider 'good character' in rape. It was not possible for the Council to consider all sentencing remarks for sexual assault (MSO) because the Council did not have access to all sentencing remarks, so a sample was used. For the methodology on the sample used, see Chapter 4.
262 For the methodology on the sample used, Chapter 4.

This review considered whether each 'good character' element was present and the weight given (if there was 'a lot of weight', 'a little weight', neutral (no identifiable weight given or weight not apparent) or no weight – where it was expressly stated 'no weight given' (i.e. because of section 9(6A) of the PSA or the person was not considered to be of 'otherwise good character')).

Neutral (no identifiable weight or weight not apparent)

Consistent with the instinctive synthesis approach, it is not a requirement for a sentencing court to precisely explain how all relevant factors were taken into account and what weight they were given. In some matters, the mere presence of a factor may not warrant it being given 'a lot of weight' or 'a little weight' – for example, where the factor is referred to in order to provide additional context. In these cases, the treatment of these factors was coded as 'neutral'. In some cases, the remarks lacked sufficient detail for the coder to clearly understand the weight given, in which case the treatment of these factors was also coded as neutral.

9.6.2 Key sentencing remark data findings

Key sentence remark data findings on 'good character' in sentences for rape (MSO)

Findings based on all rape (MSO) cases sentenced from July 2022 to June 2023 in the District Court (n=131)

1	**Evidence of 'good character' was referred to in most cases of rape.** In most cases (91.6%, n=120/131), at least one type of evidence of 'good character' was mentioned.
2	**A character reference was used in over one in 3 cases, often provided by a family member.** In over one-third of cases (35.9%, n=47/131) at least one character reference was referred to. Where the author was mentioned (n=24), most commonly these references were provided by a family member (e.g. parent, brother, sister or sister-in-law) (n=17, 70.8%), followed by an employer (n=6, 25%).
3	**Evidence of 'good character' appeared to be given 'a lot of weight' in more than one in 4 cases.** In over one in 4 cases (28.2%, n=37/131), it was clear that the person's evidence of 'good character was treated as mitigating and given 'a lot of weight'.
4	**Most commonly, evidence of 'good character' was treated as a neutral factor.** In 60 per cent of cases (n=79/131, 60.3%), some type of 'good character' evidence was mentioned but it was not possible to determine how this was taken into account.
5	**Good employment prospects and the person being described as being 'otherwise of good character' were the most common elements of 'good character' mentioned.** Having good employment prospects was the most commonly mentioned type of 'good character' evidence referred to (n=75/120) and was considered mitigating in 21.3 per cent of cases (n=16/75). Having the support of family and friends was also commonly mentioned (n=70/120) and considered mitigating in 12.9% of cases (n=9/70). Proportionally, the type of 'good character' evidence most commonly treated as mitigating, if it was raised, was the behaviour being described as being 'out of character' (84.6% of mentions where this was mitigating); however, this type of good character was only mentioned in 13 of the 120 cases. The person being described as being 'otherwise of good character' was also commonly considered mitigating if mentioned (76.2% of mentions) but was mentioned in only 21 cases (out of 120).

6	**Where 'good character' was referred to in a way that suggested it was mitigating, the person was significantly more likely to receive a partially suspended prison sentence.** Cases where evidence of 'good character' was treated as mitigating were statistically significantly more likely to result in a partially suspended prison sentence being imposed and less likely to attract an imprisonment order with a parole eligibility date, than those cases where good character was not mentioned as a mitigating factor.[263]
7	**There was no significant difference in imprisonment lengths based on the presence and treatment of good character evidence, but the sample size is small.** While the sample size is small, the data indicates that there was no significant difference in the sentence lengths for either imprisonment or a partially suspended prison sentence, based on the treatment of good character as mitigating or not.

Key sentencing remark data findings on 'good character' in sentences for sexual assault (MSO)

Findings based on a random selection of 75 cases from all sexual assault (MSO) cases sentenced between 2020–21 and 2022–23 across the Magistrates and District Court (n=75).

1	**Evidence of 'good character' was referred to often in sentences of sexual assault.** Evidence of 'good character' was considered often (n=46/75, 61.3%) in sexual assault cases.
2	**A character reference was used in one in 3 cases and often given 'a lot of weight'.** In one-third of cases, a character reference was used (n=25/75, 33.3%). Information contained in these references was often considered mitigating and given 'a lot of weight' (n=19/25, 76.0%).
3	**Most commonly, evidence of 'good character' was treated as a mitigating factor.** In just over 40 per cent of cases, some type of evidence of 'good character' was treated as mitigating and appeared to be given 'a lot of weight' (n=32/75, 42.7%).
4	**No criminal history, having good employment prospects and the person being described as being 'of otherwise good character' were the most common elements of 'good character' referred to.** Having no criminal history was the most commonly mentioned type of 'good character' evidence referred to (n=24/46) and was considered mitigating in 79.2 per cent of these cases (n=19/24). Having good employment prospects was also commonly mentioned (n=21/46) and treated as mitigating in two-thirds of these cases (n=14/21). Proportionally, the type of 'good character' evidence most commonly treated as mitigating was the person being 'of otherwise good character' (100% of mentions); however, this type of good character was only mentioned in 8 of the 46 cases. 'Providing contributions to the community' was also commonly treated as mitigating (85.7% of mentions) but was mentioned in only 7 cases (out of 46).
5	**Where 'good character' was treated as mitigating, the person was significantly more likely to receive a non-custodial penalty.** Cases where 'good character' was treated as a mitigating factor were significantly less likely to receive a custodial penalty and more likely to receive a non-custodial penalty than cases where good character was not referred to in a way that suggested it was treated as mitigating.[264] More than three-quarters of cases

263 Pearson's chi-square test: $\chi 2(3)=26.15$, p <.0001.
264 Pearson's chi-square test: $\chi 2(1)=7.38$, p <.05.

	where good character was not treated as a mitigating factor received a custodial penalty (78.6%), compared with less than half of cases where good character was a mitigating factor (48.5%).
6	**There was a significant difference in custodial sentence length, but the sample size is small.** While the sample size is small, the average custodial sentence length when 'good character' was referred to as a mitigating factor was 0.7 years (median 0.7 years), which is significantly shorter than those cases where good character was not a mitigating factor (average 1.1 years, median 0.8 years). This difference was found to be statistically significant.[265]
7	**Where 'good character' was relied on and treated as mitigating and a non-custodial penalty was ordered, most people had no conviction recorded, but the sample size is small.** Of the 26 cases where a non-custodial penalty was imposed, in 17 cases, the person's 'good character' was referred to as a mitigating factor. Almost all those cases resulted in no conviction being recorded (n=16/17, 94.1%), compared with two-thirds of cases where good character was not referred to as being a mitigating factor (n=6/9, 66.7%). The sample is too small for significance testing.

9.6.3 Discussion

The key findings from the sentencing remark data analysis on rape (MSO) and sexual assault (MSO) provide a useful illustration of how often and how 'good character' is considered and might influence sentences. It suggests to us that evidence of 'good character' is commonly referred to and, where it is mitigating, this appears to be used by the court to determine the person's prospects of rehabilitation and risk of reoffending. For example, for rape this can be relevant to determining what type of imprisonment sentence is most appropriate (for example, whether there is a need for supervision through parole). For sexual assault, this can be relevant to determining whether the purposes of sentences can be met by a non-custodial order and whether a conviction should be recorded. However, taking the discretionary and intuitive nature of sentencing into account, we do not consider that 'good character' alone is determinative or causal regarding whether a sentencing judge orders a sentence of imprisonment to be suspended or not, or whether to make some other type of sentencing order.[266] There are significant limitations to this analysis[267] and we did not control for other factors such as the seriousness of the offence, whether the victim was a child or whether there were more than one victim, number of offences or whether there were prior offences. Even controlling for these factors, this type of analytical approach has limitations.[268]

Sexual violence is widespread and committed by men from all backgrounds, ethnicities and financial positions.[269] However, recent research from the University of New South Wales found men with sexual feelings towards children who had sexually offended against children were well connected, relatively wealthy and had better social supports and relationships than men who did not have sexual feelings or histories of offending with children.[270] The report concluded that its findings have 'validated the

265 Independent Groups T-Test: t(46.36)=2.35, p <0.05, two-tailed (equal variance not assumed).
266 See Cyrus Tata, *Sentencing: A Social Process – Re-thinking Research and Policy* (Palgrave Macmillan, 2020) 43, 147: judicial officers who engage in an intuitive and discretionary decision-making process make sentencing decisions based on 'the recognition and continual recreation of "typified whole case stories"', not the addition and subtraction of independent sentencing 'factors'.
267 See Chapter 4, section 4.3.3 for a discussion of limitations.
268 See Tata, *Sentencing: A Social Process* (n 266) 38–43.
269 For further discussion of the profile of those who use sexual violence and their risk factors, including sexual violence against children, see Queensland Sentencing Advisory Council, *Sentencing of Sexual Assault and Rape: The Ripple Effect – Consultation Paper Background* (March 2024), section 4.3, 38–41.
270 University of New South Wales, *Identifying and Understanding Child Sexual Offending Behaviours and Attitudes Among Australian Men* (November 2023) 31.

observations of countless survivors that the men who abused them are well respected members of the community who enjoy high esteem and the confidence of those around them'.[271] This prevalence study suggests some types of perpetrators may get an added benefit from good character references.

9.6.4 Language

The Council was told by victim survivor and advocacy groups' stakeholders that character references can be deeply distressing and retraumatising for victim survivors, and undermine the sentencing purposes of denunciation (see above 9.5.1). The way 'good character' evidence is conceptualised, and the language used have been criticised in the literature based on the gendered application, link to gender role performances[272] and how it is used to construct 'dominant masculine narratives'.[273] A small study by Taylor based on court transcripts of 4 intrafamilial sex offence trials in Victoria concluded that 'good character' was 'recited like a verse whose meaning is never examined or scrutinized by simply articulated as one of the standard exculpatory homilies used to diminish sexual offending'.[274]

A separate study by Stevens and Wendt of child sexual abuse sentencing transcripts from the District Court in South Australia sought to understand 'the use of language' around good character.[275] They identified frequent use of 3 dominant societal discourses (family, employment and community) and one legal discourse (rehabilitation):

- Family: the language constructed the person as 'a supported or supportive family member, a valued role within the family, and a potential victim; that is, a person that suffered or will suffer harm to his family because of the child sexual abuse conviction.'[276]
- Employment: used to raise the status of person being sentenced, with notions of 'the employee with "good working" characteristics, the supported and desirable employee, and the potential victim; that is, a person whose career has or will be harmed by their child sexual abuse conviction'.[277]
- Community: comments to construct a person as being supported by the community and committed to their community to indicate the person being sentenced was otherwise 'fulfilling their community role within society'.[278]
- Rehabilitation: comments to construct a person as being a 'good' offender by doing the 'right' actions, such as engaging in rehabilitation, acknowledging their offending behaviour, demonstrating remorse, having no previous conviction and being a victim (e.g. has been psychologically harmed by the offence or conviction).[279]

From their analysis, they argue that the language used when discussing 'good character' assists the sentenced person 'to feel as though he was, is and will be a good person within the sentencing context'.[280] They note that the adoption of this narrative serves to minimise the seriousness of the offending,

271 Ibid 35.
272 Stevens and Wendt (n 168) 97 citing Wright MM, *Judicial Decision Making in Child Sexual Abuse Cases* (UBC Press, 2007) 84.
273 Ibid 97, citing Taylor SC, *Court Licensed Abuse: Patriarchal Lore and the Legal Responses to Intrafamilial Sexual Abuse of Children* (Peter Lang, 2004) 77.
274 Ibid.
275 Ibid 99. The sample considered was 8 transcripts between 1997 and 2012.
276 Ibid 101.
277 Ibid.
278 Ibid 101–2.
279 Ibid 102.
280 Ibid 106.

negatively impacts victim survivors and may reduce the impact of the court's denunciation by 'potentially delet[ing] the "wrongfulness" message of this crime'.[281] They point to the many negative consequences arising from its use and its broader implications:

> The language of good character avoids the naming of the defendant and, alarmingly, the child sexual abuse. The defendant's 'goodness' can be used to shift blame to the victim and minimises the seriousness of the child sexual abuse offences. This represents a wider societal practice of silencing discussion about child sexual abuse, which has serious potential implications for victims. The dominance of good character at the sentencing stage can create additional negative experiences within the criminal justice system for victims of child sexual abuse, especially for those who engage with the legal system to assist in their recovery.[282]

Thematic sentencing remark review

To inform our review, we undertook a thematic review of sentencing remarks.[283] We observed many examples where character references were used only to attest to personal character traits, the person's positive role in the family, express an opinion about the person's work ethic or employment, and their contributions to the community. These statements were made in various circumstances, including where the victim was a child, and the offending was not isolated, without tying this to any specific purposes of sentencing.

Language used to describe 'good character': Findings from the thematic sentencing remark analysis[284]

A person found guilty after trial of 2 counts of oral-vaginal and digital-vaginal rape and 3 indecent dealing with a child under 16, under care (his 15-year-old niece) occurring on different occasions when he entered her bedroom at night. Despite being convicted following trial, character references were used which described him as:

> A good father to your son … [and] a good and supportive husband to your wife. He notes that you have always provided well for your family and places their needs ahead of your own, and he notes, perhaps understandably, that the charges for which you are being convicted are, at least in his assessment, totally out of character, and do not reflect your personality.
>
> reliable, hardworking and honest and … great worth ethic … high moral values
>
> A 'kind-hearted, loving father, friend and husband. Hardworking, honest and all-round great person to be friends with'. (Rape, regional/remote, imprisonment < 5 years, #5)

A person who pleaded guilty to 2 counts of oral-penile rape and one count of indecent treatment of a child under 16, under 12, lineal descendent (his daughter) occurring on 3 occasions when the child victim was aged 3, in prep and again at 6 years old. The sentencing judge referred to 'good character' when describing the offences:

> The first count occurred when your daughter was in kindergarten, then aged only three years. You put honey on your penis and told her to suck it … The material to which I will refer a little later puts your behaviour as an aberration for a man otherwise of good character. It may be noted, however, that the offending which I have just described was not the only occasion upon which you preyed on your own daughter. (Rape, major city, imprisonment < 5 years, #22)

A person who pleaded guilty to one count of digital-vaginal rape and 3 counts of indecent treatment of a child under 16, under 12, occurring when he (a private English tutor aged 60) was alone with the child victims (aged

281 Ibid.
282 Ibid.
283 See Chapter 4, section 4.3 for methodology.
284 For a description of the sampling and analysis methodology see Chapter 4, section 4.3.

10 and 5). The sentencing remarks referred to a character reference and his 'previous good character' as in his favour:

> your sister … has provided a character reference for you which speaks of your otherwise positive attributes … She believes that the incident was out of character.
>
> But the sentence will obviously reflect matters in your favour, particularly … your previous good character. (Rape, major city, imprisonment < 5 years, #20)

A person who pleaded guilty to historical offences of penile-vaginal rape, 2 indecent assaults and 2 indecent treatments of a child under 16, under 12, (2 of his biological first cousins). The first victim was aged 10–12 and he was 15–17, the second victim was 11 and he was 20 (penile-vaginal rape). He was 55 at sentence and references described him as:

> Very diligent in his work ethic, good of character and trustworthy … Honest and trustworthy mate.
>
> There are other references that also speak of your good character, and there is no doubt that having regard to the fact that you have spent the last 35-odd years in employment without coming to the attention of the authorities in any way, I have regard to the fact that you are a person of good character and have lived a good life since these events that occurred in the early 1980s. (Rape, regional/remote, imprisonment < 5 years, #12)

A person pleaded guilty to the penile–anal rape of an adult victim, which occurred after a party when the victim was 'very drunk'. They had had consensual penile-vaginal intercourse, but she was saying no in a 'loud and forceful tone' to anal intercourse:

> A number of references have been tendered to this Court, and there are many people in Court supporting you today. Those persons speak highly of you. They state in those references that this offending is out of character, that you are a valuable member of the community in many roles, including as a mentor and volunteer in sporting and other community roles, that you have remorse, insight, and that you have been a high achiever at sport.
>
> I accept this is out of character. I accept that you are otherwise a contributing member of society. (Rape, major city, imprisonment < 5 years, #28)

A person was sentenced for historical offences of a penile–vaginal rape and sexual assault in circumstances where he was a dentist and had sexually offended against his employee (a dental nurse) on separate occasions:

> You have no criminal history. You are a mature man who is otherwise of good character. You obviously have a lot of support in the community. You have had a long and distinguished career in dentistry and orthodontics. And you have done voluntary work. You have been looking after your mother, who, I understand, is old and frail and, no doubt, your incarceration will be difficult on her. I have been given many references who speak of you as otherwise being a person who is regarded as kind and compassionate. I particularly note your daughter's reference, and she is obviously very close to you and she is going to find your incarceration difficult as well.
>
> … These offences did take place a long time ago and I accept that there has been no offending in between then and now, although, as the Crown says, the other side of that coin is that you have been able to live the life that you have as a result of not being held to account for these acts many, many years ago. (Rape, major city, imprisonment > 5 years, #10)

The Council also observed an example where 'good character' was given limited weight. In this case, the person being sentenced pleaded guilty to 27 charges including 4 counts of rape (digital–vaginal and penile–vaginal) and one count of maintaining a sexual relationship with a child:

> Your barrister has tendered a letter from XXX, I read that. You are well regarded by at least her, and it seems to me you are a reliable worker. But limited weight can be attached to this in light of the significant offending here over the long period. (Rape, major city, imprisonment > 5 years, #19)

There was also an example where the court considered the person to not be of 'good character'. In this case, the person being sentenced had been found guilty after a trial for 6 counts of rape and 10 counts of indecent treatment of a child under 16 (under 12 years) involving 5 victims:

> Your evidence was marked by an inflated, if not grandiose, sense of narcissistic self-interest. You were at pains to convince the jury of your limited physical ability to move, your important and time-consuming work and your good strength of character, particularly your caring and giving Christian nature. The latter was particularly offensive … I must not have regard to your good character if it assisted you in committing the offences … I do not think you are a person of any particular good standing in the first place. You may have worked throughout your adult life but you lied about your qualifications or the job that you were doing, on oath. (Rape, regional/remote, imprisonment > 5 years, #13)

This is consistent with the High Court view that evidence of 'good character' should be given limited weight if the offending occurred over a lengthy period instead of being an isolated incident, and a court is not bound to give weight if the person is not of 'good character'. There were no examples of the application of section 9(6A) of the PSA in the sample.

9.7 The Council's view

Key Finding

8. **There is a problem with certain types of 'good character' evidence**

There is a problem with certain types of 'good character' evidence. Many victim survivors find the use of character references and comments made with respect to these references to be deeply distressing and retraumatising.

See **Recommendation 5**.

There is no doubt the proper use and relevance of 'good character' evidence in the context of sentencing for sexual offences is contentious and divisive. While our research demonstrates that evidence of 'good character' can have a legitimate role in the sentencing process, we also observed numerous examples of problematic language being used, particularly when referring to character references. We acknowledge that the use of character references and the language used in the context of sentencing for rape and sexual assault can be jarring when words are used describing the perpetrator as a 'good bloke' or as being a 'loving and kind father and friend', given the nature and seriousness of this offending. We acknowledge that its use can be deeply distressing and retraumatising for victim survivors.

Balancing the concerns raised in consultation, including those shared with us by victim survivors, our review of sentencing remarks and Court of Appeal decisions, against the rationale for why evidence of 'good character' is used in sentencing, we conclude that there is a problem with certain types of 'good character', namely:

- evidence in the form of a character reference that contains subjective and a non-professional opinion about a sentenced person's personality traits;
- evidence of a person's standing in the community; and
- evidence of contributions to the community.

While we consider these aspects to be problematic and that they should never be used to reduce a person's culpability or the seriousness of the offending, we do not recommend a blanket prohibition on the use of this evidence as it is impossible to disentangle the elements of 'good character' evidence which are problematic from other parts that may serve a legitimate and important purpose in the sentencing

process. We consider there can be greater clarity about the permitted use of this evidence as only being relevant to rehabilitation and risk of reoffending,[285] in addition to reforms to allow a court to give this evidence no weight due to the nature and seriousness of the offending.

9.7.1 Character references can be subjective and contain non-professional opinions which can undermine perpetrator accountability and be distressing for victims

The Council is particularly concerned about the use of character references that comprise subjective, non-professional opinion evidence, purely attesting to the perceived or observed personality traits of the person being sentenced. We have observed that sentencing courts make extensive reference to the sentenced person's positive personal traits, including describing the person as being 'honest', 'kind-hearted', 'reliable', an 'all-round great person', a 'trustworthy mate', a 'valuable member of the community', 'kind and compassionate', and with 'otherwise good education and work ethic', without tying this to any specific purposes of sentencing.[286] We consider subjective opinion evidence from lay persons (without a professional expertise to give opinion evidence, such as a treating psychiatrist) should be scrutinised with greater rigour by a court when sentencing a person for sexual assault and rape.

In this context, we also acknowledge victim survivor concerns that positive statements by a court that a person is of 'otherwise good character' can undermine perpetrator accountability. We have been told that the language used may result in the person seeking to justify their behaviour to themselves and others as simply involving a temporary lapse in judgment. The more serious an offence is, such as rape, the more 'the usual claim to mitigation, and the "concession to human frailty" reasoning looks rather thin'.[287]

9.7.2 Standing in the community can be relevant to context, but generally has no role in assessing a person's culpability and seriousness of the offending

The Council agrees that standing in the community generally has no role to play in reducing a person's culpability or the seriousness of the offending, although it may be a relevant contextual factor.[288] For example, a person with standing might have more to lose by transgressing the boundaries of acceptable behaviour again. This fact may mean they are more likely to be deterred and less likely to reoffend (while noting there is no way to guarantee that they will in fact be deterred and will not reoffend).

9.7.3 Taking contributions to the community into account may be contrary to the principle of proportionality and give inequitable treatment to people who are privileged

Contributions to the community raise similar concerns as taking a person's 'standing in the community' into account. A sexual offence should not be considered less serious, and the person's culpability (blameworthiness) should not be reduced because a person has made significant contributions to the community. However, it may be relevant to assessing a person's prospects of rehabilitation and risk of reoffending.

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285 Similar to the observations made in *R v Knoote-Parke* [2016] 125 SASR 13 [2] (Sulan J), (Blue J), [77]–[79] (Doyle J) considering *Criminal Law (Sentencing) Act 1988* (SA) s 10(3)(ba) (now *Sentencing Act 2017* (SA) s 11(4)(c)). Cited with approval in *R v Handley* [2023] QDCSR 793, 4 (Long DCJ); *DPP v Schulz* [2018] VCC 1058 [88], [74]–[99] (Pullen J).

286 See section 9.6.

287 Andrew Ashworth, *Sentencing and Criminal Justice* (5th ed, Oxford University Press, 2010) 189–90. Ashworth makes this observation with respect to all elements of good character, including the absence of previous convictions.

288 See *R v RAZ; Ex parte A-G (Qld)* [2018] QCA 178 [22]–[25] (Sofronoff P, Gotterson JA and Boddice J agreeing).

We agree with criticisms that taking contributions to the community and 'good deeds' into account involves a strong element of 'social accounting', contrary to the principle of proportionality.[289] It may give rise to the inequitable treatment of people who are privileged with means and an opportunity to have done such deeds.[290] A person's disadvantage in life may not always mitigate, while a person's advantage (evidenced by employment, contribution to the community or family support) can do so.[291] It may also lead to an assumption that the person with advantage has a reduced risk of offending, has more to lose and could be disproportionately punished by a custodial sentence.[292]

9.7.4 Relevance of 'public opprobrium' and loss of reputation as a form of extra curial punishment

Elements of 'good character', such as a person's 'reputation' and 'standing in the community' can result in public shaming, humiliation or 'public opprobrium'.[293] The loss of standing or reputation and its impacts can be relevant to whether a person has experienced 'extra-curial punishment'.[294] We consider that the relevance of, and any weight given to, loss of standing and public humiliation is separate and distinct from a court determining a person is of 'otherwise good character'.[295]

9.7.5 Taking into account a lack of previous convictions is part of 'character' but is a special consideration that should not be further limited

We do not consider that a lack of previous convictions is in the same category as character references, standing and community contributions. We consider that a lack of prior offending goes more directly to assessments of the culpability of the person being sentenced than the other types of character evidence discussed above. It may also support an assessment of the person's rehabilitative prospects and risks of reoffending.[296] We accept, however, that in the context of sexual offending, a lack of previous convictions may not be unusual given the low rates of the reporting, and this may not, in fact, be the first time the person has engaged in this type of conduct. In some circumstances (for example, for offending that has occurred over a lengthy period), a lack of prior criminal history might be better thought of as 'neutral' than mitigating.

289 See Ashworth (n 287) 182.
290 See ibid, 19 citing Robert J, *Punishing Persistent Offenders* (2008) 110.
291 Julian V. Roberts, *Mitigation and aggravation at sentencing* (Cambridge University Press, 2011).
292 Ibid.
293 *Ryan* (n 7) 284 [303]–[304].
294 See *R v Nuttall; Ex parte A-G (Qld)* [2011] 2 Qd R 328 (Muir JA, Fraser and Chesterman JJA agreeing) [63]; *R v Burdon; Ex parte A-G (Qld)* (2005) 153 A Crim R 104, 107 (McMurdo P) referring to *Ryan* (n 7) [284]–[285] (McHugh J); [313]–[314] (Hayne J), [303]–[304] (Kirby J), [319] Callinan J); *R v Sparrow* [2015] QCA 271 [113] referring to *R v Poynder* (2007) 171 A Crim R 544.
295 In some cases, a person's loss of reputation and public humiliation will be of little weight, although there is no settled position as to whether this should be taken into account to reduce the penalty which otherwise would have been imposed: *R v Nuttall; Ex parte A-G (Qld)* [2011] 2 Qd R 328 (Muir JA, Fraser and Chesterman JJA agreeing).
296 Some legal academics who have considered the rationale for evidence of 'good character' in sentencing have argued it's use as a mitigating factor should be limited in sentencing, but a lack of prior criminal history is not included as part of any limitation or restriction: see Kate Warner et al, 'Comparing Legal and Law Assessments of Relevant Sentencing Factors for Sex Offences in Australia' (2021) 45 *Criminal Law Journal* 57; Gabrielle Wolf and Mirko Bargaric, 'Nice or Nasty? Reasons to Abolish Character as a Consideration in Australian Sentencing Hearings and Professionals' (2018) 44(3) *Monash University Law Review* 567, 582–3.

Recommendation

5. **Reforms to the use of 'good character' evidence**

The Attorney-General and Minister for Justice progress amendments to the *Penalties and Sentences Act 1992* (Qld) to qualify the current position under the Act as to the treatment of 'good character' evidence.

Amendments should provide that, despite section 11 of the *Penalties and Sentences Act 1992* (Qld), in determining the character of an offender being sentenced for a sexual offence committed by an adult and where section 9(6A) does not apply, a court must not take into account:

- evidence in the form of character references;
- evidence of a person's standing in the community; or
- evidence of significant contributions made to the community by the offender.

unless such evidence is relevant to assessing the person's prospects of rehabilitation or risks of reoffending (which is of direct relevance to sentencing purposes and factors listed under section 9(1) of the *Penalties and Sentences Act 1992* (Qld)).

In addition, courts should be provided with an express legislative discretion not to mitigate the sentence for the person's 'otherwise good character' based on character references, standing or contributions to the community. This discretion should be exercised having regard to the nature and seriousness of the offence, including the physical, mental or emotional harm done to a victim and the vulnerability of the victim.

9.7.6 Applying the Council's fundamental principles

Applying the Council's fundamental principles guiding the review[297] to the issues raised in considering evidence of 'good character' in sentencing and to address **Key Finding 8** guided us in making a recommendation:

- **Principle 1: Reforms to sentencing laws should be evidence-based with a view to promoting public confidence:** We have drawn on observations from sentencing remarks, appeal decisions, past reviews and research, as well as extensive consultation. We note the contrasting views of legal stakeholders (who advocate for no change), victim survivor advocacy and support groups (who advocate for change), the issues identified in past reviews and legal scholars who have also been critical of the use of 'good character' in the sentencing process. Although there is limited community evaluation, the current evidence available suggests there would be public support for leaving judges with discretion, but there is also room for judges to give less weight to 'good character', or more clearly articulate the rationale for giving it significant weight.
- **Principle 2: Sentencing decisions should accord with the purposes of sentencing as outlined in section 9(1) of the *Penalties and Sentences Act 1992* (Qld).** The Council acknowledges that evidence of character can be relevant to the sentencing purposes of rehabilitation and risk of reoffending (community protection). However, we are concerned with the language used when elements of 'good character' are not linked to a sentencing purpose or there is a lack of clarity on how and why it is considered.

297 For a full list of the fundamental principles, see Chapter 3.

- **Principle 3: Sentencing outcomes for sexual assault and rape offences should reflect the seriousness of these offences, including their impact on victims, while not resulting in unjust outcomes.** While the Council has observed that evidence of 'good character' is usually considered neutral, it can be mitigating, and some examples of the language used when referring to evidence in character references may reduce how the seriousness of the offence is perceived and negatively impact victims. The use of positive language when referring to character references which purely attest to personality traits, family role and work ethic can minimise the seriousness of the conduct, undermine perpetrator accountability and be distressing and retraumatising for a victim. We consider that subjective opinion evidence from lay persons (without professional expertise to give opinion evidence, such as a treating psychiatrist) should be scrutinised with greater rigour by a court when sentencing a person for sexual assault and rape.
- **Principle 5: Sentencing inconsistencies, anomalies and complexities should be minimised.** The Terms of Reference focus on sentencing practices for sexual assault and rape. A potential inconsistency would arise if our recommendation were limited to these two offences. We have been asked to ensure our advice on the use of 'good character' evidence is given in respect to *all* sexual offences (that is, not be limited to sexual assault and rape). The Attorney-General referred to other reviews underway in NSW and the ACT and to national-level discussions by the Standing Council of Attorneys-General. While we do not know the outcome of other reviews, we consider there could be merit in having a harmonised, nationally consistent approach, given that concerns with the use of 'good character' evidence are not unique to Queensland.
- **Principle 7: The circumstances of each person being sentenced, the victim survivor and the offence are varied. Judicial discretion in the sentencing process is fundamentally important.** The Council recognises that the circumstances of each person being sentenced, each victim and each offence are varied. It is therefore important that information about a person, including their character, antecedents and reputation, is considered alongside other information to assist the court in arriving at an appropriate sentence that is just in all the circumstances. We are mindful that legislation should allow a court to consider a person being sentenced as 'a whole person and not solely under the shadow of their crimes'.[298] When considering whether to further limit information available to a sentencing court, the Council is mindful that sentencing approaches that promote individualised justice applied within a framework of broad judicial discretion are generally more likely to support positive outcomes than a 'one size fits all' or 'one size fits most' approach.[299]
- **Principle 9: Sentencing decisions for sexual assault and rape should be informed by the best available evidence of a person's risk of reoffending.** We recognise that character references refer to the person having the support of their family or community, or speak to their engagement with education, employment or steps taken to rehabilitate, may be highly relevant in the sentencing process in assessing the person's risks of reoffending and rehabilitative prospects. However, as discussed above under Principle 3, an over-reliance on information contained in personal references should be avoided, given their subjective and often untested nature. In our view, information contained in such statements should be scrutinised with greater rigour by a court when sentencing a person for sexual assault and rape. Importantly, this information should

298 *Ryan* (n 7) 299 [108] (Kirby J).

299 See Andrew Day, Stuart Ross and Katherine McLachlan, *The Effectiveness of Minimum Non-Parole Period Schemes for Serious Violent, Sexual and Drug Offenders and Evidence-Based Approaches to Community Protection, Deterrence and Rehabilitation* (Literature Review, University of Melbourne, August 2021) 12–13.

not be used as substitute for professional assessments while accepting these may not be available in all cases (see further **Chapter 12**).

- **Principle 10: Any reforms should aim to be compatible with the rights protected and promoted under the *Human Rights Act 2019* (Qld) or be reasonably and demonstrably justifiable as to limitations.** If evidence of the admissibility of 'good character' is restricted, the Council acknowledges that this may be inconsistent with the principles of natural justice and may limit a person's human rights, such as 'rights in criminal proceedings'.[300] The Council is mindful of ensuring that, if a right is limited, it is reasonable and justifiable under the *Human Rights Act 2019* (Qld).

Identifying the types of 'good character' evidence which are problematic while maintaining judicial discretion

Consistent with **Key Finding 8**, the Council recommends the PSA should be amended to provide:

- evidence in the form of a character reference that contains subjective and a non-professional opinion about a sentenced person's personality traits;
- evidence of a person's standing in the community; and
- evidence of contributions to the community;

should not be taken into account unless it is relevant to assessing the person's prospects of rehabilitation or risk of reoffending.

This recommendation is made in conjunction with **Recommendations 14, 17, 18, 19 and 20** for training on trauma-informed practices and resources and training to members of the legal profession on language. Language changes regarding how evidence of 'good character' is communicated in court may assist a victim survivor and the community to understand how it is being taken into account, promoting transparency and public confidence. While language is an issue, and we agree the word 'good' is problematic and should be changed, our concerns go beyond this. Even if 'good character' is changed to 'prior character' and extensive training is delivered, in conjunction with the updating of resources, such as the Supreme and District Court's *Benchbook* on Sentencing, it is highly unlikely that this will result in a change to the use of this evidence and how it is relied on for sentencing purposes. In the absence of legislative reform, character references will most likely continue to be used and communicated in a way that indicates to victim survivors that evidence that the person is a 'good person' justifies a lesser penalty no matter how serious the offending. A legislative change will therefore serve an important purpose in directing courts and practitioners to link the use of this evidence to specific sentencing purposes rather than taking it into account 'in a general sense' – and this will direct courts to exercise greater caution when articulating their reasons for taking it into account. Such a change will not be merely symbolic, as it is intended to perform an instrumental purpose (being a mechanism to change legal practitioners' and judicial officers' treatment of such evidence).[301] The proposed change is not intended to dictate the weight given or affect 'instinctive synthesis', but rather to promote the synthesising task, which 'is

300 *Human Rights Act 2019* (Qld) s 32(2)(h) which provides a person is entitled 'to obtain the attendance and examination of witnesses on the person's behalf under the same conditions as witnesses for the prosecution'.

301 See, for example, how evidence of 'good character' is relevant to rehabilitation in *R v Knoote-Parke* [2016] 125 SASR 13 [2] (Sulan J), (Blue J), [77]–[79] (Doyle J) considering *Criminal Law (Sentencing) Act 1988* (SA) s 10(3)(ba) (now *Sentencing Act 2017* (SA) s 11(4)(c)). Cited with approval in *R v Handley* [2023] QDCSR 793, 4 (Long DCJ); *DPP v Schulz* [2018] VCC 1058 [88], [74]–[99] (Pullen J).

conducted after a full and transparent articulation of the relevant considerations including an indication of the relative weight to be given to those considerations in the circumstances of the particular case'.[302]

The Council considers that there should be greater rigour when sentencing courts consider the quality of (and any potential bias in) character evidence – for example, whether this information is from an independent source or someone who has a strong vested interest in the outcome. To improve the quality of character evidence, we recommend that funding is required in support of defence-commissioned pre-sentence reports for Legal Aid-funded persons (see **Recommendation 11** on information available to courts).

A court can choose to give elements of 'good character' no weight because of the nature and seriousness of the offence

We recognise that, under the common law, if a sentencing judge considers a person to be of 'otherwise good character' (without regard to the offences being sentenced), they are bound to take this into account in some way.[303] We recommend courts should be provided with an express legislative discretion not to mitigate the sentence for the person's 'otherwise good character' based on character references, standing or contributions to the community. This discretion should be exercised having regard to the nature and seriousness of the offence, including the physical, mental or emotional harm done to a victim and the vulnerability of the victim. While this overturns the majority decision in *Ryan*,[304] it elevates the common law approach that the nature of the offence 'is a countervailing factor of the utmost importance'[305] and the current considerations under the PSA requiring a court to consider the nature and seriousness of the offence.[306] It maintains judicial discretion and promotes public confidence.

If a sentencing court exercises its discretion, this is different from section 9(6A) of the PSA, as it does not exclude all elements of 'good character' evidence (for example, a lack of prior criminal history can still be considered). Also, the limitation is based on the nature and circumstances of the offence rather than 'if it assisted the person to commit the offence', which the Council notes has had a narrow and inconsistent application.

This recommendation should be consistent with any national approach

We are mindful of the other reviews currently underway, and implementing this recommendation should be consistent with any national approach.

Although initially our review of the use of this evidence was limited by the Terms of Reference to the offences of sexual assault and rape, we were later asked to 'have regard to the use of good character evidence in sentencing for [all] sexual offences and, if appropriate, recommendations for reform'.[307] This request was made in light of reviews underway in the ACT and NSW, and discussions occurring at a national level by the Standing Council of Attorneys-General.

We consider that the nature of sexual offences and the role of 'good character' evidence in sentencing deserve a special approach to sentencing, given the nature of this offending. The way 'good character' is used by those who commit sexual offences is different from how this evidence is used generally. Sexual

302 *Markarian* (n 60) 390 [84] (McHugh J).
303 *Ryan* 267 (McHugh, Kirby and Callinan JJ, Gummow and Hayne JJ dissenting).
304 Ibid.
305 Ibid 278 [33] (McHugh J).
306 PSA (n 4) ss 9(2)(c), (3)(d)–(e), (6)(c), (7)(a)–(ab).
307 Letter from The Hon Yvette D'Ath MP (Attorney-General and Minister for Justice) to the Hon Ann Lyons AM (Chair, Sentencing Advisory Council, 25 September 2024.

offences are, by their nature, usually committed in private with the victim survivor being the only witness to this offending. Understanding the true 'character' of a person as this relates to sexual conduct is therefore a far more complex and fraught exercise, given the typically hidden nature of this offending. It is not intended for this recommendation to apply to all offences generally.

While the PSA defines a 'sexual offence' by reference to schedule 1 of the *Corrective Services Act 2006* (Qld) ('CSA') for the purpose of the parole provisions,[308] the courts have found that, for the purposes of section 9(4)–(6A) of the PSA, an 'offence of a sexual nature' captures a broader range of offences beyond the definition of a 'sexual offence'.[309] We suggest the application of the changes we recommend should operate consistently with section 9(6A), which applies to all offences of a sexual nature in circumstances where these offences are committed against children.

The Council does not consider any legislative changes should be made to the admissibility process or procedural requirements of the court receiving 'good character' evidence, for example, mandatory cross-examination or changes to section 132C of the *Evidence Act 1977* (Qld). The Council considers that if this recommendation is legislated, courts will be directed to apply more rigour when considering elements of character.

Systemic disadvantage considerations

Our recommendation aims to reduce systemic disadvantage and promote equity in the law for disadvantaged groups. We were told 'good character' evidence embeds privilege,[310] as a person with strong family support, professional connections and wealth are able to provide positive evidence of their character. The same opportunities are not available to a person who is socially and economically disadvantaged, and less able to defend their reputation. This would affect marginalised groups such as people with a disability, culturally and racially marginalised people and people from LGBTIQA+ communities.

We also acknowledge Aboriginal and Torres Strait Islander peoples may experience intersecting forms of disadvantage, such as having a disability, living in poverty, having low socioeconomic status, experiencing a lack of employment and having a limited education. We were told during consultation that where a person was from a First Nations community (either a victim survivor or a person being sentenced), 'there was this deeply entrenched culture of you just do not talk about it. It's very – it's considered a very shameful thing to talk about'.[311] If a person is reluctant to discuss the offence and experiences shame, they may be less likely to ask family members, friends and work colleagues to provide character references. If a person has experienced, or is experiencing, poverty and homelessness, they may be unable to show evidence of contributions to the community, work ethic or caring responsibilities.

We consulted with the Aboriginal and Torres Strait Islander Advisory Panel on the recommendation to limit evidence of good character evidence. The Panel agreed that a preferred approach was to tease out the purposes of the use of this evidence rather than remove it entirely as a consideration. Panel members considered that there can be a connection between character evidence and rehabilitation. However, the Panel considered that, in most cases of sexual violence, character references should have minimal weight.

308 PSA (n 4) pt 9 div 3; *Corrective Services Act 2006* (Qld) sch 1.
309 See *R v HYQ* [2024] QCA 151 (Bowskill CJ, Dalton JA and Wilson J agreeing).
310 Submission 19 (Basic Rights Queensland) 7.
311 SME Interview 4. Similar comments made in SME Interviews 7, 24.

Human rights considerations

If evidence of good character is restricted, there is potential for a person's 'rights in criminal proceedings' to be limited.[312] A statutory provision is compatible with rights if it does not limit a right; or, if it does, that the limitation 'is reasonable and demonstrably justifiable'.

In 2019, when section 9(6A) of the PSA was introduced, the explanatory notes justified a breach of a fundamental legislative principle[313] 'to align with contemporary community standards and affords justice and dignity to victims rather than rewarding offenders for a factor enabling their offending behaviour'.[314] Similarly, our recommendation promotes victims' rights. Greater recognition of victims' experiences in the sentencing process is consistent with the right enshrined within the Charter of Victims' Rights to be treated with 'courtesy, compassion, respect and dignity, taking into account the victim's needs'.[315]

The Council has considered the important purpose of the limitation. Elements of 'good character' evidence are only limited where it is not relevant to a sentencing purpose of rehabilitation or risk of reoffending, or if the nature and seriousness of the offence mean it is not an appropriate factor for mitigation. The intention is to:

- ensure information before the sentencing court is appropriate, relevant and reduces subjectivity;
- improve the quality of information before the court;
- address any unfair advantage by a person who is privileged to have standing or contribute to the community;
- reduce the potential for a victim survivor to experience further distress; and
- encourage the court to articulate their rationale for giving this factor weight more clearly, to minimise victim trauma and align with contemporary community standards promote public confidence.

The Council considered whether there was a 'less restrictive and reasonably available way' to achieve this purpose. For this reason, the limitation to the use of good character evidence is proposed to be restricted to sexual offences committed by a person as an adult in circumstances where section 9(6A) of the PSA does not apply. The Council also considered whether this limitation should only apply to sexual offences sentenced in the higher courts; however, as the recommendation provides a discretion based on the nature and seriousness of the offence, any further limitation on this basis is considered unnecessary. The use of 'good character' evidence for cases sentenced in the Magistrates Courts is no less distressing for victim survivors than it is for matters sentenced in the higher courts, and the guidance regarding its use for magistrates is just as warranted.

Other options considered, but not recommended

The Council considered several other options including:

- **Option 1:** No legislative amendment and/or recommending further investigation.

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312 *Human Rights Act 2019* (Qld) s 32(2)(h) which provides a person is entitled 'to obtain the attendance and examination of witnesses on the person's behalf under the same conditions as witnesses for the prosecution'. This right may be relevant to sentencing laws and policies, which affect the admissibility of evidence and restrict access to information and material to be used as evidence.

313 As this was prior to the *Human Rights 2019* (Qld) being in force, a breach of fundamental legislative principles under the *Legislative Standards Act 1992* (Qld) s 4(2)(a) was considered.

314 Explanatory Notes, Criminal Code (Child Sexual Offences Reform) and Other Legislation Amendment Bill 2019 (Qld) 17.

315 *Victims' Commissioner and Sexual Violence Review Board Act 2024* (Qld) sch 1, 1.

- **Option 2:** Recommend legislative amendment by
    - not allowing evidence of 'good character' to be used and/or treated as mitigating; or
    - not allowing evidence of 'good character' to be used and/or to be treated as mitigating 'if it assisted the person to commit the offence' (mirroring the current section 9(6A) of the PSA (thereby extending this to all sexual offences against children aged 16 and 17 as well as committed against an adult victim).
- **Option 3:** Recommend legislative amendment for a court to treat evidence of 'good character' as an aggravating factor.

The reasons for not adopting the above options are explained below.

Option 1 would not address the problems with 'good character' identified as part of this review or, even with a commitment to professional development and training, be likely to change current sentencing practices in a meaningful way. Further consideration by way of a future review was also not recommended, given the high public interest in having this issue addressed as a matter of priority. At the same time, we are mindful of the benefits of adopting a harmonised nationally consistent approach to the use of 'good character' evidence in sentencing and the need to take the outcomes of other current reviews into account.

Option 2 is not an appropriate approach as 'good character' can have a legitimate purpose. The option to limit the use of evidence of 'good character' in sexual offences entirely or in a similar way to section 9(6A) of the PSA where 'it assisted the offender to commit the offence',[316] in our view may go too far in removing reliance on the evidence for any reason. We do not consider it appropriate to completely limit evidence of 'good character' as a blanket approach in all cases because aspects of character evidence can be legitimately relevant to rehabilitation and risk of reoffending.

With respect to applying a similar section 9(6A) of the PSA to adult victims, we note that this amendment was introduced to address concerns with child abuse in an institutional context[317] and are concerned that this provision may not easily apply to adult victims. Due to the limited case law in Queensland on the application of section 9(6A) of the PSA, we are not able to form an informed view in respect of its utility. However, from what we were told by victim survivors and support services, the current provision in other jurisdictions has a narrow application and is inconsistently applied, suggesting there is still dissatisfaction despite the introduction of such provisions.

Option 3 is not necessary as elements of 'good character' are currently considered aggravating. The option to establish 'good character' as a legislative aggravating factor[318] was also not supported. We note that this was considered by the Royal Commission, which was 'satisfied that it is unnecessary to … specifically allow prior good character to be raised as an aggravating factor in cases where it has facilitated the offending'.[319] We acknowledge the submissions made to the Royal Commission regarding

316 PSA (n 4) s 9(6A).
317 Royal Commission into Institutional Responses to Child Sexual Abuse, *Criminal Justice Report Parts VII - X and Appendices* (2017) 299.
318 Under Commonwealth law, 'if the person's standing in the community was used by the person to aid in the commission of the offence--that fact as a reason for aggravating the seriousness of the criminal behaviour to which the offence relates': *Crimes Act 1914* (Cth) s 16A(2)(ma). In England and Wales good character is aggravating if it was used to facilitate a historical sexual offence.
319 Royal Commission into Institutional Responses to Child Sexual Abuse, *Criminal Justice Report Parts VII - X and Appendices* (2017) 299.

the position in Queensland of considering betrayal and breach of trust as aggravating,[320] and agree with the Royal Commission's finding that a legislated aggravating factor is not necessary.

We are also aware that the NSW Department of Communities and Justice invited submissions relating to a review of section 21A(5A) of the *Crimes (Sentencing Procedure) Act 1999* (NSW) (equivalent to section 9(6A) of the PSA). In a recent submission to the NSW Sentencing Council, the NSW Office of the Director of Public Prosecutions identified the potential approaches on which the Department sought feedback.[321] These included:

1. expressly stating that a court may infer from all the circumstances that, when sentencing an offender for a child sexual offence, the offender's prior 'good character' assisted them to commit the offence;
2. imposing a burden on offenders who are to be sentenced for child sexual offences to establish that their 'good character' did not assist them to commit the offence;
3. creating a presumption of inadmissibility of 'good character' evidence in sentencing proceedings for child sexual offences that may be displaced – for example, in exceptional cases only;
4. imposing a requirement for leave to be granted before evidence of 'good character' can be adduced in sentence proceedings for child sexual offences;
5. considering whether courts should be prohibited from taking good character into account as a mitigating factor in all cases involving child sexual offences.

Having considered these alternative options and approaches to amending 'good character' evidence, we consider that **Key Finding 8** is best addressed through **Recommendation 5**, which identifies the elements of 'good character' evidence that are problematic, limits their application only if it is appropriate to assess prospects of rehabilitation or risk of reoffending (community protection) and gives a judicial discretion to give no weight to types of 'good character' evidence (despite the person being of 'otherwise good character') if it is not appropriate to do so because of the nature and seriousness of the offence. The Council also considers that this reform option best aligns with the fundamental principles guiding the review.

320 See PSA (n 4) s 9(6)(e); *R v WBM* [2020] QCA 107 [11], [47]–[49] (Applegarth J with Fraser and Mullins JJA agreeing) citing *R v BBP* [2009] QCA 114; see also *R v SAG* [2004] QCA 286 (Jerrard JA, Atkinson and Philippides JJ agreeing) [19] referring to a 'parental or protective relationship'.

321 Officer of the Director of Public Prosecutions, Submission to NSW Sentencing Council (19 July 2024) Annexure A. Available from <https://sentencingcouncil.nsw.gov.au/documents/our-work/good-character/PGC83.pdf>.

Chapter 10 – Other forms of sentencing guidance

10.1 Introduction

The Terms of Reference expressly ask us whether there is a need to make 'any legislative or other changes … to ensure the imposition of appropriate sentences for sexual assault and rape offences'.[1]

In this chapter, we consider other forms of sentencing guidance, including:

1. case law guidance on relevant general sentencing principles and the treatment of specific sentencing factors;
2. the identification by appeal courts of sentencing 'ranges'; and
3. alternative approaches to sentencing guidance – in particular, the use of formal guideline judgments.

The resources available to judicial officers and legal practitioners also constitute a form of sentencing guidance. We consider the current availability of these resources, including benchbooks, sentencing manuals, practitioner guidelines, case summaries and schedules, as well as resources developed and used in other jurisdictions.

10.2 Case law and sentencing 'ranges'

10.2.1 Case law as a non-legislative form of sentence guidance

The most significant form of non-legislative sentencing guidance in Australian jurisdictions is case law. This guidance not only plays a significant role in assisting lower courts to apply legislation in a consistent way, but also in understanding the broader approach to be taken in sentencing.[2]

Appellate court decisions correct errors, interpret legislation and set out principles and factors to provide guidance to lower courts.[3] Sentencing principles established by case law are applied alongside the legislative factors and are equally important. They are referred to as the 'common law' and courts have a duty to follow them.

The following sentencing principles apply to all cases in the Queensland courts, for example:

1. **Proportionality:** A sentence must be proportionate to the objective seriousness of the offence. This means a court must not impose a sentence that is more severe than is warranted based on

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1 See Appendix 1, Terms of Reference.

2 Michael Kirby, 'Sentencing Reform: Help in the Most Painful and Unrewarding of Judicial Tasks' (1980) 54 *Australian Law Journal* 732, 741. Arie Freiberg, *Fox and Freiberg's Sentencing: State and Federal Law in Victoria* (Law Book Co., 3rd ed, 2014) 20 [1.50] ('*Fox and Freiberg's Sentencing Law*'). See also *Griffiths v The Queen* (1977) 137 CLR 293, 310 (Barwick CJ); and *Malvaso v The Queen* (1989) 168 CLR 227, 234 as cited in *DPP (Vic) v Dalgliesh (a Pseudonym)* (2017) 262 CLR 428, 448 [62]; *R v Osenkowski* (1982) 30 SASR 212, 213; *Wong v The Queen* (2001) 207 CLR 584, 591–2 [8] as cited in *DPP (Vic) v Dalgliesh (a Pseudonym)* (2017) 262 CLR 428, 448 [62] ('*Dalgliesh*').

3 *Fox and Freiberg's Sentencing Law* (n 2) 20 [1.50]. See also *Griffiths v The Queen* (1977) 137 CLR 293, 310 (Barwick CJ); and *Malvaso v The Queen* (1989) 168 CLR 227, 234 as cited in *Dalgliesh (a Pseudonym)* (n 2) 448 [62]; *R v Osenkowski* (1982) 30 SASR 212, 213; *Wong v The Queen* (2001) 207 CLR 584, 591–2 [8] as cited in *Dalgliesh* (n 2) 448 [62].

the objective circumstances of the offence to meet other sentencing purposes (such as community protection).[4]

2. **Parity:** There should not be a marked disparity (difference) in the sentences given to people who are parties to the same offence, but matters that create differences must be taken into account.[5]
3. **Totality:** The court must consider the totality of all criminal behaviour when dealing with multiple offences at once (for instance, multiple assaults on different people in one incident) or when sentencing for an offence and the person is already serving another sentence.[6]
4. **De Simoni principle:** A sentencing judge cannot take into account factors if they would establish: (a) a separate offence that consisted of, or included, conduct that did not form part of the offence for which the person was convicted; (b) a more serious offence; or (c) a circumstance of aggravation that had not been charged if it would mean the person was liable to receive a greater punishment.[7] This can be relevant to sexual offences if there are allegations of other unlawful sexual conduct which has not been charged.[8]

The Council has undertaken a comprehensive analysis of Queensland Court of Appeal case law, as well as relevant legal jurisprudence by the High Court and Court of Appeal decisions in other states and territories relating to sexual violence offences, which is discussed in detail in **Chapter 6**, as well as in Chapter 7 of our **Consultation Paper: Background**. This section discusses case law guidance as a mechanism of setting and changing sentencing standards.

It has been recognised that the proper function of a Court of Appeal in the context of prosecution appeals against sentence is 'to lay down principles for the governance and guidance of courts having the duty of sentencing convicted persons',[9] to 'maintain adequate standards of punishment for crime … and … to correct a sentence which is so disproportionate to the seriousness of the crime as to shock the public conscience'.[10]

For a defence appeal, a sentence may be reviewed '[i]f the judge acts upon a wrong principle, if he allows extraneous or irrelevant matters to guide or affect him, if he mistakes the facts, [or] if he does not take into account some material consideration'.[11] A sentence may also be reviewed, 'if upon the facts, [the result] is unreasonable or plainly unjust'.[12]

The types of guidance that appellate courts provide vary, but such guidance often involves the court identifying sentencing considerations that are, or are not, relevant in a given case, and clarifying matters of principle or statutory interpretation.[13] For example, the Queensland Court of Appeal has clearly

4 *Markarian v The Queen* (2005) 228 CLR 357, 385 [69] (McHugh J) ('*Markarian*'); *Veen v The Queen (No 2)* (1988) 164 CLR 465, 473–4. The *Penalties and Sentences Act 1992* (Qld) ('PSA') s 9(11) expressly applies this principle to previous convictions.

5 *R v Smith* [2022] 10 QR 725, 740 [68] citing *Postiglione v The Queen* (1997) 189 CLR 295, 325-326, following *Lowe v The Queen* (1984) 154 CLR 606, 609 (Gibbs CJ) ('*Lowe*').

6 *Mill v The Queen* (1998) 166 CLR 59, 62-3 (Wilson, Deane, Dawson, Toohey and Gaudron JJ) quoting Thomas, *Principles of Sentencing* (Heinemann, 2nd ed, 1979) 56–7; *R v LAE* (2013) 232 A Crim R 96, 104-5, [32]–[37] (Martin J, Muir and Fraser JJA agreeing).

7 *R v De Simoni* (1981) 147 CLR 383, 389 (Gibbs CJ, Mason and Murphy JJ agreeing).

8 *R v D* [1996] 1 Qd R 363.

9 *Griffiths v The Queen* (1977) 137 CLR 293, 310 (Barwick CJ); and *Malvaso v The Queen* (1989) 168 CLR 227, 234 as cited in *Dalgliesh (*(n 2) 448 [62].

10 *R v Osenkowski* (1982) 30 SASR 212 at 213; *Wong v The Queen* (2001) 207 CLR 584, 591–2 [8] as cited in *Dalgliesh* (n 2) 448 [62].

11 *House v The King* (1936) 55 CLR 499, 505 (Dixon, Evatt and McTiernan JJ).

12 Ibid.

13 For example, in the Victorian Court of Appeal decision of *DPP v Jurj* [2016] VSCA 57 [79]–[80], the Court considered relevant case authorities referred to in the Judicial College of Victoria's *Sentencing Manual* in setting out a non-exhaustive list of factors relevant to assessing the objective gravity of rape offences including: premeditation, in company, duration, number

expressed that the sentencing purposes of punishment, denunciation, deterrence and community protection should be given significant weight in sentencing sexual assault and rape offences.[14] Indeed, the Court of Appeal has acknowledged the community expectation that the courts will denounce sexual offending through the sentencing process:

> It is important not to fall into the trap of excusing inexcusable behaviour. Sexual assault is a very grave and serious affront to human dignity and personal space. It is unacceptable behaviour. It is essential that the courts reflect community sentiment, in a general way, by the sentences which are imposed for offences of this kind[15]

In *R v Al Aiach*,[16] the Court found that

> considerations of denunciation and deterrence are of such importance in cases of sexual offences by adults against children that it will only be in exceptional cases that the balancing process involved in fixing upon an appropriate sentence will not result in a sentence involving actual imprisonment.[17]

In respect of sexual offending against a child in the context of domestic violence, the Court of Appeal has stated:

> Taking advantage of a child, particularly your own child, is offending of the most serious order which undermines the fabric of society and is the ultimate betrayal of trust for the child concerned. Any sentence imposed must reflect the gravity of that offending and act as an appropriate deterrent and denunciation, as well as accounting for other considerations relevant to sentencing in terms of mitigation and rehabilitation.[18]

10.2.2 Appellate court guidance does not generally extend to setting sentencing standards

However, this form of guidance generally does not extend to setting sentencing standards to be followed by sentencing courts. While the Court of Appeal may indicate a sentencing range for a type of offence, it has been careful to highlight the limitations of an over-reliance on such sentencing 'ranges'. Generally, the role of Australian appeal courts is on the identification of whether there was an error and/or a sentence imposed was manifestly excessive or inadequate.[19]

On appeal, the sentence may be 'unreasonable or plainly unjust' when regard is had to other comparable cases, but this is the only factor and is not determinative.[20] A 'range' is generally based on an analysis by

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of rapes, additional violence or threat of violence, weapon use; risk of pregnancy or sexually transmitted disease (whether a condom was used); whether the victim's warnings or protests were ignored and factors in respect of the victim including injury, vulnerability, humiliation or degradation. See also *Marrah v The Queen* [2014] VSCA 119 [25] (Redlich and Tate JJA), in respect of rape in a domestic violence context: 'The sentences must convey the unmistakeable message that male partners have no right to subject their female partners to threats or violence. The sentences must be of such an order as to strongly denounce violence within a domestic relationship'.

14 See for example *R v Misi; Ex parte A-G (Qld)* [2023] QCA 34 [4] (Mullins P, Dalton and Flanagan JJA); *R v Pham* [1996] QCA 3; *R v GAW* [2015] QCA 166; *R v H* (1993) 66 A Crim R 505; *R v Williams; Ex parte A-G (Qld)* [2014] QCA 346 [58], [73] (McMeekin J, Henry JJ agreeing); *R v McConnell* [2018] QCA 107 [22] (Fraser JA, Sofronoff P and Philippides JA agreeing); *R v Ruiz; Ex parte A-G (Qld)* [2020] QCA 72 [19] (Sofronoff P, McMurdo and Mullins JJ); *R v Teece* [2019] QCA 246 [38] (Philippides JA, Morrison and McMurdo JJA agreeing). In respect of domestic violence, see also *R v Fairbrother; ex parte Attorney-General (Qld)* [2005] QCA 105 [23]; *R v Major; Ex parte A-G (Qld)* [2011] QCA 210.

15 *R v Daniel* [1998] 1 Qd R 499, 519–20 (Fitzgerald P, McPherson JA agreeing) ('*Daniel*'), quoting *R v Russell* (1995) 84 A Crim R 386, 391, 395 (Kirby ACJ). See also *R v Hardie* [2008] QCA 32 [29] (McMurdo P, Holmes JA and Mackenzie AJA agreeing).

16 *R v Al Aiach* [2007] 1 Qd R 270.

17 Ibid [45] (Keane JA). See also *R v Quick; Ex parte A-G (Qld)* (2006) 166 A Crim R 588: (de Jersey CJ): 'It may be unlikely the respondent would re-offend, but the primary considerations in sentencing for this sort of offending, apparently rife, are general deterrence and, in plain terms, community denunciation' cited in *R v Stable (a pseudonym)* [2020] 6 QR 617 [59] (Sofronoff P and Fraser and Philippides JJA) ('*Stable*').

18 *R v BDQ* [2022] QCA 71 [54] (Brown J, Morrison and McMurdo JJA agreeing).

19 Sarah Krasnostein and Arie Freiberg, 'Pursuing Consistency in an Individualistic Sentencing Framework: If You Know Where You're Going, How Do You Know When You've Got There?' (2013) 76 *Law and Contemporary Problems* 265, 275. For the test on appeal see *House v King* (1936) 55 CLR 499, 504–5 (Dixon, Evatt and McTiernan JJ).

20 *R v SDS* [2022] QCA 106 [78]–[79] (Morrison JA, Sofronoff P and Mullins JA agreeing) citing *Wong v The Queen* (2001) 207 CLR 584 [58]; *R v MCT* [2018] QCA 189 [240]. See also *Munda v Western Australia* (2013) 249 CLR 600 [39].

Courts of Appeal of sentences imposed for similar offending. These cases may indicate the type and length of sentence that is in 'range', while recognising that courts have a wide sentencing discretion.

Importantly, the use of past appellate decisions to determine a sentencing 'range':

- is not a binding precedent: it is a 'historical statement of what has happened in the past';[21]
- is not fixed: '[t]hat history does not establish that the range is the correct range, or that the upper or lower limits to the range are the correct upper and lower limits';[22]
- may change over time:[23] particularly if there has been changes in community attitudes and understanding of the long-term harm experienced by the victim survivor;[24] or if there have been legislative changes;[25]
- 'must be viewed in the context of the particular circumstances':[26] because '[s]entencing is not a process that leads to a single correct answer arrived at by some process admitting of mathematical precision';[27]
- should be flexible and not too prescriptive: 'While an appellate court usefully provides indicative ranges, they must be flexible enough to accommodate varying factual situations and never presented or approached as if prescriptive';[28] and
- if dismissed appeals are included in the range, caution should be exercised: where an appeal was dismissed this 'is not the same as an endorsement that the sentence imposed … would be one that the members of the Court might have imposed'.[29] This is because a court of criminal appeal cannot substitute a sentence merely because it would have decided differently.[30]

While a sentencing 'range' is one factor to be taken into account, it does not solely determine whether a sentence is manifestly inadequate or excessive.[31] Appellate review seeks to ensure consistency in the application of relevant principles rather than a numerical equivalent in sentencing outcome.[32]

From a review of case law, the Council has observed the Court of Appeal provides a 'range' for some types of rape and sexual assault, which is discussed in detail in **Consultation Paper: Background** sections 7.3.2 and 7.3.3. The Court of Appeal has also cautioned there is 'no rule of thumb'[33] and 'each case falls to be considered by reference to its particular facts and to cite ranges for offending can be problematical'.[34]

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21 *Dalgliesh* (n 2) 454 [83] (footnotes omitted). See also *Barbaro v The Queen* (2014) 253 CLR 58 [41] cited in *R v Mogg* [2024] QCA 125 [8] (Boddice JA, Bond JA agreeing) ('*Mogg*').

22 *Dalgliesh* (n 2) 454 [83] (footnotes omitted).

23 See PSA (n 4) s 9(4)(a) For an offence of sexual nature committed in relation to a child under 16 years or a child exploitation offence 'the court must have regard to the sentencing practices, principles and guidelines applicable when the sentence is imposed rather than when the offence was committed'.

24 *R v Kilic* (2016) 259 CLR 256.

25 *Stable* (n 17) [38], [45], [58] (Sofronoff P and Fraser and Philippides JJA); *R v Free; Ex parte Attorney-General (Qld)* [2020] QCA 58 [66] (Philippides JA, Bowskill and Callaghan JJ).

26 *Mogg* (n 21) [9] (Boddice JA, Bond JA agreeing).

27 *Hili v The Queen* (2010) 242 CLR 520, 543 [74] ('*Hili*') cited in *Mogg* (n 21) [9] (Boddice JA, Bond JA agreeing).

28 *R v Saltmarsh* [2007] QCA 25, 8 (de Jersey CJ, Williams and Keane JJA agreeing) repeated in *R v Hodges; ex parte A-G (Qld)* [2008] QCA 335, 5 (de Jersey CJ, White AJA and McMeekin J agreeing).

29 *R v Cox* [2011] QCA 277 [25] (McMeekin J, Fraser J and Margaret Wilson AJA agreeing); *R v EO* [2019] QCA 145, 5–6 (McMurdo JA, Gotterson JA and Philippides JA agreeing).

30 *Lowndes v The Queen* (1999) 195 CLR 665 [15] (Gleeson CJ, Gaudron, McHugh, Gummow, Kirby, Hayne and Callinan JJ)

31 See *Munda v Western Australia* (2013) 249 CLR 600 [39]; *Mogg* (n 21) [9] (Boddice JA, Bond JA agreeing); *R v Goodwin; Ex parte Attorney-General (Qld)* [2014] QCXA 345 [5] (Fraser J).

32 *Hili* (n 27) 527 [18] (French CJ< Gummow, Hayne, Crennan, Kiefel and Bell JJ).

33 *R v GAR* [2014] QCA 30 [29] (Muir JA, Fraser and Morrison JJA agreeing).

34 *R v Tory* [2022] QCA 276 [38] (Kelly J, McMurdo and Dalton JJA agreeing)

10.2.3 Appellate courts can comment on the adequacy of current sentencing practices and direct sentences be adjusted upwards

As discussed in **Chapter 8**, section 9(4)(a) of the PSA requires that when sentencing an offence of a sexual nature against a child aged under 16 years, 'the court must have regard to the sentencing practices, principles and guidelines applicable when the sentence is imposed rather than when the offence was committed'.[35] Victoria has a similar provision,[36] which was considered in *Director of Public Prosecutions (Victoria) v Dalgliesh (a Pseudonym)*.[37] The High Court noted that the Victorian Court of Appeal's observation on past sentencing practices for the offence of incest revealed an error and that they were not proportionate to the nature and seriousness of the offending:

> [C]urrent sentencing for incest reveals error in principle. The sentencing practice which has developed is not a proportionate response to the objective gravity of the offence, nor does it sufficiently reflect the moral culpability of the offender. Sentences for incest offences of mid-range seriousness must be adjusted upwards. That is a task for sentencing judges and, on appeal, for this Court. The criminal justice system can be – and should be – self-correcting.[38]

The High Court found it was an error for the Victorian Court of Appeal to feel bound by previous sentencing practices and the matter was remitted to be resentenced.[39] The Victorian Court of Appeal resentenced Dalgliesh to 7.5 years for the offence of incest, which was a 4-year increase from the original sentence imposed (a new total effective sentence of 9.5 years' imprisonment).[40]

A review by the Victorian Sentencing Advisory Council found that in 2016 (pre-the *Dalgliesh* decisions), the average charge-level prison sentence was about 4 years, and by 2019 this had increased to almost 7 years.[41] This was attributed to a combination of factors, including the various *Dalgliesh* decisions.[42]

A similar statement regarding the adequacy of sentences with respect to digital rape was made by the Victorian Court of Appeal in *Shrestha v The Queen*.[43] The appeal was made by Shrestha based on error and manifest excess; it was not a DPP appeal to increase the sentence. However, the Court of Appeal considered past sentencing practices (on the Director's request).[44] The Victorian Court of Appeal concluded 'there must be an upward adjustment':[45]

> It is clear that the general run of sentences for digital rape is well below what is necessary to reflect the objective gravity of that offence, and the moral culpability of the offender.[46]

Using appellate court guidance to increase sentencing practices relies on:

1. an appropriate case being appealed;[47]
2. the adequacy of current sentencing practices being raised and discussed during submissions and sentence;

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35 PSA (n 4) s 9(4)(a). This also applies to a child exploitation offence.
36 *Victorian Sentencing Act 1991* (Vic) s 5(2)(b).
37 *Dalgliesh* (n 2).
38 *DPP (Vic) v Dalgliesh (A Pseudonym)* [2016] VSCA 148 [128] cited in *Dalgliesh* (n 2) 440–1 [35].
39 *Dalgliesh* (n 2) Ibid 452 [76]–[77] (Kiefel CJ, Bell and Keane JJ), 454 [84]–[86] (Gageler and Gordon JJ).
40 *DPP (Vic) v Dalgliesh (A Pseudonym)* [2017] VSCA 360 (7 December 2017).
41 Sentencing Advisory Council (Victoria), *Sentencing Sex Offences in Victoria: An Analysis of Three Sentencing Reforms* (June 2021) x, 38 [5.9].
42 Ibid.
43 *Shrestha v The Queen* [2017] VSCA 364 ('*Shrestha*').
44 Ibid [26]. An additional reason was there should not be a discernible gap in the current sentencing practices for rape and incest: [27] referring to *Dalgliesh* (n 2).
45 *Shrestha* (n 43) [31].
46 Ibid [30].
47 It does not need to be limited to an Office of the Director of Public Prosecutions or an Attorney-General appeal, see *Shrestha* (n 43) [26].

3. a view by the primary judge that current sentencing practices are inadequate; and
4. the primary judge noting they are constrained when imposing an appropriate sentence because of the current sentencing practices.[48]

A decision by an appellate court in respect of the adequacy of current sentencing practices will only apply to 'circumstances that are broadly similar in objective gravity to the offence of which the appellant was convicted'.[49]

Reforms in Queensland and sentencing adequacy

In Queensland, legislation expressing regard to current sentencing practices is limited to an offence of a sexual nature against a child under 16 years or a child exploitation offence.[50] The Council is not aware of any decisions in Queensland that have considered the adequacy of current sentencing practices for sexual assault and rape.[51]

However, the Court of Appeal has cautioned against the use of dated comparative sentences, particularly in the context of suggesting these set a sentencing 'range'. For example, in the recent 2024 decision of *R v Mogg,*[52] the Court said, with reference to the 2010 decision of *R v Baxter*:[53]

> To the extent that *R v Baxter* may have had points of similarity, that sentence was imposed 14 years ago and the observation that a starting point of six years' imprisonment for the offence of rape was "at the top of the range" must be viewed, having regard to contemporary sentencing principles as to 'ranges'.[54]

A court may take into account community attitudes, standards and expectations as part of the exercise of judicial discretion (as required by the sentencing purpose of denunciation).[55] Changes in community attitudes and expectations might be reflected in a change of sentencing practice:

> The requirement of currency recognises that sentencing practices for a particular offence or type of offence may change over time reflecting changes in community attitudes to some forms of offending. For example, current sentencing practices with respect to sexual offences may be seen to depart from past practices by reason, inter alia, of changes in understanding of the long-term harm done to the victim. So, too, may current sentencing practices for offences involving domestic violence depart from past sentencing practices for this category of offence because of changes in societal attitudes to domestic relations.[56]

48 Ibid.
49 Ibid [31].
50 PSA (n 4) s 9(4)(a). In comparison, in Victoria this is a general sentencing consideration: *Victorian Sentencing Act 1991* (Vic) s 5(2)(b).
51 Cf the offence of taking a child under 12 years for an immoral purpose which was considered in the decision in *R v Free; Ex parte A-G (Qld)* [2020] QCA 58 discussed the prior decisions of *R v Cogdale* [2004] QCA 129 as being too low: 'However, in our respectful view, what that bare comparison does not address is the legislative changes which have taken place since *Cogdale*, mirrored by changing attitudes within the community, and a greater understanding by courts of the impact of child sexual abuse. All of this supports the view that what might have been regarded as an appropriate penalty for this kind of offending in 2004 is not necessarily what should be considered appropriate now. We say this without question in relation to the head sentence ultimately imposed of *Cogdale*, of five years imprisonment, which in our respectful view would be regarded as an affront to the community if imposed today. But even the "starting point", that is, the notional penalty that might be imposed after a trial, of eight years' imprisonment, is in our view simply too low': [66] (Philippides JA, Bowskill and Callaghan JJ).
52 *Mogg* (n 21).
53 *R v Baxter* [2010] QCA 235.
54 *Mogg* (n 21) [12] (Boddice JA, Bond JA agreeing) cf [51]–[52] (Callaghan J in dissent) (citation omitted).
55 *R v O'Sullivan; Ex parte A-G (Qld); R v Lee; Ex parte A-G (Qld)* [2019] QCA 300 [101]–[103] (Sofronoff P and Gotterson JA and Lyons SJA).
56 *R v Killic* (2016) 259 CLR 256, [21] (Bell, Gageler, Keane, Nettle and Gordon JJ) cited in *R v O'Sullivan; Ex parte A-G (Qld); R v Lee; Ex parte A-G (Qld)* [2019] QCA 300 [103] (Sofronoff P, Gotterson JA and Lyons SJA).

The issue for a court in using changes in community attitudes is identifying '*legitimate* community expectations'.[57] Community attitudes to sentencing are further discussed in **Chapter 5**.

The Queensland Court of Appeal has acknowledged with reference to statements made by the High Court the need for sentencing practices to change in response to changing community attitudes about the seriousness of certain types of offending conduct.[58] Relevant to the sentencing of rape, the Court has explicitly directed that the 'rigid compartmentalisation' of rape offences based on penetration type is to be avoided within the sentencing context. In refusing an appeal that relied on the argument that a sentence for an offence of digital rape may be expected to be less severe than other forms of rape, the Court of Appeal[59] reinforced principles outlined in *R v Wark*[60] that

> there is no rigid compartmentalisation of rape offences into two categories, firstly digital rape and secondly penile rape. In each case "it is the particular circumstances which will determine the level of criminality and together with other facts the sentence to be imposed". Accepting as a general proposition that penile rape will attract a higher sentence than digital rape or oral rape, there may be cases calling for punishment as great or exceeding those involving penile penetration. [61]

This principle has been endorsed in subsequent decisions of the Court.[62]

To assess the extent to which the Court of Appeal guidance is being applied in practice, the Council conducted a review of the transcripts of sentencing submission and remarks for 24 cases involving sentences (at first instance) for offences of rape involving either digital or oral rape. In doing so, the Council sought to better understand the submissions and supporting cases being put forward by the prosecution regarding the appropriate sentencing range for digital and oral rape offences, and whether there were any cases in which the prosecution had suggested that the current sentencing levels were not appropriate and should be lifted on the basis of those decisions.

The findings revealed that the most common decisions relied upon by the prosecution in these cases were *R v Smith,*[63] *R v Kelly*[64] and *R v GAP*.[65] While the relevant decisions of *R v RGB*[66] and *R v Wallace*[67] are not often cited in submissions, nor in the remarks of judicial officers at sentence, *Smith* is often used, and refers to the earlier relevant decision of *Wark*.

Concerningly, *GAP* and *Kelly* both appear to advance the proposition that sentences for rape should be distinguished by conduct. For example, in *GAP*, Fryberg J (in obiter) referred to comments in *R v Bull*[68] and agreed that:

> In assessing the cases I have borne in mind what was written by this court in *R v Colless*[69] where '[vaginal] rape accomplished digitally may generally be seen as somewhat less grave than a rape accomplished by penile penetration'. While I would not wish to lay down any rule, I think it may also be said that penile rape effected in the

57 *R v O'Sullivan; Ex parte A-G (Qld); R v Lee; Ex parte A-G (Qld)* [2019] QCA 300 [104] (*emphasis* in original) (Sofronoff P, Gotterson JA and Lyons SJA). See further discussion [105]–[109] (Sofronoff P, Gotterson JA and Lyons SJA).
58 See, for example, *Stable* (n 17) [45] referring to earlier statements made by the High Court *R v Kilic* (2016) 259 CLR 256, 267 [21]..
59 *R v Smith* [2020] QCA 23 [37] ('*Smith*').
60 [2008] QCA 172, [36]–[38] (Cullinane J) ('*Wark*') .
61 Ibid.
62 See, for example, *R v RGB* [2022] QCA 143 ('*RGB*'); *R v Wallace* [2023] QCA 22 ('*Wallace*').
63 *Smith* (n 59).
64 *R v Kelly* [2021] QCA 134.
65 *R v GAP* [2013] 1 Qd R 427 ('*GAP*').
66 *RGB* [(n 62).
67 *Wallace* (n 62).
68 *R v Bull* [2012] QCA 74.
69 [2010] QCA 26 [17].

> mouth of the victim may generally be seen as somewhat more grave than vaginal rape, particularly where there is ejaculation in the mouth or throat.[70]

As discussed in **Chapter 6**, we found a reliance on cases that were very dated.

While it was not possible to undertake the same analysis of submissions made on sentence in sexual assault cases, the same issues are likely to arise in these cases. For example, the case of *R v Demmery*[71] was referred to by some subject expert interview participants as a case against which the seriousness of other sexual offences was benchmarked, despite this being a decision handed down in 2005 – close to 20 years ago.

In *R v Demmery*,[72] the Court of Appeal allowed an appeal against a sentence of 2 years' imprisonment suspended after 6 months served for an operational period of 2 years on the basis it was manifestly excessive. They substituted this for a sentence of 12 months' imprisonment suspended after 25 days (time already served in custody) for an operational period of 12 months. The 27-year-old applicant had pleaded guilty to one count of sexual assault of a 16-year-old girl in which 'he pulled her underwear to the side and then masturbated and ejaculated over her vulval area. She was asleep while he did that.'[73] The Court of Appeal found the sentencing judge's description that 'the offence was another instance of a situation where a female in a very vulnerable situation had been taken advantage of for the self-gratification of a male, albeit a person of generally good character and standing' was 'quite accurate'.[74]

From a review of more recent Court of Appeal decisions, we have observed that this decision is still referred to. For example, in the 2021 case of *R v Rogan*,[75] the applicant had sexually assaulted the complainant after they had been drinking together at a party. The offending behaviour involved the applicant straddling himself over the victim, unwanted touching, forcing her top open, exposing her breast and sucking on it, licking her face and inserting his tongue into her mouth. The victim told him to stop and tried to push him off but he did not stop and touched her under her dress between her legs and over her underwear. He unzipped his jeans, exposed his penis and put it onto her pelvic area. The victim screamed, the party host entered the room and the offending stopped. After the applicant learned the victim had reported the matter to the police, he asked his friend to ask the victim to withdraw her complaint. He pleaded guilty and was originally sentenced to 12 months' imprisonment, to be suspended after serving two months. On appeal, the sentence was varied to be suspended after time served (approximately 12 days). The Court said:

> In my respectful opinion, previous cases such as *R v Owen*[76] and *R v Demmery*[77] show that a sentence that includes an actual period of imprisonment is not always required in cases like the present, in which an offender's criminal acts are out of character, in which there is real remorse, and in which there has been a timely plea of guilty.[78]

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70 *GAP* (n 65) [138] (Fryberg J) (footnotes in original). Gotterson JA 'refrain[ed] from expressing any view on the comparative gravity of different types of penile rape: [82]. Muir JA, in dissent, would have allowed an appeal against conviction so did not consider the sentence.
71 *R v Demmery* [2005] QCA 462 ('*Demmery*').
72 Ibid.
73 Ibid [7].
74 Ibid [26].
75 *R v Rogan* [2021] QCA 269.
76 *R v Owen* [2008] QCA 171.
77 *Demmery*(n 71).
78 *R v Rogan* [2021] QCA 269 [18] (Sofronoff P, McMurdo JA and Williams J agreeing).

Demmery was also among the cases relied upon by the applicant in two more recent unsuccessful appeals:

- In *R v Singh*,[79] a 2024 appeal decision, *Demmery* was relied upon in conjunction with 2 other cases[80] as a basis for submitting the sentence was manifestly excessive because it required him to serve actual time in custody.[81] The applicant, who was an Uber driver, was convicted of 3 counts of sexual assault against a passenger and sentenced to 10 months' imprisonment suspended after 4 months for an operation period of 15 months. He pleaded guilty on what would have been the first day of his trial and had no prior criminal history. The Court of Appeal, in dismissing the appeal, found that: 'While the authorities relied upon by the applicant's counsel suggest the period of actual custody could have been for a lesser period, the period of four months was not outside the proper exercise of a discretion.'[82]
- In *R v Abdullah*,[83] a 2023 appeal decision, *Demmery* was referred to alongside 4 other cases[84] as a basis for arguing a sentence of 18 months' imprisonment suspended after 5 months was manifestly excessive. The applicant submitted that the sentence imposed 'did not recognise the low level of offending and that a sentence of no more than nine months, wholly suspended, was warranted' (noting this was less than had been submitted by the applicant's counsel at sentence).[85] The Court found that '[a] review of the authorities does not support the conclusion that the overall head sentence of 18 months' imprisonment … was manifestly excessive, given the circumstances of this case' and nor was the requirement that he serve 5 months of that time in custody prior to the balance being suspended 'unjust or unreasonable'.[86] The applicant was a tow-truck driver who committed sexual assaults against young women on two separate occasions – the second while on bail for the first offence. He pleaded guilty and had no prior criminal history.

In the 2022 decision of *R v Kane; Ex parte Attorney-General (Qld)*[87] the Court of Appeal noted the prosecutor at first instance relied on *Demmery* and other cases decided in 2005 and 2007:[88]

> as supporting a range of imprisonment of 12 to 18 months for similar offending where there was with no violence and that was the basis for the prosecutor's submission that imprisonment for 18 months was the appropriate head sentence for the respondent.[89]

Despite the prosecutor's submissions at first instance, the Attorney-General's appeal was allowed as the Court found the authorities relied on by the prosecutor before the primary judge 'could not be characterised properly as yardsticks'.[90] The sentence at first instance, of 18 months' imprisonment, suspended after 282 days for an operational period of 3 years, was increased on appeal to 3 years' imprisonment, suspended after 282 days for an operational period of 3 years:[91]

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79 *R v Singh* [2024] QCA 50.
80 *R v Rogan* [2021] QCA 269; *R v Sologinkin* [2020] QCA 271.
81 *R v Singh* [2024] QCA 50, [39] (Brown J, Morrison and Dalton JJA agreeing);
82 Ibid.
83 *R v Abdullah* [2023] QCA 189, [29] ('*Abdullah*').
84 *R v Hatch* [1999] QCA 495; *R v Murphy* [2011] QCA 363 *R v Al Aiach* [2007] 1 Qd R 270; and *R v Baldwin* [2014] QCA 186. The cases submitted by the applicant at first instance were: *R v Bradford* [2007] QCA 293; *R v Murray* [2005] QCA 188; and *R v Quinlan* [2012] QCA 132;
85 *Abdullah* (n 83) [29].
86 Ibid [46]–[47] (Bowskill CJ, Flanagan JA and Buss AJA agreeing).
87 *R v Kane; Ex parte A-G (Qld)* [2022] QCA 242.
88 Ibid [12] (Mullins P and Dalton and Flanagan JJA) referring to *R v Murray* [2005] QCA 188; *R v Bradford* [2007] QCA 293.
89 Ibid.
90 Ibid [19] citing *Barbaro v The Queen* (2014) 253 CLR 58 [41].
91 Ibid [28]–[29].

> When account is taken of Mr Kane's conduct in targeting a woman walking by herself in a public place, removing her to a secluded area to commit the assault, putting his hand inside her pants to press his finger against her anus (as well as squeezing one breast), overcoming her resistance and protests, and not desisting until a passer-by approached, the extent and nature of the assault made the offending significantly more serious than the offending in the comparable authorities relied on by the prosecutor before the primary judge. As Mr Heaton of King's Counsel submitted on behalf of the appellant, the circumstances of the subject offence, including the respondent's prior history for offending which included the use of violence, was such that community protection and denunciation warranted a significant penalty that had to be determined in the context of an offence. The appellant succeeded in showing that the sentence that was imposed by the primary judge failed to reflect the seriousness of the subject offence in relation to the maximum penalty and having regard to the circumstances of the respondent and was therefore also manifestly inadequate. A sentence of imprisonment of at least three years was called for in respect of Mr Kane's guilty plea. Mr Kane's criminality and the relevance of his criminal history were not reduced in any way by his problem with alcohol.[92]

Guideline judgments

Guideline judgments are used in some jurisdictions as 'a mechanism for the courts to provide broad sentencing guidance beyond the specific facts of a particular case'.[93] Generally, guideline judgments are seen as an alternative way to increase sentencing outcomes without significantly restricting the sentencing discretion of the court (as opposed to mandatory sentencing schemes).[94]

Guideline judgments may take various forms – for example, clarifying any aggravating or mitigating features that should be considered in particular circumstances, providing indications of appropriate penalties or an appropriate starting point for sentences.[95]

In Queensland, the Court of Appeal may provide a guideline judgment on its own initiative or on application by the Attorney-General, the Director of Public Prosecutions or the Chief Executive of Legal Aid Queensland.[96] In deciding whether to issue a guideline judgment, the Court must consider the need to promote consistency of approach in sentencing offenders and to public confidence in the criminal justice system.[97] In considering its position and whether to issue a judgment, the Court of Appeal can also receive advice from the Council about the giving or reviewing of a guideline judgment (upon its request).[98] Despite their availability, there have been no guideline judgments given in Queensland.

For the reasons discussed below, even in those jurisdictions that have previously made use of these judgments in the past as a useful form of sentencing guidance, they have largely fallen into disuse.

What do other jurisdictions do?

New South Wales was the first jurisdiction in Australia to introduce a statutory guideline judgment scheme and to issue a guideline judgment. The NSW Court of Appeal found the role of a guideline judgment as simply a matter 'to be "taken into account only as a "check" or "sounding board" or "guide" but not as a "rule" or "presumption"'.[99]

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92 Ibid [27].
93 Sentencing Advisory Council (Victoria), *Sentencing Guidance in Victoria, Report* (2016) 22, 130.
94 Sentencing Advisory Council (Tasmania), *Sentencing of Driving Offences that Result in Death or Injury: Final Report No 8* (2017) 124.
95 Beth Crilly, 'Guideline Judgments in Victoria: An Examination of the Issues' (2005) 31(1) *Monash University Law Review* 37, 38.
96 PSA (n 4) pt 2A.
97 Ibid s 15AH.
98 Ibid s 199(1)(a).
99 *R v Whyte* (2002) 55 NSWLR 252 [113] (Spigelman CJ).

Since 2004, no new guideline judgments have been issued in New South Wales.[100] Commentators consider that this is because of a series of High Court decisions that cautioned against numerical guidelines and emphasised that sentencing 'is an instinctive and individualistic exercise'.[101] Further, in 2002 a new standard non-parole period scheme was introduced into sentencing legislation, which overrode any existing and potential future guideline judgments issued for offences falling with that scheme.[102]

A review of two guideline judgments[103] issued in New South Wales revealed that they appeared to successfully 'reinforce public confidence in the integrity of the process of sentencing'[104] by increasing making sentencing 'more comprehensible and transparent'.[105] While the judgments appeared to raise sentencing levels at first instance, they also resulted in larger numbers of successful appeals on the basis of the initial sentence being too severe.[106] Concerns were also raised regarding whether guideline judgments will impact sentences in a consistent way.[107]

In Victoria, the Victorian Court of Appeal issued its first (and only) guideline judgment in 2014, which related to the use of a new order called a 'community corrections order'.[108] In that decision, the Court of Appeal noted that while the development of case law had the advantage of the development of legal principles informed by the practical realities of individual cases, equally the 'great advantage of a guideline judgment is that it enables [the Court of Appeal] to deal systematically and comprehensively with a particular topic or topics relevant to sentencing, rather than being confined to the questions raised by particular appeals', while not fettering the discretion of the sentencing court in any way.[109]

10.3 Alternative models for sentencing guidelines

Sentencing guidelines are non-legislative sources of guidance, which identify sentencing purposes and matters relevant to sentence that the court should consider in sentencing particular offences, including aggravating and mitigating factors. They have heavily influenced sentencing in England and Wales, where guideline judgments and Sentencing Council guidelines exist alongside legislative instruments to provide structure to the exercise of judicial discretion.

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100 High Range PCA, *Road Transport (Safety and Traffic Management) Act 1999* (NSW) s 9(4): *Application by the Attorney General under Section 37 of the Crimes (Sentencing Procedure) Act for a Guideline Judgment Concerning the Offence of High Range Prescribed Content of Alcohol Under Section 9(4) of the Road Transport (Safety and Traffic Management) Act 1999 (No 3 of 2002)* (2004) 61 NSWLR 305 [146]; Form 1: *Attorney General's Application under s 37 of the Crimes (Sentencing Procedure) Act 1999 No 1 of 2002* (2002) 56 NSWLR 146 [9]; Guilty plea *(Crimes (Sentencing Procedure) Act 1999* (NSW) s 22): *R v Thomson & Houlton* (2000) 49 NSWLR 383 [160]; Break, enter and steal (*Crimes Act 1900*, s 112(1)): *Attorney-General's Application (No 1), R v Ponfield* (1999) 48 NSWLR 327, 337–338 [48]; Armed robbery (*Crimes Act 1900* (NSW) s 97): *R v Henry and Ors* (1999) 46 NSWLR 346. Dangerous driving (*Crimes Act 1900* (NSW), s 52A): *R v Jurisic* (1998) 45 NSWLR 209 ('*Jurisic*'), as reformulated in *R v Whyte* (2002) 55 NSWLR 252 [252]. The High Court overruled the guideline for drug importation (*Customs Act 1901* (Cth), s 233B): *Wong v The Queen* (2001) 207 CLR 584 overruling *R v Wong & Leung* (1999) 48 NSWLR 340.

101 Sarah Krasnostein, 'Boulton v the Queen: the Resurrection of Guideline Judgments in Australia' (2015) 27(1) *Current Issues in Criminal Justice* 41 citing *Fox and Freiberg's Sentencing: Law* (n 2) 251, 971. The relevant High Court decisions are: *Barbaro v The Queen* 2014] HCA 2 (12 February 2014) [27]; *Wong v The Queen* (2001) 207 CLR 584; *Hili* (n 27) 544–5; *Markarian* (n 4) 371.

102 Krasnostein (n 101) 41 citing NSW Sentencing Council, *Standard Non-Parole Periods: Report* (2013).

103 *Jurisic* ((n 100); *R v Henry* (1999) 46 NSWLR 346.

104 *Jurisic* (n 100) 220 (Spigelman CJ).

105 Beth Crilly, 'Guideline Judgments in Victoria: An Examination of the Issues' (2005) 31(1) *Monash University Law Review* 37, 48–9.

106 Ibid 45–9.

107 Ibid 46.

108 *Boulton v The Queen* (2014) 46 VR 308 ('*Boulton*').

109 Ibid 316 [26].

For example, the Sentencing Council for England and Wales[110] produces sentencing guidelines for the judiciary through a formal consultation process.[111] Under this scheme, courts are legislatively required to follow guidelines developed by the Sentencing Council unless satisfied it would be contrary to the interests of justice to do so,[112] but the guidelines themselves are not legislated.

The Sentencing Council for England and Wales produces both specific guidelines for offences, as well as general guidelines that apply to all offences.

The Scottish Sentencing Council,[113] in comparison to the English model, acts in more of an advisory role. Any guidelines the Council develops must be approved by the High Court,[114] and are not binding. Scottish sentencing courts are therefore only required to 'have regard to any sentencing guidelines which are applicable in relation to the case' and, if they decide not to follow the guidelines or to depart from them, to state the reasons for doing so.[115] These guidelines are approved through a staged approval process that includes consultation with members of the judiciary at an early stage. Once approved, all guidelines are monitored and reviewed. To date, the High Court in Scotland has endorsed 4 guidelines produced by the Scottish Sentencing Council.[116] The Scottish Sentencing Council is currently developing guidelines for both sexual assault and rape and is in the process of consulting on the guideline for rape.[117]

These guidelines reflect a much more structured approach to sentencing than in Australia, as they require courts to engage in a two-step process to determine, first, the seriousness of the offence and, second, the effect of any aggravating and mitigating factors on the categorisation of the offence.[118] As intended, the presumptive sentencing guidelines developed by sentencing councils have been found to be the most effective way to improve consistency and reduce disparity within a jurisdiction.[119]

In May 2017, the Victorian Government announced an intention to establish a Sentencing Guidelines Council with a similar role to the UK Council.[120] In May 2018, the Victorian Sentencing Advisory Council made 22 recommendations about the most appropriate features of a Sentencing Guidelines Council for Victoria and the sentencing guidelines such a council would create.[121] Under the recommended model, the development of sentencing guidelines would be on the council's own motion or at the request of the Attorney-General.[122] In many respects, the guidelines model proposed is similar to that operating in the United Kingdom.

The Victorian Government is yet to establish a Guidelines Council as proposed.

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110 The current Sentencing Council was established in 2010 under the *Coroners and Justice Act 2009* (UK) as an independent body. The President of the Sentencing Council is the Lord Chief Justice of England and Wales, and the Council has both judicial and non-judicial members.
111 *Sentencing Act 2020* (UK) pts 2–13, constitute the 'Sentencing Code': s 1.
112 Ibid s 59(1); *Coroners and Justice Act 2009* (UK) s 125(1).
113 Scotland has established a Scottish Sentencing Council comprising judicial and non-judicial members under the *Criminal Justice and Licensing (Scotland) Act 2010* (Scot).
114 *Criminal Justice and Licensing (Scotland) Act 2010* (Scot) s 2.
115 Ibid s 6(1)–(2).
116 Scottish Sentencing Council 'Guidelines in development', <https://www.scottishsentencingcouncil.org.uk/sentencing-guidelines/guidelines-in-development>.
117 Ibid.
118 Sentencing Council (UK) 'Using Sentencing Council guidelines', <https://www.sentencingcouncil.org.uk/explanatory-material/magistrates-court/item/using-the-mcsg/using-sentencing-council-guidelines>.
119 Michael Tonry, 'Fifty Years of American Sentencing Reform–Nine Lessons' (2019) 48 *Crime and Justice* 1, 3–6.
120 Premier of Victoria, 'Victorian Community To Have Its Say on Sentencing' (Media Release, 25 May 2017) .
121 Sentencing Advisory Council (Victoria), *A Sentencing Guidelines Council for Victoria, Report* (2018).
122 Ibid rec 5.

The benefits of this form of guidance have been argued to include that:

- sentencing councils or commissions can help detect sentencing disparities, and modify sentencing guidelines to correct for excessive variability in punishment;
- by consulting with a broad range of stakeholders, sentencing councils or commissions can 'better incorporate the community's views within penal policy'; and
- sentencing councils or commissions can 'improve transparency and expand the public's knowledge about sentencing and increase their confidence in it'.[123]

10.4 Sentencing resources

Other forms of sentencing guidance include resources such as judicial benchbooks, practitioner guidelines, case law summaries and sentencing statistics. These other forms of sentencing guidance are discussed briefly below.

10.4.1 Why sentencing resources are important

Sentencing resources are vital to assist legal practitioners to understand sentencing theory and provide guidance on case law and legislation as well to as to stay up to date with legal developments. These resources may also be beneficial for newly appointed judicial officers who were not criminal law practitioners prior to their appointment.

There are frequent changes to sentencing laws, and sentencing laws continue to evolve, both with respect to developments in the common law and legislation. As discussed in **Chapter 8**, the PSA has been amended on numerous occasions and this applies not only to section 9 changes, but other reforms to the PSA and other factors that impact sentencing, such as relevant maximum penalties and the introduction of new circumstances of aggravation.

Having clear, accessible and central sentencing resources that are appropriately funded to enable regular updates to be made can assist members of the legal profession to have the appropriate knowledge to place all relevant, available information before the courts to inform sentencing decisions. It may also improve public confidence by enabling transparency and limit the need for appeals on points of law.

10.4.2 Judicial benchbooks

Benchbooks are produced or endorsed by members of the judiciary to guide sentencing practices and decisions. In Queensland, resources issues by the courts relevant to the sentencing of adults include:

- the *Benchbook on Sentencing,*[124] last updated in 2017;
- the *Equal Treatment Benchbook,* with a chapter on gender in sentencing; [125]
- the *Domestic and Family Violence Protection Act 2012 Bench Book*;[126]
- the *Chief Magistrate's Notes*.[127]

123 Terry Skolnik, 'Criminal Justice Reform: A Transformative Agenda' (2022) *Alberta Law Review Society* 631, 653 citing these arguments in support of the establishment of a permanent sentencing commission in Canada.
124 Michael Shanahan AM, *Benchbook on Sentencing* (April 2017) <https://www.sclqld.org.au/collections/main-research-collections/texts-journals-commentaries-andreference/benchbook-on-sentencing>.
125 Chapter 7, Sentencing in Supreme Court of Queensland, *Equal Treatment Benchbook* (2nd ed, 2016) .
126 Magistrates Court of Queensland, *Domestic and Family Violence Protection Act 2012 Bench Book* (2021).
127 Court Services Queensland, Chief Magistrate's Notes <https://www.courts.qld.gov.au/__data/assets/pdf_file/0009/656613/mc-cm-notes.pdf>

Although not specific to sentencing, the former Queensland Government provided in-principle support for a recommendation made by the Women's Safety and Justice Taskforce to develop and implement a specific benchbook to guide criminal trials involving sexual violence.[128] In making this recommendation, the Taskforce suggested that the benchbook could include 'relevant procedural requirements and timeframes, data and statistics, information about community attitudes and rape myths, information about the impacts of trauma on victims of sexual violence and relevant laws'.[129] To date, no benchbook on sexual violence has been progressed.

What do other jurisdictions do?

Other jurisdictions have produced and freely published sentencing specific resources.

- New South Wales: The Judicial Commission of NSW has published a *Sexual Assault Trials Handbook*[130] and *Trauma-informed Courts: Guidance for Trauma-informed Judicial Practices*, which discuss trauma, its impact on particular groups and practical considerations for embedding trauma-informed practice.[131] The *Bugmy Bar Book* is a free, evidence-based resource for criminal legal practitioners and judicial officers, as well as policy-makers and other professionals, to promote improved understanding of the experiences of people who come into contact with the criminal justice system. It collates published research and government reports and findings surrounding the impacts of experiences of trauma (including childhood sexual abuse), socioeconomic inequality, structural disadvantage and rehabilitation, and is intended to support legal advocates and decision-makers within the criminal sentencing context. The Queensland District Court has acknowledged its value as a resource.[132]
- Victoria: The Judicial College of Victoria maintains the Victorian *Criminal Charge Book* and *Victorian Sentencing Manual*, both of which include dedicated sections on sexual offences.[133] The *Victorian Sentencing Manual* is a consolidated summary of the relevant sentencing provisions and applicable case law, both generally and for specific sentences.[134] It provides links to 'Sentencing Snapshots' prepared by the Sentencing Advisory Council[135] and a table of relevant cases, and highlights important principles to consider when sentencing an offender. It is consistently updated and reviewed for accuracy, ensuring that it remains a reliable, complete source of guidance for all criminal justice stakeholders. The Judicial College of Victoria has also developed a resource *Victims of Crime in the Courtroom: A Guide for Judicial Officers,* which includes advice for judicial officers on understanding trauma and information about victims of

128 Queensland Government response to the report of the Queensland Women's Safety and Justice Taskforce, *Hear Her Voice – Report Two* (2022) 25.
129 Queensland Women's Safety and Justice Taskforce, *Hear her voice – Report Two – Women and Girls' Experiences Across the Criminal Justice System* (2022) vol 1, 310.
130 Judicial Commission of New South Wales, Sexual Assault Trials Handbook (2007) - last updated November 2023.
131 Judicial Commission of New South Wales, *Trauma-Informed Courts: Guidance for Trauma-Informed Judicial Practices* (November 2023).
132 See *Pamtoonda v Commissioner of Police* [2021] QDC 207 [66], fn 20; 5 (Smith DCJ).
133 Judicial College of Victoria, *Criminal Charge Book*, pt 7.3 <https://resources.judicialcollege.vic.edu.au/article/1053858> and Judicial College of Victoria, *Victorian Sentencing Manual* (4th ed), Pt 24 <https://resources.judicialcollege.vic.edu.au/article/669236>.
134 Judicial College of Victoria, *Bench Book/Victorian Sentencing Manual* (4th ed, 2024) <https://resources.judicialcollege.vic.edu.au/article/669236/section/2168>.
135 See, for example, Sentencing Advisory Council, 'Sentencing Snapshot 279: Sentencing Trends for Rape in the Higher Courts of Victoria 2017–18 to 2021–22, 3 October 2023, <https://www.sentencingcouncil.vic.gov.au/snapshots/279-rape>.

sexual offences and victims who are Aboriginal and Torres Strait Islander people or from CALD backgrounds.[136]

- Western Australia: The *Aboriginal Bench Book for Western Australia Courts* was commissioned by the National Indigenous Cultural Awareness Committee of the AIJA in response to the disproportionate representation of Aboriginal and Torres Strait Islander peoples in Australia's criminal justice system.[137] The benchbook includes a chapter on sentencing.
- South Australia: the Legal Services Commission publishes a *Law Handbook* online.[138]
- Commonwealth: Commonwealth Director of Public Prosecutions publishes *Sentencing of Federal Offenders in Australia: a guide for practitioners*.[139] This has been updated yearly since 2020 and includes particular guidance on child sex offences.[140]
- The National Judicial College of Australia: The National Judicial College publishes articles and publications such as how to craft clear decisions and oral decisions.[141]
- The Australasian Institute of Judicial Administration: in partnerships with the Australian Government's Attorney-General Department and the University of Melbourne, the Australasian Institute of Judicial Administration has produced a *National Domestic and Family Violence Bench Book*, which includes a dedicated section on sentencing,[142] and has also released a report on specialist approaches to managing sexual assault proceedings.[143]
- The Judicial Council on Diversity and Inclusion: produced the *Interpreters in Criminal Proceedings: Benchbook for Judicial Officers* setting out information for the assistance of judicial officers where an interpreter is required. It is a companion document to the *Recommended National Standards for Working with Interpreters in Courts and Tribunals.*[144] The benchbook provides general guidance for all criminal offences, including about cultural assumptions, stereotypes and subconscious bias.

10.4.3 Practitioner guidelines, handbooks and other resources

Various other resources are available that are relevant to sentencing. They include:

- Caxton Legal Centre Inc publishes *The Queensland Law Handbook*, which includes a chapter on 'Sentencing' that is freely available online.[145]
- Thomson Reuters, *Queensland Sentencing Manual*.

136 Judicial College of Victoria, *Victims in the Courtroom: A Guide for Judicial Officers* (2019).
137 Stephanie Fryer Smith, *Aboriginal Benchbook for Western Australia Courts* (AIJA, 2nd ed, 2008).
138 Legal Services Commission South Australia, *Law Handbook, Court – Criminal Matters*, 2024, <https://lawhandbook.sa.gov.au/ch13.php>.
139 Commonwealth Director of Public Prosecutions, *Sentencing of Federal Offenders in Australia: A Guide for Practitioners* (July 2024, 7th ed).
140 Ibid [7.3] 315–25.
141 National Judicial College of Australia, *Judicial Decisions - Crafting Clear Reasons* (2008); National Judicial College of Australia, *Oral Decisions - Delivering Clear Reasons* (2011).
142 Australasian Institute of Judicial Administration, *National Domestic and Family Violence Bench Book* (last updated July 2024), section 9.3 'Sentencing'.
143 Amanda-Jane George et al. *Specialist Approaches to Managing Sexual Assault Proceedings: An Integrative Review*, Attorney-General's Department and Australasian Institute of Judicial Administration (August 2023).
144 Judicial Council on Diversity and Inclusion, *Recommended National Standards for Working with Interpreters in Courts and Tribunals* (Second Edition, March 2022).
145 See Caxton Legal Centre Inc, Sentencing (Web Page, 23 September 2024) <https://queenslandlawhandbook.org.au/the-queensland-law-handbook/offenders-and-victims/sentencing>.

- Thomson Reuters, *Ross on Crime.*
- LexisNexis Australia, *Carter's Criminal Law of Queensland*.

The Queensland *Director of Public Prosecution*s also issues *Director's Guidelines* that are 'designed to assist the exercise of prosecutorial decisions to achieve consistency and efficiency, effectiveness and transparency'.[146]

The Women's Safety and Justice Taskforce has recommended the *Director's Guidelines* be reviewed and additional guidance provided on the prosecution of sexual violence cases:[147]

> More 'practice focused' guidance should be included in specific guidance documents to support the operation of the Guidelines. Any additional guidance documents should be made publicly available to maintain public confidence, transparency and accountability.[148]

The implementation of this and other recommendations is underway.[149]

10.4.4 Case law summaries and sentencing tables

Case law summaries provide an overview of the circumstances of offence and the sentence outcome in a given case.

Case law summaries can assist members of the legal profession by helping to identify cases that identify relevant statements of law or principle. On the Supreme Court of Queensland Library's website, summaries produced by judicial officers are publicly available and usually done in respect of cases that are complex and high profile to assist with understanding the judgment. They are not produced in every case, are not authoritative and are not a substitute for the Court's reasons.[150]

Some organisations have internal databases to assist practitioners to identify relevant sentencing principles and comparable cases to indicate a possible range of sentences. For example:

- The Queensland Office of the Director of Public Prosecutions (DPP) produces an internal compendium of relevant Court of Appeal case summaries (known as the 'Appeals Register' or 'Appeals Schedule') to guide legal officers and prosecutors when making submissions on sentence at first instance. The Appeals Register provides a brief overview of the factual matrix of the case, the characteristics of person being sentenced (including their age and whether they have a relevant criminal history), any aggravating or mitigating features considered by the sentencing judge, the initial sentence and the outcome of any appeal. The DPP Appeals Register is updated with summaries of relevant court of appeal decisions to ensure that the DPP continues to make appropriate and relevant submissions on sentence. This resource is not publicly available.
- Legal Aid Queensland maintains an 'adult comparable sentencing decisions database' and a 'criminal judgments database' within their in-house library to assist preferred suppliers.[151] The 'Adult comparable sentencing decisions database' contains decisions about sentencing of adults.

146 Office of the Director of Public Prosecutions Queensland, *Director's Guidelines* (as at 30 June 2023) 23, 1.
147 Queensland Women's Safety and Justice Taskforce, *Hear Her Voice – Report Two*: *Women and Girls' Experiences Across the Criminal Justice System* (2022) vol 1, 240 rec 47.
148 Ibid 238.
149 Office of the Director of Public Prosecutions Queensland, *2022-23 Annual Report* (18 March 2024) 40.
150 See Supreme Court Library, Case Summaries (Web Page, 2023) <https://www.sclqld.org.au/collections/caselaw/case-summaries?facets=%257B%2522sort%2522%253A%2522%2522%252C%2522dates%2522%253A%257B%257D%252C%2522facets%2522%253A%257B%257D%257D&page=1>.
151 Legal Aid Queensland, Tools and Resources, Library services for preferred suppliers (Web Page, 20 August 2024)

It can be searched based on offence, person's age, employment history and criminal history, but is not a full-text database meaning it does not search the attached PDF record.[152] Similarly, the 'criminal judgments database' contains criminal decisions in a central location to allow searches for procedural and evidence issues, legal concepts and new *Criminal Code* (Qld) charges.[153] This is also not a full-text database meaning it does not search the attached PDF record.[154] These resources are only available to in-house lawyers and preferred suppliers, as opposed to all criminal justice stakeholders.

What do other jurisdictions do?

In other Australian jurisdictions, there are published summaries and sentencing tables. For example:

- South Australia: the DPP publishes 'cases of interest'.[155]
- Western Australia: the DPP produces 'Comparative Sentencing Tables'.[156]
- New South Wales: the Public Defenders publishes 'Sentencing Tables'.[157]
- Victoria: the Judicial College of Victoria produces a comprehensive *Sentencing Manual of Case Summaries* – including for sexual violence sentences.[158] In addition to these summaries, the Supreme Court of Victoria also produces and publishes summarised sentences on its website.[159]

10.4.5 Sentencing databases

Sentencing databases collect and disseminate sentencing information, providing the legal profession with a preliminary overview of sentencing practices and outcomes in other cases.[160] This information may include information about the offence/offending, data relating to these variables, the sentence outcome, and a link to a copy of the remarks from the decision.[161] Sentencing databases may assist in locating cases which establish a sentencing 'range'. The High Court has found numerical tables, bar charts and graphs, of themselves, should be interpreted with caution:

> Presentation in any of these forms suggests, wrongly, that the task of a sentencing judge is to interpolate the result of the instant case on a graph that depicts the available outcomes. But not only is the number of federal offenders sentenced each year very small, the offences for which they are sentenced, the circumstances attending their offending, and their personal circumstances are so varied that it is not possible to make any useful statistical analysis or graphical depiction of the results.[162]

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152 Legal Aid Queensland, *Adult comparable sentencing decisions database: Tip Sheet*. Available from <https://www.legalaid.qld.gov.au/files/assets/public/v/1/for-lawyers/library-factsheets/criminal-judgments-database/laq_00155-adult-comparable-sentencing-decisions-database-tip-sheet.pdf>

153 Legal Aid Queensland, Criminal judgments database: Tip Sheet. Available from <https://www.legalaid.qld.gov.au/files/assets/public/v/2/for-lawyers/library-factsheets/criminal-judgments-database/laq_00155-criminal-judgments-database-tip-sheet-web.pdf>

154 Ibid.

155 https://www.dpp.sa.gov.au/prosecuting-crimes/cases-of-interest.

156 Government of Western Australia, Sentencing: From 1 January 2014 to 31 December 2020 (Web Page, 10 January 2023) <https://www.wa.gov.au/government/document-collections/sentencing-1-january-2014-31-december-2020>

157 The Public Defenders, Sentencing Tables (Web Page, 11 June 2024) <https://www.publicdefenders.nsw.gov.au/Pages/public_defenders_research/Sentencing%20Tables/Public_Defenders_Sentencing_Tables.aspx>

158 https://resources.judicialcollege.vic.edu.au/article/679573

159 https://www.supremecourt.vic.gov.au/areas/case-summaries/recent-sentences

160 The Honourable Justice Brian J Preston, *'A judge's perspective on using sentencing databases'* (Conference Paper, Judicial Reasoning: Art or Science? Conference, 7-8 February 2009) 2–4.

161 Ibid 3.

162 *Hili* (n 27) 535 [48] (French CJ, Gummow, Hayne, Crennan, Kiefel and Bell JJ) cited in *R v Pham* (2015) 256 CLR 550, 561, [32] (French CJ, Keane and Nettle JJ)

The intention of promoting consistency is not to achieve uniform sentence outcomes for all offences, but rather, to ensure principles of fairness and equal justice prevail across and within a jurisdiction.[163] To achieve this, it is important that a sentencing judge is made aware of, or has access to, information surrounding sentence outcomes imposed by other judicial officers in similar cases.[164] Through a process of continuously reviewing and understanding the comparability of prior sentences, the ability of a sentencing judge to determine the appropriate sentence is improved.[165]

In Queensland, responsibility for collecting, maintaining and disseminating this information rests with the Queensland Supreme Court Library through its management of the Queensland Sentencing Information Service ('QSIS'). The purpose of QSIS to create a free online resource of sentencing information (the QSIS database) to improve the administration of justice, including through enhanced consistency in sentencing.[166] Access to QSIS is available to judicial officers, government entities involved in the justice system and criminal legal practitioners,[167] and includes statistical graphs of sentencing trends and copies of sentencing hearing transcripts.

Information provided through QSIS has previously been relied upon by members of the judiciary as a tool to consider the conduct and range of sentences previously imposed for similar cases.[168] In 2023, QSIS underwent a significant change with the launch of the QSIS platform. The intention was to create a more intuitive user experience and user-friendly search functionality, as well as improving data security. Despite this intention, it is understood that the new platform has some functionality challenges, and its collection of relevant cases and information is currently incomplete.

The value of courts and practitioners having access to a reliable sentencing database has been recognised within the context of appellate reviews by the NSW Court of Appeal, who noted that such a resource can assist with determining whether a sentence was manifestly excessive or inadequate, and monitoring sentencing practices and outcomes within the lower courts.[169]

Victoria[170] and Queensland[171] also each publish statistical information through their respective sentencing councils. These statistics include sentencing outcomes for specific offences, sentencing snapshots and sentencing trends. However, the data is anonymised, and the databases do not provide access to the relevant transcripts. These statistical databases are intended to promote a greater understanding of sentencing outcomes across the wider community.

163 *Lowe* (n 5) 610–11.
164 The Honourable Justice Brian J Preston, *'A judge's perspective on using sentencing databases'* (Conference Paper, Judicial Reasoning: Art or Science? Conference, 7-8 February 2009) 4, referring to the Sentencing Commission for Scotland, *Report: The Scope to Improve Consistency in Sentencing* (2006) 35.
165 Ibid 4–5.
166 *Supreme Court Library Act 1968* (Qld) pt 3.
167 Ibid s 19.
168 See *R v Cooney; Ex parte A-G (Qld)* [2008] QCA 414 [27], [31] (McMurdo P, White AJA and McMeekin J agreeing); *HGT v Queensland Police Service* [2021] QDC 186 [32] (Dearden DCJ); *R v LAL* [2018] QCA 179 [74] n 57 (Ryan J, Sofronoff P and Crow J agreeing); *R v Seaton* (District Court of Queensland, Judge Baulch SC, 21 October 2010) 3.
169 *R v Maguire* (Unreported, 30 August 1995, NSWCCA); *R v Bloomfield* (1998) 44 NSWLR 346, 371; *R v Giordano* [1998] 1 VR 544, 549.
170 Sentencing statistics in Victoria are published on the Sentencing Advisory Council Statistics (SACStat) database. The SACStat database was last updated in July 2024.
171 Sentencing statistics in Queensland are published on the Sentencing Advisory Council's Sentencing DataHub. The DataHub reflects data for those cases sentenced up to 30 June 2023.

10.5 Stakeholder views

10.5.1 Views from submissions

In our Consultation Paper, we invited feedback on:

1. whether current forms of sentencing guidance are adequate to guide sentencing for rape and sexual assault, and any problems or limitations with these (Q.4); and
2. whether the current approach to sentencing for sexual assault and rape committed against children is appropriate. What about for other people who are vulnerable? (Q.5).

Most feedback received from stakeholders focused on the issue of whether additional legislative guidance was required, rather than on other models for responding to any issues they identified regarding the appropriateness and adequacy of current sentencing practices.

Some suggested changes to practice independently of the need for legislative reform. For example, Basic Rights Queensland, in addition to legislative changes that would require certain factors to be treated as aggravating, supported inclusion of greater cultural considerations in sentencing.[172] It observed that while these factors do not excuse rape and sexual assault, 'there are circumstances where it *may* be considered relevant in the context of sentencing for these offences.'[173] It was stressed that these circumstances are only of relevance where they relate to the experience of trauma or other psychological factors.[174]

The Queensland Sexual Assault Network generally considered that 'sentencing practice should be more aligned to community expectations and the gravity and impact of these crimes on victim survivors and a sentencing uplift be considered', supporting the development of 'stronger sentencing guidelines'.[175]

A submission from an PhD candidate considered that, 'The public tends to disagree with judicial decisions due to a lack of accurate knowledge of the sentencing framework'.[176] She recommended that judges should publish their summing-up process to give greater transparency to the public about why some charges did not proceed to sentence.[177] In respect of sentencing decisions, it was recommended that:

- More consistent publishing of sentence remarks in lower courts, such as District and Magistrate courts. One can refer to the publishing mechanisms adopted by superior courts, namely the Supreme Courts and Courts of Appeal, which consistently produce and publish written decisions.
- All the documents should communicate judicial decision-making processes and outcomes to the public in a simple, jargon-free, clear and consistent manner.[178]

Legal Aid Queensland referred us to Western Australia, which published an *Aboriginal Benchbook for Western Australian Courts* in May 2022. They considered:

> 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 … 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

172 Submission 19 (Basic Rights Queensland) 6–8.
173 Ibid 8.
174 Ibid.
175 Submission 24 (QSAN) 13.
176 Submission 4 (Rita Lok) 3.
177 Ibid 2.
178 Ibid.

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.

10.5.2 Subject matter expert views

In our subject matter expert interviews, reliance on older or dated cases was viewed by some participants as being problematic and as impacting sentencing practices.

Some participants told us that legal practitioners are still using 'comparable cases from decades ago … despite the Court of Appeal having said in a number of cases … that legislative changes need to be taken into account when sentencing people.'[179] Another participant noted that 'there is still a heavy reliance upon older cases that have a tendency to have much less serious penalties'.[180]

One example given was the case of *Demmery,* decided in 2005,[181] which was frequently used as a 'yardstick' or benchmark against which the seriousness of every other case was judged.[182] One participant reflected that 'everyone compares that case. They say, well this is not as bad, so how can you send [the accused] to jail?'[183]

Our brief examination of the how this case is applied in the Court of Appeal is discussed above in section 10.2.3.

Another participant considered that there had not been 'any great change with the authorities, or the gravamen of offending, substantially changing what the applicable range is'.[184]

We were also told the recent changes to QSIS have made it challenging for a practitioner to find relevant cases to rely upon at sentence.[185] Acknowledging this gap in sentencing resources, the participant considered that having access to a comprehensive sentencing resource, such a sentencing benchbook that summarises relevant case law and principles, would be beneficial so all stakeholders know what the important and relevant decisions are.[186]

One participant indicated that it would be beneficial to have summaries of Court of Appeal decisions - like those produced by the DPP or LAQ - made more widely available to support all criminal practitioners and members of the judiciary.[187] It was noted that this would benefit smaller law firms, which do not have the same resources to establish and maintain such a resource.[188]

One participant told us of the value of *Carter's Criminal Code*, which includes commentary and was described as 'very user-friendly'.[189]

Another participant considered that there is nothing currently lacking in sentencing guidance,[190] with yet another considering Queensland practitioners and members of the judiciary are 'pretty spoiled' already.[191]

179 SME Interview 10.
180 SME Interview 15.
181 *Demmery* (n 71).
182 SME Interviews 14, 15, 16, 19.
183 SME Interview 14.
184 SME Interview 25.
185 SME Interview 7.
186 Ibid.
187 SME Interview 7.
188 Ibid.
189 Ibid.
190 SME Interview 6.
191 SME Interview 7.

10.5.3 Consultation events

At our consultation events, comments included that:

- Most victim survivors consider the sentence given it not sufficiently reflective of the harm they have suffered and want more punitive sentences. However, there was agreement that most victim survivors just want to be believed more than anything.[192]
- There needs to be better genuine recognition/acknowledgement of the victim from both the court and the offender during the sentence (including, what has happened to them, the impact the offending has had on their lives and how their life trajectory has changed).[193]

We were told that there is an opportunity to enhance sentencing resources to enable the sentencing court to better recognise the complexities of sexual assault and rape cases in sentencing and also strong support for the establishment of specialist sexual assault and rape courts in Queensland, which are able to more appropriately recognise and respond to the prosecution of these offences.[194]

10.6 The Council's view

We have concluded that there are opportunities for non-legislative forms of sentencing guidance to be enhanced. Agencies require appropriate resources to ensure these forms of guidance are updated on a regular basis and made more accessible (**Key Finding 9**).

Key Finding

9. **Non-legislative forms of sentencing guidance need to be updated and enhanced**

Non-legislative forms of sentencing guidance need to be updated and enhanced. Agencies require appropriate resources to ensure these forms of guidance are updated on a regular basis and made more accessible.

See **Recommendation 6**.

Taking into consideration the information and evidence gathered, including our analysis of relevant sentencing practices, Court of Appeal and first instance sentencing decisions and submissions, feedback provided during subject matter expert interviews and by stakeholders during our consultation process, we have concluded that existing forms of legislative sentencing guidance can be enhanced, acknowledging that agencies require appropriate resources to ensure these forms of guidance are updated on a regular basis and made more widely accessible.

Recommendation

6.1 **Resources for courts and legal practitioners**

The Department of Justice consult with the Chief Justice and other Heads of Jurisdiction to allocate resources to support judicial officers and legal practitioners in sentencing for sexual assault and rape offences, and for other sexual violence offences.

192 Cairns Consultation Event, 21 March 2024.
193 Ibid.
194 Ibid.

	The department also should explore alternative options for the development of resources for use by legal practitioners in consultation with relevant legal professional bodies, criminal justice agencies and victim survivor legal and support services. Any resources developed might identify principles to be applied drawn from Queensland case law as well as relevant statements made by the High Court of Australia, and links to any useful resources – such as research relating to the impacts of childhood sexual abuse developed as part of the *Bugmy Bar Book*. Specific information relevant to the sentencing of offences against children, Aboriginal and Torres Strait Islander people and those from other culturally and racially marginalised groups, people with a mental illness or cognitive impairment (as victims and offenders), LGBTQIA+ people and people with disabilities should be included in any resources developed.
6.2	The Queensland Government ensures the Office of the Director of Public Prosecutions and Legal Aid Queensland are appropriately funded and resourced to ensure that relevant sentencing information and resources, such as the Appeal Register maintained by the Office of the Director of Public Prosecutions, are maintained and are able to be updated on a regular basis. The Department of Justice should consult with Legal Aid Queensland and the Office of the Director of Public Prosecutions regarding what additional funding is required to make this information publicly accessible so it can be used by other legal practitioners and legal and policy decision-makers, as well as by researchers and other professionals [see, for example, the Comparative Sentencing Tables published by the WA Office of the Director of Public Prosecutions Sentencing (www.wa.gov.au) and information maintained by the NSW Public Defenders Office Resources (nsw.gov.au)]. See also **Recommendation 28** regarding QSIS enhancements.

10.6.1 Applying the Council's fundamental principles

Applying the Council's fundamental principles guiding the review[195] to the issues raised in considering sentencing guidance and to address **Key Finding 9** guided us in making a recommendation:

1. **Principle 3: Sentencing outcomes for sexual assault and rape offences should reflect the seriousness of these offences, including their impact on victims, while not resulting in unjust outcomes.** All lawyers and judicial officers should have a current understanding of sexual violence, its prevalence, long-term harm, and the myths and misconceptions about sexual violence. Having a clear, accessible and central sentencing resource can assist members of the legal profession to have the appropriate knowledge to place all relevant, available information before the courts. It may improve public confidence by enabling transparency. It may also limit the need for appeals on points of law. We consider that there is an opportunity to better support the legal profession with more developed and freely available sentencing resources to improve sentencing processes and outcomes. The judiciary should be involved in developing resources that it considers relevant to sentences for rape and sexual assault in Queensland.
2. **Principle 5: Sentencing inconsistencies, anomalies and complexities should be minimised.** Developed, updated and accessible sentencing resources can minimise inconsistencies, anomalies and complexities. As discussed in **Chapter 6**, we reviewed some sentencing submissions for rape and observed generally legal practitioners submit 2 or 3 cases that were factually similar to the matter being sentenced and involved the same penetrative conduct. The

195 For a full list of the fundamental principles, see Chapter 3.

comparable offence focus meant relevant general appellate guidance on compartmentalisation (which applies to all sexual offences regardless of the victim) was only mentioned in cases of an adult victim and not a child.

3. **Principle 6: Reforms should take into account likely impacts on the disproportionate representation of Aboriginal and Torres Strait Islander peoples in the criminal justice system.** Sentencing resources can include empirical research surrounding the impacts of sexual violence offending on victim survivors, as well as specific information relevant to sentences involving offences against children, Aboriginal and Torres Strait Islander persons and those from other culturally and racially marginalised (CARM) groups, people with a mental illness or cognitive impairment (as victims and offenders), LGBTQIA+ people and people with disabilities – similar to the *Bugmy Bar Book*.[196] Providing legal practitioners with the appropriate resources and knowledge to place all relevant, available information before the courts can improve sentencing processes and outcomes for these disadvantaged groups.
4. **Principle 7: The circumstances of each person being sentenced, the victim survivor and the offence are varied. Judicial discretion in the sentencing process is fundamentally important.** The development and maintenance of relevant sentencing resources is consistent with the principles of individualised justice, providing courts and legal practitioners with information in support of this objective. As discussed above, we recommend any resources developed expressly consider factors which are relevant to the sentencing of offences committed against vulnerable groups, as well as those factors impacting on those being sentenced for committing such offences.

10.6.2 Benefits of access to current comprehensive sentencing resources

As highlighted in **Key Finding 3**, discussed in **Chapter 6**, we acknowledge that, in the case of rape, unhelpful distinctions are often made when determining offence seriousness based on the type of conduct alone, contrary to a clear direction by the Queensland Court of Appeal to the contrary that the seriousness of each individual case must be determined based on its own particular circumstances.[197]

This reflects the tendency of prosecutors and defence practitioners, in making submissions on sentence, to rely on comparative cases involving the same type of rape conduct (for example, cases involving digital-vaginal rape of an adult in making submissions on sentence in a case involving a digital-vaginal rape), rather than focusing on other factors relevant to the assessment of offence seriousness. This appears to have resulted in the development of accepted sentencing 'ranges' based on penetration type alone, with other considerations, such as victim vulnerability, being treated as secondary considerations.

The Court of Appeal has provided clear guidance that such 'compartmentalisation' of rape conduct is to be avoided.

Given the significant impact this current approach has on sentencing levels for rape, we have identified a need for the current focus on conduct type as the principal or a primary determinant of offence seriousness as an issue that should be monitored over time following the delivery of this report (**Recommendation 7**). Our intention is to enable a change in practice to occur in response to Court of Appeal guidance rather than recommending a short-term legislative 'fix' that, in practice, would be very difficult to implement. Further, the additional step of recommending changes to legislation in our view

196 The Public Defenders (NSW), *The Bugmy Bar Book* < https://bugmybarbook.org.au>.
197 See *Wark* [2008] (n 60) [2] (McMurdo P) [13]–[14] (Mackenzie AJA), [36] (Cullinane J), referred to with approval in *Wallace* (n 62) 5 [13] (Bowskill CJ). See also *RBG* (n 62) [4] (Dalton JA) referring to *Smith* (n 59) [34]–[37] (Morrison JA).

should only be taken where it is not possible to achieve the desired change to sentencing practice without legislative reform.

The development and enhancement of existing resources for prosecutors, defence practitioners and judicial officers is important in support of these practice changes to ensure that Court of Appeal guidance is more consistently applied and that recent case law is relied upon to ensure submissions made on sentence reflect current sentencing practices (**Recommendation 6**).

This is also important in the case of sexual assault, where we identified that there may be insufficient recognition of the seriousness of these offences rand reliance on dated case authorities. While we did not undertake an analysis of a sample of sentencing submissions, as we did for rape, it is clear that from feedback provided by some subject matter expert interview participants, there are concerns that the seriousness of this form of offending is not always appropriately acknowledged and that reference is being made to dated Court of Appeal decisions.

There is also an opportunity for the Queensland Government to signal the serious nature of sexual violence offending to members of the legal profession, as well as recognising the significant and lifelong impacts caused to victim survivors of rape and sexual assault through further resourcing of sentencing information. If this approach is not supported, or is not feasible, we recommend that the Queensland Government explore alternative options for the development of resources for use by legal practitioners in consultation with relevant legal bodies, criminal justice agencies, and victim survivor legal and support services.

In addition to the development of these resources, we recommend ensuring training and resources for prosecutors and criminal defence practitioners to promote recognition of the objective seriousness of this form of offending and the significant impacts it has on victim survivors (**Recommendations 19 and 20**), and to ensure judicial officers have access to ongoing professional development focused on sexual violence (**Recommendation 18**).

10.6.3 Monitoring the impacts of any reforms over time

Recommendation

7. Monitoring the impacts of the recommended reforms

The Attorney-General and Minister for Justice ask the Council, or other appropriate entity, to monitor and report on court sentencing practices for rape and sexual assault within 5 years of implementation of the recommended reforms to assess whether sentencing levels have increased in response to these changes, relevant Court of Appeal and High Court statements and community views about the seriousness of this form of offending. This review should consider:

- whether sentencing levels for offences of rape committed against children have increased relative to offences committed against adults, including for digital–vaginal, digital–anal and penile–oral rape assessed against the penile–vaginal and penile–anal rape of an adult;
- the extent to which sentencing practices are continuing to 'compartmentalise' rape conduct rather than assess offence seriousness based on the individual circumstances of the case; and
- sentencing levels for rapes occurring in an intimate partner or family relationship relative to those committed by strangers or acquaintances.

In line with fundamental **Principle 1: Reforms to sentencing laws should be evidence-based with a view to promoting public confidence**, we have a strong commitment to evidence-informed policy development and law reform. For this reason, we consider it important that any recommended reforms that are implemented are monitored to ensure they are meeting their intended objectives and are not having any unintended impacts. We suggest 5 years as a reasonable period of time to undertake this initial assessment.

A further review should also consider relevant Court of Appeal and High Court statements and community views about the seriousness of this form of offending and:

- whether sentencing levels for rape of a child have increased relative to sentences for rape of an adult, including for digital-vaginal, digital-anal and penile-oral rape assessed against penile-vaginal and penile-anal rape of an adult;
- the extent to which sentencing practices are continuing to 'compartmentalise' rape conduct rather than assess offence seriousness based on the individual circumstances of the case; and
- sentencing levels for rapes occurring in an intimate partner or family relationship relative to those committed by strangers or acquaintances.

In addition to an analysis of sentencing remarks and administrative data, we suggest that further consultation should occur with victims and survivors, advocacy and support organisations and legal stakeholders as part of conducting a monitoring review. This will also provide an opportunity to review the impact of any changes on Aboriginal and Torres Strait Islander peoples and other groups from a background of disadvantage.

PART D:
Sentencing options and processes

Contents

PART D: Sentencing options and processes

List of Figures

List of Tables

Chapter 11 — Penalty and parole options (and other orders)

11.1 Introduction

The Terms of Reference ask us to 'advise on options for reform to the current penalty and sentencing framework to ensure it provides an appropriate response to this type of offending'.[1]

In this chapter, we examine the sentencing and parole options in the *Penalties and Sentences Act 1992* (Qld) ('PSA') as these are commonly applied to offences of sexual assault and rape to assess whether they support adequate and appropriate sentencing outcomes by meeting the important purposes of sentencing and whether they reflect the seriousness of these offences.

We present a high-level summary of current sentencing practices based on our data findings and consider how sentencing outcomes meet the purposes of sentencing and their effectiveness. We also explore what other jurisdictions do regarding sentencing.

We further consider how courts approach issues relevant to sentence, such as the recording of a conviction, and orders made in addition to a sentence, such as non-contact orders.

Evidence in support of the reforms we recommend is based both on work undertaken for this review and our earlier reviews.[2] We have also drawn on findings of other previous Queensland-based justice system reviews.[3]

11.2 Previous Council reviews and recommendations

Two of the Council's previous reviews considered reforms relevant to this current review. These reviews and their findings are summarised below.

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1 See Appendix 1, Terms of Reference.

2 This includes literature reviews commissioned by the Council for previous reviews - Karen Gelb, Nigel Stobbs and Russell Hogg, *Community-based Sentencing Orders and Parole: A Review of Literature and Evaluations across Jurisdictions* (Prepared for the Queensland Sentencing Advisory Council by Queensland University of Technology, 2019) ('*QUT Literature Review*'), informed by an earlier report prepared by Michelle Sydes, Elizabeth Eggins and Lorraine Mazerolle on 'what works' in corrections for Queensland Corrective Services (2018, unpublished); Andrew Day, Stuart Ross and Katherine McLachlan, *The Effectiveness of Minimum Non-parole Period Schemes for Serious Violent, Sexual and Drug Offenders and Evidence-based Approaches to Community Protection, Deterrence, and Rehabilitation* (Prepared for the Queensland Sentencing Advisory Council by The University of Melbourne, August 2021) ('*University of Melbourne Literature Review*'); Lacey Schaefer et al, *Sentencing Practices for Sexual Assault and Rape Offences: Literature Review* (Griffith University for Queensland Sentencing Advisory Council, Final Report, February 2024) ('*Griffith University Literature Review*').

3 Queensland Productivity Commission, *Inquiry into Imprisonment and Recidivism: Final Report* (Report, 2019) rec 17 ('*Inquiry into Imprisonment and Recidivism*'); Women's Safety and Justice Taskforce, *Hear Her Voice – Report Two: Women and Girls' Experiences Across the Criminal Justice System* (2022) rec 127 ('*Hear Her Voice, Report Two*').

11.2.1 Community-based Sentencing Orders, Imprisonment and Parole Options report

In our 2019 *Community-based Sentencing Orders, Imprisonment and Parole Options: Final Report* ('*Community-based Sentencing Orders and Parole Options Report*'),[4] the Council recommended reforms to the existing mix of community-based sentencing orders in Queensland designed to achieve greater flexibility in sentencing and expand the sentencing 'toolbox' for courts. We also recommended that changes be made to parole.

At the time of the 2019 report, we observed that the unintended consequence of excluding sex offenders from court-ordered parole is that it has resulted in many sex offenders being subject to sentences that do not involve supervision.[5] This has also been evident during this review.

We concluded that this was partly due to sexual offences not being eligible for court-ordered parole, meaning that when sentencing a person for a sexual offence, a court can only set an eligibility date, not a release date.[6]

The Queensland Parole System Review noted similar issues, raising concerns that:

> it may be that the effect of not allowing the court-ordered parole regime to apply to sex offences is to make it less likely that an offender who commits a sex offence is sentenced to a period of imprisonment with subsequent effective supervision and rehabilitation on parole.[7]

It recommended, as we also did in the 2019 review, that court-ordered parole should apply to a sentence imposed for a sexual offence, given evidence that a period of supervision reduces the risk of reoffending, thereby supporting the objective of community safety.[8]

Specific recommendations made by the Council in our 2019 report included:

- the introduction of a new form of community-based order – a 'community correction order' ('CCO') – which can be tailored through the conditions imposed to meet the various purposes of sentencing, while also responding to the individual factors contributing to offending (recommendation 9);
- reforms to intensive correction orders ('ICOs') to increase their flexibility, drawing on reform models adopted in other jurisdictions (recommendation 8);
- allowing courts to combine a suspended prison sentence with a CCO when sentencing a person for a single offence and, until such time as the CCO was fully operational, allowing a court to combine a suspended prison sentence with a probation order or community order when sentencing a person for a single offence (recommendations 17 and 37);[9]

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4 Queensland Sentencing Advisory Council, *Community-based Sentencing Orders, Imprisonment and Parole Options: Final Report* (July 2019) ('*Community-based Sentencing Orders, Imprisonment and Parole Options Report*').
5 Ibid 377.
6 Ibid 397–98.
7 Walter Sofronoff, *Queensland Parole System Review: Final Report* (Report, November 2016) 102–3 [507] ('*QPSR Report*').
8 Ibid 103 [508]–[509], rec 5; *Community-based Sentencing Orders, Imprisonment and Parole Options Report* (n 4) rec 47.
9 *Community-based Sentencing Orders, Imprisonment and Parole Options Report* (n 4). See also rec 42 on recommended guidance when setting the operational period for a combined suspended imprisonment sentence and community-based sentencing order.

- the investigation of whether, once the new order was operational, there may be benefit in providing courts with additional powers on breach of a CCO where combined with a suspended prison sentence, such as a power to activate a limited number of days of imprisonment due to non-compliance (recommendation 44);
- providing courts with a dual discretion to set either a parole release date or a parole eligibility date when sentencing a person for a sexual offence (recommendation 47) with potential for this to be extended to sentences of up to 5 years following a recommended review of the effectiveness of court-ordered parole (recommendations 49 and 50); and
- removal of parole as an option for sentences of imprisonment of 6 months or less for any offence, except in limited circumstances (activation of a suspended prison sentence in whole or in part and sentences imposed for offences committed on Board-ordered or court-ordered parole). This was subject to the implementation of other reforms recommended and them being operational (recommendation 51), including the availability of CCOs as an alternative (either used on their own or made in combination with a suspended prison sentence).

In our 2019 report, we noted that several other reviews had recommended a CCO model be considered for adoption; these included the 2016 Queensland Parole System Review,[10] the 2016 Queensland Drug and Specialist Courts Review[11] and the 2017 Australian Law Reform Commission ('ALRC') inquiry into the incarceration rate of Aboriginal and Torres Strait Islander peoples ('*Pathways to Justice Report*').[12]

As discussed in section 11.5.1, CCOs have now been introduced in NSW, Victoria, NT and Tasmania. The introduction of this generic form of order with a range of conditions that can be imposed drew on developments in England and Wales, which first introduced a new form of community sentence in 2003.[13] Other reviews similarly have supported the adoption of this model, including the 2019 Queensland Productivity Commission inquiry into imprisonment and recidivism,[14] and the Women's Safety and Justice Taskforce ('WSJ Taskforce') which recommended the 'Queensland Government respond to and implement' the Council's earlier recommendations with particular reference to 'the need to expand suitable, gender-specific services that support women being sentenced to community-based orders rather than short periods of imprisonment'.[15]

The former Queensland Government indicated its in-principle support for this recommendation, noting that it was 'considering the recommendations of the Queensland Sentencing Advisory Council's Community-based sentencing orders report as part of the work of the Criminal Justice Innovation Office' (now Justice Reform Office in the Department of Justice).[16] These reforms are yet to be implemented.

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10 *QPSR Report* (n 7) 97–8. The second proposal deserving consideration was introducing the ability to impose a combined suspended prison sentence and probation order as a sentence: at [477].
11 Arie Freiberg et al, *Drug and Specialist Courts Review: Final Report* (November 2016) 38, rec 8.
12 Australian Law Reform Commission, *Pathways to Justice — An Inquiry into the Incarceration Rate of Aboriginal and Torres Strait Islander Peoples* (Report No. 133, 2017) 234, rec 7-2.
13 See *Criminal Justice Act 2003* (UK). These orders became operation on 4 April 2005 and relevant provisions are now contained in the *Sentencing Act 2020* (UK). For more information on their history, see George Mair, Noel Cross, Stuart Taylor, *The Use and Impact of the Community Order and the Suspended Sentence Order* (Centre for Crime and Justice Studies, 2007).
14 *Inquiry into Imprisonment and Recidivism* (n 3) vol 1, 303, rec 9.
15 *Hear Her Voice, Report Two* (n 3) vol 2, 572, rec 127.
16 Queensland Government, *Queensland Government Response to the Report of the Queensland Women's Safety and Justice Taskforce, Hear Her Voice–Report Two: Women and Girls' Experiences Across the Criminal Justice System* (November 2022) 39 ('*Response to Hear Her Voice, Report Two*').

For reasons discussed in section 11.2.1, we continue to consider that these recommendations have strong merit and would result in better sentencing outcomes for sexual violence offending, including more people being subject to supervision and having access to relevant program and treatment conditions.

11.2.2 Serious violent offence scheme and parole options for sexual offences

In **Chapter 7**, we presented our finding that sentences are not adequate for rape, particularly as this applies to offences against children (**Key Finding 4**). We consider that the operation of the serious violence offences ('SVO') scheme may be contributing to this inadequacy.

The SVO scheme requires a person sentenced in the District or Supreme Courts and convicted of the relevant listed offences[17] to serve 80 per cent of their sentence (or 15 years, whichever is less) in prison before being eligible for release on parole.[18] The making of a declaration is mandatory for sentences of imprisonment of 10 years or more and discretionary for sentences of imprisonment greater than 5 years and less than 10 years. There is also discretion to make a declaration for any offence, or for a listed offence that results in a sentence of less than 5 years, if the offence involved the use or attempted use of serious violence, or resulted in serious harm to another person.[19]

Just over one in 10 sentences for rape (MSO) involved the making of an SVO declaration, and most were made on a mandatory basis. However, sentences falling just below this level are also likely to be impacted by the SVO scheme. There were no SVO declaration for sexual assault (MSO).

In our 2022 report, *The '80 Per Cent Rule': The Serious Violent Offences Scheme in the Penalties and Sentences Act 1992 (Qld)* ('*The "80 Per Cent Rule*"'),[20] we found it restricts the maximum period an offender can be subject to supervision in the community and may discourage offenders from applying for parole.[21] We also found evidence of the scheme having a 'distorting effect'[22] on head sentences, reducing the sentence that might otherwise have been imposed had it not applied.[23]

We concluded that the reduction of sentences to take the making of a declaration into account did not mean sentencing judges were deliberately 'avoiding' or intentionally subverting the scheme. It was simply a consequence of the fixed nature of the non-parole period that applies under the scheme, and its mandatory application once a sentence of 10 years is imposed, as a court must take the making of the declaration into account as part of the integrated approach to sentencing.[24]

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17 *Penalties and Sentences Act 1992* (Qld) ss 161A–161B, sch 1 ('PSA'). Also includes 'counselling, procuring, attempting or conspiring to commit such an offence': s 161A(a)(i)(B).
18 *Corrective Services Act 2006* (Qld) s 182 ('CSA').
19 PSA (n 17) s 161B(4). While the court also has discretion to declare rape or sexual assault as an SVO where a sentence of less than 5 years' imprisonment, if it involved the use, or attempted use, of serious violence or resulted in serious harm to another person, provided the offence is dealt with on indictment, we found no sentencing outcomes where this occurred since 2011.
20 Queensland Sentencing Advisory Council, *The '80 per cent Rule': The Serious Violent Offences Scheme in the Penalties and Sentences Act 1992 (Qld): Final Report* (Report, May 2022) ('*The "80 per cent Rule"*').
21 Ibid 120, key finding 1.
22 See *R v Sprott; Ex parte A-G (Qld)* [2019] QCA 116 [41] (Sofronoff P, Gotterson JA and Henry J agreeing).
23 *The '80 per cent Rule'* (n 20) 253.
24 Ibid 120, key finding 3.

We also acknowledged that it was unclear whether, and if so by how much, head sentences might increase if the SVO scheme did not exist at all and courts instead had full discretion to set parole eligibility. It is not usual for courts to specify the reduction given in this way.[25]

While we found that the current SVO scheme may achieve its sentencing purposes of punishment, denunciation and, at least in the short-term, community protection, we determined that it only achieves this in part. Meeting these sentencing purposes is compromised by the fixed non-parole period at 80 per cent and its mandatory application to sentences of 10 years or more. We did not find evidence that the SVO scheme supported long-term community protection; to the contrary, it was found that it may be counter-productive to achieving this objective. This is because a person under the scheme will spend less time in the community under supervision or be released at the end of their sentence without supervision.[26] A review of the research literature found that more, rather than less, time under parole supervision supports the objective of community safety.[27]

We were also concerned about the low number of declarations made below the 10-year mandatory threshold. Victim survivors during our 2022 review told us that the minimum time a person is required to serve in custody prior to parole eligibility matters to their sense of justice being done and the person having received an adequate punishment.[28] They also told us that when the parole eligibility date is very close to the date of sentence, this can cause them significant anxiety and distress and that deferral of this date as long as possible would support their recovery and ability to get on with their lives.[29]

Similar concerns were expressed during the current review. For example, Queensland Sexual Assault Network ('QSAN') told us that victim survivors 'have overwhelming fear when the offender is released' from custody and 'a sense of injustice if this occurs immediately after the trial'.[30] However, a victim survivor told us that more time under supervision is important from a community safety perspective.[31] This suggests that a balance must be struck between the minimum time spent in custody and the time available to be spent under supervision in the community.

Following our earlier review, we recommended significant reforms to the SVO scheme (which we also recommended be renamed 'serious offences scheme').[32] We recommended that the SVO scheme be changed to a presumptive scheme for sentences of greater than 5 years with discretion when a declaration is made to set the parole eligibility date between 50 and 80 per cent.[33] We proposed that rape and aggravated sexual assault should be retained as offences to which the reformed scheme applies.

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25 Ibid key finding 4. There are, however, some examples of this. See, for example, *R v O'Sullivan and Lee; Ex parte A-G* (Qld) [2019] 3 QR 196 ('*O'Sullivan*'). The Court noted: 'It is usually wrong to attempt to try to put forward a mathematical formula to explain the degree to which factors in mitigation of sentence have affected a penalty that would otherwise have been imposed in their absence'. However, this was viewed as being 'necessary to explain as fully as possible the effect of … legislative changes' discussed in that judgment 'upon the range of sentences that have been wrongly accepted as a basis for sentencing'. It found that, taking into account the factors in mitigation, particularly his early guilty plea, the sentence should be one of 12 years for manslaughter reduced from a 15-year sentence that would have otherwise been appropriate: at 247 [163].

26 *The '80 per cent Rule'* (n 20) xvi–xvii.

27 See *University of Melbourne Literature Review* (n 2) 11–14.

28 *The '80 per cent Rule'* (n 20) 181–2.

29 Ibid.

30 Submission 24 (QSAN) 8.

31 Victim Survivor Interview 4.

32 *The '80 per cent Rule'* (n 20) rec 3.

33 Ibid recs 2, 9. Note, for listed drug offences we recommended the presumption apply when sentences are 10 years or more (rec 8).

Under our proposals, once a declaration is made, a court would have a discretion to set the parole eligibility date between 50 and 80 per cent of the head sentence. We recommended that flexibility because it would limit head sentences being reduced to make proper allowance for a person's plea of guilty and other factors in mitigation, which would otherwise (under a fixed model) only be able taken into account by reducing the head sentence.

This recommendation was made noting all examples of sentenced serious offences, including rape and aggravated sexual assault, that attract sentences of 5 years or more are serious and therefore a substantial proportion of the sentence should be required to be served in custody in support of just punishment and denunciation regardless of whether the person has pleaded guilty (which in Queensland, often results in parole eligibility being set at one-third below the usual statutory parole eligibility date of 50%).[34]

A court would retain the ability not to make a declaration where not doing so was considered to be in the interests of justice. This reflected our concern about the importance of achieving a just sentence in all the circumstances — which has been recognised by the Queensland Court of Appeal as 'the paramount objective of sentencing'.[35]

The expected outcomes of our reforms, if adopted, including for rape and aggravated sexual assault, were:

- more SVO declarations being made for sentences of imprisonment of 5 years or more, and less than 10 years. That would mean more people sentenced for these offences being required to serve a greater proportion of their sentence in custody (at a minimum, 50 to 80%) before being eligible for release on parole;
- the potential to achieve longer head sentences in Queensland as the mandatory declaration for sentences of 10 years or more would be removed and courts would have the ability to set parole eligibility within a range of 50 to 80 per cent to recognise mitigating factors.

These reforms are yet to be legislated.

11.3 Overview of sentencing outcomes

As discussed in **Chapter 4**, the Council undertook a detailed review of sentencing trends for rape and sexual assault based on cases sentenced over an 18-year period (2005–06 to 2022–23). The findings are detailed in **Appendix 4.** This section presents a high-level summary of some of these findings.

11.3.1 Rape: Key sentencing trends

Penalty types

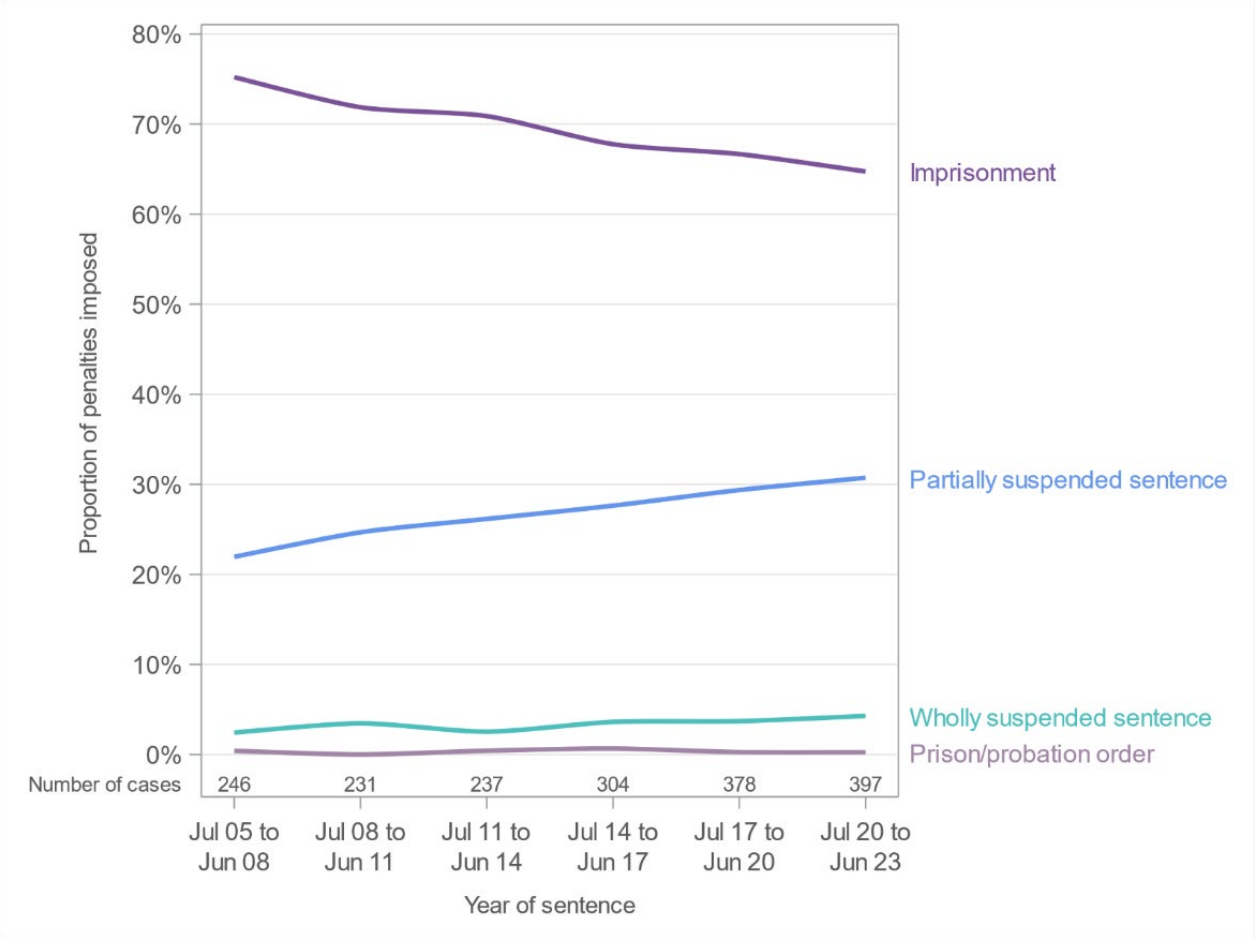
The Council's analysis identified the following key trends in the sentencing of rape offences in Queensland over an 18-year period (2005–06 to 2022–23):

34 CSA (n 18) s 184(2). There are some legislative exceptions to this, such as prisoners sentenced for an offence with a serious organised crime circumstance of aggravation.
35 *R v Randall* [2019] QCA 25 [37] (Sofronoff P and Morrison JA and Burns J).

1	**Almost all people sentenced for rape had to serve time in prison as part of their sentence:** Over the 18 years, 98.7 per cent of all penalties imposed for rape were custodial and of those; 96.5 per cent required the person to serve time in prison.
2	**The use of partially suspended sentences is increasing:** The proportion of prison sentences with a parole eligibility date decreased as the proportion of partially suspended sentences increased.
3	**Suspended sentences were commonly ordered alongside probation where this option was open:** Nearly three-quarters of cases resulting a partially suspended sentence had a co-sentenced offence sentenced at the same court event (73.5%). The most common co-sentenced penalty was another partially suspended prison sentence (75.6%), followed by imprisonment (38.0%) and probation (31.3% – representing 23% of all partially suspended sentences for rape (MSO)).
4	**Aboriginal and Torres Strait Islander people were more likely to be given a sentence of imprisonment than non-Indigenous people:** Aboriginal and Torres Strait Islander people were no more or less likely than non-Indigenous people to receive a custodial penalty (98.8% v 98.6%), though were more likely to receive a sentence of imprisonment (80.0% v 65.0%), and less likely to receive a partially suspended sentence (16.2% v 31.1%) than non-Indigenous people. These findings are statistically significant. There was no statistical difference in custodial sentence length.

As shown in Figure 11.1, in the most recent 3-year period examined, partially suspended prison sentences represented just under one-third of custodial sentences imposed (30.7%) while imprisonment sentences represented close to two-thirds of penalties (65.7%).

Figure 11.1: Custodial penalty type imposed for rape (MSO), by year of sentence (grouped)



Data notes: MSO, adults, higher courts, 2005–06 to 2022–23. Intensive correction orders (n=1) were included in the calculations but have not been presented in the figure.
Source: Queensland Government Statistician's Office, Queensland Treasury – Courts Database, extracted September 2023.

Sentence lengths and time in custody

Over the same 18-year data period (2005–06 to 2022–23):

5	**Custodial sentence lengths remained relatively stable:** The median custodial sentence length for rape ranged each year between 5.0 and 6.0 years (with the average ranging between 5.1 and 6.3 years) (this takes into account the combined length of all types of custodial penalties imposed for rape (MSO) each year).
6	**For those sentenced to imprisonment, most people had parole eligibility fixed at or below 50 per cent of their head sentence, although additional time was often spent in custody beyond a person's parole eligibility date prior to release:**[36] Three-quarters of people who pleaded guilty (74.4%) had their parole eligibility set below 50 per cent and more than half (55.8%) had it set at or below one-third of the head sentence. In contrast, for people who were found guilty following a trial, only 17.6

[36] This data is reported for a shorter data period and includes an analysis of cases sentenced between July 2011 and June 2023.

	per cent had parole eligibility set below 50 per cent of the head sentence.[37] The median time served in prison beyond the parole eligibility date before being released was 211.5 days, or approximately 7 months (average 267.8 days).[38]
7	**The median time to serve prior to release for partially suspended prison sentences was one-third of the head sentence:** The median sentence length for partially suspended prison sentences was 3.0 years, with a median time to serve prior to release of 1.0 years. There were no differences by gender or Aboriginal and Torres Strait Islander status. The median operational period was 4.0 years (3 years longer than the median time to serve and one year longer than the imprisonment term).
8	**For cases sentenced between July 2011 and June 2023 resulting in imprisonment, over two-thirds of cases involved pre-sentence custody declared as time served under the sentence with additional time to serve**: The median time declared was just over 10 months (313.0 days).
9	**For cases sentenced between July 2011 and June 2023 resulting in a partially suspended prison sentence, just under one in 3 (32.7%) involved declared pre-sentence custody with additional time to serve in custody prior to suspension:** In just over one in ten cases (12.4%) time was declared with no additional time to serve prior to suspension. The median time declared was just over 6 months (189 days).

11.3.2 Sexual assaults: Key sentencing trends

Penalty order types

The pattern of sentencing outcomes for sexual assault offences was very different from rape, taking into account the lower maximum penalty that applies to non-aggravated forms of offending, which are the most common, and the type of conduct involved – much of which involves acts of non-consensual indecent touching.

The Council's analysis identified the following key trends over the 18-year data period (2005–06 to 2022–23):

10	**The use of custodial sentences has increased in the Magistrates Courts while remaining relatively stable in the higher courts:** In the Magistrates Courts, sentences of imprisonment and wholly suspended sentences both increased over the 18-year period, while the use of monetary penalties decreased. In the higher courts, the use of wholly suspended sentences for non-aggravated assault has increased over time while the use of imprisonment has decreased.

37 Note these findings are for a shorter data period than other date reported in this table. They involve cases sentenced over a 12-year data period (1 July 2011 to 30 June 2023), as data regarding parole eligibility was not available prior to this time.

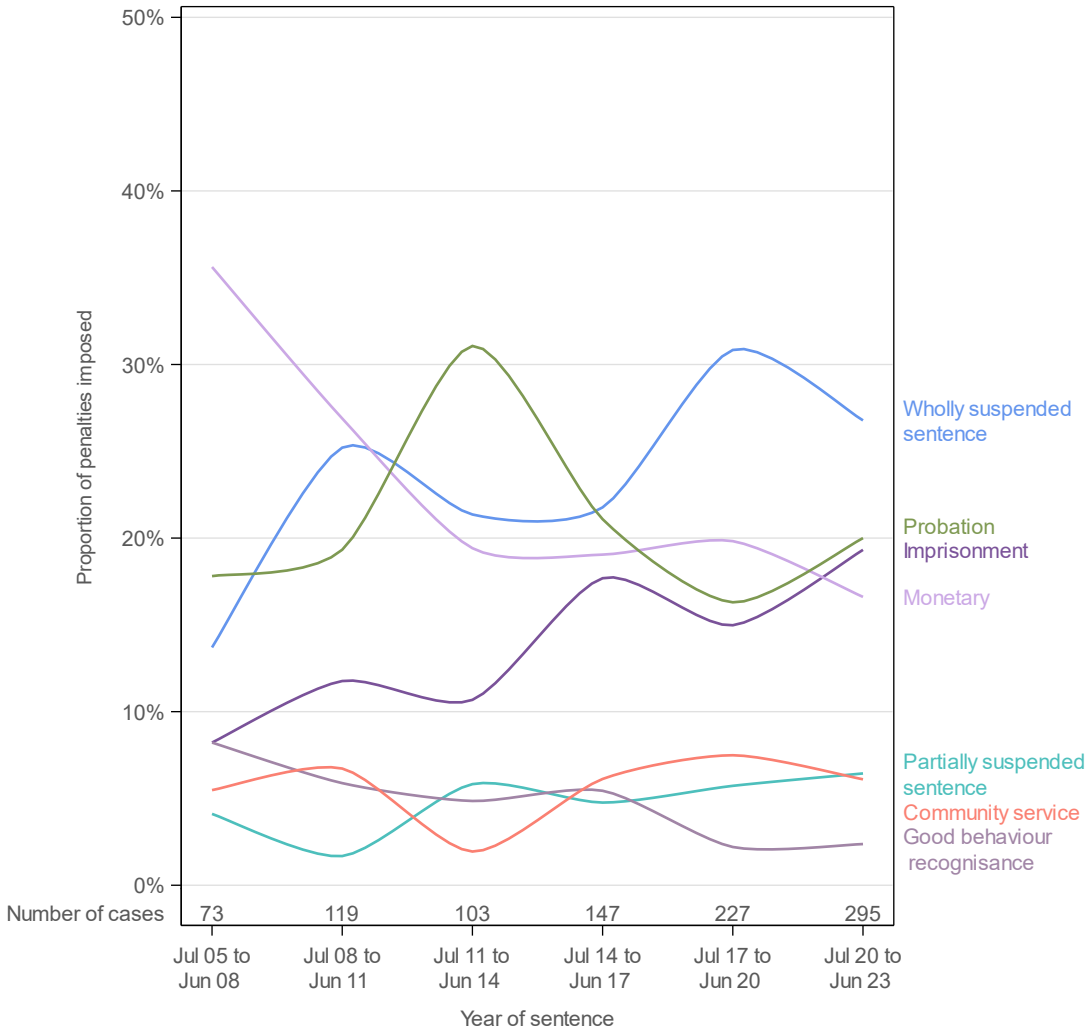
38 In *The '80 per cent Rule'* (n 20), we found that for people sentenced to 5 years or more but less than 10 years' imprisonment (with no SVO declaration), rape was one of the least likely categories for a parole application to be approved (62% compared to deal or traffic in illicit drugs 91% and grievous bodily harm 81%): at 114–15, fig 34.

11	**Wholly suspended sentences were the most common penalty imposed for non-aggravated sexual assault in both the higher and lower courts:** Wholly suspended sentences were ordered in just over one-quarter of all cases in the Magistrates Courts (25.2%) with a median sentence length of 6 months. Just over one-third of all sentences in the higher courts (37.4%) had a wholly suspended sentence imposed, with a median sentence of 9 months.
12	**Almost all aggravated sexual assaults received custodial penalties:** A custodial penalty was imposed in 95.1 per cent of sexual assault (aggravated) and 96.3 per cent of sexual assault (aggravated life) cases. The most common penalties were partially suspended sentences and imprisonment.
13	**Aboriginal and Torres Strait Islander people were more likely to receive a custodial penalty than non-Indigenous people:** One in 5 sexual assault cases were committed by an Aboriginal and Torres Strait Islander person and the overwhelming majority were for non-aggravated sexual assault (95.1%). The majority of Aboriginal and Torres Strait Islander people sentenced received a custodial penalty (81.8%) compared with under two-thirds of non-Indigenous people sentenced (60.2%).
14	**Over half of all people sentenced to a custodial penalty were sentenced for another offence:** Over half (55.2%) of all cases with a custodial penalty were sentenced for another offence at the same hearing. It was more common to combine a suspended sentence with a probation order for sexual assault and other sexual offences, in comparison to other offence types.

Sentences of imprisonment and wholly suspended sentences both increased over the data period in the Magistrates Courts, while the use of monetary orders decreased (see Figure 11.2).

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

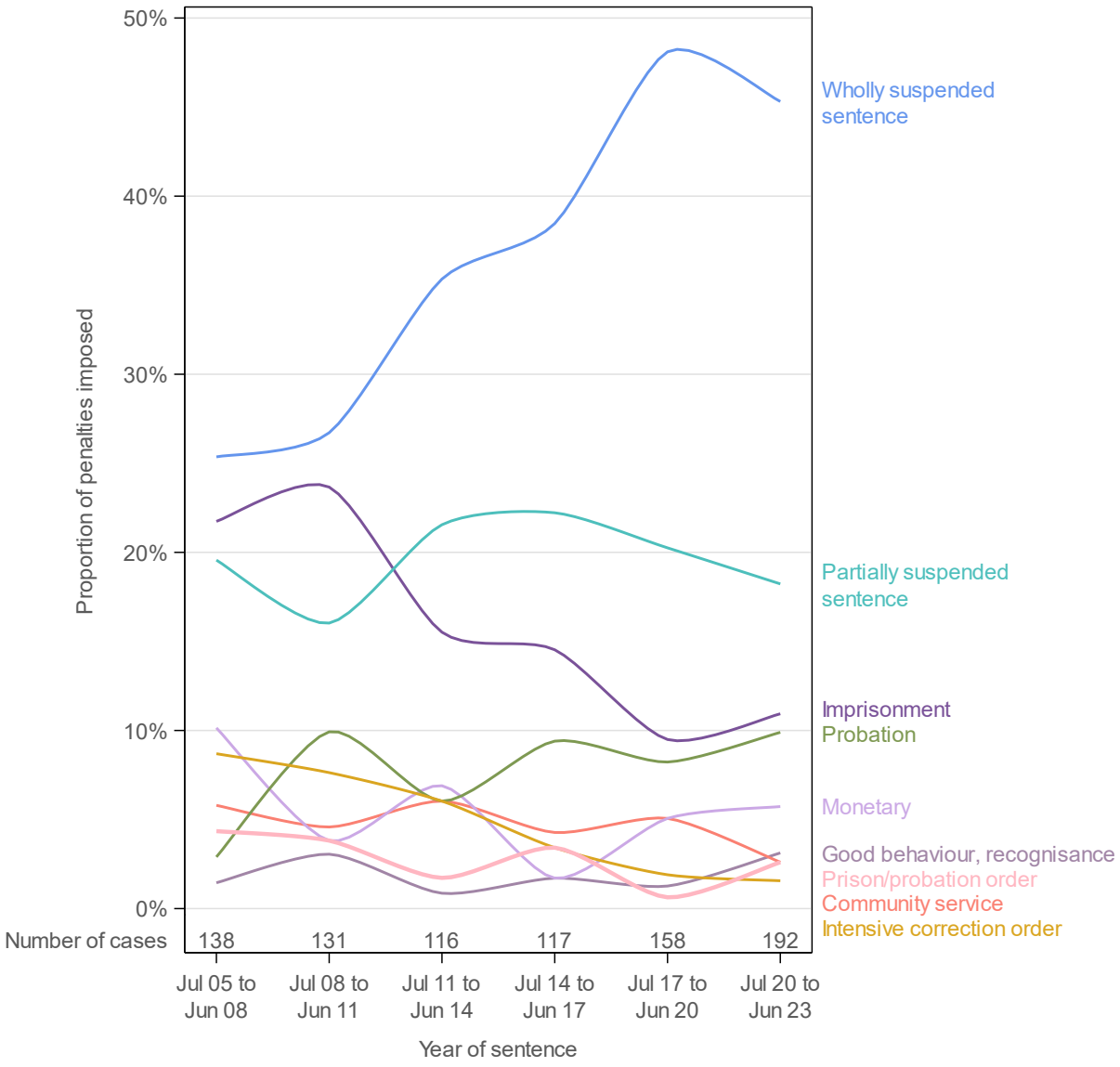
Figure 11.2: Penalties imposed for non-aggravated sexual assault (MSO) in the Magistrates Courts, by year of sentence (grouped)



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

As shown in Figure 11.3, over the most recent 3-year period (July 2020 to June 2023), the most common penalty imposed for non-aggravated sexual assault cases sentenced in the higher courts was a wholly suspended sentence (45.3%), followed by partially suspended sentences (18.2%) and imprisonment (10.9%).

Figure 11.3: Penalties imposed for non-aggravated sexual assault (MSO) in the higher courts, by year of sentence (grouped)



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

Sentence lengths, time to serve, time declared and operational periods

We also analysed sentence lengths, operational period for suspended prison sentences and time to serve in custody finding:

15	**Sentence lengths for orders involving actual imprisonment are consistent, but differ by court level.** Over the 18-year data period, the median imprisonment sentence length for non-aggravated sexual assault offences in the higher courts was 15 months, and 9 months in the Magistrates Courts.

	For partially suspended sentences, the median sentence length for cases sentenced in the higher courts was 15 months, and 9 months for partially suspended sentences imposed in the Magistrates Courts.
16	**For cases sentenced between July 2011 and June 2023 resulting in imprisonment, the median time to serve before being eligible for release on parole varied by court level and plea.** For non-aggravated sexual assault sentenced in the Magistrates Courts (plea of guilty), the median time to serve prior to parole eligibility was just under 2.5 months (0.2 years). In the higher courts, those sentenced for sexual assault (both aggravated and non-aggravated) who pleaded guilty were eligible for release on parole after serving a median of just over 9.5 months (0.8 years). Those who did not plead guilty had to serve a median of 6 months (0.5 years) prior to parole eligibility with an average time to serve of just over 7 months (0.6 years).
17	**The median time to serve under a partially suspended prison sentence also varied by court level.** In the Magistrates Courts, the median time to serve was just under 3 months (2.9 months), ranging from about 12 days (0.4 months) to just under 10 months (9.7 months). In the higher courts, for those sentenced after pleading guilty the median time to serve was 4 months, ranging between about 15 days (0.5 months) to just over 1 year and 5 months (17.5 months) prior to release. For those who did not plead guilty, the median time to serve was also 4 months, ranging from about 1 month and 17 days (1.6 months) to 18 months.
18	**For cases sentenced between July 2011 and June 2023, 3 in 5 sentences of imprisonment (58.2%) had pre-sentence custody declared as time served under the sentence, while this was also the case for close to half (48.7%) of partially suspended sentences.** For sentences of imprisonment: over one in 4 (42.6%) had time declared that was less than the time spent already in custody, while 15.6 per cent had time declared that equalled the sentence length. The median time declared was just under 4 months (116 days). For partially suspended sentences, one in 5 (20.1%) had time declared that was less than the time to be served prior to release, while more than one in 4 had time declared which equalled the time to serve before release (28.6%). The median days declared pre-sentence custody for a partially suspended sentence was just over 3 months (92.5 days, average was about 4 months and 15 days (139.1 days)).
19	**Probation orders were longer than time required to be spent in custody under imprisonment or a partially suspended prison sentence**: Across the 18-year data period, the median length of probation orders imposed in the Magistrates Courts

	was 15 months (average 16.2 months). For cases sentenced in the higher courts, the median length of a probation order was 18 months (1.5 years).
20	**The length of wholly suspended sentences, the median sentence length varied by court level:** For cases sentenced in the higher courts, the median sentence length for wholly suspended prison sentences was about 9.5 months (0.8 years). In the Magistrates Courts, the median sentence length for wholly suspended prison sentences was 6 months.
21	**For suspended sentences, the median operational period varied by sentence type:** Across both court levels, median operational periods were highest for partially suspended prison sentences at 2 years, and lowest for wholly suspended prison sentences at 18 months.

11.4 How Queensland compares with other jurisdictions

As discussed in **Chapter 7**, there are challenges in comparing sentencing outcomes across jurisdictions. While there are many similarities between the types of sentencing orders available, there are also important differences.

Acknowledging these limitations, we present a high-level overview of how Queensland compares with the use of imprisonment and sentencing outcomes for sexual assault offences.

We also discuss differences in the range of sentencing orders available to courts and the setting of non-parole periods where relevant throughout this chapter. More information can be found in our **Consultation Paper: Background**.[39]

11.4.1 Number of people in prison and community corrections

The 2023 *Prisoners in Australia* report produced by the Australian Bureau of Statistics ('ABS'), which reported on prisoners in custody as at 30 June 2023, found that Queensland had the second highest number of sentenced prisoners (n=6,488) and unsentenced prisoners (n=3,686) of all states and territories.[40]

When considering 'sexual assault and related offences' as the most serious offence/charge and Aboriginal and Torres Strait Islander status, Queensland had the second highest number of Aboriginal and Torres Strait Islander prisoners (n=396)[41] and the third highest number of non-Indigenous prisoners (n=1,021).[42]

Based on data for the September 2024 quarter published by the ABS,[43] Queensland prisoners numbers remain high. For this quarter, Queensland reported 10,858 prisoners, of whom 6,676 were sentenced.[44]

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39 Queensland Sentencing Advisory Council, *Sentencing of Sexual Assault and Rape: The Ripple Effect - Consultation Paper: Background* (March 2024) ('*Consultation Paper: Background*').
40 Australian Bureau of Statistics, *Prisoners in Australia 2023* (25 January 2024) Table 14 ('*Prisoners in Australia 2023*'). NSW was the highest with 7,499 sentenced prisoners and 4,818 unsentenced prisoners.
41 Ibid. NSW had 408.
42 Ibid. NSW had 1,903 and Victoria had 1,035.
43 Australian Bureau of Statistics, *Corrective Services Australia – September Quarter 2024* (28 November 2024).
44 Ibid Table 7.

Queensland's sentenced prisoners rate per 100,000 population was 154.0 – higher only than Western Australia and the Northern Territory.[45] NSW had a sentenced prisoners rate much lower than Queensland (110.0), as did Victoria (70.8).[46] The rate of remand prisoners in Queensland was also higher in Queensland (95.1) than in NSW and Victoria (85.6 and 36.1 respectively).

The number of people in community corrections in the September 2024 quarter in Queensland was just over half the number in NSW (18,903 compared with 36,642 in NSW).[47] This count includes people on parole, but excludes people on suspended sentences in Queensland who are not subject to QCS supervision.

11.4.2 Sentencing practices for 'Sexual assault and related offences'

While we have not attempted a detailed quantitative comparison of sentencing outcomes with other jurisdictions, given jurisdictional differences, the data published by the ABS based on a standardised offence classification scheme provides a high-level indication on types of sentencing outcomes commonly imposed by jurisdiction. However, as noted above, a direct comparison by offence type is not possible and there is variation across jurisdictions regarding the types of sentencing orders given.

The standardised offence classification scheme that is used is broad in scope, rather than reporting on sentencing outcomes for specific offences, such as rape and sexual assault. There are also differences in the types of penalties available in individual jurisdictions and how these are mapped to the standard ABS sentence type classification. For more information see **Appendix 9**.

Despite these limitations, we note that for the broad category of 'Sexual assault and related offences' based on higher courts data, compared with New South Wales, Victoria and Western Australia, Queensland had:

- the lowest proportion of sentences involving custody in a correctional institution (67%) the definition of which includes partially suspended prison sentences, compared with just under three-quarters of penalties in Victoria (73%) and Western Australia (74%), and 81 per cent in New South Wales;
- the second highest proportion of fully suspended prison sentences (17%) behind Western Australia (19%) where, in contrast to Queensland, conditions can be ordered, while NSW had none following the abolition of these orders;
- the highest proportion of 'moderate penalty in the community' orders (11%), with NSW having the equivalent percentage of 'intensive penalty in the community' orders;
- the equal lowest use of community service/work orders, with Western Australia representing just 1 per cent of penalties, compared to Victoria, for which 10 per cent of orders involved community work.[48]

At the Magistrates Court level, in comparison to NSW, Victoria and Western Australia, Queensland had:

45 Ibid Table 8.
46 Ibid.
47 Ibid Table 14.
48 See Appendix 9, Cross-jurisdictional analysis of sentencing outcomes (Queensland, NSW, Victoria and Western Australia).

- the second highest proportion of sentences involving custody in a correctional institution, (including imprisonment and partially suspended prison sentences (26%), second only to NSW (29%);
- the highest proportion of fully suspended prison sentences (18%) followed by Western Australia (12%) noting that NSW and Victoria have removed this as a sentencing option for state offences;
- the second highest use of 'moderate penalties in the community' (e.g. in Queensland, orders such as probation) (22%), although NSW in particular had a far greater proportion overall of community-based penalties (described as 'intensive penalty in the community', 'community service/work' and 'moderate penalty in the community') (49% of penalties in NSW compared to 27% in Queensland);
- the second highest use of fines (25%) behind Western Australia, which made extensive use of monetary penalties/fines (52% of penalties). A relatively small percentage of orders in NSW (6%) involved monetary orders while 18 per cent of penalties in Victoria were monetary penalties;
- the lowest use of good behaviour orders/bonds (4% of penalties) behind Western Australia which reported none. In comparison, good behaviour orders were much more commonly used in Victoria (19% of penalties) and NSW (15% of penalties). Victoria also had a significant proportion of 'nominal and other penalties' (14%).[49]

11.5 Problems identified during this review

An exploration of key sentencing trends, and the issues raised by stakeholders regarding current sentencing practices, suggests that penalty and parole options may not provide the best framework to achieve the intended objectives in sentencing for sexual assault and rape.

In the following sections, we discuss the problem identified, what stakeholders have told us, what we know about the purpose of the sentencing orders examined and their effectiveness, and what other jurisdictions do.

11.5.1 Issue 1: Supervision, parole and the use of suspended sentences

Introduction

Following our earlier 2019 *Community-based Sentencing Orders and Parole Options Report*, we concluded that there is a lack of flexibility in the current mix and range of penalty options in Queensland.[50] We found this was contributing to the high use of suspended prison sentences for sexual offences, including sexual assault and rape.[51] As a consequence, orders were being made that did not involve the person being actively supervised or required to engage with treatment and other forms of interventions in the community. Examples of restrictions included:

- There is an inability to order a suspended prison sentence with probation when sentencing a person for a single offence; this is only an option when sentencing a person for two or more offences.

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49 Ibid.
50 *Community-based Sentencing Orders, Imprisonment and Parole Options Report* (n 4).
51 Ibid.

- For sentences of 3 years or less, a court is not permitted to set a parole release date when sentencing a person for a sexual offence.[52]

As discussed in section 11.5.4, this also related to the flexibility of the current suite of community-based orders which we recommended be reformed.

The reason why court-ordered parole was restricted for sexual offences and the unintended impacts

When court-ordered parole was introduced in 2006, the reason for excluding people sentenced for sexual and (declared) serious violent offences from the scheme was due to their higher level of risk.[53] The 'provision of programs to sex offenders and violent offenders to address criminogenic needs and reduce recidivism risk' was identified by the minister as of primary importance in the management of these offenders.[54] The Queensland Court of Appeal observed, 'The evident intent [of excluding these offenders from the scheme] is that each offender would be considered individually with respect to suitability for early release into the community'.[55]

In practice, restricting the availability of this option has resulted in other orders being made to achieve certainty of release. For example, it may result in a decision by the court to suspend a prison sentence, taking into account the substantial time that person might already have spent in custody on remand, the potential delays they may experience in having their application for parole determined by the Parole Board and issues regarding program access, including the times of the year when these are offered and their length (see further section 11.5.3).

Many stakeholders told us the availability of court-ordered parole for sexual offences would be a preferable option to the use of combination orders (where open) or suspended prison sentences, given the powers of Queensland Corrective Services ('QCS') officers to immediately respond to issues of non-compliance and escalating risk for people on parole.

Nature of suspended sentences of imprisonment

Suspended sentences of imprisonment in Queensland can be of one of two types: a wholly suspended prison sentence (in which case no time is spent in custody under the sentence, although they may have served a substantial period on remand) or a partially suspended prison sentence (in which case the person must spend some time in custody prior to rest of the sentence being suspended).[56] The period of time for which the sentence is suspended is called the 'operational period' and must be not less than the term of imprisonment imposed and not more than 5 years.[57]

The process of imposing a suspended prison sentence involves a two-step process. A court must first determine that a sentence of imprisonment is appropriate and then it must decide whether it is appropriate for the sentence to be suspended in whole or in part.[58] In making this determination, all the circumstances relevant to both the offence and the person sentenced must be considered and should

52 PSA (n 17) s 160D.
53 Queensland, *Parliamentary Debates*, Legislative Assembly, 29 March 2006, 941 (Judy Spence, Minister for Police and Corrective Services).
54 Ibid.
55 *R v Waszkiewicz* [2012] QCA 22, 7 [32] (White JA, de Jersey CJ and Atkinson J agreeing).
56 PSA (n 17) s 144.
57 Ibid s 144(6).
58 *Dinsdale v The Queen* (2000) 202 CLR 321, 346 [55] (Kirby J).

not be limited 'to the effect which suspension would have on rehabilitation of the offender'.[59] The court may consider whether the person requires supervision in the community under a parole order or can be 'left to [their] own guidance' based on their assessed level of risk.[60]

A suspended imprisonment sentence can serve various sentencing purposes, as explained in *R v Nona*:[61]

> a wholly suspended sentence serves the proper purposes of denunciation and general deterrence through the imposition of the term of imprisonment, rehabilitation through the opportunity for reform provided by its suspension and personal deterrence through the suspension being conditional upon the offender not committing another offence punishable with imprisonment.[62]

The courts have long recognised that a suspended sentence of imprisonment is a significant punishment in itself[63] and not a mere exercise in leniency.[64] It is often described in terms of a person having the 'sword of Damocles' hanging over their head during the operational period of the order.[65] The punitive and denunciatory aspects of the sentence include:

- its status as a custodial (prison) sentence requiring the person to serve additional time in custody (in the case of a partially suspended sentence) or being liable to serve time in custody (in the case of a wholly suspended sentence) if they commit further offences during the operational period of the order; and
- the fact that a conviction must be recorded,[66] meaning the court has no choice about whether to do so, which may have potential consequences for the person's future employment, ability to obtain certain licences (such as a security or firearms licence) and to be permitted to travel to some countries.[67]

If the person subject to a suspended imprisonment sentence commits an offence punishable by imprisonment during the operational period, a court must order the person to serve the whole of the term of suspended imprisonment unless it considers it would be unjust to do so, and particular factors in the PSA assist courts to make this determination.[68] Other options include extending the operational period of the sentence for up to 12 months or ordering that the person serve all or part of the suspended imprisonment.[69] The consequences of breaching a suspended prison sentence are therefore very different from a person on a parole order as it is the sentencing court, not the Parole Board, that decides how to respond to the breach.

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59 Ibid 348–9 [84]–[86] (Kirby J, Gaudron and Gummow JJ agreeing at [26]). See also [18] (Gleeson CJ and Hayne J).

60 *R v Wano; Ex parte A-G (Qld)* [2018] QCA 117, 6 [34] (Henry J). In this case, the Court noted that the sentencing judge 'was left unassisted by any submissions by the prosecution below in respect of this important point': ibid.

61 [2022] QCA 26.

62 Ibid 17 [83] (Henry J, Bond JA and Boddice J agreeing but giving separate orders) citing Heather Douglas and Suzanne Davina Harbidge, *Criminal Process in Queensland* (Thomson, 2008) 276 [12.150]; Mirko Bagaric, *Ross on Crime* (Thomson Reuters, 8th ed, 2018) 1398 [19.2350]; Mirko Bagaric, Theo Alexander and Richard Edney, *Sentencing in Australia* (Thomson Reuters, 6th ed, 2018) 684 [700.3500].

63 *Elliot v Harris (No 2)* (1976) 13 SASR 516; *DPP (Cth) v Carter* [1998] 1 VR 601; *Sweeney v Corporate Security Group* (2003) 86 SASR 425 [92]–[99].

64 *Reilly v The Queen* [2010] VSCA 278 [36]; *DPP (Cth) v Carter* [1998] 1 VR 601, 607-8; *DPP v Buhagliar and Heathcote* [1998] 4 VR 540, 547 (Batt and Buchanan JJA).

65 See, for example, statements to this effect by McMurdo P in *R v Harrison* [2015] QCA 210, 8; and *R v Moxon* [2015] QCA 65, 9 [33]; and Fryberg J in *R v Alvin* [2004] QCA 422, 11.

66 PSA (n 17) s 143.

67 It may also result in a person becoming a reportable offender under the *Child Protection (Offender Reporting and Offender Prohibition Order) Act 2004* (Qld).

68 PSA (n 17) ss 147(2)–(3). Factors the court must have regard to include the seriousness of the original offence, including any physical or emotional harm done to a victim and any damage, injury or loss caused by the offender: s 147(3)(b).

69 Ibid s 147.

The determination of the breach involves another significant court hearing (usually involving the original sentencing court), during which submissions are made and evidence is led regarding what action should be taken, including whether the whole of the suspended prison term should be activated (that is, required to be served).

It has been suggested that the efficacy of a suspended prison sentence as a punitive sanction is necessarily tied to the first aspect regarding the nature of this sanction and whether it is activated on breach.[70] Otherwise, 'if the conditions imposed on the offender are fairly minimal and courts react to breaches of those conditions with indulgence, the [suspended] sentence may be no more severe than a term of probation'.[71]

In *Dinsdale v The Queen*,[72] Kirby J described the tension between the suspended sentence of imprisonment's status at law as a significant penalty and community views as to its practical effect:

> The question of what factors will determine whether a suspended sentence will be imposed, once it is decided that a term of imprisonment is appropriate, is presented starkly because, in cases where the suspended sentence is served completely, without reoffending, the result will be that the offender incurs no custodial punishment, indeed no actual coercive punishment beyond the public entry of conviction and the sentence with its attendant risks. Courts repeatedly assert that the sentence of suspended imprisonment is the penultimate penalty known to law and this statement is given credence by the terms and structure of the statute. However, in practice, it is not always viewed that way by the public, by victims of criminal wrong-doing or even by offenders themselves. This disparity of attitudes illustrates the tension that exists between the component parts of this sentencing option: the decision to imprison and the decision to suspend.[73]

This is supported by research into community views, which has found that while judicial officers rank suspended sentences quite highly in terms of the severity of this sanction, community members do not, with this sanction being ranked in some studies below probation or a financial penalty.[74]

Case law: Suspension of imprisonment vs imprisonment with parole

The comparatively high use of partially suspended prison sentences for rape, and trends in the use of both partially suspended and wholly suspended prison sentences for non-aggravated sexual assault suggests the inability of courts to fix a parole release date is impacting sentencing practices. In particular, this appears to have resulted in a displacement effect away from the use of imprisonment to other forms of orders to achieve certainty of release and to reflect mitigating factors such as a plea of guilty.

For example, in *R v Lloyd*,[75] the applicant was sentenced to 3 years' imprisonment for child exploitation material offences with parole eligibility after 12 months. The applicant had spent 301 days in pre-sentence custody (approximately 10 months), in which he was not able to enrol in suitable programs or courses.[76] It was argued that this made the parole eligibility date set 2 months post the date of sentence 'illusory'.[77] The Court found that as the applicant was unlikely to be released before substantially serving his sentence, it 'would not give requisite credit to his pleas of guilty to an ex-officio indictment. It would

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70 Law Reform Commission of Ireland, *Suspended Sentences: Report* (2020) 38 [2.19] ('*Suspended Sentences Report*').
71 Julian V Roberts and Thomas Gabor, 'Living in the shadow of the prison: Lessons from the Canadian experience in decarceration' (2004) 44 *British Journal of Criminology* 92, 93–4.
72 (2000) 202 CLR 321.
73 *Dinsdale v The Queen* (2000) 202 CLR 321, 346–7 [80].
74 For a review of some of these studies, see *Suspended Sentences Report* (n 70) 36–8; and Arie Freiberg and Victoria Moore, 'Disbelieving suspense: Suspended sentences of imprisonment and public confidence in the criminal justice system' (2009) 42(1) *The Australian and New Zealand Journal of Criminology* 101, 110.
75 [2011] QCA 12.
76 Ibid 2 [2], 4–5 [17] (Chesterman JA, de Jersey CJ and White JA agreeing).
77 Ibid 2 [3].

be unjust and was not what was intended by the primary judge.'[78] In allowing the appeal the Court also noted the inability to order a prison/probation order because, at the time of appeal, he had been in custody for over 12 months.[79] Given these circumstances, the Court ordered that the sentence be immediately suspended with an operational period of 3 years, in addition to setting aside an order for imprisonment on one count and ordering instead that the applicant be sentenced to 2 years' probation, during which time he should undertake appropriate courses to address his reoffending risks.

A court will not always allow an appeal and may decline to order that an unsuspended prison sentence be suspended even if it is unlikely that the person will be released on, or soon after, they reach their parole eligibility date,[80] as there may be reasons for the sentencing court making this determination. For example, in *R v Sutton*,[81] the 54-year-old appellant was convicted after trial on one count of indecent assault of a 16-year-old boy.[82] He was sentenced to 2 years' imprisonment with a parole eligibility after 4 months (being one-sixth of the sentence).[83] On appeal, the Court noted it was open to suspend the imprisonment, but

> [as] there is nothing to prevent the appellant resuming his occupation upon his release from custody, it is desirable that he should undergo some assessment before his release on parole and some ongoing supervision in the community for a time thereafter in order to increase the prospects of his rehabilitation and to reduce the risk of further offending. His Honour may well have taken the view that a substantial period of supervision of the appellant on parole was desirable to ensure that he refrained from succumbing to the inclination to use his occupation as an opportunity to obtain illicit sexual gratification. In my respectful opinion, it cannot be said that it was not reasonably open to his Honour to act upon this view.[84]

Recently the High Court held that 'the general principle is that the prospect of securing release on parole or of obtaining remissions is not relevant to the judicial task of sentencing' and the prospect of release on parole is a matter for the executive branch of government.[85] In *R v Ponsonby*,[86] the Court of Appeal found it was an error for the original sentencing court to take into account 'the irrelevant consideration of the applicant's parole prospects'.[87] President Mullins noted:

> A sentencing judge may have available two or more alternative sentencing structures in exercising the instinctive synthesis approach to sentencing in imposing an appropriate sentence for the offender's offending and circumstances … Provided the sentencing judge does not stray into taking account of considerations irrelevant to the sentencing process, the decision in *Hatahet* does not preclude the sentencing judge's selection of an available sentencing structure that is appropriate in all the circumstances for the sentencing of the offender.[88]

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78 Ibid 5 [20]–[22].
79 Ibid.
80 *R v Waszkiewicz* [2012] QCA 22, 2 [5], 5 [24], 6–7 [28]–[31], 8 [35] (White JA, de Jersey CJ and Atkinson J agreeing).
81 [2008] QCA 249.
82 *R v Sutton* (2008) 87 A Crim R 231. The offending occurred while the appellant, who ran a massage business from his home, was giving the victim survivor a massage. The appellant had directed the child to undress completely and locked the door of his premises. During the massage he touched the victim survivor's penis with his hand and masturbated him for 15 to 20 minutes. He was acquitted of another count of indecent assault (touching the victim's penis with his mouth) and the jury were unable to reach a verdict on rape (inserting a finger into the victim's anus). The issue at trial was whether the victim consented to what occurred: 233–4 [10], [19] (Keane JA, Fraser JA and Fryberg J agreeing).
83 Ibid 232–3 [1].
84 Ibid 242–3 [59]–[60].
85 *R v Hatahet* (2024) 98 ALJR 863; [2024] HCA 23 [21], [27] (Gordon ACJ, Steward and Gleeson JJ), citing *Hoare v The Queen* (1989) 167 CLR 348. Cited in *R v Ponsonby* [2024] QCA 229, 2 [2] (Mullins P).
86 [2024] QCA 229.
87 Ibid 8 [34] (Callaghan J, Mullins P and Bond JA agreeing).
88 Ibid 2 [3] (Mullins P).

Rape

Much of the Court of Appeal commentary surrounding the decision about whether to impose a parole eligibility date or suspend a sentence relates to the nature of the offence, whether the offender requires supervision in the community, their risk of reoffending, other prospects of rehabilitation, how to appropriately reflect mitigating factors and the need to protect the community. In certain cases, depending on the imprisonment length, there may be no discretion for the judge to suspend the imprisonment (for example, if it is more than 5 years).

In *R v Wano; Ex parte Attorney-General (Qld)*,[89] the respondent pleaded guilty to burglary and stealing, rape, sexual assault in company, and attempted burglary in the night in company and was sentenced to 3 years' imprisonment, suspended after 323 days (the amount of pre-sentence custody declared as time served) with an operational period of 3 years. The Attorney-General appealed the sentences on grounds of manifest inadequacy. The Court of Appeal found:

> A curious feature of the sentence proceeding is that no-one identified any basis at all as to why a partly suspended sentence was preferable to one which would involve at least some ongoing supervision on the respondent's release, as for example occurs when a prisoner is released on parole. The respondent was a long remanded teenager, without tangible rehabilitative progress or family support, whose continued burglary offending had disturbingly escalated to accompanying sex offending. The need for him to be under supervision when released back into the community was compelling.[90]

The Court allowed the appeal, setting aside the original sentence and imposing a head sentence of 3.5 years' imprisonment on the rape offence with a parole eligibility date after 12 months had been served.

In *R v Cunningham*,[91] the court rejected the argument that a suspended sentence should be imposed instead of a parole eligibility date because the period of incarceration would be so short that the offender would not be able to benefit from programs, and may be detrimental from having to apply for parole without the opportunity to undertake programs. Jones J observed:

> It is generally accepted that an important use to be made of prisoner time to be served by sexual offenders is the completion of various programmes which address such offending. There is nothing in the applicant's background or the circumstances of the case which suggests that the substitution of a suspended sentence is warranted if its effect is to relieve him of the obligation to undertake such a course. Alternative measures might include the linking of probation orders with suspended terms of imprisonment. But such considerations are outside the scope of this application which is to determine whether the sentence imposed is manifestly excessive.[92]

In *R v Ruiz; Ex parte Attorney-General (Qld)*,[93] the Attorney-General appealed a sentence of 3 years' imprisonment suspended after 12 months for an operational period of 3 years for rape and 18 months' imprisonment (concurrent) for 2 counts of indecent treatment of child under 16, under 12. A consequence of the sentence was the respondent would be a reportable offender under the *Child Protection (Offender Reporting and Offender Prohibition Order) Act 2004* (Qld) ('CPOROPOA'). It was argued that the sentence was manifestly inadequate because it was a partially suspended sentence and should have been a parole eligibility date after 12 months served in prison or, alternatively, a probation

89 [2018] QCA 117.
90 *R v Wano; Ex parte A-G (Qld)* [2018] QCA 117, 8 [44] (Henry J).
91 [2008] QCA 289.
92 Ibid 6 [18]–[20] (Jones J, Mackenzie AJA, Cullinane J agreeing).
93 [2020] QCA 72.

order should be made for a co-sentenced offence, because a suspended sentence 'failed to give any effect to the factor of community protection'.[94]

The Court of Appeal found that, when defence counsel submits for suspended imprisonment at sentence, 'if that course is regarded by the prosecution as beyond the scope of the sentencing discretion, then it is a duty of prosecuting counsel to submit as much to the judge'.[95] The Court found the reporting obligations under the CPOROPOA 'are very onerous and designed to assist in preventing reoffending' and there was no submission to the sentencing judge that 'something more severe was required.'[96]

In *R v Smith*,[97] the Court of Appeal reduced a sentence of 3 years' imprisonment (parole eligibility date after 9 months) for 2 counts of rape and 5 counts of sexual assault of an adult woman, to be 2 years and 6 months, suspended immediately for an operational period of two and a-half years. The Court noted that 'the very serious nature of the offending' called 'for a sentence that reflects the need to deter others who might be inclined to violate a woman sleeping in her own bed'[98]. However, the applicant's youth, genuine remorse, cooperation and 'willingness to take steps towards treatment' should moderate his head sentence and time to be served in prison.[99]

Sexual assault

The Queensland Court of Appeal has found that general deterrence can be a paramount consideration for sexual assault, and a suspended imprisonment sentence can meet this purpose.[100]

In *R v Kane, Ex parte Attorney-General (Qld)*,[101] the Court of Appeal found the sentence of 18 months' imprisonment, suspended after serving 282 days for an operational period of 3 years, was manifestly inadequate for sexual assault. The Court found that

> the circumstances of the subject offence, including the respondent's prior history for offending which included the use of violence, was such that community protection and denunciation warranted a significant penalty that had to be determined in the context of an offence.[102]

The Court ordered that the respondent be sentenced to 3 years' imprisonment, but maintained the previous sentence structure that it was partially suspended after 282 days, to reflect the seriousness of the offending. The appeal was heard over 7 months after the respondent had originally been sentenced and released in the community and the Court of Appeal considered 'it would be undesirable to return him to custody immediately with the potential of disrupting his reintegration into the community'.[103]

In *R v Banda*,[104] the applicant pleaded guilty and was sentenced to 3 years' imprisonment for burglary and 2 years' imprisonment for sexual assault, to be served concurrently (at the same time), suspended after 12 months with an operational period of 3 years. Among other factors, the primary judge recognised

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94 Ibid 4 [14] (Sofronoff P, McMurdo and Mullins JJA agreeing).
95 Ibid 5 [18]
96 Ibid 6 [25].
97 [2020] QCA 23.
98 Ibid 10 [51] (Morrison JA, Holmes CJ and McMurdo JA agreeing).
99 Ibid.
100 See *R v Al Aiach* [2006] QCA 157 [46]–[49]; *R v Downs* [2023] QCA 223 [55]; *R v Quinlan* [2012] QCA 132 [27], [30]; *R v SDF* [2018] QCA 316 [9], [26].
101 [2022] QCA 242.
102 Ibid 8 [27] (Mullins P and Dalton and Flanagan JJA).
103 Ibid 8–9 [28], see also [29]–[30].
104 [2021] QCA 171.

the consequences of the *Migration Act 1958* (Cth) (deportation on release), which was the reason why he partially suspended the sentences.[105]

The Court of Appeal has provided guidance on when a term of actual imprisonment is required rather than a wholly suspended sentence. For example, in *R v Abdullah*,[106] Chief Justice Bowskill said:

> In addition, the requirement for this applicant to serve five months of that in custody, before the balance was suspended, is not unjust or unreasonable. The circumstances of the offending and this offender – notably, the further offending whilst on bail, his minimisation evident from the psychologist's report and the failure yet to have taken any therapeutic steps to address the offending – are such that appropriate punishment, deterrence, strong denunciation of the conduct and community protection all justified an order that he serve part of the sentence in actual custody. This was not a case in which a wholly suspended sentence was appropriate. The portion required to be served reflects the orthodox approach, on a plea of guilty, of requiring an offender to serve around one-third of the sentence imposed. That another judge may have suspended the sentence at an earlier time is not such as to demonstrate error.[107]

In *R v Rogan*,[108] the court considered the objective nature of the sexual assault called for a sentence of imprisonment (to meet the purposes of general deterrence and denunciation), but as actual imprisonment was not mandatory and it would be a short term of imprisonment, the court considered whether the personal circumstances of the applicant justified actual imprisonment:

> A very short term of imprisonment can have large effects. Apart from the stigma which imprisonment carries, it may affect present and future employment, housing arrangements and all kinds of financial arrangements. The effects of prison extend to whatever experiences are undergone in prison, which may occur even within a short period.
>
> Consequently, the imposition of a very short term of imprisonment is not just a matter of the loss of liberty for a particular period.[109]

Suspended imprisonment and conditions

A person under a suspended sentence of imprisonment in Queensland is not supervised in the community by QCS officers as part of their sentence and nor are they subject to other conditions, such as program engagement. This is in contrast to most other jurisdictions which have retained this order as a sentencing option (discussed further below). The only type of conditional suspended sentence in Queensland is a Drug and Alcohol Treatment Order, but sexual offences are excluded.[110]

In some cases, courts may order a suspended prison sentence alongside a community-based order, such as probation, but this is not possible when sentencing an offender for a single offence,[111] or the person is required to spend longer than 12 months in prison.[112] For multiple offences, combined orders may be used, for example, to enhance the person's prospects of rehabilitation through access to treatment.[113] However, this assumes the second offence is one that is less serious than the offence for which the

105 Ibid 4 [11]. For the relevance of deportation in sentencing, see *R v Norris; Ex parte A-G (Qld)* [2018] 3 Qd R 420.
106 [2023] QCA 189..
107 Ibid 11 [47] (Bowskill CJ, Flanagan JA, Buss AJA agreeing).
108 [2021] QCA 269.
109 Ibid 4 [16]–[17] (Sofronoff P, McMurdo JA, Williams J agreeing).
110 PSA (n 17) pt 8A. Sexual assault offences are excluded from these orders: at s 151F. They also are only available to offenders sentenced by the Queensland Drug and Alcohol Court in Brisbane who meet other suitability and eligibility criteria set out under the PSA.
111 In some Australian jurisdictions with suspended sentence orders, the court can attach additional supervisory, program or community service orders.
112 A probation order must commence on the date of sentence: PSA (n 17) s 92(2) and cannot be ordered if the person is sentenced to imprisonment for a term longer than 1 year: s 92(1)(b).
113 See, for example, *R v MCB; Ex parte A-G (Qld)* [2014] QCA 151, 13 [65].

suspended prison sentence was imposed and is also a sexual offence (to ensure supervision, programs and interventions are directed to factors associated with that person's sexual offending).

Evidence of effectiveness

Evidence about the effectiveness of suspended sentences has primarily been based on research undertaken in NSW, but there are significant gaps and further research is required.[114] On the available evidence,

> wholly suspended sentences may have a small but statistically significant effect for at least some offenders, particularly when compared with terms of imprisonment. One explanation for this effect may be that the suspended sentence avoids the negative consequences of imprisonment, allowing offenders to maintain family and community ties, continue any employment and avoid losing accommodation.
>
> Although the evidence is sparse, it appears that wholly suspended sentences might be more likely to be completed by older offenders and those convicted of property offences.[115]

In respect of Aboriginal and Torres Strait Islander peoples, and other vulnerable cohorts, there is no evidence about its effectiveness.[116] However, suspended sentences are considered useful to those living in rural and remote areas and are seen as less onerous, making them more suitable for women who may have kinship, parental, caring and cultural obligations to comply with.[117]

Breach of suspended sentences

An examination of data for variations of suspended sentences found that the majority of partially suspended sentences for sexual assault (76.7%) were not varied, suggesting that the person had not committed another offence punishable by imprisonment during the operational period of the order. An even higher proportion of wholly suspended sentences for sexual assault (86.2%) were not varied.

Overall, this suggests that these orders are being appropriately targeted. However, this assumes that any further offending is reported, prosecuted and results in the person being convicted. With respect to sexual offending, as noted throughout this report, there are high rates of under-reporting and low rates of conviction.

The Council's analysis found that, of the 60 cases where a wholly suspended sentence had been imposed for sexual assault and the person dealt with for a breach, more than half of those sentenced received an extension to the operational period of the order (n=33/60; 55.0%). In 23 cases, the person was ordered to serve all or part of the suspended imprisonment, and a further 4 cases had a very small portion activated (rising of the court). Similar trends were found for partially suspended sentences, with the most common outcome being the operational period of the order being extended, followed by the suspended imprisonment being ordered to be served in whole or in part.

As discussed above, action on breach is an important aspect of promoting community confidence in the use of this order and the 'sword of Damocles' will in fact fall in the event of (even minor) forms of reoffending. However, a full analysis of the circumstances in which these breaches had occurred was not possible within the timeframes for this review. There are likely good reasons why the court chose to extend the operational period rather than to activate the suspended imprisonment.

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114 *QUT Literature Review* (n 2) xiii.
115 Ibid 112.
116 Ibid 117.
117 Ibid 114.

For more information, see **Appendix 4**.

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

In contrast to suspended sentences, parole orders (discussed above), and other types of sentencing orders such as ICOs and probation, involve supervision. Relevant findings based on research evidence include:

- 'Evidence shows mixed support for the effectiveness of supervised release. Supervision without adequate rehabilitation services and support – that is focused on enforcement – does not reduce recidivism.'[118] However, when used in combination with rehabilitation programs and services, such as mental health and drug treatment, and housing assistance, supervision is effective in achieving reduced rates of reoffending.[119]
- 'Community supervision best reduces recidivism when [it] adheres to the principles of effective correctional intervention and core correctional practices. Supervision that emphasises relapse prevention and assists offenders to identify, avoid, and resist crime opportunities may be more useful for individuals who have sexually offended.'[120]

Findings based on the intensity levels of supervision also suggest these forms of supervision can be beneficial under the right conditions, with a previous literature review of the research evidence concluding:

- 'The evidence on high-intensity supervision is mixed, with much of the evidence indicating that its heightened surveillance acts to increase both recidivism and technical violations.'[121] But 'when coupled with therapeutic interventions, high intensity supervision can be effective, especially for high-risk offenders'.[122]
- 'Although the evidence is sparse, low-intensity supervision, used for low-risk offenders, does not appear to increase recidivism, so may be a cost-effective tool for managing large, low-risk offender cohorts.'[123]

Wholly suspended prison sentences have a small effect on reducing reoffending compared to immediate imprisonment

Wholly suspended prison sentences have been found in some studies to have a small effect on reducing recidivism compared with imprisonment, especially for repeat offenders (although this finding is not specific to those sentenced for sexual offences) and of being of potential benefit for those who are unable to access other orders, such as due to living in rural and remote areas.[124] However, this evidence is not specific to Queensland's suspended imprisonment order and includes evaluations of orders that include conditions, such as supervision.

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118 Ibid xvi.
119 Ibid.
120 *Griffith University Literature Review* (n 2) 53.
121 Ibid.
122 Ibid.
123 *QUT Literature Review* (n 2) xvi.
124 Ibid 115

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

There is 'no robust research on the effectiveness of partially suspended sentences' and '[w]hat little research exists finds that recidivism rates are higher following a partially suspended sentence than after a wholly suspended sentence'.[125] There is a lack of research on the impact of partially suspended prison sentences among vulnerable offenders and '[r]ecidivism rates following a partially suspended sentence appear to be lower among older offenders and those with no criminal history, but the evidence for this is weak'.[126]

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

ICOs have been found to be of equal benefit as suspended prison sentences in reducing recidivism, with evidence suggesting that they are more effective than short terms of imprisonment. However, there is no evidence on the effectiveness of ICOs among vulnerable cohorts.[127] Although not specific to people convicted of sexual offences, for individuals on these orders, 'reoffending following an intensive correction order appears to be more likely among men, Indigenous [people], those with criminal histories and those classified as high risk'.[128]

ICOs are very different in nature to suspended sentences of imprisonment as the person is subject to a structured set of conditions, including supervision, and the prison sentence is not in this case suspended, but rather ordered to be served in the community.[129] In Queensland, these orders can only be made for 12 months or less.[130] If the person breaches the order, they are only liable to serve the portion of the prison sentence remaining to be served at the time of breach.[131]

What sentencing outcomes tell us

The key sentencing trends indicates that courts generally set longer operational periods than the length of the sentence (the minimum period the courts must set),[132] meaning that people whose prison sentence is suspended are 'at risk' of having the sentence activated in whole or in part for an extended period.

The use of a combined sentence of a wholly or partially suspended prison sentence ordered alongside probation is significant as it means the person will be under supervision in the community. As discussed above, supervision may be an important means of responding to potential risks of reoffending for some offenders, with the quality and type of supervision being particularly important in reducing the likelihood of reoffending for those at higher risk of committing serious, violent crimes.[133]

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

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125 Ibid xii.
126 Ibid.
127 Ibid xiii.
128 Ibid.
129 PSA (n 17) pt 6.
130 Ibid s 112.
131 Ibid s 127.
132 Ibid s 144(6)(a).
133 *University of Melbourne Literature Review* (n 2) 14.

The findings are similar for sexual assault cases. A substantial proportion of sexual assault cases that resulted in partially or wholly suspended prison sentences had co-sentenced offences, ranging from 38.0 per cent of wholly suspended prison sentences in the higher courts, to 74.0 per cent of partially suspended prison sentences in the Magistrates Courts.[134] For partially suspended prison sentences, probation orders were made in just under a quarter (24.3%) of cases sentenced in the Magistrates Courts with co-sentenced offences and 29.1 per cent of those cases sentenced in the higher courts. For wholly suspended prison sentences, the proportions were slightly lower (22.9% and 21.9% respectively). However, unlike rape, the proportion of wholly suspended prison sentences made alongside a probation order was lower compared with all sexual offences (31.1%).

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

The data discussed above also illustrates the unintended consequence of excluding sexual offences from court-ordered parole. Courts have also made use of combined orders, such as the use of a suspended prison sentence and probation, where this option is available to provide certainty of release but with the added component of supervision. For the same reasons, where appropriate, the court may make a combined imprisonment/probation order.[135]

What do other jurisdictions do?

Imprisonment

Some jurisdictions, such as the Northern Territory[136] and Victoria,[137] have a mandatory requirement for courts to impose actual imprisonment for rape and other specified sexual offences.[138] There is usually greater sentencing discretion for sexual assault equivalent offences where they are committed against an adult victim. In NSW, when sentencing a person found guilty of a domestic violence offence (including a sexual offence committed in the context of domestic violence),[139] a court must impose either a sentence

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134 See *Consultation Paper: Background* (n 39) 144, fig 27 for more information.

135 PSA (n 17) s 92(1)(b). A sentence of up to one year can be imposed in combination with a probation order of not less than 9 months, or more than 3 years: ibid ss 92(1)(b), (2)(b).

136 *Sentencing Act 1995* (NT) s 78F(1). A 'sexual offence' to which this section applies means an offence specified in sch 3: s 3 and includes offences against *Criminal Code Act 1983* (NT) sch 1 ('*Criminal Code* (NT)') Part VIA (Sexual offences) (excluding s 208NA - public masturbation). This part includes a wide range of sexual offences including rape (s 208H, called 'sexual intercourse without consent'), acts of gross indecency without consent (s 208HB) and indecent touching or act without consent (s 208HC) in addition to sexual offences against children. A court can also make a home detention order after service of part of a term of imprisonment under a partially suspended sentence, meaning that this is a sentencing option that is available in these cases: *R v Bennett* [2021] NTCCA 2.

137 *Sentencing Act 1991* (Vic) s 5(2G) ('*Sentencing Act* (Vic)').

138 See Chapter 8 for more information.

139 A 'domestic violence offence' for this purpose has the same meaning as in the *Crimes (Domestic and Personal Violence) Act 2007* (NSW) ('CDPV Act'): *Crimes (Sentencing Procedure) Act 1999* (NSW) s 3. A 'domestic violence offence' is defined in s 11 of the CDPV Act and includes 'an offence committed by a person against another person with whom the person who commits the offence has (or has had) a domestic relationship' which is also a 'personal violence offence'. The definition of a 'personal violence offence' in s 4 of the Act includes several sexual offences under the *Crimes Act 1900* (NSW) including sexual assault (s 61I), aggravated sexual assault (s 61J), aggravated sexual assault in company (s 61JA), sexual touching (s 61KC), aggravated sexual touching (s 61KD), sexual act (s 61KE), aggravated sexual act (s 61KF), sexual intercourse with a child under 10 (s 66A), sexual intercourse with a child between 10 and 16 (s 66C) as well as sexual touching and sexual act offences where committed against a child (ss 66DA–DF), persistent sexual abuse of a child (s 66EA) and incest (s 78A).

of full-time detention or a supervised order[140] unless satisfied that a different sentencing option is more appropriate in the circumstances.[141]

Suspended imprisonment sentences

Several jurisdictions have suspended imprisonment as a sentencing option (the Australian Capital Territory ('ACT'), the NT, South Australia ('SA'), Tasmania, Western Australia ('WA') and the Commonwealth).[142] The maximum term of imprisonment generally ranges from 2 years to 5 years, although in some jurisdictions imprisonment of any length may be suspended.[143]

Suspended sentences are also a sentencing option in England and Wales.[144]

Most jurisdictions also allow for conditions[145] to be ordered, either as part of the order itself or in making a good behaviour order alongside the order for suspension; in some cases, this is mandatory.[146] In SA, a sentence of imprisonment cannot be suspended if the person is being sentenced as an adult for a 'serious sexual offence', including rape.[147] In WA, and in England and Wales, there is no power to partially suspend a sentence at all.

Suspended sentences are no longer a sentencing option in NSW, Victoria and New Zealand. Victoria abolished suspended sentences in 2014 after implementing broader sentencing reforms such as introducing the Community Corrections Order ('CCO').[148] NSW removed the ability to suspend a sentence of imprisonment in 2018, at the same time that a number of other reforms came into effect, including the introduction of CCOs and an enhanced form of ICO.[149]

A recent review of sexual offences in the ACT recommended introducing a legislative presumption that ICOs and suspended sentences are not to be imposed for serious sexual offences.[150] The ACT

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140 This includes an intensive correction order, a community condition correction order or a conditional release order that includes a supervision condition: see *Crimes (Sentencing Procedure) Act 1999* (NSW) ss 4A(1), (A)(3).

141 Ibid s 4A(2).

142 Australian Capital Territory, Northern Territory, South Australia, Tasmania, Western Australia and England and Wales. For Commonwealth offences, an equivalent order exists called a recognizance release order. See *Crimes Act 1914* (Cth) s 20(1)(b). The Tasmanian Government had a policy intention to phase suspended sentence out. See Sentencing Advisory Council (Tasmania), *Review under Section 2 of the Sentencing Amendment (Phasing Out of Suspended Sentences) Act 2017* (2021) and Tasmania, *Parliamentary Debates,* House of Assembly, Estimates Committee B, 4 June 2023, 40–1, (Elise Archer, Attorney-General).

143 For example, this is the case under the *Criminal Justice Act 2006* (Ireland) s 99. This is subject to the person entering into a good behaviour bond/recognisance.

144 *Sentencing Code* (UK) ch 4.

145 Called 'requirements' in England and Wales: ibid ch 5.

146 See *Crimes (Sentencing) Act 2005* (ACT) ss 12(3), 13; and *Sentencing Act 2017* (SA) s 96(1). The core (mandatory) conditions in the ACT go beyond not committing an offence punishable by imprisonment and include keeping Corrective Services advised if their contact details change, and to comply with any directions given in relation to the order, as well as other conditions with which the person must comply if other conditions are ordered (for example, a probation condition or a community service work condition): *Crimes (Sentence Administration) Act 2005* (ACT) s 86.

147 *Sentencing Act 2017* (SA) ss 96(3)(ba), (9).

148 Following an extensive review of suspended sentences and other intermediate sentencing orders, the Victorian Sentencing Advisory Council (by a majority) recommended the phasing out of suspended sentences in conjunction with broader sentencing reforms: Sentencing Advisory Council, Victoria, *Suspended Sentences and Intermediate Sentencing Orders: Suspended Sentences Final Report Part 1* (2006). Recommendations are at xxv–xxvi. The Council's recommendation was adopted, with suspended sentences being progressively phased out from 2011, and abolished for all offences committed from 1 September 2014: *Sentencing Amendment (Abolition of Suspended Sentences & Other Matters) Act 2013* (Vic).

149 *Crimes (Sentencing Procedure) Amendment (Sentencing Options) Act 2017* (NSW) assented to 24 October 2017, date of commencement 24 September 2018 (s 2 and 2018 (534) LW 21 September 2018 — commencement proclamation).

150 The Sexual Assault Prevention and Response Steering Committee, *Listen. Take Action to Prevent, Believe and Heal* (December 2021) 80, rec 23(c). A serious sexual offence is a sexual offence involving physical contact, and which carries a maximum penalty of more than 10 years imprisonment.

Government response to this recommendation was to note this recommendation for further consideration.[151]

[151] ACT Government, *Government Response to the Listen. Take Action to Prevent, Believe and Heal Report* (2022) 23–4.

What is an intensive correction order ('ICO')?

An ICO is a sentence of imprisonment served in the community under conditions. At law, an ICO is treated as being a custodial (prison) sentence and the court must order a conviction be recorded.

An ICO is available as a sentencing option in the ACT, NSW, NT (called an 'intensive community correction order'), Qld and SA.[152] The maximum term varies from 12 months (in Qld) to up to 4 years (in the ACT).[153]

In NSW, an ICO can be ordered where a sentence of imprisonment of up to 3 years is imposed (or 2 years if the person is sentenced for a single offence).[154] A court must not make an ICO if sentencing a person for several listed offences, including sexual offences against a child under 16 years or against a person of any age if the elements of the offence include sexual intercourse.[155]

After an offender is sentenced by the sentencing court, conditions of an ICO in NSW are imposed, varied or revoked by the Parole Authority rather than the court.[156] The Parole Authority can also make an order suspending the ICO and, if the person is not then in custody, issue a warrant for the person's arrest.[157] The suspension ceases to have effect after 28 days, unless revoked sooner.[158] A community corrections officer also may suspend specific conditions for a period or periods of indefinitely.[159]

In Queensland, [160] a court, not the Parole Board, must deal with the person on the conditions of the order being breached. The court in this case can revoke the order and order the person to serve the unexpired portion as at the time of breach in prison.[161]

The conditions of the Queensland order are that the person must:

- not commit another offence during the period of the order;
- report to, and receive visits from, an authorised corrective services officer at least twice in each week for the period the order is in force;
- take part in counselling and satisfactorily attend other programs as directed by the court or an authorised corrective services officer (up to 12 hours per week) during the period of the order;
- perform in a satisfactory way community service that an authorised corrective services officer directs during the period of the order;

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152 *Crimes (Sentencing) Act 2005* (ACT) s 11, ch 5, pt 5.4; *Sentencing Act 1995* (NT) pt 3, div 5, subdiv 2; *Crimes (Sentencing Procedure) Act 1999* (NSW) s 7, pt 5; PSA (n 17) pt 6; *Sentencing Act 2017* (SA) pt 3, div 7, subdiv 2. Western Australia also has an intensive supervision order although this is not treated as a custodial order. See *Sentencing Act 1995* (WA) pt 10.
153 *Crimes (Sentencing) Act 2005* (ACT) s 11(3).
154 *Crimes (Sentencing Procedure) Act 1999* (NSW) s 68.
155 Ibid s 67. See definition of 'prescribed sexual offence' in s 67(2). The definition of 'sexual intercourse' is broader than acts captured by the offence of rape in Queensland. See *Crimes Act 1900* (NSW) s 61HA.
156 See *Crimes (Sentencing Procedure) Act 1999* (NSW) s 72; *Crimes (Administration of Sentences) Act 1999* (NSW) pt 3.
157 *Crimes (Administration of Sentences) Act 1999* (NSW) s 91.
158 Ibid s 91(7).
159 Ibid s 82A.
160 PSA (n 17) s 112.
161 Ibid ss 120, 127.

- live at community residential facilities for periods (not longer than 7 days at a time) if directed to do so by an authorised corrective services officer;
- notify an authorised corrective services officer of every change of the offender's place of residence or employment within 2 business days after the change happens; and
- not leave or stay out of Queensland without permission; and
- comply with every reasonable direction of an authorised corrective services officer.

Unless otherwise directed, the person must attend programs for one-third of the time directed, and perform community service for two-thirds of the time directed.[162] Additional conditions can also be ordered.[163]

Non-custodial orders

Most jurisdictions have similar orders to those that exist in Queensland, although there are also important differences.

NSW, Victoria, NT and Tasmania have introduced CCOs, which are intended to provide courts with a more flexible form of order that is tailored to meet the purposes of sentencing and address the underlying causes of offending. The form of the CCO and permitted combinations of sentencing orders differ by jurisdiction.

In Victoria, a court can combine a sentence of up to one year's imprisonment with a CCO when sentencing a person for one or more than one offence (with some exclusions). VSAC has reported that, in the higher courts, sex offences (MSO) represented 9.1 per cent of all cases attracting a combined order of imprisonment with a CCO, over the period 2012 to 2020, representing 170 cases.[164] This compared with 18.5 per cent of all sentenced cases in the higher courts that involved a sexual offence.[165]

However, mandatory imprisonment (which must not be imposed in addition to making a community correction order)[166] applies to 23 'Category 1 offences' (including rape, rape by compelling sexual penetration, and sexual penetration of a child offences),[167] providing the offence was committed by a person aged 18 years or more at the time it was committed.[168]

162 Ibid s 112(2A).
163 Ibid s 115.
164 Paul McGorrery and Paul Schollum, *Combined Orders of Imprisonment with a Community Correction Order in Victoria* (Sentencing Advisory Council, Victoria, 2023) 6.
165 Ibid 7, n 34.
166 *Sentencing Act* (Vic) (n 137) s 5(2G). There are some limited exceptions to this: see ss 5(2GA), 10A.
167 Ibid s 3(1) (definition of 'Category 1 offence').
168 Ibid.

What is a community correction order ('CCO')?

A CCO is a non-custodial order served in the community under conditions set by the sentencing court, with or without a conviction being recorded. It was first introduced in Victoria and commenced operation on 16 January 2012.[169]

The Victorian Court of Appeal, following the introduction of this new order, observed:

> The availability of the CCO dramatically changes the sentencing landscape [in Victoria]. The sentencing court can now choose a sentencing disposition which enables all of the purposes of punishment to be served simultaneously, in a coherent and balanced way, in preference to an option (imprisonment) which is skewed towards retribution and deterrence.[170]

The ability of a CCO to be tailored to meet a range of purposes, including rehabilitation and punishment, has been identified as one of its advantages.[171] Its 'robustness and flexibility' also mean 'it can be imposed in a wide variety of circumstances'.[172]

The maximum duration of a CCO is 2 years in the NT,[173] 3 years in NSW and Tasmania[174] and up to 5 years in Victoria.[175] In Victoria, it can be made in combination with imprisonment, which may not exceed one year following the deduction of any period of pre-sentence detention.[176]

A CCO comprises standard conditions, as well as additional option conditions. In NSW, the only standard conditions of the order are that the person no commit any offence and appear before the court if called on to do so.[177] In the NT, the mandatory conditions similarly are limited to being of good behaviour while the order is in force and not committing an offence punishable by imprisonment.[178]

In Victoria, the person must comply with a greater number of 'standard conditions', including – in addition to not committing an offence punishable by imprisonment during the period of the order – to:

- report to and receive visits from the Secretary during the period of the order;
- report to the community corrections centre specified in the order within two clear working days after the CCO comes into force;
- notify the Secretary of any change of address or employment within two clear working days after the change;
- not leave Victoria without the permission of the Secretary; and

169 *Sentencing Amendment (Community Correction Reform) Act 2011* (Vic).
170 *Boulton v The Queen* [2014] 46 VR 308 [113].
171 Ibid [91]–[98], [128]–[130], [186].
172 Ibid [116].
173 *Sentencing Act 1995* (NT) s 32.
174 *Crimes (Sentencing Procedure) Act 1999* (NSW) s 85; *Sentencing Act 1997* (Tas) s 42AQ (referred to as the 'operational period' of the order).
175 *Sentencing Act* (Vic) (n 137) ss 38(1)(a)–(b).
176 Ibid s 44(1). However, see s 44(1A) which provides that a sentence of any length imposed for an arson offence may be combined with a CCO if the person is sentenced in the higher courts.
177 *Crimes (Sentencing Procedure) Act 1999* (NSW) s 88.
178 *Sentencing Act 1995* (NT) s 33.

- comply with any direction given by the Secretary to ensure the offender complies with the order.[179]

Additional conditions that a court may order in NSW include:

- a curfew condition imposing a specified curfew (not exceeding 12 hours in any period of 24 hours);
- a community service work condition (not exceeding 500 hours or the number of hours prescribed by the regulations);
- a rehabilitation or treatment condition requiring the offender to participate in a rehabilitation program or to receive treatment;
- an abstention condition requiring abstention from alcohol or drugs or both;
- a non-association condition prohibiting association with particular persons;
- a place restriction condition prohibiting the frequenting of or visits to a particular place or area;
- a supervision condition requiring the offender to submit to supervision by a community corrections officer.[180]

In Victoria, the court must impose at least one additional condition similar to those in NSW, although more options are listed, including:

- a residence restriction or exclusion condition (that the person must live at a certain place or not live at a certain place;
- a judicial monitoring condition, which can be made if the court is satisfied that it is necessary for the court to review (during the course of the order) the person's compliance with the order;
- an electronic monitoring condition (ordered in conjunction with a curfew condition or a place or area exclusion condition and only by the higher courts);
- a bond (payment of an amount of money that is forfeited if the person fails to comply with the order).[181]

Under the NSW and Victorian models, a sentencing court may attach any other conditions considered necessary;[182] however, in NSW an electronic monitoring condition, home detention condition or curfew condition in excess of 12 hours in any 24-hour period must not be imposed.[183] These can only be ordered in NSW if the person is placed on an intensive correction order.

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179 *Sentencing Act (*Vic) (n 137) ss 45(1)(a)–(f).
180 *Crimes (Sentencing Procedure) Act 1999 (*NSW) s 89.
181 *Sentencing Act* (Vic) (n 137) ss 47, 48C–48LA. A court may also attach a justice plan condition for people with an intellectually disability: ibid s 47, div 2 of pt 3BA.
182 Ibid s 48, except for one related to the making of restitution, or the payment of compensation, costs, or damages or the same subject matter of a condition otherwise permitted to be made for a CCO under the Act; *Crimes (Sentencing Procedure) Act 1999* (NSW) s 90(1), provided these are not inconsistent with the standard conditions or any additional conditions ordered and must not include prohibited conditions (electronic monitoring, home detention, or a curfew of greater than 12 hrs in a 24-hour period).
183 *Crimes (Sentencing Procedure) Act 1999* (NSW) s 89(3).

In Victoria, courts must take into account the principles of proportionality in setting the conditions of the order as well as the purposes of sentence and of the order.[184] The Victorian Court of Appeal has said that if asking for a CCO, defence counsel has a duty to inform the sentencing court about the types of conditions that 'will address the offender's particular needs, and the causes of the offending, and which will promote the necessary changes in the offender's life to reduce the risk of reoffending'.[185]

In both NSW and Victoria, courts may limit the duration of specific or additional conditions. In Victoria, if the CCO is for a period of 6 months or longer, the court may specify an intensive compliance period, during which time specific conditions must be completed.[186] A sentencing court in NSW may also limit the time during which an additional conditions is in force (that is, it need not be the same duration as the order).[187]

If the person fails to comply without the conditions of the order, the person must appear before a court to be dealt with for the breach. In NSW, if satisfied the person has failed to comply with the conditions, the court may revoke the order and re-sentence the person, vary or revoke any conditions (other than standard conditions) or impose further conditions on the order, or take no action.[188] In Victoria, the court can similarly confirm the order made, cancel it and re-sentence the person, or vary the order or conditions.[189]

In both NSW and Victoria, if a person is making positive progress under the order, changes can be made. For example, in Victoria the order can be discharged or varied by a court,[190] while in NSW a community corrections officer may suspend a supervision condition for a period, periods or indefinitely, which may be unconditional or subject to conditions. [191]

What we know from earlier reviews in other jurisdictions

Tasmania

Following its review of sentencing for sexual offences in 2015, the Tasmanian Sentencing Advisory Council (TASC) recommended the establishment of new aggravated forms of offences against children (aggravated sexual intercourse with a young person and maintaining a sexual relationship with a young person in circumstances of aggravation).[192]

No changes were recommended to the penalty options available. TSAC did, however, comment on the use of suspended prison sentences, finding that these 'are generally inappropriate for the offence of sexual intercourse with a young person' except where factors such as closeness in age were present.[193]

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184 *Sentencing Act (*Vic) (n 137) s 48A. The stated purpose of a community correction order is 'to provide a community based sentence that may be used for a wide range of offending behaviours while having regard to and addressing the circumstances of the offender'. The Act also provides that it may be an appropriate sentence where, before the ability of the court to impose a suspended sentence was abolished, the court may have imposed a wholly suspended sentence.
185 *Boulton v The Queen* [2014] 46 VR 308, 333 [101].
186 *Sentencing Act* (Vic) (n 137) s 39(1)–(2).
187 *Crimes (Sentencing Procedure) Act 1999* (NSW) s 89(5).
188 *Crimes (Administration of Sentences) Act 1999* (NSW) ss 107C(5), 107D.
189 *Sentencing Act* (Vic) (n 137) ss 48M(2)(a)–(h).
190 Ibid s 48M.
191 *Crimes (Administration of Sentences) Act 1999 (*NSW) ss 107E(2), (4).
192 Sentencing Advisory Council (Tasmania), *Sexual Offence Sentencing* (Final Report, August 2015).
193 Ibid vii.

The TSAC review took place in the context of a commitment made by the Tasmanian Government to phase out the use of these orders.

Victoria

In an earlier review, the Victorian Sentencing Advisory Council ('VSAC') recommended the phasing out of suspended sentences, while also making other recommendations prior to this occurring.[194] The recommended reforms included setting out a non-exhaustive list of factors to guide courts in determining whether the sentence should be suspended and creating a legislative presumption against suspending a sentence in full for listed serious offences unless it was in the interests of justice due to the existence of exceptional circumstances.[195] VSAC noted that many of the concerns expressed during consultation about the use of suspended prison sentences appeared to relate to their use in cases involving serious offences against the person, such as rape and intentionally causing serious injury.[196] The review followed a high-profile case in the media in which the Court of Appeal dismissed an appeal by the DPP against a wholly suspended prison sentence imposed for aggravated burglary, two counts of rape and indecent assault.[197]

VSAC also reported on the impact of sentencing reforms for sexual offences, one of which was the classification of some serious sex offences as Category 1 offences, meaning the court is required to impose imprisonment.[198] VSCA found that, as rape already attracted very few non-custodial sentences prior to sentencing reform, 'the reform did not have any discernible influence on sentencing outcomes'.[199] When considering some sentencing remarks prior to these reforms, they found non-custodial sentences were being imposed either as a direct result of the Court of Appeal's guideline judgment in *Boulton v The Queen*[200] or involved a finding that there were exceptional circumstances justifying this outcome.[201] In VSAC's view, this raised 'genuine questions about whether a reform designed to prevent undue leniency in the sentencing of serious sex offenders might also result in the detention of people who may have otherwise warranted a more merciful sentence'.[202]

Legal commentators have been critical of these and other Victorian sentencing reforms, arguing that they have not achieved their objective of greater deterrence and community protection.[203]

New South Wales

The 2018 NSW domestic violence sentencing reforms (which also apply to DV sexual offences) were evaluated by the NSW Bureau of Crime Statistics ('BOCSAR') in 2020 alongside other sentencing reforms. BOCSAR found some shifts in sentencing practices.

At the Local Court level (the equivalent of Queensland's Magistrates Courts), there was a small decrease in the percentage of DV offenders sentenced to imprisonment, an increase in the use of supervised

194 Sentencing Advisory Council (Victoria), *Suspended Sentences – Part 1* (Final Report, May 2006).
195 Ibid recs 3, 5.
196 Ibid 63.
197 *Director of Public* Prosecutions (Vic) *v Sims* [1999] VSCA 25 (Winneke P, Brooking and Ormiston JJA).
198 Sentencing Advisory Council (Victoria), *Sentencing Sex Offences in Victoria: An Analysis of Three Sentencing Reforms* (June 2021) ('*Sentencing Sex Offences in Victoria*').
199 Ibid 18 [3.6].
200 [2014] 46 VR 308. Guideline judgments are discussed in Chapter 10.
201 *Sentencing Sex Offences in Victoria* (n 198) 19–20 [3.8]–[3.9].
202 Ibid xi.
203 Michael D Stanton, 'Instruments of injustice: The emergence of mandatory sentencing in Victoria' (2022) 48(2) *Monash University Law Review* 1.

community orders and a reduction in the proportion of offenders sentenced to an unsupervised order, fine or other penalty.[204]

For cases sentenced in the higher courts, the percentage of DV offenders who received a supervised community order declined and there was an increase in the use of prison sentences, but this change was found not to be statistically significant.[205] The percentage of sentenced persons receiving a prison sentence of 36 months or less also declined and there was an increase in sentences of greater than 36 months.[206]

A subsequent evaluation by BOCSAR in 2022 found that the increased use of supervised community sentences, including for domestic violence offenders, did not appear to have translated into reduced short-term reoffending rates. The study concluded that the 'abundance of evidence to support the effectiveness of community supervision in reducing recidivism suggests further research into the extent and quality of supervision following the sentencing reforms may be worth pursuing'.[207] Subsequently, in 2021, the NSW Government announced an investment of $33 million to increase the supervision of offenders in the community and enable greater access to rehabilitation programs,[208] contributing to the government's broader aim of reducing reoffending by 5 per cent by 2023.[209]

Stakeholder views

Submissions from victim survivors and support and advocacy stakeholders

Victim survivors and support and advocacy organisations raised concerns about the use of options such as suspended prison sentences as an inappropriate response given the extent of harm caused by these offences. For example, noting the increasingly common use of these orders, the Queensland Sexual Assault Network ('QSAN') said they 'can feed into a community perception that sexual offences have minimal consequences, even after going through the entire criminal justice process'.[210] QSAN said:

> We received feedback from victim-survivors that suspended prison sentences do not adequately reflect the level of fear, the financial cost, the trauma experienced, and the years of counselling and trauma work required to [recover from acts of sexual assault and rape] and be able to fully participate in our community. The impact of the crime will stay with them forever even if they can get themselves back on track.[211]

QSAN recommended that 'stronger sentencing guidelines be developed specifically in response to the making of suspended sentences in sexual violence matters' and that 'access [to] vulnerable people by the offender be considered and mitigated'.[212]

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204 The percentage of DV offenders receiving a prison sentence declined from 14.0% to 11.8%, while the percentage sentenced to supervised community orders increased from 27.4% to 43.6%. The percentage receiving an unsupervised order, fine or other penalty declined from 58.6% to 44.5%: N Donnelly, 'The Impact of the 2018 NSW Sentencing Reforms on Supervised Community Orders and Short-Term Prison Sentences' (Crime and Justice Statistics Bureau Brief No 148, NSW Bureau of Crime Statistics and Research, 2020) 8.

205 Ibid 14.

206 Ibid. The use of supervised orders, unsupervised orders, fines and other penalties also declined.

207 Ibid 20.

208 NSW Government, 'Investing in Community Supervision and Safety' (Media Release, Communities and Justice, 22 June 2021) <https://dcj.nsw.gov.au/news-and-media/media-releases-archive/2021/investing-in-community-supervision-and-safety.html>.

209 For further information on progress made in reaching this target, see Corrective Services NSW, 'Targets', Reducing Reoffending (web page, 11 May 2023) <https://correctiveservices.dcj.nsw.gov.au/reducing-re-offending/targets.html>. BOCSAR is next due to publish an update to its data series on reoffending rates in March 2025 – see <https://bocsar.nsw.gov.au/topic-areas/re-offending.html>

210 Submission 24 (QSAN) 8.

211 Ibid.

212 Ibid 13.

In a supplementary submission, QSAN referred to Victoria's approach providing for judicial monitoring as one that should be considered, suggesting that this 'may be an appropriate option in some high-risk sexual violence matters, where judicial oversight might assist compliance, accountability and hopefully rehabilitation of offenders'.[213]

DV Connect referred to victim survivors' views 'that sentencing is not commensurate to the crime and fails to meet the intent of punishment' with reference to 'the long term, wide reaching, detrimental impact of sexual violence'.[214]

DV Connect told us that current sentencing 'fails to serve as a deterrent to offending', also 'acting as a deterrent to victim/survivors coming forward' and 'victim/survivors do not feel that sentences adequately denounce the crime'.[215]

With respect to the sentencing purpose of denunciation, Fighters Against Child Abuse Australia ('FACAA') suggested that meeting this objective is 'completely unravelled when rapists are given non-custodial sentences with suspended sentences or community corrections orders'.[216] It suggested: 'The very simple solution to this is to make a mandatory custodial sentence for anyone found guilty of a penetrative rape offence particularly against a child'.[217]

Submissions from research institutions, professional bodies and community advocacy organisations

The Justice Reform Initiative raised concerns that 'more punitive sentencing regimes, systems of mandatory sentencing, and increasing maximum sentencing limits for particular offences increases the likelihood that an accused person will elect to plead not guilty to an offence'. It was concerned this would 'subject victims to further trauma' and that such an approach 'is not a trauma-informed framework that will benefit victims of crime'.[218] Instead, it recommended that the review should consider 'the potential to develop appropriate, victim-centred restorative justice processes for sexual offences'.[219]

A submission made by academics from the QUT School of Justice jointly with researchers from the Bravehearts Foundation told us that, based on their research, victim survivors of sexual violence supported perpetrators receiving rehabilitative interventions such as parole supervision and psychological support to address their offending behaviour 'so that they do not harm others', but only if the person 'had already served an appropriate custodial sentence'.[220] They also referred to the importance of remorse in influencing victim survivors' views and support for post-custodial interventions as '[o]verwhelmingly, [victim survivors] saw only remorseful perpetrators as capable of change'.[221]

Individual submissions

The Council also received a small number of submissions from other members of the community.

One submitter suggested that wholly suspended sentences and intensive correction orders, along with fines, 'do not deter perpetrators of such offences and should not be handed out as a first resort'.[222]

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213 Submission 24 (Addendum) (QSAN) 1.
214 Submission 20 (DV Connect) 4.
215 Ibid 5.
216 Submission 15 (FACAA) 9.
217 Ibid 9.
218 Submission 13 (Justice Reform Initiative) 1.
219 Ibid 2.
220 Submission 12 (QUT - School of Justice) 4.
221 Ibid 4–5.
222 Submission 27 (Name withheld) 1.

Another community member recommended that the options considered should include 'mandatory personal development for all convicted perpetrators of crimes related to sexual violence', such as therapy, counselling and support groups, as well as 'mandatory community service'.[223]

[223] Submission 35 (C Murphy) 2–3.

Consultation with victim survivors

Consultation with victim survivors

One of the victim survivors of sexual assault we met with viewed a wholly suspended sentence as an inadequate outcome.[224]

> [The] majority of the sentences [for sexual assault] are wholly suspended, so it's like, oh, I could send you to prison. But actually, what we usually do is just tell you: 'I could, but it's wholly suspended … You need to be good.' (Victim survivor (rape), Interview 6)

This victim survivor suggested that a sentence that would involve community service with 'some form of accountability' would have been preferable, in conjunction with psychological treatment/support.[225] She contrasted the position with a neighbour who had lost their driver's licence for speeding and talking on the phone:

> My neighbour lost his driving licence for speeding and talking on his phone. His lost his driving licence for 10 months. He has to move. It impacts him being able to take his kid to school. It impacts so many aspects of his life. I feel like he's been more affected than the perpetrator of sexual violence.

Submissions from legal stakeholders

In considering the effectiveness of various options, Legal Aid Queensland ('LAQ') suggested that '[s]entencing options which target factors contributing to offending are more likely to be effective' than imprisonment, which 'provides temporary protection of the community'.[226]

This view was shared by the Youth Advocacy Centre,[227] which supported 'having a broad sentencing discretion' with 'flexibility to fashion sentences that reflect the individual circumstances of the case and the nature of offending'.[228] It considered it 'important that the sentencing orders should include dual orders such as combined suspended sentences and community-based orders to allow Courts to incorporate punishment, deterrence and rehabilitation within a sentence'.[229] The Youth Advocacy Centre supported implementation of the Council's 2019 recommendations (discussed at section 11.2.1),[230] as did LAQ.[231]

LAQ was particularly supportive of 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 regarding whether a parole release date or parole eligibility date should be set in such circumstances.[232] It told us:

> 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

224 Victim Survivor Interview 7.
225 Ibid.
226 Submission 23 (Legal Aid Queensland) 20.
227 Submission 30 (Youth Advocacy Centre) 7.
228 Ibid.
229 Ibid.
230 Submission 30 (Youth Advocacy Centre) 7.
231 Submission 23 (Legal Aid Queensland) 19.
232 Ibid.

> 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.[233]

The following example was provided to illustrate the point, with the view that the scenarios described are 'undesirable as they provide for a reduced or no period supervised in the community following release from prison':

> 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 an 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.[234]

With respect to sentences for sexual assault LAQ's view was:

> 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 … The imposition of imprisonment for such offending has increased, more than doubling in 18 years.[235]

The Aboriginal and Torres Strait Islander Legal Service (Qld) ('ATSILS') similarly was of the view that:

> Whilst punishment and deterrence … by way of incarceration and other punitive measures certainly have a place in certain contexts, these measures do not, in isolation, address the root causes of offending. Improving community safety necessitates an approach that also prioritises the rehabilitation of the individual such that the individual is less likely to reoffend.[236]

It told us that, for Aboriginal and Torres Strait Islander individuals,

> to have the best chance of success, rehabilitation programs must be delivered by community-controlled organisations preferably within the local community that the individual belongs, to provide the cultural safety required to promote engagement by the individual.[237]

It referred to there being 'a significant paucity of culturally safe rehabilitation/healing programs throughout the state, particularly in rural and remote areas', which suggests a need for further funding to expand the delivery of these programs.

Queensland Corrective Services ('QCS') indicated that it 'continues to be generally supportive of an expansion of [court-ordered parole] as a penalty option for sexual offending … noting that any change would be subject to Government consideration processes around policy and policy implementation'.[238] It referred to 'a central purpose of QCS's business' as being 'to ensure those who come into the correctional system are less likely to return to crime'.[239] It told us that it

> delivers a range of targeted programs in correctional centres that aim to reduce sexual offending recidivism. These include group based cognitive behavioural programs to address sexual offending, including preparatory, medium

233 Ibid.
234 Ibid 19–20.
235 Ibid 18.
236 Submission 28 (ATSILS) 4.
237 Ibid.
238 Submission 31 (Queensland Corrective Services) 2.
239 Ibid 1.

> intensity, high intensity and maintenance programs. There are also specific programs for First Nations individuals and individuals with low cognitive and/or low social/emotional abilities.[240]

Subject matter expert interview participants

The suspension of a prison sentence of 5 years or less was generally described by subject matter expert interview participants as involving a choice between delivery of the certainty of release that a suspended prison sentence would provide versus parole eligibility, which might mean the person spends a longer period in custody.

The assessed risk posed by the person being sentenced and the importance of community protection were referred to by many participants as critical to this assessment. For example, one practitioner told us that whether there was a view the person should do sex offender courses in prison in the interests of community protection was highly relevant:

> With child sex offenders there [are] programs that can only be done in prison, and I've definitely made submissions around that, well it should be eligibility because they should do the high intensity sex offender program in jail and they should prove to the Parole Board that they should be released and they're not a risk to the community. If that takes longer than one-third of the sentence, so be it, community protection is a big principle here .[241]

Several participants referred to factors such as whether the person had 'set themselves on the path to rehabilitation' – in which case a suspended sentence might be justified – as relevant.[242] If rehabilitation was required, then imprisonment with parole was generally viewed as being more appropriate.[243]

A lack of previous history and young age were also referred to by some as supporting suspension,[244] as was the person living in a remote or isolated location because of the difficulties of having that person on parole.[245]

Exclusion from court-ordered parole

Many expert interview participants thought supervision was important for sexual offences,[246] and the exclusion of court-ordered parole for sexual offences was impacting sentencing practices due to limited judicial discretion.[247] The fact that court-ordered parole is not available as an option in sentencing was also viewed as affecting the willingness of people to plead guilty.[248]

In the absence of other options, courts may choose to suspend the sentence to ensure certainty of release (or, alternatively, make use of prison-probation orders where this option is available). Several expert interview participants remarked that this results in people on suspended prison sentences potentially not being under any supervision in the community.[249] One participant, for example, told us:

> There are sexual assault cases where … they'd be prime candidates for a parole release date to get that supervision, that intense supervision by way of parole. But they can't get a parole release date, they can only get an eligibility date and with all that comes the problems of making an application for parole, the delay in that. So there are many cases,

240 Ibid.
241 SME Interview 19.
242 For example, SME Interviews 3, 10, 19, 22.
243 For example, SME Interviews 4, 5, 7.
244 For example, SME Interviews 13, 14.
245 SME Interview 17.
246 SME Interview 14, 16.
247 For example, SME Interviews 6, 11, 13.
248 SME Interview 25.
249 SME Interviews 1, 4, 11, 25.

> I would imagine, where a judge is sentencing for a sexual assault where they'd like to be able to sentence to, say, 18 months to two years with a parole release date immediately and they know the person's supervised.[250]

The risk of the person serving their whole sentence in custody in the case of shorter sentences was also referred to as problematic when a court is faced with a decision of whether to suspend the sentence.[251]

Several interview participants told us the exclusion of sexual offences from court-ordered parole causes problems and constrains sentencing options.[252] This would ensure the person was supervised in the community but would still also have certainty of release.

There was also some support for courts having more flexibility in sentencing options, including a dual discretion to set either a parole release date or parole eligibility date (as previously recommended by the Council)[253] and for the release of those given a parole release date, with release being conditional on the completion of relevant courses while in custody.[254] It was considered that this certainty of release (even if conditional) might translate into more people pleading guilty.[255]

Problems with existing orders and permitted combinations

The ability to combine a suspended prison sentence with a probation order or immediate imprisonment of more than 12 months with probation for a single charge was suggested by some participants as potentially beneficial, providing courts with greater flexibility in sentencing.[256]

Current restrictions were viewed by some as making the situation 'unfair' because if a person is sentenced for one offence and pleads guilty, the only option is a suspended prison sentence or imprisonment with parole eligibility, while for someone sentenced for two offences, they might be placed on a suspended prison sentence for one offence and a probation order for the second offence to achieve 'what we now don't have'.[257] The option of imposing a suspended sentence on one count and a combined prison probation order on another to provide some supervision was also noted.[258]

Another barrier to the use of combined orders is legal considerations. If the nature of the offending is too serious (for example, where the co-sentenced offences are counts of rape), then imposing a probation order for one count and a partially suspended prison sentence for the other would not be appropriate.[259]

Consultation events

Many participants were surprised that partially suspended prison sentences were being used so commonly for rape offences as well as by the high use of wholly suspended sentences for sexual assault.[260]

Similar to some of the views expressed by subject matter expert participants, the use of partially suspended prison sentences was viewed as a result of the current legislative framework/restrictions

250 SME Interview 22.
251 SME Interview 1.
252 For example, SME Interviews 3, 7, 9, 10, 14, 15, 16, 20, 21, 22, 24, 26.
253 SME Interviews 3 7, 14, 20, 21, 24.
254 SME Interview 7. See also SME Interview 4.
255 SME Interview 7.
256 SME Interviews 1, 7, 26.
257 SME Interview 9.
258 SME Interview 10.
259 SME Interview 11.
260 Cairns Consultation Event, 21 March 2024.

around the availability of court-ordered parole, with some participants supporting reforms to extend this to sexual offences.[261]

The comment was made that victim survivors often view a suspended prison sentence as 'weak' or 'disappointing', and as if it was not worth going through the process at all, particularly as there is no requirement for the person to participate in any programs or comply with any conditions (other than not to reoffend).[262] They were described as 'a bit of a "nothing" sentence'.[263]

The lack of supervision involved in suspended prison sentences was raised by several participants as problematic, which was not considered conducive to a person's rehabilitation and to holding perpetrators accountable.[264] The view was the community may expect a sexual offender to receive supervision and a wholly suspended prison sentence in its current form does not deliver this.

There was some support for courts to have the ability to attach other conditions to suspended prison sentences.[265]

It was acknowledged there are more options available to QCS to respond to a non-compliant offender who is on parole, compared with a person subject to a suspended prison sentence unsupervised.[266]

There were concerns that having a longer operational period on a suspended prison sentence does not assist with rehabilitation as it just extends the 'good behaviour period' (although a representative of the Family Responsibilities Commission at a subsequent meeting expressed support for even longer operational periods to be considered).[267]

For young first-time offenders, it was suggested that judges often do not want to risk that someone will spend longer in custody than is equitable if they set a parole eligibility date, as completing courses will often be a condition of parole and they may need to wait a long time to complete these courses.[268] Judges will sometimes instead choose a wholly suspended prison sentence as the legislation does not allow enough discretion.

Reliance on the making of dual orders – for example, the ordering of a suspended sentence for one offence with probation for another – was not only noted as reliant both on the offences being of an appropriate level of seriousness and both offences being sexual offences. Otherwise, the conditions of supervision and program engagement for the non-sexual offence would be tailored around that type of offending. Not the person's sexual offending.[269]

Previous Council recommendations

As discussed in section 11.2.1, the Council has previously recommended significant reforms to sentencing orders in Queensland. Of relevance to the use of suspended sentences, this included allowing a court to order a suspended sentence alongside a community-based order (probation, community service

261 Brisbane Consultation Event, 11 March 2024.
262 Cairns Consultation Event, 21 March 2024.
263 Ibid.
264 Brisbane Consultation Event, 11 March 2024.
265 Cairns Consultation Event, 21 March 2024; Online Consultation Event, 16 April 2024.
266 Brisbane Consultation Event, 11 March 2024.
267 Ibid.
268 Ibid.
269 Ibid.

or, once established, a community correction order) when sentencing a person for a single offence/charge[270] (recommendation 37).

The introduction of conditional forms of orders would allow supervision and compliance with program and treatment conditions to be ordered as part of the sentence where such conditions are warranted.

11.5.2 Issue 2: Non-parole periods in Queensland and adequacy

The current approach

Most people sentenced to imprisonment will be eligible for release on parole. The sole purpose of parole 'is to reintegrate a prisoner into the community before the end of a prison sentence to decrease the chance that the prisoner will ever reoffend. Its only rationale is to keep the community safe from crime'.[271]

The High Court of Australia, in characterising the approach to be taken to the setting of the non-parole period, has said that '[t]he non-parole period is imposed because justice requires that the offender serve that period in custody'.[272] It 'is a minimum period of imprisonment to be served because the sentencing judge considers the crime committed calls for such detention'.[273] Both punishment and deterrence are relevant to this determination,[274] together with other purposes of sentencing, such as community protection.[275]

It is common practice in Queensland for factors in mitigation (including a timely plea of guilty) to be reflected in setting parole eligibility at approximately one-third of the head sentence (representing a one-third reduction from the statutory 50 per cent ordinarily required to be served if no parole eligibility date is set).[276] The current approach in Queensland is discussed in more detail in **Chapter 15**.

There are mandatory sentencing provisions that are exceptions to the usual practice, including where the person is declared convicted of a serious violent offence (discussed below) or sentenced to life imprisonment.[277] In these cases, a court can set a later parole eligibility date (but not an earlier one).[278]

A special form of imprisonment, known as an indefinite sentence, can be ordered in place of imprisonment where certain criteria are met. It has no fixed date for when the sentence will end[279] and the person cannot apply for parole.[280]

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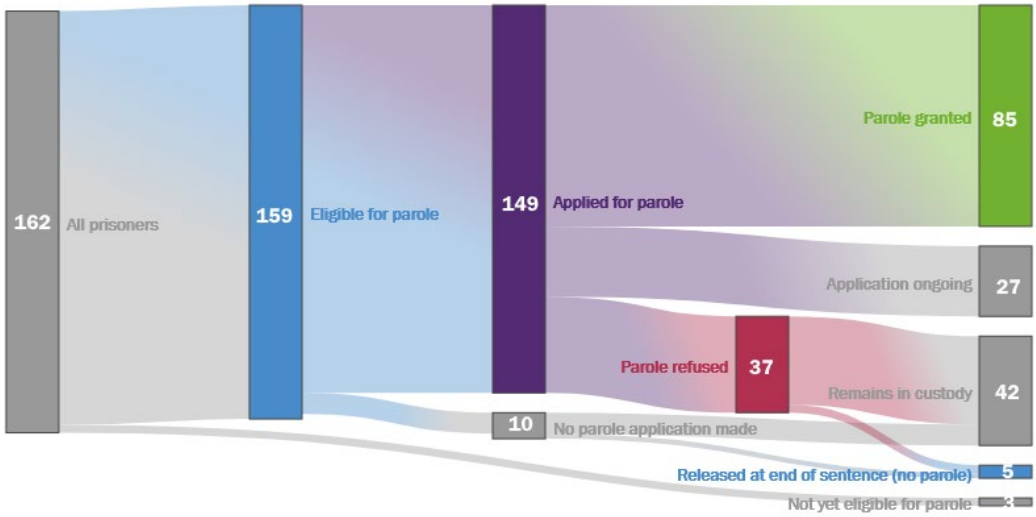
270 *Community-based Sentencing Orders, Imprisonment and Parole Options Report* (n 4) rec 37.
271 *QPSR Report* (n 7) 1 [3] (emphasis in original).
272 *Muldrock v The Queen* (2011) 244 CLR 120 [57].
273 *Power v The Queen* (1974) 131 CLR 623, 628–9 [7].
274 Ibid.
275 *Bugmy v The Queen* (1990) 169 CLR 525, 537.
276 *R v Hoad* [2005] QCA 92; *R v Norton* [2007] QCA 320; *R v Blanch* [2008] QCA 253; *R v Ungvari* [2010] QCA 134; *R v Hyatt* [2011] QCA 55; *R v Lockley* [2021] QCA 77; *R v Crouch* [2016] QCA 81; *R v DAC* [2023] QCA 53. Note, however, the Queensland Court of Appeal has increasingly noted the 'one-third reduction for a plea of guilty is not a rule' but rather a 'starting point, to be adjusted up or down, depending on the particular circumstances of each case: *R v WBV* [2023] QCA 79 [6] (Boddice JA). See also *R v Granz-Glenn* [2023] QCA 157 [12] (Bond, Flanagan JJA and Bradley J agreeing); *R v Randall* [2019] QCA 25 [37].
277 For life imprisonment, the person must serve a mandatory minimum period of 15 years before being eligible for release on parole: CSA (n 18) s 181(2)(d). The mandatory minimum period of 20 years applies if the sentence is imposed for a repeat 'serious child sex offence': s 181A.
278 Ibid s 181(3). See, for example, *R v Cowan; Ex parte A-G (Qld)* [2016] 1 Qd R 433; *R v Griffith* [2024] QDC 207.
279 PSA (n 17) s 162.
280 CSA (n 18) s 179(2)(a)(iii).

What data tells us about parole eligibility

As discussed above in section 11.3.1 on key sentencing trends for rape, most people had parole eligibility fixed at or below 50 per cent of their head sentence, although additional time was often spent in custody beyond a person's parole eligibility date prior to release.

From a review of a sample of cases for those sentenced to imprisonment for rape (MSO) who were expected to be able to apply for parole between 1 July 2021 and 30 June 2023, we found that just over half of people were granted parole and one-quarter were refused. A small number of prisoners were released after serving the full sentence, meaning they spent no time on parole.[281]

Figure 11.4: Parole application outcomes for prisoners sentenced for rape (MSO)



Data notes: Parole outcomes for imprisonment penalty for rape (MSO) with a parole eligibility date between 1 July 2021 and 30 June 2023. If more than one parole application was made, the earliest outcome or the earliest outcome that resulted in parole being granted has been counted.
Source: QCS unpublished data, extracted May 2024.

For the 3 people in the 'not yet eligible parole' category, two were subject to *Dangerous Prisoners (Sexual Offenders) Act 2003* (Qld) ('DPSOA') orders.[282]

From the sample, of the people who had been released on parole (n=84),[283] the median time served in prison beyond the parole eligibility date before being released was approximately 7 months (211.5 days, average 267.8 days).[284]

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281 A sample of cases were selected to analyse parole outcomes for those sentenced to imprisonment for rape. This data was from Queensland Corrective Services (QCS). The sample comprised of all prisoners who were sentenced to imprisonment for rape (MSO) and were expected to be able to apply for parole between 1 July 2021 and 30 June 2023.

282 A DPSOA is not a parole order, but a post sentence civil application by the Attorney-General. This order can be made by the Supreme Court towards the end of a prisoner's sentence and requires additional set periods of incarceration and/or community supervision to be served after the person has completed their sentence. In our SVO scheme report, we found, of prisoners sentenced with an SVO declaration, the proportion of DPSOA orders was much higher for rape (28.4%), compared to maintaining a sexual relationship with a child (11.7%). Both offences had similar rates of successful parole applications, with around one-third of prisoners granted parole (38.1% for rape, 35.1% for maintaining). See *The '80 per cent Rule'* (n 20): section 9.2.1.

283 One person was excluded from the analysis as they had been granted parole but had not yet been released when the data was extracted (June 2024) therefore did not yet have a discharge date.

284 Ibid.

In our 2022 report, *The '80 Per Cent Rule'*,[285] we found that people sentenced for rape with an SVO declaration served the longest period beyond their parole eligibility date compared with other offences.[286] For people sentenced to 5 years or more but less than 10 years (with no SVO declaration), rape was one of the least likely categories for a parole application to be approved.[287]

How the SVO scheme impacts non-parole periods

Just over one in 10 sentences for rape (MSO) involved the making of an SVO declaration, and most of these were made on a mandatory basis. However, sentences falling just below this level are also likely to be impacted by the SVO scheme. There were no SVO declarations for sexual assault (MSO).

As discussed in section 11.2.2, when a declaration is made, this means a person must serve 80 per cent of their sentence or 15 years (whichever is less) before being eligible for release on parole.

What other jurisdictions do

The general approach taken to the fixing of non-parole periods in other jurisdictions differs. Some jurisdictions identify a minimum statutory ratio of the non-parole period to the head sentence (and the reverse in NSW), while others leave this to be determined by the court as a matter of discretion.

In other states and territories, sentencing and parole legislation provides guidance about the required minimum, or recommended proportion between the non-parole period and the head sentence. This ranges from 50 per cent in the Northern Territory, Tasmania, and Western Australia (in this case, limited to sentences of 4 years), to 75 per cent in NSW.[288] In WA, for sentences of more than 4 years, a person is eligible for parole after serving all but two years of the term of imprisonment imposed in custody.[289]

In a number of these jurisdictions, a court is either not permitted to set a non-parole period that is less than the statutory ratio specified,[290] or is allowed to depart from this only if special circumstances apply.[291] This is different from the position in Queensland, where the usual requirement that a person serve 50 per cent of their sentence before being eligible for release on parole only applies if the court does not set an earlier (or later) parole eligibility date.[292]

Special schemes apply in some cases, requiring a higher proportion of the sentence to be served in custody prior to parole eligibility; these are either presumptive or mandatory, and also apply to some sexual offences – for example:

- In the NT, for sentences of imprisonment of 12 months or longer, the non-parole period must not be less than 70 per cent of the head sentence for offences of sexual intercourse without consent,

285 *The '80 per cent Rule'* (n 20).
286 Ibid 113, fig 33.
287 Ibid, 114 fig 34: parole applications for rape were granted in 67% of cases (only behind attempted murder 62%) compared to deal or traffic in illicit drugs 91% granted, and grievous bodily harm 81% granted). Rape were the most likely to have a parole application refused (14% of applications were refused, slightly more than maintaining at 13% refused).
288 See *Sentencing Act 1995* (NT) ss 55, 55A; *Sentencing Act 1997* (Tas) s 17(3); *Sentencing Act 1995* (WA) s 93 (for aggregate sentences see s 94); *Crimes (Sentencing Procedure) Act 1999* (NSW) s 44, unless there are special circumstances for the balance of the sentence to be more. A court can also decline to set a non-parole period: s 45.
289 *Sentencing Act 1995* (WA) s 93 (for aggregate sentences see s 94).
290 See, for example *Sentencing Act 1997* (Tas) s 17(3).
291 See *Crimes (Sentencing Procedure) Act 1999* (NSW) s 44.
292 CSA (n 18) s 184(2). There are some legislative exceptions to this.

certain other sexual offences and violent offences, and certain offences committed against people under 16 years of age.[293]

- In SA, a minimum non-parole period of four-fifths (80%) of the head sentence applies to people convicted of a serious offence where the offender is, or has been, declared to be a serious repeat offender[294] unless there are exceptional circumstances.[295]
- In Victoria, for a 'standard sentence offence' (which includes rape), the non-parole period must be fixed at least 60 per cent of the head sentence when less than 20 years; at least 70 per cent of the head sentence when 20 years or more; and 30 years if life imprisonment is imposed, unless the court finds it is in the interests of justice not to do so.[296]

Stakeholder views

Submissions from victim survivors and support and advocacy stakeholders

As discussed throughout this report, victims survivors and support and advocacy organisations generally told us they consider that sentences for sexual assault and rape inadequate and do not sufficiently reflect the seriousness of these offences and the harm caused to victim survivors.

QSAN referred to both short non-parole periods and time spent in pre-sentence custody affecting release dates as impacting victims, submitting:

> If a person is on remand because they are a risk to the community and/or the victim-survivor and were unable to convince a court of ways to mitigate this risk, it seems at odds that with no further mitigation of risk, they can benefit from a quick/immediate release taking into account time already served.[297]

With respect to serious violent offence (SVO) declarations, the Queensland Network of Alcohol and Other Drug Agencies Ltd ('QNADA') submitted: 'It seems strange to us that [SVO] declarations are more common for drug trafficking than for sexual offending.'[298]

Submissions from legal stakeholders

LAQ considered 'sentencing for sexual assault and rape offences adequately reflect[s] the purposes of sentencing and the seriousness of these offences and no changes to sentencing options on this basis should be made'.[299] It raised concerns that any strengthening of sentencing responses could disincentivise pleas of guilty, with more cases being taken to trial and a larger proportion of such matters resulting in no convictions:

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293 *Sentencing Act 1995* (NT) ss 55, 55A.
294 *Sentencing Act 2017* (SA) ss 53, 54. This is triggered if the person has committed at least 3 serious offences on separate occasions or at least 2 serious sexual offences committed on separate occasions. 'Serious offence' and 'serious sexual offence' are defined in s 52. For more information, see Queensland Sentencing Advisory Council, *Minimum Non-parole Period Schemes for Serious Violent Offences in Australia and Select International Jurisdictions: Background Paper 2* (2021) section 2.7.3.
295 *Sentencing Act 2017* (SA) ss 48(2), 54(2). In the case of the serious repeat offender provisions, the person must also satisfy the court it is in all the circumstances not appropriate that they be sentenced as a serious repeat offender: ibid s 54(2)(b).
296 *Sentencing Act* (Vic) (n 137) s 11A.
297 Submission 24 (QSAN) 8–9.
298 Submission17 (QNADA) 4.
299 Submission 23 (Legal Aid Queensland) 16.

> 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.[300]

LAQ noted its objection to 'mandatory minimums and legislative changes that would narrow sentencing discretion', cautioning that such an approach 'risks unjust sentences being imposed'.[301] It agreed with statements made by Sisters Inside in its preliminary submission that 'an introduction in 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'.[302]

Subject matter expert interview participants

One participant commented on what they considered the significant differences between Queensland and NSW regarding the setting of non-parole periods/parole eligibility dates.[303] They noted the common practice of setting parole eligibility at one-third if the person pleads guilty, which was in contrast to NSW, where there is less discretion and a percentage-based system to encourage early resolution of cases. This practitioner suggested the percentage of cases committed for sentence was far lower than in NSW for this reason, which they considered was a better outcome for victims in having matters resolved more quickly, as well as for those sentenced. Explaining to community members how a 9-year sentence can result in parole eligibility set at 3 years was viewed as challenging: 'I think the sentiment from the community is that it's not enough on that level.'[304]

Participants raised concerns about the mandatory nature of SVO declarations (for sentences of 10 years or more) which limited the ability of a court to reflect the seriousness of the offence in setting the head sentence, but structuring the time in custody to reflect a plea of guilty and other factors in personal mitigation.[305] In its current form, there were concerns that it does not incentivise a person to plead guilty.[306]

At the upper end of offending (around the 10-year mark), this was viewed as having an impact, with submissions noting that there was a significant likely difference in a 9-year sentence, with parole eligibility set at one-third or fixed at half, compared with a 10-year sentence to serve 8 years (80% under the scheme).[307]

Even if made on a discretionary basis, if there was a plea the comment was made that any reduction 'has to come from the top', meaning the head sentence would be reduced as a consequence.[308]

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300 Ibid 18.
301 Ibid 17.
302 Ibid 18.
303 SME Interview 19.
304 Ibid.
305 SME Interview 26.
306 Ibid.
307 SME Interviews 11, 19.
308 SME Interviews 15, 16.

Consultation with victim survivors

Consultation with victim survivors

The Council consulted with victim survivors.[309] Several victim survivors with whom the Council met raised concerns about perpetrators being eligible for parole so soon after sentence – often due to the person having spent significant time in pre-sentence custody that was declared.[310] This issue was also raised in a submission made by a person with lived experience of sexual violence.[311]
One victim survivor referred to statements made by the sentencing judge that it was an eligibility date only and not a certainty that the person would be released.

> So … He has to finish a sex course or something in [custody]. But the judge says he probably won't get it [parole]. (Victim survivor (rape and sexual assault of a child), Interview 4)

In some cases, these victim survivors considered that the person should be supervised for life (and be electronically monitored)[312] and/or spend their whole sentence (or life) in custody due to significant impacts of offending and from a community safety perspective.[313] In a submission, a person with lived experience of sexual violence was concerned about the need to protect children:

> Every time you allow these predators out of jail children are harmed, for those children it is a life sentence, and there is no parole.[314]

The perpetrator in the first case was sentenced for engaging in penile intercourse with a child under 16 years (she was 13 at the time) in circumstances where the perpetrator was a child at the time of the offending and received an 18-month probation order and a community service order to complete 70 hours of community service work. The victim survivor indicated that she supported a longer period of supervision rather than a longer prison sentence with a shorter period of supervision on community protection grounds:

> In response to a question about what is more important, longer time in prison and short supervision or long supervision and short time in prison: short time in prison. Because supervision … protects other kids.

In general, however, those interviewed were of the view those convicted of sexual offences should spend a longer time in custody.[315] The comment was made even a small increase in sentences would 'make a big difference' to their view of the sentence.[316]

Previous Council recommendations

As discussed in section 11.2.1, the Council has previously recommended significant reforms to community-based sentence orders and parole options in Queensland. Of relevance to the current review

309 See Chapter 4 for methodology and further details on this consultation activity.
310 For example, Victim Survivor Interviews 4, 6
311 Submission 1 (Name withheld).
312 Victim Survivor Interview 4.
313 For example, Victim Survivor Interviews 2, 4, 6. The perpetrator in Victim Survivor 2's case received an SVO declaration and she indicated that she did not consider the requirement to serve 80 per cent of the sentence to be enough 'You do the crime, you do the time'. But if released, he should be supervised for life.
314 Submission 1 (Name withheld).
315 For example, Victim Survivor Interviews 1, 4.
316 Victim Survivor Interview 4.

are the recommended reforms to the SVO scheme (which we recommended be renamed 'serious offence declarations').[317]

We recommended the SVO scheme be changed to a presumptive scheme for sentences of greater than 5 years with discretion when a declaration is made to set the parole eligibility date between 50 and 80 per cent.[318] We proposed that rape and aggravated sexual assault should be retained as offences to which the reformed scheme applies.

The expected outcomes of our reforms, if adopted, including for rape and aggravated sexual assault, were more SVO declarations being made for sentences of imprisonment of 5 years or more and less than 10 years. That would mean more people sentenced for these offences being required to serve a greater proportion of their sentence in custody (at a minimum, 50% up to 80%) before being eligible for release on parole.

These reforms are yet to be legislated.

11.5.3 Issue 3: Program availability, length and resourcing issues

For people sentenced to imprisonment (including as part of a partially suspended prison sentence), there are limited opportunities for program engagement and completion prior to release or eligibility for release from custody. In the case of sexual assault, this is due primarily to the short sentence lengths and, in the case of both sexual assault and rape, extended periods spent by some sentenced persons on remand. Lengthy periods of pre-sentence custody impact in a variety of ways, including by reducing the time the person is under parole supervision due to difficulties accessing programs on remand and delays in accessing these programs once sentenced due to program availability in circumstances where the Parole Board Queensland might consider program completion an important precondition for the person's release.

Parole eligibility, time under supervision and program engagement

During our consultations, we were told that for people in custody, there is limited opportunity for program engagement and completion prior to people reaching their parole eligibility dates.[319] This is particularly a problem for those people serving short sentences of 12 months or less.

Data compiled for this review on median sentences for sexual assault and rape, median time declared as time served for a person who has spent time on remand and the median time to serve before being eligible for release on parole provides a high-level measure to assess the extent to which pre-sentence custody might impact opportunities for program completion and supervision in the community.

For rape, we found the following:

- The median imprisonment sentence was 6.5 years.[320]
- The median time to serve before parole eligibility was 2.5 years.[321]

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317 *The '80 per cent Rule'* (n 20).
318 Ibid recs 2, 9. Note, for listed drug offences we recommended the presumption apply when sentences are 10 years or more (rec 8).
319 This issue was raised by several subject matter expert interview participants: SME Interviews 4, 12, 15, 21.
320 See Appendix 4 section 4.7.1 analysing data from July 2005 to June 2023.
321 See Appendix 4 section 4.7.7 analysing data from July 2011 to June 2023.

- The median time on remand for an imprisonment sentence was 10 months,[322] meaning the person would have one year and 8 months of additional time to serve prior to reaching their parole eligibility date.
- For those who applied for and were granted parole, the median time served beyond their parole eligibility date was 211.5 days (about 7 months).[323] This would still leave about 3 years under parole supervision based on median sentence lengths and parole eligibility dates.
- People sentenced for rape with an SVO declaration served the longest beyond their parole eligibility date compared with other offences.[324]
- For people sentenced to 5 years or more but less than 10 years (with no SVO declaration), rape was one of the offence categories least likely to have a parole application approved (62% compared with 91% of deal or traffic in illicit drugs offences and 81% of assault occasioning grievous bodily harm offences).[325]

For non-aggravated sexual assault, we found:

- For a case sentenced in the higher courts, a sentence of one year and 3 months, assuming a parole eligibility date set at one-third, as is the common practice in Queensland when a person pleads guilty, would mean the person would have to spend 5 months prior to parole eligibility, of which a substantial portion may have been spent on remand.
- For a case sentenced in the Magistrates Courts, the median imprisonment sentence was 9 months[326] and the time to serve before being eligible for parole was 2.5 months. As is the case for cases sentenced in the higher court, some of this time may have been spent on remand.

The median time on remand across both court levels and including both aggravated and non-aggravated sexual assault offences was 3.8 months (116 days) – noting that cases where pre-sentence custody was declared had longer median sentence lengths compared with those that did not (1.0 years vs 0.75 year).[327]

These findings support the conclusions:

- There is limited time for a person to complete programs in custody prior to reaching their parole eligibility date, given that many programs have historically not been offered to prisoners on remand and the length of many of these programs and waiting lists.
- For sexual assault in particular, very limited time is likely to be spent under parole supervision.

322 See Appendix 4 section 4.7.10 analysing data from July 2011 to June 2023.
323 See Appendix 4 section 4.7.8 analysing data from July 2021 to June 2023.
324 *The '80 per cent Rule'* (n 20) section 9.2.2, 113 fig 33.
325 Queensland Corrective Services uses different offence categories to the legislative offences. See Queensland Sentencing Advisory Council, *The '80 per cent Rule': The Serious Violent Offences Scheme in the Penalties and Sentences Act 1992 (Qld): Final Report – Appendices* (2022) App 5, Table A4 for how they correspond (*'80 per cent Rule' – Appendices*).
326 See Appendix 4 section 4.8.2 analysing data from July 2005 to June 2023.
327 See Appendix 4 section 4.8.11 analysing data from July 2011 to June 2023.

Availability of programs on remand

The Queensland Productivity Commission, in its 2019 *Inquiry into Imprisonment and Recidivism: Final Report*, recommended reforms to ensure prisoners on remand are able to access suitable programs and other activities likely to aid their rehabilitation.[328]

While the Productivity Commission's recommendation was not specific to sexual offending, the additional 7 months (median) that prisoners sentenced for rape serve in custody beyond their parole eligibility date before they are released on parole (assuming they apply for and are granted parole) suggests additional time is required to be spent post the person's parole eligibility date to complete required programs in custody prior to release. This impacts parole release and therefore the time the person is under supervision in the community prior to the expiry of the sentence.

In *R v Waszkiewicz*,[329] the Court of Appeal noted that: 'Parliament has legislated that neither remand prisoners nor offenders seeking leave to appeal their sentences may receive relevant rehabilitation treatment in prison.'[330] Atkinson J observed:

> it appears counterproductive that the beneficial rehabilitation effect of treatment programmes in prison are denied to prisoners who do not seek to deny their guilt but do seek to exercise their right to seek leave to appeal against sentence. Rehabilitation of such prisoners undoubtedly benefits the offender but more importantly it protects the community by reducing the risk of reoffending, perhaps the most fundamental justification for incarceration.[331]

Contextual factors

Several broader contextual factors impact sentencing practices in Queensland and the services, programs and interventions available to people sentenced for sexual assault and rape. They include:

- substantial increases in prisoner numbers between 2013 and 2024,[332] and increase in Aboriginal and Torres Strait Islander imprisonment rates;[333]
- service delivery, staff attraction and retention and resourcing challenges across all parts of the criminal justice system; and
- broader social issues, such as the lack of affordable and accessible housing and limited availability of support services in the community such as mental health services and drug and alcohol services.

While these factors operate independently of the sentencing framework, they can nevertheless impact sentencing in important and significant ways, including:

- whether a person charged with an offence is released on bail;
- for those people held on remand, increased time between being charged, convicted and sentenced, meaning some people may spend long periods in pre-sentence custody prior to sentence;

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328 *Inquiry into Imprisonment and Recidivism* (n 3) rec 17.
329 [2012] QCA 22.
330 *R v Waszkiewicz* [2012] QCA 22, 8 [35] (White JA, Chief Justice de Jersey and Atkinson J agreeing) citing CSA (n 18) s 180(2)(b).
331 Ibid 8 [37].
332 *Prisoners in Australia 2023* (n 40) Table 15. Queensland prisoners increased from 6,079 in 2013 to 10,226 in 2023. The percentage of unsentenced prisoners increased from 22.1% in 2013 to 36% in 2023.
333 Ibid, percentage of Aboriginal and Torres Strait Islander persons in prison in Queensland was 31.2% in 2013 and increased to 37.2% in 2023. See ibid Table 30 for data on sentenced and unsentenced and male and female.

- making the conditions under which people are held in custody more onerous due to issues such as prison overcrowding, correctional centre lockdowns and suspension of in-person family visits – for example, in response to the COVID-19 pandemic;
- limiting the ability of QCS and other service providers to deliver programs and other interventions in custody and in the community;
- placing additional pressure on QCS to ensure operational staff are appropriately skilled and trained to work effectively with people on probation and parole to reduce their reoffending risks and increasing caseloads of community corrections officers;[334]
- increasing the workload of the Parole Board which may limit its ability to determine applications for parole in a timely way.[335]

We acknowledge that many of these issues go beyond those we have been asked to review, but they are still relevant to our assessment of options for reform.

The management of sexual offenders

How people under sentence are managed in custody and in the community can influence whether sentencing orders made by a court meet their intended objectives. In this section, we provide a brief overview of assessment and screening tools that guide the level of service and interventions offered, and the types of program interventions available to prisoners in custody and on parole. More information about how people are managed by QCS can be found on the QCS website.[336]

Assessments and screening tools

In our **Consultation Paper: Background**,[337] we identified the range of screening and assessment tools used for people in custody. We noted that people who are serving a term of imprisonment less than 12 months may not undertake the same assessments as those serving terms of imprisonment greater than 12 months (such as the Rehabilitation Needs Assessment). For a person with a term of imprisonment of 12 months or less, a Progression Plan and case management process may be initiated if special needs have been identified, such as 'at risk, dysfunctional and intellectual disability'. This is determined on a case-by-case basis.[338]

We also discussed the use of specialised risk assessment tools for people who have been convicted of sexual offences. Men sentenced to a period of 12 months or more for relevant sexual offences (including sexual assault or rape)[339] must undergo a Specialised Assessment with the STATIC 99-R. This is an actuarial assessment tool designed to predict sexual offending recidivism. In addition to the STATIC 99-R, QCS also

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334 See, for example, Australian Government Productivity Commission, *Report on Government Services 2024* (2024) Part C, Section 9 'Corrective services', Table 8A.9 which reports that Queensland's community corrections offender-to-operational staff ratio was 24.3 in Queensland compared to a national average of 18.6.

335 For example, in 2023–24, the Parole Board Queensland reported it had received 4, 794 parole applications and considered 7, 952 applications (noting applications can be considered more than once. It estimated that close to 70% were decided within the statutory timeframes (meaning that 30% were not): Parole Board Queensland, *Annual Report 2023–24* (2024) 13. The number of applications received and considered was an increase from the previous year: see Parole Board Queensland, *Annual Report 2022–23* (2023) 14.

336 See Queensland Corrective Services (web page) <https://corrections.qld.gov.au>.

337 See *Consultation Paper: Background* (n 39).

338 See 'Placement Considerations' in Queensland Corrective Services, *Sentence Management: Classification and Placement, Custodial Operations Practice Directive* (03/08/2023: Public version) 6 ('QCS Sentence Management').

339 As defined in Schedule 1 of the CSA (n 18). Offenders sentenced for child exploitation material offences including possession, making or production, or procurement of minors for objectional computer games, films or publications are not assessed using this assessment tool.

uses STABLE-2007, which measures sexual offending risk factors that can change over time.[340] It is typically used as part of the treatment and management process of men convicted of a sexual offence who have completed the Getting Started Preparatory Program, and prior to their engagement in a treatment.

As part of its new case management framework, QCS has been phasing in the use of a new suite of validated assessment tools. The Level of Service Inventory – Revised: Screening Tool (LSI-R:SV) has been introduced as an initial screening assessment for eligible prisoners at locations involved in the End-to-End Case Management Project (see below). Similar to the Risk of Reoffending (RoR) score currently in use in Queensland, the LSI:R:SV measures static factors such as age and criminal history but also takes into account potential criminogenic needs such as family relationships, peers, attitude, emotional wellbeing and substance abuse history.

Case management

The Case Management Custodial Operations Practice Directive outlines QCS's approach to managing people in custody. It requires each corrective services facility to allocate relevant staff members as case officers. Case management is 'shared between case officers drawn from nominated intervention specialists and corrective services officers from the prisoner's accommodation area whose combined efforts will contribute to the overall case management of the individual prisoner'.[341]

Case officers are involved in the 'day to day management and supervision of the prisoner' and have several responsibilities, including to:

- manage prisoner behaviour;
- ensure the prisoner's risks and needs are managed and documented;
- facilitate the prisoner's attendance at interventions, courses and activities;
- liaise with other staff/case workers to ensure the implementation of the prisoner's Progression Plan;
- provide reports as required;
- facilitate referrals; and
- act as a positive role model.[342]

End-to-End Case Management and End-to-End Offender Management Framework

In early 2019, QCS initiated End-to-End ('E2E') Case Management as an improved way to manage and support people in custody to achieve behavioural change.[343] The E2E Offender Management Framework provides a single, evidence-based framework for all QCS officers across the state.[344] The framework encompasses five fundamental principles: risk and need; desistance; responsivity; evidence-based; and

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340 STABLE-2007 is administered for those individuals motivated to engage in treatment, regardless of their STATIC 99-R risk, to assess a person's treatment needs and inform their most suitable treatment pathway.

341 Queensland Corrective Services, *Daily Operations – Case Management, Custodial Operations Practice Directive* (3 February 2023) 6.

342 Ibid.

343 The approach aims to respond to various recommendations in the *QPSR Report* (n 7) and is informed by extensive research undertaken by the Offender Management Renewal Program in 2017 and 2018: The approach aims to respond to various recommendations in the QPSR and is informed by extensive research undertaken by the Offender Management Renewal Program in 2017 and 2018.

344 Queensland Corrective Services, *Annual Report 2020-21* (Report, 2020-21) 31–2 ('*QCS Annual Report 2020-21*').

governance. It aims to provide a consistent pathway, beginning at the point of entry to the correctional system, and supports:

- progression through the correctional system;
- improving preparedness and readiness for release into the community; and
- continuity of service delivery.

Critically, E2E Case Management aims to ensure there is front-end assessment when a person enters custody to provide them with a targeted plan for their time under QCS management.

Under the E2E Case Management Framework, eligible persons and supervised persons at select locations are assessed for their level of service needs using validated tools.[345] Intensity of service delivery is scaled in accordance with sentence length, legal status and assessed risk and need.[346]

The E2E pilot commenced at the Townsville Correctional Complex in December 2020 and was expanded to South-East Queensland women's correctional centres in 2022. E2E has also been utilised for all women under the supervision of Community Corrections since 2023.[347] Further rollout of this model continues to be evaluated.[348]

Sexual offending programs and interventions

QCS delivers a range of targeted programs in correctional centres that aim to reduce sexual offending recidivism – see Table 11.1. These include group-based cognitive behavioural programs to address sexual offending, including preparatory, medium-intensity, high-intensity and maintenance programs. There are also various specific programs for Aboriginal and Torres Strait Islander persons and those with low cognitive social emotional abilities.

All those who participate are required to complete the preparatory program first, prior to transitioning to a higher intensity program. There is no differentiation in QCS's sexual offending programs between those who committed offences against children or adults as all sexual offending programs are considered suitable for both cohorts.

Participation in and completion of a sexual offending program is taken into consideration by the Parole Board when assessing a prisoner's application for parole.

During 2022–23, there were a combined 407 completions of sexual offending programs in custody and in community corrections.[349] There were also '165 sexual offenders who were also offered individual intervention, safety planning or assessment to address sexual offending in circumstances where they could not access group-based treatment'.[350]

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345 QCS uses the Level of Service Inventory - Revised: Screening Tool (LSI-R:SV) as an initial screening assessment and the Level of Service/Risk, Need, Responsivity (LS/RNR). These tools are validated and guided by the Risk-Need-Responsivity model of offender management and cover: criminal history, education/employment, family/marital and peer relationships, leisure/recreation activities, substance abuse, pro-criminal attitudes and antisocial patterns: Correspondence from Queensland Corrective Services to Queensland Sentencing Advisory Council, 3 November 2023

346 Similar to the RoR score, the LSI-R:SV measures static factors (such as age and criminal history), as well as criminogenic needs (such as family relationships, peers, attitude, emotional wellbeing and substance abuse history). The LSI-R:SV score does not determine a person's eligibility for parole: Correspondence from Queensland Corrective Services to Queensland Sentencing Advisory Council, 3 November 2023.

347 Queensland Corrective Services, *Annual Report 2022-23* (Report, 2023) 11 ('*QCS Annual Report 2022-23*').

348 *QCS Annual Report 2020–21* (n 344) 33.

349 *QCS Annual Report 2022-23* (n 347) 21.

350 Ibid.

A 2019 review of sex offender treatment programs then delivered by QCS found that engaging in these programs 'appears to be effective in reducing sexual and non-sexual recidivism'.[351] They found that around 4.5 per cent of the total sample reviewed returned to custody for a new sexual offence, which was consistent with an earlier 2010 study.[352] Youthful offenders and Aboriginal and Torres Strait Islander males being the 'least likely to complete programs', suggesting possible difficulties engaging with the QCS programs available at the review period.[353]

The review found that:

> Current best-practice evidence, and program logic for the suite of QCS intervention programs, suggests that the completion of all three components of the QCS SOTP [sex offender treatment program], in addition to a reintegration program, may produce the best outcomes.[354]

In light of this finding, the available time to complete programs was found to be particularly important, with the authors of this research finding that 'shorter sentences may therefore limit important intervention opportunities, including whether an offender is given the change to complete all intervention components'.[355]

Since that evaluation was completed, QCS has piloted a new First Nations sexual offending program called Solid Spirit between July 2022 and March 2023; it was delivered in the 2023–24 financial year, adopting recommendations made as a result of the pilot.[356] QCS reports the program takes 'an average of six months to complete, with participants undertaking a mixture of individual and group-based intervention with a focus on successful community reintegration and risk management'.[357]

More information about the research findings on the effectiveness of sexual offending programs, including programs delivered by QCS, is provided in our **Consultation Paper: Background**, section 9.6.[358]

Table 11.1: QCS sexual offending programs in custody

Program name	Details
Getting Started Preparatory Program (GSPP)	A 24-hour introductory, motivational program designed to assist people to reduce barriers and responsivity factors known to inhibit further intensive sexual offending programs. A person must have sufficient time on their sentence to complete the program with their current sexual offence conviction. Available at: Lotus Glen, Townsville, Capricornia, Maryborough, Woodford, Wolston, Far Northern Community Corrections, Brisbane Community Region Community Corrections, and Southern/South Coast Community Corrections.

351 *University of Melbourne Literature Review* (n 2) 87.
352 Ibid 88, citing findings of 4.9% by Stephen Smallbone and Meredith McHugh, *Outcomes of Queensland Corrective Services Sex Offender Treatment Programs* (Final Report, February 2010) 37.
353 Nadine McKillop et al, 'Effectiveness of Sexual Offender Treatment and Reintegration Programs: Does Program Composition and Sequencing Matter?' (2022_ 55(2) *Journal of Criminology* 195 ('*The Effectiveness of Sexual Offender Rehabilitation Programs*').
354 USC Sexual Violence Research and Prevention Unit, The *Effectiveness of Sexual Offender Rehabilitation and Reintegration Programs: Integrating Global and Local Perspectives to Enhance Correctional Outcomes* (Research Report, August 2019) 48.
355 Ibid.
356 Queensland Corrective Services, *Annual Report 2023–24* (2024) 30.
357 Ibid.
358 See *Consultation Paper: Background* (n 39).

Medium Intensity Sexual Offending Program (MISOP)	A 78- to 132-hour program for people assessed as low to moderate risk of sexual reoffending. A person must have sufficient time to complete the program with their current sexual offence conviction. Available at: Lotus Glen, Townsville, Capricornia, Maryborough, Woodford, Wolston, Far Northern Community Corrections, Brisbane Region Community Corrections, and Southern/South Coast Community Corrections.
High Intensity Sexual Offending Program (HISOP)	A 351-hour program for people assessed to be at high risk of sexual reoffending. A person must have sufficient time on their sentence to complete the program with their current sexual offence conviction. Available at: Wolston
Inclusion Sex Offending Program (ISOP)	A 108-hour program for people with low cognitive and/or low social/emotional abilities, that have been assessed as requiring support to participate in a sexual offending program. A person must have sufficient time on their sentence to complete the program with their current sexual offence conviction. Available at: Wolston
Strong Solid Spirit – First Nations	A 6-month intervention program specifically designed for First Nations men who have been convicted of a sexual or sexually motivated offence. The program is a mixture of group based and individual intervention sessions with a focus on successful community integration and risk management. A person must have sufficient time on their sentence to complete the program with their current sexual offence conviction. Available in: Lotus Glen
Sexual Offending Maintenance Program (SOMP)	A 16- to 24-hour program to build on and strengthen people's cognitive, emotional and behavioural skills linked with living an offence free lifestyle. A person must be sentenced and have sufficient time on their sentence to complete the program with their current sexual offence conviction, and must have completed a previous sexual offending intervention. Offenders can participate in SOMP multiple times, commencing 12 months after completing an intervention program. Available at: Wolston, Brisbane Region Community Corrections and Southern/South Coast Community Corrections.

Source: Queensland Corrective Services, Annual Report 2021-22, 17-19 with details about the programs taken from the Queensland Parole System Review, Appendix 12; with delivery location information sourced from Correspondence from Queensland Corrective Services to Queensland Sentencing Advisory Council, 3 November 2023.

Violence programs and interventions

Some people serving a custodial sentence for a sexual violence offence may also need interventions that address violence offending. There are very few programs addressing violent offending offered by QCS – see Table 11.2.

Table 11.2: QCS violence offending programs in custody

Program name	Details
Disrupting Family Violence Program (DFVP)	A 75-hour moderate intensity program targeted at perpetrators of domestic and family violence. A person must have sufficient time to complete the program and a history of domestic violence ('DV') offending/current Domestic Violence Order. This program is not suitable for high risk DV offenders. Available at: Woodford, Maryborough, Wolston and Capricornia
Living Without Violence (LWV)	LWV is a 135-hour program delivered to people who are assessed as being at moderate risk of violent re-offending and have a moderate level of rehabilitative need. LWV addresses various criminogenic needs including, but not limited to, factors corelated to violent behaviour such as substance misuse and relationships. Available at: Woodford, Townsville Correctional Complex (Mens)

Source: Queensland Corrective Services, Annual Report 2021-22, 16-17 with details about programs taken from the Queensland Parole System Review, Appendix 12; with delivery location information sourced from Correspondence from Queensland Corrective Services to Queensland Sentencing Advisory Council, 3 November 2023.

Stakeholder views

Submissions from victim survivors and support and advocacy stakeholders

QSAN consulted with Murrigunyah (a sexual assault support service for Aboriginal and Torres Strait Islander people)[359] regarding relevant impacts of intergenerational trauma and cultural considerations. It submitted that a range of issues impact Aboriginal and Torres Strait Islander people sentenced for these offences, including:

> Lack of access to cultural supports and resources, art or other creative/expressive outlets … no access to local Elders to assist with level of advocacy whilst serving sentences. The inability of the offender to access culturally appropriate interventions and culturally safe practices such as traditional ways of healing and little diversion to local Traditional Owner healing groups or Elders who provide Spiritual Healing. Racist treatment from Correctional staff and others who work in the system at times exacerbates stress.[360]

The 'lack of culturally appropriate and safe interventions, programs and access to Elder advocates who visit the correctional centres' and a 'lack of connection to culture, family and other significant people in community' was highlighted in the context of a need to consult with community and engage with Elders as part of the sentencing process.[361]

Murrigunyah submitted: 'The most important priority in sentencing is the safety of the victim/survivor and accountability of the offender'.[362]

Submissions from research institutions, professional bodies and community advocacy organisations

The Royal Australian and New Zealand College of Psychiatrists advocated for 'enhanced mental health services in custody' in recognition of 'the significant short fall in adequate care for people with substance use disorders and those living with intellectual and developmental disability'.[363] It noted that the current High Security Inpatient Service, 'The Park' at Wacol, 'can only take a proportion of high-risk classified persons', with other persons needing to be managed in 'a general adult mental health ward'. It advocated for an additional unit to be established to service 'highly complex and high-risk persons'.[364]

It told us another concern of the Queensland Branch was that, 'despite having a well-developed mental health system for people in custody, the growth of the custodial population has well outstripped the capacity of these services to meet the needs of people with complex mental health problems transitioning into the community', placing them 'at a higher risk of re-offending or having a relapse'.[365] They highlighted the need for 'appropriate and adequate resourcing' as well as 'integration of mental health services, effective funding of drug and alcohol services, care co-ordination and addressing social determinants of health like homelessness'.[366]

Submissions from legal stakeholders

In response to a separate question regarding sentencing guidance, LAQ submitted that there was a need for court to be 'provided with information on the availability of specific targeted sex offender courses that could be ordered' to better allow courts to tailor their orders to meet the purposes of sentencing.[367] It

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359 Murrigunyah Family & Cultural Healing Centre is a community based sexual assault support service. For more information, see <https://www.murrigunyah.org.au/about-us>.
360 Submission 24 (QSAN) 5 (directly referencing feedback provided by Murrigunyah).
361 Ibid.
362 Ibid.
363 Submission 33 (The Royal Australian & New Zealand College of Psychiatrists) 3.
364 Ibid.
365 Ibid.
366 Ibid.
367 Submission 23 (Legal Aid Queensland) 20.

commented that sentencing purposes were not 'mutually exclusive' and consideration should be given to changes to improve access to programs, including when prisoners are on remand:

> 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.[368]

It signalled 'an opportunity for future research into what type of pre-and post-release services can best address outcomes' to 'provide a strong evidence base to show what works and what is ineffective'.[369]

Subject matter expert interview participants

Several participants referred to the length and availability of some programs in custody, noting the impact on parole release decisions. For example, comments included:

> if people are required to do the sex offenders, high intensity sexual offenders program before getting out of jail, they're just not going to get out of jail. There's already enough people in there that need to do that course without adding all these other people in there and just clogging up the system because [Queensland Corrective Services] just don't have enough, they don't have the ability to offer the course any more often than they are given the intensity of it.[370]
>
> I know that to do the high intensity sexual offenders' program in prison, you've got to be in prison for... The program takes 18 months once you get on the program. And before you get on the program you've got to do the pre-program to get on to the program. And that's .. two months or something. Six weeks I think. And then you've got to get on that program. So anyone who's going to be sentenced to something less than two years of actual custody...realistically they're not going to be able to do any sexual offenders program. And if they don't do the program that makes it difficult for them to get parole.[371]

When the person was in custody prior to sentence, it was noted that they do not have the ability to have access to sexual offender programs, which was viewed as being 'a significant issue in the court's assessment and considerations' regarding whether to give the person a parole eligibility date.[372] The lack of access to programs during this pre-custody phase was viewed as being a 'major problem', as 'how do you assess whether somebody has any capacity for rehabilitation if they've been in pre-sentence custody for nine months and they haven't done any programs?'[373] It was noted that the need for an admission of guilt prior to program participation was often a barrier, together with uncertainty about how long the person would spend on remand prior to sentence.[374]

For those sentenced for sexual assault, it was noted that imprisonment would be viewed as not appropriate for many people as they would not get access to a sex offenders program, and may just need

368 Ibid.
369 Ibid 21.
370 SME Interview 13.
371 SME Interview 14.
372 SME Interview 15. Similar comments were made in other interviews, for example SME Interviews 8, 13, 17, 21.
373 SME Interview 8.
374 SME Interviews 8, 17.

to be deterred rather than requiring them to attend psychologists or other services, which might be an 'unnecessary use of resources'.[375]

Broader concerns were expressed about the lack of options and funding with respect to rehabilitative programs for those on probation or parole.[376]

More investment in rehabilitation options, both with prisons and in the community, was seen as one way that sentencing could be improved for these offences.[377]

The Queensland Productivity Commission Report

The Queensland Productivity Commission, in its 2019 *Inquiry into Imprisonment and Recidivism: Final Report*, recommended reforms to ensure prisoners on remand are able to access suitable programs and other activities likely to aid their rehabilitation.[378] While this recommendation was not specific to sexual offending, the additional period of 7 months (median) that prisoners sentenced for rape serve in custody beyond their parole eligibility date before they are released on parole (assuming they apply for and are granted parole) also suggests that additional time is required to be spent post the person's parole eligibility date to complete required programs in custody prior to release, which impacts parole release and therefore the time the person is under supervision in the community prior to the expiry of the sentence.

11.5.4 Issue 4: Flexibility of community-based orders and ability to tailor to individual circumstances support by services

Probation and community service orders were rare sentencing outcomes for rape (MSO).[379]

For sexual assault, the second most common type of penalty for non-aggravated sexual assault (MSO) sentenced in the Magistrates Courts was a probation order.[380]

The purpose of probation is primarily rehabilitative, although it can also serve a number of additional purposes, including community protection (by virtue of the supervisory component in the first instance, and longer-term protection by reducing the risks of the person reoffending).

By contrast, community service orders are viewed as more punitive,[381] requiring a person to undertake unpaid work in their own time.[382] In Western Australia and Victoria, this punitive element is recognised in legislation.[383] Western Australia also recognises rehabilitation as an alternative purpose.[384]

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375 SME Interview 3.
376 SME Interviews 4, 25.
377 SME Interview 24.
378 *Inquiry into Imprisonment and Recidivism* (n 3) rec 17.
379 In the 18 year data period there were 17 probation orders and 3 community service orders. In all except 1 case, the offender committed the offence as a child but was sentenced as an adult.
380 See Figure 11.2.
381 Geraldine Mackenzie and Nigel Stobbs, Principles of Sentencing (Federation Press, 2010) 163 citing Tasmania law Reform Institute, Sentencing, Final Report No 11 (Report, June 2008).
382 Ibid 166.
383 *Sentencing Act 1995* (WA) s 67(1); and *Sentencing Act* (Vic) (n 137) s 48C(2).
384 *Sentencing Act 1995* (WA) s 67(1).

Evidence of effectiveness

Probation appears to be effective for those who commit sexual offences.

While probation appears to be effective for those who commit sexual offences, the evidence is weak.[385] Factors associated with a higher risk of committing a new criminal offence have been found to include age and prior criminal history: 'older offenders were slightly less likely to be rearrested, while those with a prior arrest as an adult were more likely to reoffend'.[386] 'Sex offenders on probation who had a current substance abuse problem were five times more likely to commit a new offence.'[387] 'Being married, having social supports and being employed full-time were positively associated with remaining successful on probation for longer.' 'Failure appears to be more likely among those with a criminal history or substance abuse issues and may be more likely with low-level supervision and fewer treatment conditions.'[388]

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

Community service appears to reduce recidivism more effectively than a term of imprisonment and a bond, but is not as effectively as a fine – although, importantly, this finding is based on studies of those convicted of non-sexual offences.[389] 'There is no evidence on the mechanisms that underlie the effectiveness of this order, and none on the factors that contribute to successful order completion.'[390] There are also 'substantial concerns around the availability of this order among Aboriginal and Torres Strait Islander communities and [people] in rural and remote areas'.[391]

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

A 2017 study by the Victorian Sentencing Advisory Council ('VSAC') on CCOs found:

- People sentenced in the higher courts for whom the CCO was imposed for a sexual offence had a relatively high rate of contravention by further offending (44%), 'most commonly by failing to meet the reporting obligations of being on the Sex Offender Register'.[392]
- Those who were subject to CCOs for 2 years or longer sentenced in the higher courts were 1.7 times more likely to contravene them by further offending than those on shorter CCOs.[393] Factors associated with an increased risk of contravention by further offending were having a prior conviction (with those with prior convictions being 5 times more likely to contravene) and age (with those aged 18 to 24 years nearly twice as likely to contravene by further offending than older offenders).[394]

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385 *QUT Literature Review* (n 2) 112.
386 Ibid 141.
387 Ibid.
388 Ibid 146 [4.6.5].
389 Ibid xiv. The study referred to in support of this finding was focused on adult offenders convicted of aggravated drink-driving (a third or subsequent conviction), drink driving (first or second offence), shoplifting (estimated value under $500) and common assault: see Michelle Morris and Charles Sullivan, The Impact of Sentencing on Adult Offenders' Future Employment and Re-offending: Community Work Versus Fines (New Zealand Treasury Working Paper 15/04, June 2015).
390 Ibid xiv.
391 Ibid.
392 Ibid 149 citing Sentencing Advisory Council (Victoria), *Contravention of Community Correction Orders* (2017) 44–5.
393 Ibid.
394 Ibid.

- There were no differences based on gender or whether the CCO was the principal sentence or combined with imprisonment.[395]
- The findings for CCOs imposed by the Magistrates Court were largely consistent with those for cases sentenced in the higher courts, although in this case offenders whose CCO was combined with imprisonment were more than twice as likely to contravene by further offending than those who CCO was not combined with imprisonment.[396]

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

The use of CCOs in New South Wales was explored as part of a New South Wales Bureau of Crime Statistics and Research ('BOCSAR') study, which examined the impact of that jurisdiction's 2018 sentencing reforms.[397] The study found while the 2018 reforms had significantly increased the proportion of individuals sentenced to supervision in the community, there was no evidence this was associated with a reduction in reoffending or time to reoffend. However, given '[t]he abundance of evidence to support the effectiveness of community supervision in reducing recidivism', its authors concluded 'further research into the extent and quality of supervision following the sentencing reforms may be worth pursuing' – with acknowledgment that the New South Wales Government had announced additional funding in support of supervising offenders in the community and ensuring greater access to rehabilitation programs.[398]

Stakeholder views

Limited feedback was provided in submissions specifically on the use of probation or community services orders – which most relevantly apply in the case of sentencing for sexual assault but also, in exceptional cases, to rape.

Submissions from research institutions, professional bodies and community advocacy organisations

Sisters Inside referred to the work of Professor Leigh Goodmark in concluding that 'there is no evidence that the criminal punishment system is creating safety, preventing violence or holding people accountable'.[399] Instead, 'What the criminal justice system does efficiently and effectively is to deploy violence to exert control', which is to the detriment of 'those in marginalised communities, particularly First Nations people'.[400]

Referencing a report published by the Centre for Innovative Justice, Sisters Inside raised concerns:

> Using punishment and social isolation as the primary responses to sexual violence means that most people who cause harm will deny their behaviour, which makes the process of seeking redress more traumatic for victim-survivors.[401]

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395 Ibid.
396 Ibid 148.
397 Neil Donnelly, Min-Taec Kim, Sara Rahman and Suzanne Poynton, Have the 2018 NSW Sentencing Reforms Reduced the Risk of Re-offending? (Crime Research Bulletin No 246, NSW Bureau of Crime Statistics and Research, March 2022), Other reforms included the abolition of suspended sentences and home detention orders and introduction of a new type of Intensive Correction Order.
398 Ibid 20. BOCSAR's Executive Director also identified another reason as being the reforms only had a small impact on the actual rate at which offenders were supervised in the community given the practice of NSW Community Corrections of prioritising supervision for higher-risk offenders: BOCSAR, 'The Impact of the 2018 Sentencing Reforms on Reoffending' (Media Release, 22 March 2022).
399 Submission 32 (Sisters Inside Inc) 2.
400 Ibid..
401 Ibid 3.

It saw this as a reason to 'reimagine how responses to sexual violence could look', with reference to the concept of transformative justice.[402]

TASC (Social Advocacy) supported a reconsideration of current responses and cautioned that in all likelihood 'the criminal justice system cannot punish or deter its way out of the challenge presented by rape and other forms of sexual assault', pointing to evidence that deterrence through punishment may not be effective, and 'imprisonment itself and punishment more generally is fundamentally criminogenic'.[403]

It made several recommendations for reform, including:

- Assessing lengths of incarceration based on the understanding that less punishment and not more may aid in efforts towards rehabilitation.
- Increased use of community orders where programs are invested in ideas of therapeutic justice and offender related prehabilitation …
- Use of rehabilitation programs that stress accountability while also acknowledging the ways in which criminal behaviour develops in people.[404]

Submissions from legal stakeholders

LAQ provided the following two case examples to illustrate why the retention of sentencing discretion, even for rape, was important in the context of the operation of section 9(4) of the PSA (the requirement that the person be ordered to serve a term of actual imprisonment for offences of a sexual nature against children under 16 years):

> 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 … 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.
>
> 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.[405]

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402 Ibid. This concept is discussed in more detail in Chapter 16.
403 Submission 22, Chapter 2 (TASC Legal and Social Justice) 14 (citations omitted).
404 Ibid 16.
405 Submission 23 (Legal Aid Queensland) 13–14 referring to *R v Rainbow* [2018] QDCSR, 13 December 2018 and *R v OYJ* [2020] QDCSR 379.

Several stakeholders supported alternatives to imprisonment but without expressly referring to probation or similar forms of orders. For example, the Queensland Mental Health Commission supported taking a trauma-informed approach to sentencing, both in support of better outcomes for people who have experienced sexual violence and to support effective rehabilitation of perpetrators.[406] Adopting this approach, it told us that sentencing 'should be flexible, taking into account the victim survivor's needs and wishes' while also being 'proportionate to the crime' and stated that sentencing options 'might include therapeutic interventions, education on sexual violence, and community service, in addition to or instead of incarceration, tailored to encourage rehabilitation and reduce recidivism'.[407]

As discussed above, victim survivor stakeholders considered orders that involve a requirement for the person to be under supervision and require them to engage with treatment and interventions to be preferable to the imposition of a suspended prison sentence, which does not.

Subject matter expert interviews

Some subject matter expert interviews commented on probation for sexual assault only being considered if it was at the lower end of offence seriousness,[408] such as a momentary touch or unwanted kiss,[409] particularly if coupled with the person who committed the offence having a cognitive or intellectual impairment.[410]

More commonly, this was mentioned in the context of an order involving a combined prison-probation order, which was viewed as useful in some cases,[411] or a suspended sentence imposed for one offence and probation for the other.

The very different consequences of probation and community service orders compared with parole orders was also noted, given that a court rather than the Parole Board had to deal with the breach, with the person having the opportunity, via their legal representative, to explain the circumstances and the opportunity for the order to be extended.[412]

One participant suggested an order 'in between' an ICO and probation be considered, which 'requires some portion of it to be treatment or rehabilitation or programs about sexual violence'.[413]

There was also support by some for the previous proposals of the Council to introduce a community correction order, including increasing discretion and the ability to tailor orders and conditions.[414] What services, courses and counselling were available might be important in informing this decision[415]

For those sentenced for sexual assault, it was noted that imprisonment would be viewed as not appropriate for many people, as they would not gain access to a sex offenders program, and may just need to be deterred rather than requiring them to attend psychologists or other services, which might be an 'unnecessary use of resources'.[416]

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406 Submission 29 (Queensland Mental Health Commission) 1.
407 Ibid 2.
408 SME Interviews 5, 24.
409 SME Interview 24.
410 SME Interview 5.
411 For example, SME Interview 11.
412 SME Interview 22.
413 SME Interview 6.
414 SME Interviews 12 and 23.
415 SME Interview 12.
416 SME Interview 3.

The availability of programs was also a problem noted in regional and remote areas regarding the utility of probation, which might be 'in the sentencer's mind' regarding the benefit to be gained in ordering probation if no courses are likely to be offered.[417] Inconsistency was noted between regions about what programs, courses and resourcing are available,[418] with broader concerns expressed about the lack of options and funding with respect to rehabilitative programs for those on probation or parole.[419]

Some participants were unaware of whether sex offence programs were available in the community, having not heard Queensland Corrective Services refer to these,[420] or, while they were aware of them, had not seen one completed as part of a probation order.[421]

A potential disconnect between what legal stakeholders consider is involved and the reality of service provision was also mentioned by one participant, who told us that while, if the person is low risk, the level of contact might be quite low or occur via phone, probation orders are often imposed as a punishment and to meet other purposes of sentence, not just for rehabilitation.[422]

More investment in rehabilitation options, both within prisons and in the community, was seen as one way that sentencing could be improved for these offences.[423]

Consultation events

Some participants in our consultation events thought having more sentencing options available (versus imprisonment) may assist victims who want the offender to learn from their behaviour, but not necessarily go to prison, to come forward.[424]

Some participants thought current sentencing options were not working and alternatives were needed. Concerns were raised that successful pilots are often discontinued due to lack of funding.[425]

There was support by some for alternative supervised options (such as intensive correction orders or another form of tailored order, such as the CCO model previously recommended by the Council), as well as the greater use of compensation orders for victim survivors.[426]

Probation was highlighted as potentially unsuitable for some sexual offenders as it does not allow corrections officers to mitigate immediate risks.[427]

It was noted that the current order enables a court, in addition to core conditions, such as reporting to and receiving visits from a community corrections officer and not leaving the state without permission,[428] to order additional conditions – such as that the person submit to medical, psychiatric or psychological treatment, abstain from the use of dangerous drugs or other illicit substances while subject to the order

417 SME Interviews 5, 12.
418 SME Interview 5.
419 SME Interviews 4, 25.
420 SME Interview 1.
421 SME Interview 13.
422 SME Interview 17.
423 See, for example SME Interviews 17 and 24.
424 Brisbane Consultation Event, 11 March 2024.
425 Ibid.
426 Ibid.
427 Ibid; and Cairns Consultation Event, 21 March 2024.
428 PSA (n 17) s 93.

(without lawful excuse) and undergo drug testing as required by an authorised corrective services officer.[429]

However, in contrast to parole orders, there is no ability under a probation order for conditions to be quickly varied if a corrective services officer reasonably believes the person has failed to comply with the conditions of the order or poses an unacceptable risk of committing an offence (e.g. by imposing a curfew condition),[430] or for the person to be placed in custody.[431] This is because any decisions to vary or cancel a probation order must be made by a court rather than by the Parole Board on the application of a corrective services officer.[432]

There was a view that longer community-based orders would be beneficial, rather than short terms of imprisonment,[433] with the view that 'rehabilitation won't be achieved if the order is not long enough' to provide for program completion.[434] Programs carried out in the community, it was suggested, are more 'reality based' and give offenders the opportunity to practise the concepts they are learning.[435]

There was support for additional investment in programs and interventions, and for this funding to be 'quarantined' from the funding required to meet QCS's operational requirements.[436] Ensuring greater access in regional, rural and remote areas of the state was also viewed as important, as was the development of culturally appropriate programs and interventions for Aboriginal and Torres Strait Islander persons.[437] Generally, it was considered that programs should be developed by community-controlled organisations and that more needed to be done to ensure all aspects of the system operate in a way that is culturally appropriate.[438]

Participants acknowledged that there were significant barriers to achieving more service coverage and increasing access to programs and services, including skills shortages and service delivery shortages, as well as accommodation issues in regional, rural and remote areas of the state.[439]

Previous Council reports and recommendations

As discussed in section 11.2.1, in its *Community-based Sentencing Options and Parole Orders Report*, the Council's recommendations included the introduction of a new intermediate sanction – a CCO – that can be tailored through the conditions imposed to meet the various purposes of sentencing while also responding to the individual factors contributing to offending.[440] We recommended that probation (in the

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429 Ibid s 94. Additional conditions are those that a court considers necessary (i) to cause the offender to behave in a way that is acceptable to the community; or (ii) to stop the offender from again committing the offence for which the order was made; or (iii) to stop the offender from committing other offences.

430 See *Corrective Services Act 200*6 (Qld) s 201. This order made by the chief executive of QCS lasts for up to 28 days unless cancelled earlier by the Parole Board: ibid s 202. The Parole Board can also amend, suspend or cancel a parole order for these reasons or if the person is preparing to leave Queensland without permission or poses a serious risk of harm to someone else: s 205,

431 Through the cancellation or suspension of parole: see CSA (n 18) ch 5, pt 1, div 5, subdiv 2 & 2A..

432 PSA (n 17) ss 120, 121, 122. The offender and the Director of Public Prosecutions can also apply to have the order varied or revoked: ibid s 122(1).

433 Brisbane Consultation Event, 11 March 2024.

434 Cairns Consultation Event, 21 March 2024.

435 Brisbane Consultation Event, 11 March 2024.

436 Ibid.

437 Cairns Consultation Event, 21 March 2024.

438 Ibid.

439 Brisbane Consultation Event, 11 March 2024.

440 *Community-based Sentencing Orders, Imprisonment and Parole Options Report* (n 4) rec 9.

form of 'supervision') and community service should be subsumed within the CCO as conditions of a CCO, rather than existing as separate forms of sentencing orders.[441]

We identified that QCS might identify relevant 'packages' of conditions targeting different risks and needs, and recommended that the new order not be introduced until such work had been completed, appropriate service delivery models for services linked to these conditions developed, and required resourcing and staffing levels put in place.[442]

Under our model, there is no reason why special packages of conditions could not be developed to respond to sexual offending.

We also identified scope within this framework to recognise the need to develop, over time, culture-specific programs that could either be a separate program condition or fall within a broader rehabilitation condition.[443]

We acknowledged resourcing issues and service delivery challenges, which were also at that time subject to investigation by the Queensland Productivity Commission.

11.5.5 Issue 5: Other issues with penalty types – fines, no conviction recorded and non-contact orders

The types of sentencing orders commonly imposed for sexual assault may not appropriately or adequately reflect the nature of the person's offending and its seriousness. This section will discuss the use of fines as a penalty option as well as two orders that can be made in addition to sentence: recording no conviction and non-contact orders.

A fine is a monetary order payable to the state and its primary purpose is punishment.[444]

The maximum fine for a sentence of sexual assault or rape in the Magistrates Courts is $26,614.50; in the District Court it is $673,247.50 (with no limit in the Supreme Court).[445] A fine can be ordered in addition to, or instead of, any other sentence with or without a conviction being recorded.[446]

Fines have been suggested to be the 'ideal penal measure'[447] because:

- they can easily be adjusted to reflect different levels of offence seriousness and culpability,[448] and to meet relevant sentencing principles, such as proportionality, consistency, parity, totality and deterrence;[449] and
- they are non-intrusive and do not involve supervision or loss of a person's time[450] and costs associated with supervision.[451]

441 Ibid rec 11.
442 Ibid rec 13.
443 Ibid 188–9.
444 *Sgroi v The Queen* (1989) 40 A Crim R 197, 200 ('*Sgroi*').
445 PSA (n 17) ss 45, 46. Current value of a penalty unit is $161.30 as at 31 October 2024: *Penalties and Sentences Regulation 2015* (Qld) s 3.
446 PSA (n 17) ss 44–5.
447 Andrew Ashworth, *Sentencing and Criminal Justice* (Cambridge University Press, 5th ed, 2010) 327.
448 Ibid 327–8.
449 Mackenzie and Stobbs (n 381) 152.
450 Ashworth, *Sentencing and Criminal Justice* (n 447) 328.
451 Mackenzie and Stobbs (n 381) 152.

When imposed, a fine must be proportionate and take into account the person's ability to pay.[452]

Sentencing outcomes for sexual assault and rape

During the 18-year data period, no fines were imposed for rape (MSO).

For sexual assault cases sentenced in the Magistrates Courts monetary penalties are common. Over time, the use of monetary orders has reduced. This has occurred alongside the increasing use of imprisonment and wholly suspended prison sentences. However, this trend is not unique to sexual assault as the same reduction in the use of monetary penalties was observed across all offences sentenced in the Magistrates Courts (excluding traffic and vehicle offences).

The following are illustrative of the circumstances in which fines were imposed for sexual assault in the Magistrates Courts (and one District Court example), based on our review of a sample of cases:

- A 72-year-old man with no previous convictions pleaded guilty to grabbing a woman's buttock as she was closing up a shop she worked at ($400 fine, no conviction recorded).[453]
- A retiree (age not specified) with no prior criminal history pleaded guilty to touching a young woman's buttock as she was walking past a travelator at a shopping centre. The assault was caught on CCTV ($750 fine, no conviction recorded).[454]
- A 33-year-old man, a neighbour of the victim with whom he previously had had a casual sexual relationship, was at the victim's house, followed her into the kitchen and as she walked by reached out and squeezed her right breast. He pleaded guilty and had some history for drug offences and a previous non-sexual assault. He was a self-employed builder ($750 fine, no conviction recorded).[455]
- A 74-year-old man who was a member of a golf club grabbed the victim, who was working at the golf shop, on either side of her head and kissed her on the lips (caught on CCTV). The victim was acquainted with him through their involvement with a local golf club. He pleaded guilty and had no prior criminal history ($2,500 fine, no conviction recorded and no contact order issued for 12 months).[456]
- A 45-year-old man pleaded guilty to indecently assaulting a young woman who was at a hotel for a friend's 21st birthday party. He was intoxicated and approached her from behind as she was at the bar and used his hand to grab onto her buttock and then offered to buy her a drink (caught on CCTV). He had a minimal criminal history ($1,200 fine, no conviction recorded).[457]
- A 55-year-old man pleaded guilty to inappropriately massaging his partner's 16-year-old sister removing her shorts and her underwear and massaging her bottom. He had no prior criminal history ($5,000 fine with no conviction recorded).[458]

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452 PSA (n 17) s 48; *Sgroi* (n 444) 200.
453 Sexual assault, major city, lower courts, non-custodial,#2.
454 Sexual assault, major city, lower courts, non-custodial, #11.
455 Sexual assault, major city, lower courts, non-custodial, #8.
456 Sexual assault, major city, lower courts, non-custodial, #12.
457 Sexual assault, major city, lower courts, non-custodial, #10.
458 Sexual assault, regional/remote, higher courts, non-custodial, #2.

Evidence of effectiveness

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

The literature review by Griffith University commissioned for this review did not find any relevant research literature related to monetary penalties for sexual assault and rape offences.[459] Generally, there is insufficient evidence to assess the effectiveness of monetary penalties in preventing crime or deterring reoffending.[460]

Stakeholder views

There was limited feedback on the use of fines in submissions.

One individual submitter referred to fines not deterring such offending and not being an appropriate penalty.[461]

TASC (Social Justice) suggested that wealthy offenders could be required to pay fines 'where the funds go to supporting prehabilitative [preventative] programs'.[462]

Subject matter expert interviews

One subject matter expert interview referred to the fines in the context of suspended prison sentences being viewed as being inadequate by many victim survivors:

> Sometimes you hear people say, 'They weren't even fined.' Well that's because [legal practitioners] actually think 12 months' [imprisonment] wholly suspended is a more serious sentence than a $2,000 fine. But I know that you don't understand that, because that's what lawyers understand.[463]

Another participant reflected on their experience in the late 2000s that 'it was a common understanding that fines were very viable for minor sexual offences' but that view had changed.[464] This was, however, contrary to the views of another interview participant, who was surprised that the use of custodial sentences for sexual assault was so high as they mostly had seen fines and probation orders imposed.[465]

Consultation views

At our consultation events, some concerns were expressed that fines may not be an appropriate form of sentencing orders, given the nature of the rights infringed. There was a view by some participants that compensation orders were preferable to the use of fines.[466]

Orders in addition to sentence

Recording of a conviction

As almost all rape cases result in a custodial penalty, a conviction must be recorded.

A small number of cases over the 18-year data period involved a non-custodial penalty being imposed and no conviction being recorded (n=20). In all but one of these cases, the person had committed the

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459 *Griffith University Literature Review* (n 2) 53.
460 Ibid.
461 Submission 27 (Name withheld) 1.
462 Submission 22, Chapter 2 (TASC Legal and Social Justice) 16.
463 SME Interview 14.
464 SME Interview 23.See also SME Interview 14.
465 SME Interview 20.
466 Brisbane Consultation Event, 11 March 2024.

offence as a child (meaning the court was required to sentence the person having regard to the sentence that might have been imposed had the person been sentenced to as a child).[467]

Of the sexual assault (MSO) cases sentenced over the data period, 35.4 per cent received a non-custodial order (n=674). Of these, over two-thirds did not have a conviction recorded (n=470, 69.7%) and almost all were for a non-aggravated sexual assault (99.4%, n=670).

Close to three-quarters of cases did not have a conviction recorded were sentenced in the Magistrates Courts (73.9%, n=362).

For cases sentenced in the higher courts, 108 cases did not have a conviction recorded. All but 3 of these cases were for non-aggravated sexual assault.

The most common order types that resulted in no conviction being ordered to be recorded for sexual assault were:

- monetary orders (38.7%);
- probation orders (35.3%);
- community service orders (14.9%); and
- good behaviour orders (10.4%).[468]

Courts are required by section 12 of the PSA in deciding whether to record a conviction to take into account the circumstances of the case, including the nature of the offence.

The Court of Appeal has acknowledged that, 'The purpose of recording an offender's conviction is to make the fact of the conviction known to those who have a legitimate interest in knowing about it.'[469] The nature of the exercise of the discretion not to order a conviction be recorded and legitimate considerations in reaching this determination have been explained in the following terms:

> The decision not to record a conviction … denies the community the benefit of the information that would otherwise be available when it might be relevant to an assessment of the offender's character. The renunciation of these benefits conferred by the recording of a conviction is not for nothing. The benefit is foregone because a sentencing judge has decided that, in the circumstances of the case, it is to the greater benefit of the community to afford the offender the privilege of non-disclosure. Incidentally the offender also enjoys the personal benefit of this privilege but that is not the point of making the order.
>
> A sentencing judge must consider the potential benefits and detriments to the community of adopting either course. That is what the opposing factors stated in s 12(2) of the Penalties and Sentences Act require … [A]s is implied by the factors that are identified in s 12(2)(b) and (c), the offender's subjective circumstances so far as they relate to the offender's future prospects are also significant matters. They raise for consideration whether the promise of future rehabilitation calls for and justifies affording the offender the advantages that flow from not recording a conviction. To put it another way, the question is whether the community will be better served by not placing the obstacles created by a recorded conviction in the path of the offender towards rehabilitation. The issue is not one of tenderness to the offender.[470]

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467 *Youth Justice Act 1992* (Qld) s 144(2).
468 Three people were also convicted with no further punishment ordered.
469 *R v Graham* (2023) 15 QR 243 [4] (Kelly J, Mullins P and Bond JA agreeing) ('*Graham*').
470 *R v ZB* (2021) 287 A Crim R 519, 522 [9]–[10] (Sofronoff P) (footnotes omitted) referred to with approval in *Graham* (n 469) [5].

Because of the consequences that arise from such a decision, such as loss of employment or relevant licences to undertake work, or impacts on travel, this decision may have further punitive consequences on the person sentenced beyond those inherent in the type of sentencing order imposed.

Non-contact orders

The use of non-contact orders across the data period was relatively uncommon.

Some victim survivors considered that the need for non-contact orders was not sufficiently considered, and some thought their duration should be extended.

The WSJ Taskforce's 2022 report recommended that the duration of a non-contact order be extended to 5 years, consistent with its recommended increase regarding the length of a restraining order for an offence of unlawful stalking as well as the minimum presumptive duration of a domestic violence order (protection order).[471] This recommendation was accepted by the former Queensland Government.[472]

Legislative amendments, to commence on a day to be fixed by proclamation, will extend the maximum duration of these orders to 5 years and the penalty for contravention of a non-contact order from 40 penalty units or one year's imprisonment to 120 penalty units or 3 years' imprisonment.[473]

Regardless of these changes, the legislative threshold for the making of a non-contact order may continue to limit the making of such orders, given that a court must be satisfied at the time of sentence that unless the order is made, there is an unacceptable risk that the offender would:

- injure the victim or associate – including, for example, by injuring the victim or associate psychologically; or
- harass the victim or associate; or
- damage the property of the victim or associate; or
- act in a way that could reasonably be expected to cause a detriment to the victim or associate.

In the absence of a pre-existing work or personal relationship, or the person engaging in concerning behaviour between the commission of the offence and sentence, it may not be possible for the prosecution to establish that such a risk exists.

We acknowledge that victim survivors may be fearful of the person who has harmed them making contact with them, even if the assessed risk of this occurring is low, thus impacting their sense of safety and recovery.

Other options exist for a victim survivor who is not able to seek a protection order under the *Domestic and Family Violence Protection Act 2012* (Qld). For example, they may be able to seek an order under the *Peace and Good Behaviour Act 1982* (Qld) if the relevant criteria are met.[474] Non-contact conditions may be ordered if the person is sentenced to imprisonment and released on parole.

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471 *Hear Her Voice, Report Two* (n 3) 269–70 and rec 60.

472 See *Response to Hear Her Voice, Report Two* (n 16) 23.

473 See *Criminal Justice Legislation (Sexual Violence and Other Matters) Amendment Act 2024* (Qld) ss 47–48 amending ss 43C and 43F of the PSA (n 17).

474 See *Peace and Good Behaviour Act 1982* (Qld) ss 5, 7. The test for an order under this Act is that a person has threatened to (a) assault or to do any bodily injury to the complainant or to any person under the care or charge of the complainant; or (b) to procure any other person to assault or to do any bodily injury to the complainant or to any person under the care or charge of the complainant; or (c) to destroy or damage any property of the complainant; or (d) to procure any other person to destroy or damage any property of the complainant in circumstances where the complainant is in fear of the person complained.

11.6 The Council's view

Key Finding

10. **Sentencing options available to courts in sentencing for rape and sexual assault need to be expanded**

The current range of sentencing options available to the courts is inadequate and needs to be expanded to increase the options that judges and magistrates have to punish offenders in a way that is 'just in all the circumstances' and to meet other intended purposes of sentencing, including denunciation, community protection and rehabilitation.

Current restrictions on the availability and use of orders, such as the exclusion of sexual offences from eligibility for court-ordered parole and the inability to impose a suspended imprisonment order in combination with a community-based order when sentencing for a single offence, puts people sentenced for a sexual offence at risk of not being subject to appropriate supervision and support as part of their sentence. This lack of flexibility impacts negatively on the ability of current sentences imposed to meet the objective of community protection.

See **Recommendation 8**.

As discussed in this chapter, we have identified several problems with sentencing outcomes for sexual assault and rape based on sentencing options available:

- For people in custody, there is limited opportunity for program engagement and completion.
- The use of suspended imprisonment can be problematic for sexual offences. The exclusion of sexual offences from court-ordered parole and the inability to order a suspended sentence with a community-based order for a single offence may contribute to this, resulting in orders being made that do not enable access to treatment programs and interventions and which do not involve supervision.
- In some instances, current community-based orders are not providing courts with suitable alternatives that respond to a person's individual circumstances. The lack of flexibility in the conditions of these orders may also be contributing to the use of fines in sentencing for sexual assault.

The above issues with penalty and parole options indicate to us that the PSA currently does not entirely meet its purpose to provide 'for a sufficient range' of sentences for 'appropriate punishment and rehabilitation'.[475] This limits to the ability of current sentencing practices to adequately reflect the nature and seriousness of sexual assault and rape offences.

We recommend reforms be made to the current range of sentencing options available to courts to improve and expand upon the tools judges and magistrates have at their disposal to punish offenders 'in a way that is just in all the circumstances' and to meet other intended purposes of sentencing, including denunciation, community protection and rehabilitation (**Key Finding 10**).

Many of our previous recommendations would address our concern of the current lack of flexibility in sentencing and parole options and have significant benefits when sentencing sexual assault and rape, in

[475] PSA (n 17) s 9(3)(b).

allowing a court to impose a sentence that appropriately responds to this type of offending and can better meet the purposes of sentencing (**Recommendations 8, 9 and 10**).

We remain of the view that expanding the range of penalty and parole options will lead to better tailored and more appropriate sentencing outcomes consistent with principles of individualised justice.

We consider the practical implications of the adoption of our recommended reforms in sentencing for rape and sexual assault below.

Recommendations

8. **Reforms to community-based sentencing orders and parole options**

The Queensland Government should respond to and implement recommendations made by the Council in its 2019 *Community-based Sentencing Orders, Imprisonment and Parole Options: Final Report*, with appropriate funding provided to support their effective implementation, in particular:

a) Recommendation 9: The introduction of a new intermediate sanction – a 'community correction order' ('CCO') – which can be tailored through the conditions imposed to meet the various purposes of sentencing, while also responding to the individual factors contributing to offending.

b) Recommendations 17 and 37: Allowing courts to combine a suspended prison sentence with a CCO when sentencing a person for a single offence, and until such time as the CCO is fully operational, allowing a court to combine a suspended prison sentence with a probation order or community service order when sentencing a person for a single offence.

c) Recommendations 47 and 48: Establishing a dual discretion to set either a parole eligibility date or a parole release date when sentencing a person to 3 years' imprisonment 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).

d) Recommendation 51: Subject to implementation of the Council's proposed reforms to community-based sentencing orders and parole, and the outcomes of a recommended review of the effectiveness of parole, the removal of parole for sentences of imprisonment of 6 months or less, with some legislated exceptions.

9. **Access to programs for prisoners on remand**

The Queensland Government respond to and implement recommendation 17 of the Queensland Productivity Commission's 2019 *Inquiry into Imprisonment and Recidivism: Final Report* to ensure that prisoners on remand, including those charged with a sexual violence offence, are able to access suitable programs and other activities likely to aid their rehabilitation.

Such programs should be made available, where practicable, in multiple correctional centre locations and provide for continuation of programs and interventions post-sentence either in custody or in the community.

10. **Reforms to Serious Violent Offences Scheme**

The Queensland Government respond to and implement recommendations made by the Council in its final report on the operation and efficacy of the serious violent offences scheme — *The '80 Per Cent Rule': The Serious Violent Offences Scheme in the Penalties and Sentences Act 1992 (Qld): Final Report* including:

a) The current serious violent offence scheme be replaced with a fully presumptive scheme to be retitled as the 'serious offences scheme' that requires a court to make a declaration when a person Is sentenced to a term of imprisonment of more than 5 years for a listed offence unless the court determines it is in the interests of justice not to do so.

b) Once a declaration is made, to require parole eligibility to be set within a specified range between 50–80 per cent of the head sentence.

11.6.1 Applying the Council's fundamental principles

As for other recommendations made in this report, the fundamental principles guiding the review[476] have provided an important basis for considering reforms required to the existing range of penalty options and to address **Key Finding 10**:

- **Principle 1: Reforms to sentencing laws should be evidence-based with a view to promoting public confidence**: The Council has drawn on the findings of our comprehensive review of current sentencing practices, research evidence summarised in literature reviews commissioned for this review and previous and other relevant research literature, as well as a cross-jurisdictional analysis of different types or penalty options available in other jurisdictions to identify what changes are required to the current mix of penalty options in Queensland as these apply to rape and sexual assault. Our review of this evidence suggests there are current gaps and opportunities for orders to be better tailored to meet the purposes of sentence.
- **Principle 2: Sentencing decisions should accord with the purposes of sentencing as outlined in section 9(1) of the PSA**: Based on the evidence outlined in Principle 1, we consider that there is an opportunity to better align sentencing practices with community and victim survivor expectations and to promote perpetrator accountability and rehabilitation in support of achieving both short- and longer-term community protection. This is best achieved by providing for a mix of different penalty options with conditions that can be better tailored to the individual circumstances of the offence and the person being sentenced.
- **Principle 3: Sentencing outcomes for sexual assault and rape offences should reflect the seriousness of these offences, including their impact on victims, while not resulting in unjust outcomes**: The types of sentences currently imposed for rape and sexual assault reflect the existing sentencing framework in Queensland and sentencing options available under it. We consider that significant benefits would be gained in providing courts with more options on sentence to ensure that the nature of the penalties imposed and conditions under them can be better tailored to meet the relevant purposes of sentencing, including recognition of the harm caused to victim survivors of these offences, which we recommend also be elevated as an important sentence purpose (see **Recommendation 2**).
- **Principle 4: People serving sentences in the community for a sexual offence should have appropriate supervision**: As highlighted above, there is significant evidence that supervision in the community for people convicted of sexual offences can be beneficial in reducing reoffending risks. While evidence suggests the risks of reoffending for this cohort based on reported rates of reoffending is low, as outlined in **Chapter 2**, we also know that these types of offences are highly under-reported and, due to the private context in which they often occur, are unlikely otherwise

476 For a full list of the fundamental principles, see Chapter 3.

to be detected. These offences also have potential to cause substantial psychological and emotional harm, even if the risk of them occurring is low. For this reason, we consider orders involving some element of supervision should usually be preferred over those that do not. This includes making court-ordered parole available as an option to courts in sentencing for sexual offences as it is for other forms of non-sexual violent offending.

- **Principle 5: Sentencing inconsistencies, anomalies and complexities should be minimised**: There are specific anomalies and complexities that relate to sentencing for rape and sexual assault, which also apply to other sexual offences. The reforms we recommend be implemented we have made in previous reports will remedy some of these. They include the inability to order a suspended prison sentence alongside a community-based order when sentencing for one offence, (although this is possible if the person is being sentenced for more than one offence) and the inability of a court to set a parole release date when sentencing a person for a sexual offence, in contrast to other non-sexual violent offences.
- **Principle 6: Reforms should take into account likely impacts on the disproportionate representation of Aboriginal and Torres Strait Islander peoples in the criminal justice system**: The potential impacts on Aboriginal and Torres Strait Islander persons, should our recommended reforms be adopted, are discussed below. Our analysis shows that Aboriginal and Torres Strait Islander individuals are less likely to receive a suspended prison sentence for both rape and sexual assault than non-Indigenous people and more likely to be sentenced to immediate imprisonment.[477] We consider better and more tailored community orders, which can be ordered alone or in combination with a suspended sentence of imprisonment, will offer significant benefits in recognising the seriousness of this offending while providing opportunities to address its underlying causes, including for Aboriginal and Torres Strait Islander persons. These types of orders might also allow for expanded options for community supervision and support that are culturally appropriate and responsive rather than a 'one size fits all' approach. Expanding the availability of court-ordered parole might also result in longer periods being spent in the community under supervision in support of long-term community safety.
- **Principle 7: the circumstances of each person being sentenced, victim survivors and offences are varied. Judicial discretion in the sentencing process is fundamentally important**: The reforms we recommend would retain judicial discretion rather than mandating a particular outcome or removing particular types of sentencing orders from being available. We maintain our view that mandatory penalties are generally undesirable for reasons including moving discretion to other parts of the system that are less visible and transparent (such as regarding charging and prosecutorial practices) and potentially resulting in orders that may not be appropriate and proportionate in the circumstances of the case.
- **Principle 9: Sentencing decisions for sexual assault and rape should be informed by the best available evidence of a person's risk of reoffending**: In **Chapter 12**, we discuss the type of information that may assist courts in determining the most appropriate type of sentence to impose and, where applicable, its conditions. This includes not only information about whether a person is considered at low risk of reoffending, but also the types of interventions that may address factors associated with the person's offending. It may also go to other matters that may

[477] See further Appendix 4.

be important to understand, such as the person's personal circumstances and relevant services and supports in the community, including through the preparation of cultural submissions and reports.

- **Principle 10: Any reforms should aim to be compatible with the rights protected and promoted under the *Human Rights Act 2019* (Qld) ('HRA') or be reasonably and demonstrably justifiable as to limitations**: A number of rights may be relevant in sentencing, including the right to equality, the right to liberty and security, protection from cruel, inhuman or degrading treatment, the right to humane treatment when deprived of liberty, the protection of families and children, and cultural rights for Aboriginal and Torres Strait Islander persons.[478] The changes we recommend will expand and promote the achievement of these objectives, while also protecting the rights of victim survivors given the significant infringement of human rights acts of rape and indecent assault entail (see **Chapter 6**).
- **Principle 11: The Council will, as far as possible, ensure consistency with previous positions and recommendations**: It has been important to us to build on the Council's previous work and recommendations as well as of other reviews and inquiries, including the WSJ Taskforce. This recognises the importance of any reforms being complementary to work already underway to reform various aspects of the criminal justice system in Queensland and also acknowledges that a number of these reviews have explored specific issues in more detail than has been possible given the scope of this review.

11.6.2 Benefits of adopting the Council's previous recommendations

Benefits of for rape and aggravated sexual assault

Considered together, the implementation of recommendations we have made in previous reports will have significant benefits in meeting current sentencing purposes when sentencing for rape and aggravated sexual assault, which commonly result in immediate imprisonment or a partially suspended prison sentence.

In support of ensuring just punishment, denunciation, deterrence and community protection, the Council's recommended reforms to the SVO scheme would:

- provide potential for higher head sentences to be achieved for sentences of 10 years or more currently subject to a mandatory declaration, as a court would have the ability to set parole eligibility within a range of 50 to 80 per cent;
- mean more people sentenced for rape and aggravated sexual assault to a term of imprisonment of greater than 5 years would be subject to a declaration that the person is convicted of a serious offence and have their parole eligibility date deferred; and
- assist in reducing the anxiety and stress reported by victims of knowing that the person's parole eligibility date is approaching shortly after the person is sentenced, while noting many people

[478] *Human Rights Act 2019* (Qld) ss 15 (recognition of equality before the law), 17 (protection from cruel, inhuman or degrading treatment), 26 (protection of families and children), 28 (cultural rights of Aboriginal and Torres Strait Islander peoples), 29 (right to liberty and security), 30 (right to humane treatment when deprived of liberty).

sentenced for rape serve substantial time beyond their parole eligibility date and this deferral may to some extent reflect current practice.

In support of the objectives of community protection and rehabilitation, other reforms we recommend would enable a court to combine a suspended prison sentence with a community-based order when sentencing for a single offence, which for those sentenced to imprisonment for 5 years or less would increase the likelihood of supervision and to provide for engagement with services and programs where required.

These reforms would be in addition to the existing power to order imprisonment with a parole eligibility date or a combined prison-probation order.

Benefits for non-aggravated sexual assault

For non-aggravated sexual assault, due to the different mix of penalties imposed compared with rape and aggravated sexual assault, and, for orders of immediate imprisonment, the shorter sentence length, the potential benefits would be different.

We know wholly suspended imprisonment is the most common sentencing outcome for this offence. The low number of breaches of wholly suspended prison sentences suggests these orders generally are being appropriately targeted at people who present a low risk of reoffending (while noting that this is based on further offending that is detected and prosecuted).

However, equally, there are cases where it might benefit a person to be under supervision and engaged with treatment services other than on a voluntary basis, which is not possible given that suspended prison sentences do not allow for conditions to be attached. This can only be achieved where the person is sentenced for multiple offences, where a community-based order can be ordered alongside the suspended sentence. We have been told that reliance on the ability to combine orders in this way to enable access to appropriate treatment interventions is problematic for several reasons, including that the co-sentenced offence may be too serious to justify the court imposing a probation order simply to achieve the certainty of release with supervision and, if the order is made for a non-sexual offence (such as a drug offence), the conditions and interventions under the probation order will not be tailored to address factors contributing to the person's sexual offending.

An additional concern is how these offences are viewed by victim survivors and the services that support them, as well as by the broader community. Victim survivors and support services shared their concerns that suspended sentences do not provide an adequate penalty for sexual offending and do not reflect the harm caused by this offending. We heard that the use of this sanction for sexual offending in its current form can result in victim survivors believing that going through the criminal justice process was 'not worth it' and the person's offending had no real, tangible consequences.

To a substantial extent, dissatisfaction with this form of sanction may be due to nature of a suspended prison sentence, which 'threatens future punishment for past misconduct',[479] but without an immediate punitive consequence other than that arising from the fact of the conviction itself, and with no requirement to address factors associated with that person's offending.

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[479] Thomas O'Malley, *Sentencing Law and Practice* (3rd ed, Round Hall Press, 2016) 642 as cited in Keir Irwin-Rogers and Julian V Roberts, 'Swimming against the tide: The suspended sentence order in England and Wales, 2000–2017' (2019) 82 *Law and Contemporary Problems* 137, 137.

The reforms we recommended in our previous *Community-based Sentencing Options and Parole Orders Report* would increase the options available to a court to achieve certainty of release, while at the same time enabling courts to make an order that involves supervision and other conditions. A court would be able to order a suspended prison sentence alongside a community-based order when sentencing a person for a single offence, or to order imprisonment with a parole eligibility or (under our proposals) a parole release date. This would address the anomalous position that an order with supervision and program conditions can only be achieved under a suspended sentence when a court is sentencing a sexual offender for more than one offence.

The ability for a court to set conditions in conjunction with a suspended sentence may allow for the order to operate more flexibly, better respond to the purposes of sentencing (including just punishment and rehabilitation) and promote greater judicial and community confidence in the use of this order.[480]

Through the introduction of a new community-based order – the CCO – courts also would have enhanced capacity to tailor order conditions, taking into account the nature and seriousness of the offence as well the personal circumstances of the person sentenced and factors associated with their risks of reoffending. Such orders, which will likely be longer in duration than if a sentence of immediate imprisonment were imposed for sexual assault, may be more effective in reducing long-term risks of reoffending, in support of the longer-term objective of community protection. This is because short prison sentences carry a number of attendant risks, including disrupting a person's employment and access to accommodation, and negatively impacting family functioning and relationships, while being too short to allow for meaningful engagement with programs while in custody or in the community. Once any time served in pre-sentence custody is factored in, in reality there may be very little of the sentence left to serve and limited opportunities for supervision.

As highlighted by previous reviews of sexual offender treatment programs, 'shorter sentences may … limit important intervention opportunities, including whether an offender is given the chance to complete all intervention components'.[481]

We recommended that the core (general) conditions of a CCO be limited to those directly associated with which the order is made and required for its proper administration and that work be undertaken to identify 'packages' of conditions that could come online progressively as the new orders become operational and ensure the service sector has the capacity to deliver the programs and services envisaged.[482] The types of additional requirements that we recommended be available to a court, with a requirement to attach at least one, included community service, supervision, participation in rehabilitation activities, treatment, alcohol and/or drug abstinence and monitoring, non-association and residence (or non-residence) requirements, place or area exclusions, curfew, payment of a bond, judicial monitoring and electronic monitoring.[483]

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480 *Community-based Orders, Imprisonment and Parole Options Report* (n 4) 255. As to the use of conditions to promote judicial and community confidence, see Keir Irwin-Rogers and Julian V Roberts, 'Swimming against the tide: The suspended sentence order in England and Wales, 2000–2017' (2019) 82 *Law and Contemporary Problems* 137, 137–8.

481 USC Sexual Violence Research and Prevention Unit, *The Effectiveness of Sexual Offender Rehabilitation and Reintegration Programs: Integrating Global and Local Perspectives to Enhance Correctional Outcomes* (Research Report, August 2019) 48.

482 *Community-based Sentencing Orders, Imprisonment and Parole Options Report* (n 4) recs 13–14, 20–21.

483 Ibid rec 22.

As a result of our earlier review, we recommended that parole should only apply to sentences of more than 6 months, with some limited exceptions.[484] This was to encourage the greater use of longer supervised tailored orders in the community rather than the use of short prison sentences, which, in contrast to other Australian jurisdictions, also include the possibility of parole. The types of orders discussed above would be available as alternatives.

11.6.3 Intensive correction orders

Another option raised during the current review by some stakeholders was the potential expanded use of ICOs. Because of the limited duration of these orders (12 months) and their inflexibility, the Council has previously noted these forms of orders are infrequently made. At the same time, they may be viewed by some as valuable for people facing a real risk of being sentenced to immediate imprisonment, given their status as custodial orders served in the community with both punitive (community work) and rehabilitative elements.

Only one rape case over the data period received an ICO. There were 45 ICOs made for sexual assault across the 18-year data period, with most orders (n=39) imposed for non-aggravated sexual assault.

The Council's recommendations with respect to ICOs in our earlier 2019 report were that these orders should be retained as an interim measure only, with a view to their repeal, subject to monitoring and analysis of the impact of proposed sentencing and parole reforms, with a transitional period of at least 2 years, during which time ICOs and any new CCO – including used in combination with a suspended prison sentence – should operate concurrently.[485]

The Council preferred this option over committing to reform of these orders, as has occurred in the ACT, NSW and SA, as we were concerned that this would increase the likely complexity of the sentencing framework, result in potential overlap in the types of sentencing orders available (particularly given the availability of court-ordered parole in Queensland) and risk diverting resources from a CCO model, which would require extensive resources to operate effectively. This was consistent with the Council's preference for the introduction of broader, more flexible community-based orders with a wide range of available conditions that can meet a range of sentencing purposes, rather than overly rigid and inflexible orders that are suitable only for a small group of offenders.

We recommended that, if retained in the long term, they should be reformed to increase their flexibility, drawing on reform models adopted in other jurisdictions, including:

- to reduce the number of mandatory (core) conditions to which a person on the order is subject, in line with the Council's proposed model for CCOs;
- to provide for a range of conditions that can be ordered as additional conditions;
- to allow the frequency of reporting (currently a minimum of at least twice in each week that the order is in force) to be determined by Queensland Corrective Services, based on the person's assessed level of risk and need; and

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484 Ibid rec 51. Recommended exceptions were on activation of a suspended sentence, in whole or in part, and sentencing or imprisonment imposed for offences committed while on parole.

485 *Community-based Sentencing Orders, Imprisonment and Parole Options Report* (n 4) recs 5–7.

- to allow for any attendance at counselling, appointments and programs to be counted towards satisfying the community service component of the order.

This remains our position.

11.6.4 Access to programs on remand

It is likely that many offenders, particularly those charged with rape or aggravated sexual assault, even with the adoption of our recommended reforms, will continue to serve a significant proportion of their sentence in pre-sentence custody on remand. This in itself can contribute to current sentencing options not being adequate or appropriate in meeting the objective of long-term community protection due to the lack of access to treatment programs and interventions prior to sentence.

While the reasons for delays in the finalisation of matters are complex, the impacts of this on sentence can be reduced if access to appropriate programs and interventions pre-sentence can be facilitated. The former Queensland Productivity Commission in its 2019 *Inquiry into Imprisonment and Recidivism: Final Report* recommended reforms to ensure prisoners on remand are able to access suitable programs and other activities likely to aid their rehabilitation.[486]

While the Commission's recommendation was not specific to sexual offending, the Council supports this recommendation and further suggests that such programs and interventions should be made available, where practicable, in multiple correctional centre locations and provide for continuation of programs and interventions post-sentence either in custody or in the community.

We note that there are significant capacity issues in custody, which are likely to continue, and the potential benefits in this context of prioritising the development and funding of suitable community-based alternatives to custody for lower-risk offenders.

A historical barrier to program participation has been a concern about the use of admissions made in the course of a prisoner's program participation. We note that such concerns may be partly addressed by recent amendments made to the *Corrective Services Act 2006* (Qld), which commenced on 19 September 2024.[487] The Act now provides that an admission made by a prisoner as part of their participation in a program or service (established or facilitated under section 266 of that Act) is not admissible against the prisoner in any legal proceedings about the alleged offence for which they have been detained.[488] Evidence of an admission or derivative evidence of the admission will be inadmissible in any civil, criminal or administrative proceeding (unless the prisoner agrees to this) that relates to the facts constituting the offence for which the prisoner was detained on remand.[489]

11.6.5 Resourcing issues

As noted in our *Community-based Sentencing Orders and Parole Options Report*, the reforms recommended will require significant investment by government to ensure that there is appropriately resourcing and funding for these tailored packages of conditions, and taking into account that more people are likely to be subject to some form of QCS supervision. However, where properly targeted, such

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486 *Inquiry into Imprisonment and Recidivism* (n 3) rec 17.
487 See *Criminal Justice Legislation (Sexual Violence and Other Matters) Amendment Act 2024 (*Qld) s 6 inserting a new section 344AB into the *Corrective Services Act 2006* (Qld). This provision commenced operation on the date of assent.
488 *Corrective Services Act 2006* (Qld) s 344B.
489 Ibid.

reforms are likely to be less costly than the significant costs of imprisonment, ensuring that this option is reserved for those requiring imprisonment due to the serious nature of their offending and the risks posed to the community.

More generally, we acknowledge the identified need for ongoing investment to be made in programs, interventions and services, both in custody and in the community, which target factors associated with a person's risks of reoffending. This includes exploration of alternate means of delivery of services and interventions in remote and isolated locations of the state, where it may not be possible to deliver these in person, and to ensure that culturally responsive programs and services can be delivered.

During our consultations, significant concerns were raised by a several stakeholders about what was viewed as a chronic lack of investment in Queensland for rehabilitative programs and interventions.[490] At our Brisbane consultation event, the comment was made that, 'Both the Sofronoff [Queensland Parole System Review in 2019] and the Productivity Commission report on imprisonment and recidivism said the same thing: you need to increase funding to support people to change their behaviour.' We strongly endorse this sentiment.

Similar observations about the need for funding in support of effective interventions were made by the authors of the 2019 research report on the effectiveness of sexual offender rehabilitation and reintegration programs.[491] The author of this report noted that 'significant resourcing (e.g. staff; space)' would be required to maximise the number of offenders who complete the entire treatment package, including transitional programs in support of reducing risks of reoffending.[492]

While some funding has been made available since these earlier reports were delivered, there is an urgent need to review the adequacy of services and funding across the Queensland correctional system.

11.6.6 Supervision, parole and the use of suspended sentences

Why the use of suspended sentences of imprisonment is so high and why this might be a problem

We consistently heard from legal stakeholders that one of the key drivers of the high use of partially suspended prison sentences was a desire by courts to ensure certainty of release, noting that those sentenced have often spent considerable time in pre-sentence custody and also the limited availability of programs that may delay the person's release from custody well beyond their parole eligibility date.

We were also told that in some cases suspension might be appropriate where the person is at low assessed risk of reoffending and where the court may not consider that the person requires supervision.

The primary problem with suspended sentences in Queensland, in our view, is their lack of flexibility.

In contrast to many other jurisdictions which have retained this a sentencing option, they do not allow a court to order that the person be subject to supervision or to engage in rehabilitation and treatment and

490 Cairns Consultation Event, 21 March 2024. Similar concerns were raised during our other consultation sessions.
491 *The Effectiveness of Sexual Offender Rehabilitation Programs* (n 354).
492 Ibid 48.

program interventions as part of their sentence. Under a suspended imprisonment sentence, the only condition with which the person must comply is not to commit an offence punishable by imprisonment.[493]

While we consider that suspended imprisonment sentences have an important role to play in the Queensland sentencing system, we support our previous recommendations that courts be permitted to order conditions as part of a suspended prison sentence through the making of a community-based order alongside a suspended sentence for a single offence. Our preference is that, in the longer term, a new form of community-based order be introduced – a community correction order, or CCO – that would have more flexibility to tailor the conditions to the individual circumstances of the case.

The problems with restricting access to court-ordered parole for sexual offences

With respect to the restrictions on the use of court-ordered parole for sexual offences, we agree with concerns raised by the Queensland Parole System Review, which found that such restrictions may have had the undesirable effect of making it 'less likely that an offender who commits a sex offence is sentenced to a period of imprisonment with subsequent effective supervision and rehabilitation on parole'.[494]

As this earlier review concluded, there are several benefits of extending court-ordered parole to sexual offences, including:

- There is a decreased risk of offending of those subject to parole supervision.
- Parole orders are more effective in terms of supervision than probation orders.
- Additional conditions can be immediately imposed on a parole order.
- People who are unable to be managed safety in the community can have the order suspended and be returned to custody.[495]

We consider that the current situation should be rectified as a matter of priority, with a court having the ability to set either a parole release date or a parole eligibility date to support supervision and rehabilitation on parole being an option available in more cases, as we have recommended previously.

No need for legislative guidance regarding penalty options

We do not see a need, following the model adopted in NSW for domestic violence offences,[496] to legislate a presumptive requirement that a sentence of either full-time detention or a supervised order be made.

We also note reforms introduced by the Australian Government that require a court to have regard to the objective of rehabilitation when sentencing a person for a Commonwealth child sex offence, including to consider the appropriateness of including rehabilitation or treatment conditions and, in determining the length of any sentence or non-parole period, to include sufficient time for the person to undertake a rehabilitation program.[497] While these considerations are highly relevant in sentencing people for sexual assault and rape, we do not see an immediate need for this form of guidance to be legislated. This issue

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493 PSA (n 17) pt 8A. Sexual offences are excluded from these orders: PSA s 151F. They also are only available to offenders sentenced by the Queensland Drug and Alcohol Court in Brisbane who meet other suitability and eligibility criteria set out under the PSA.
494 *QPSR Report* (n 7) 102–3.
495 Ibid.
496 *Crimes (Sentencing Procedure) Act 1999 (*NSW) s 4A.
497 *Crimes Act 1914* (Cth) s 16A (2AAA).

might be further considered as part of the broader review we recommend of section 9 of the PSA (**Recommendation 3**).

We acknowledge that sexual assault, in particular, involves a broad spectrum of conduct of varying levels of seriousness, and the reoffending risks posed by individuals and the types of interventions that might otherwise be appropriate as part of a supervised order (such as counselling) might have also been accessed privately prior to sentence.

Why we have not recommended restricting the use of suspended sentences of imprisonment

We accept that some stakeholders and community members might consider the use of particular forms of orders, such as wholly suspended imprisonment sentences and fines, to be inappropriate for a sexual offence of any kind, and as a basis for the availability of such options to removed or restricted.

A fundamental principle adopted for this review was that judicial discretion is fundamentally important (**Principle 7).** The Terms of Reference further expressly require us to have regard to the need to maintain judicial discretion to impose a just and appropriate sentence.

In our view, increasing appropriate sentencing options to court, rather than restricting available options, is most likely to deliver improved outcomes. This includes introducing the ability for a court to make a community-based order alongside imposing a suspended sentence of imprisonment when sentencing a person for a single offence to ensure, where appropriate, that they are required to comply with conditions of supervision and treatment.

If suspended imprisonment sentences were to be removed as a sentencing option for rape and sexual assault, there would be several undesirable impacts. Of most concern to us, this may significantly disincentivise pleas of guilty, which would likely result in fewer people being convicted of such offences. Given that the NSW data suggests the conviction rate for sexual assault offences may already be as low as 7 per cent or even lower,[498] in our view, any further reductions should not be risked. While current reforms in response to the WSJ Taskforce report are aimed at remedying current factors contributing to attrition, some evidential challenges will remain affecting the rate of successful prosecutions.

Removing suspended prison sentences as a sentencing option may further discourage offenders from disclosing offending that might not otherwise be detected, which warrants an additional element of leniency.[499] These disclosures in the context of sexual offending often involve offences committed against young children,[500] or offences against other vulnerable victims.[501] Removing such incentives may encourage those who have committed such offences to minimise the true extent of their offending behaviour to the detriment of those victim survivors, who might have been subjected to harm and otherwise not had this offending properly acknowledged.

For sexual assault, we envisage that the removal of suspended imprisonment sentences as a sentencing option or placing of restrictions on the use of such orders would result in an undesirable displacement effect to other forms of orders that might result in sentences that do not match the person's assessed

498 See Brigitte Gilbert, *Attrition of Sexual Assaults from the New South Wales Criminal Justice System* (Crime and Justice Statistics Bureau Brief No 170, NSW Bureau of Crime Statistics and Research, May 2024). Differences were found between attrition rates for offences against adults and children and contemporary and historic child sexual assaults.
499 As to this issue, see *AB v The Queen* (1999) 198 CLR 111, 155–6.
500 For example, *R v Ruiz; Ex parte A-G (Qld)* [2020] QCA 72.
501 For example, *R v Smith* [2020] QCA 23.

level of risk and need. This would particularly be the case in the absence of suitable community-based alternatives.

Reforms previously recommended discussed at section 11.2, in our view, are far preferable and will result in better outcomes.

Use of the term 'suspended sentences'

It has become clear during this review that suspended imprisonment sentences are poorly understood by the community.

We are concerned that the common labelling of these sentences as 'suspended sentences' rather than as 'sentences of suspended imprisonment' or 'suspended prison sentences' may be contributing to this lack of understanding.

Our review has highlighted the need to ensure that any sentencing resources and information aimed at the general community adopt the language of ‘suspended imprisonment’ or 'suspended prison sentence' rather than 'suspended sentence'. This will reinforce the custodial nature of this form of order and that the suspension of the term of imprisonment is conditional on the person not committing another offence punishable by imprisonment during the operational period of the order.

The Council will ensure that this language is used in any future information or resources it produces, including any updates made to our website, the *Queensland Sentencing Guide* and the *Court Reporting Guide for Journalists*.

The Council would encourage other Queensland legal stakeholders to make a similar commitment to the Council in adopting the language of suspended imprisonment in developing relevant sentencing information for practitioners and others (see **Recommendation 6.1**) to promote improved community understanding.

Increasing the visibility of the proportion of orders that are breached and action taken on breach in the interests of community confidence is also important. The Council previously has noted current challenges in reporting on these breach outcomes. This is discussed in **Chapter 18** of this report.

Impact of the guilty plea on parole eligibility

There were some, concerns raised during consultation by some stakeholders about current practices around the setting of parole eligibility dates for people who have pleaded guilty and significant benefit being given to a plea even if entered at a late stage. We discuss this issue in **Chapter 15** and recommend a review be undertaken (**Recommendation 24**).

11.6.7 Other issues with penalty types

Use of fines for non-aggravated sexual assault

Monetary orders for offences of non-aggravated sexual assault are common, although the use of these orders is decreasing. This decrease in the use of fines appears to mirror broader trends in the use of these types of penalties rather than being specific to sexual assault.

A fine is undoubtedly punitive; however, given the nature of the infringement of human rights that sexual assault involves, a question could be raised about whether this is a suitable form of penalty.

As discussed in section 11.5.5, fines are often viewed as appropriate in the context of offending viewed as being at the 'less serious' end of the spectrum of offence seriousness – typically where the person has no prior relevant criminal history.

Monetary penalties are used most often in the case of non-Indigenous offenders, although the Council has not explored the reasons for this, which could include factors such as whether the person is a first-time offender and the person's assessed capacity to pay a fine or compensation.

Our main concern with the use of fines is that the type of sentence ordered and the obligations under it should to some extent reflect the nature of the violation. The inherently non-intrusive nature of a fine is in stark contrast to intrusiveness of sexual assault, which violates the victim survivor's rights to privacy, sexual autonomy and integrity, and involves the demeaning objectification of them – most usually by male perpetrators.

We accept that courts may consider that they have few other reasonably available alternatives, particularly where a person is assessed as being at low risk and not in need of supervision.

In our view, this provides further evidence for the need for the types of significant reforms we recommended to the range of intermediate sentencing orders with better tailored conditions. An obligation to participate in a respectful relationships program, to engage in counselling or to undertake unpaid community work, for example, is likely to be more meaningful and more likely to promote a sense of accountability than an order that the person pay a monetary fine.

We remain of the view that expanding the range of sentencing options will lead to better tailored and more appropriate sentencing outcomes consistent with principles of individualised justice.

No recommendations to change discretion to record a conviction

We note that victim survivors and their advocates raised other issues viewed as contributing to the appropriateness of sentencing outcomes for sexual assault in particular. These included a concern about decisions made by a sentencing court that a conviction should not be recorded.

The decision about whether to record a conviction where such an option is open applies to all criminal offences. Taking the broader application of section 12 of the PSA into account, it is not the subject of further Council findings or recommendations. We did not consider it appropriate to recommend that specific exceptions should apply to just two offences.

We acknowledge that decisions made about whether a conviction should be recorded may play an important role in victim survivors' views regarding the adequacy of sentencing responses. In **Chapter 14**, we recommend that additional resources be developed in support interactions with victim survivors (**Recommendations 17, 18 and 19**). It may be beneficial for such resources, once developed, to include a suggestion that judicial officers clearly articulate their reasons for deciding a conviction should not be recorded when imposing sentence, with explicit reference to why the community will be better served by the decision not to do so.[502]

[502] See *ZB* (n 470) [9]–[10] (Sofronoff P),

Non-contact orders

We note identified issues regarding the current criteria for the making of a non-contact order and whether these should be changed in support of more orders being made in circumstances where a victim survivor might be concerned about the perpetrator initiating contact.

We suggest that this issue is best examined in the context of a broader examination of how the current provisions apply across all forms of sexual violence and non-sexual violence offending. Given the limited scope of our review, this has not been possible.

11.6.8 Systemic disadvantage considerations

Sentencing outcomes

Rape

For rape, while there were no difference in the likelihood of a custodial penalty or average or median sentenced length for Aboriginal and Torres Strait Islander people compared with non-Indigenous people,[503] there were statistical differences in the type of custodial penalty imposed.[504]

Aboriginal and Torres Strait Islander people were more likely to have received a sentence of imprisonment for rape (80% vs 65%). Conversely, non-Indigenous people were significantly more likely to receive a partially suspended imprisonment sentence for rape (31.1% vs 16.2%).

Sexual assault

Similar to the outcomes for rape, there was little difference in the average or median sentence length for custodial penalties in the Magistrates Court or higher courts when Aboriginal and Torres Strait Islander status was considered.

Across all sexual assault offences (MSO), Aboriginal and Torres Strait Islander people were more likely to receive a custodial penalty compared with non-Indigenous people (81.8% vs 60.2%).[505] The biggest difference was in the Magistrates Courts, for non-aggravated sexual assault (76.5% vs 41.0%).[506]

A sentence of imprisonment was the most common sentence for Aboriginal and Torres Strait Islander defendants for a sexual assault (MSO) case dealt with in the Magistrates Courts (42.5%), followed by wholly suspended imprisonment sentences (21.5%). In comparison, for non-Indigenous people, nearly equal proportions of people received a wholly suspended sentence (25.9%), a monetary order (24.1%) or a probation order (23.0%).

Discussion of impact

The availability of additional sentencing options that provide an alternative to immediate imprisonment and can be appropriately tailored to the individual circumstances of those being sentenced, including Aboriginal and Torres Strait Islander defendants, may achieve greater equity of access to non-imprisonment alternatives (while noting that there may be other structural barriers to achieving this).

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503 Pearson's Chi-Square Test: $\chi 2(2) = 0.42$, $p = .8110$, V=0.01.
504 Pearson's Chi-Square Test: $\chi 2(4) = 38.92$, $p < .0001$, V=0.15.
505 Pearson's Chi-Square Test: $\chi 2(1) = 63.14$, $p < .001$, V=0.18.
506 Pearson's Chi-Square Test: $\chi 2(1) = 79.91$, $p < .001$, V=0.29.

During consultation, the lack of appropriate community-based options and supervision in regional and remote areas of the state was raised consistently by stakeholders, limiting options for courts in sentencing. This particularly applies in remote Aboriginal and Torres Strait Islander communities, where 'supervision' might be a once-a-month check-in and where there are extremely limited options for treatment interventions.

Referring to data presented in the Consultation Paper, LAQ commented:

> It is also concerning to LAQ that First Nations people were less likely to receive a partially suspended [prison sentence] and more likely to receive a sentence of actual imprisonment … 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.[507]

Similar concerns were raised at a meeting with a representative of the Family Responsibilities Commission, who noted the lack of programs available in communities to address the underlying causes of offending.[508] Supervision in remote communities was considered lacking, with the comment that that this might consist of a phone call with a probation and parole officer once a fortnight. It was suggested that there had been good models operating with direct interventions with high-risk offenders in the youth space. Suspended prison sentences were considered to be particularly valuable sentencing options for Aboriginal and Torres Strait Islander persons. Introducing a capacity for a suspended prison sentence and supervision order to be ordered for the one offence, or conditional forms of suspended imprisonment orders, was supported. The comment was made that there needs to be motivation to comply with the order, and failure to complete a program could trigger a breach of the order. There was also support for extending the ability to set a parole release date to sexual offences.

With respect to shorter sentences of imprisonment imposed for non-aggravated sexual assault, the ability of courts to decide whether to fix a parole release date or a parole eligibility date might be of particular benefit to Aboriginal and Torres Strait Islander persons. This is because they are more likely to receive a sentence of immediate imprisonment, and less likely to receive a partially suspended prison sentence.

An option for courts to order a parole release date through the extension of court-ordered parole to sexual offences may also be beneficial in cases where there is some risk that an Aboriginal or Torres Strait Islander person may not apply for parole. It is important, given the evidence regarding the benefits of parole, that opportunities for this type of supervision be maximised in the interests of supporting the person's rehabilitation and long-term community safety.

However, we note that for rape, reforming the SVO scheme to a presumptive scheme could disproportionately impact Aboriginal and Torres Strait Islander peoples. During the SVO scheme review, we found that Aboriginal and Torres Strait Islander people were disproportionately represented among those sentenced to greater than 5 years' imprisonment for rape, representing just under one-third of all rape (MSO) cases (29.3%).[509]

During that earlier review, legal stakeholders raised the potential for a presumptive scheme to further disadvantage defendants who are marginalised or experiencing disadvantage, including Aboriginal and

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507 Submission 23 (Legal Aid Queensland) 20.
508 Meeting with representative of Family Responsibilities Commission, 9 May 2024.
509 *The '80 Per cent Rule' – Appendices* (n 325) Appendix 5, Figure A.1.

Torres Strait Islander peoples, women, people with a mental illness or cognitive impairment, people from a culturally or linguistically diverse background and other disadvantaged groups. Under the reformed scheme, defendants will be required to make submissions to show why a declaration should not be made. Defendants who have access to high-quality legal representation and are able to fund the preparation of specialist reports might be better able to establish that a declaration should not be made than those who have limited access to the same resources.

The Council therefore recommended that, as part of any implementation strategy developed by the Department of Justice should our recommended reforms be adopted, further consultation should be undertaken with legal stakeholders, including those providing direct representation for Aboriginal and Torres Strait Islander defendants and other defendants who are marginalised or experiencing disadvantage, to identify any additional legal funding or support required to minimise unintended impacts of the scheme.[510] This consultation process should include consideration of the adequacy of existing funding, both in support of defendants' legal representation and to fund the preparation of any required specialist reports. We continue to support this earlier recommendation.

11.6.9 Human rights considerations

Under the HRA, human rights limitations must be justified as a proportionate way of achieving the purpose of legislation, provided there is evidence that it is the least restrictive option.

Any changes resulting in the adoption of higher penalties, more restrictive sentencing options and/or changes to the types of sentencing options available potentially engage several human rights protected in the HRA, including:

- the right to equality (section 15);
- the right to liberty and security (section 29);
- protection from torture and cruel, inhuman or degrading treatment (section 17);
- the right to humane treatment when deprived of liberty (section 30);
- protection of families and children (section 26); and
- cultural rights of Aboriginal and Torres Strait Islander peoples and other persons (sections 27 and 28).

The right not to be subject to retrospective criminal laws (section 35) is also of relevance in considering any required transitional provisions.

The reforms recommended will increase, rather than decrease, sentencing options available to a court in support of individualised justice. The adoption of these reforms will therefore promote rights, rather than limiting these rights.

With respect to reforms recommended to the SVO scheme, the Council has previously prepared a detailed human rights impact statement addressing various aspects of these reforms.[511]

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510 *The '80 per cent Rule'* (n 20) rec 25.
511 See *The '80 Per cent Rule' – Appendices* (n 325) Appendix 15.

Chapter 12 – Information available to courts to inform sentence

12.1 Introduction

In this chapter, we consider an important precondition to ensuring sentences for sexual assault and rape are 'adequate' and 'appropriate': the information available to courts to inform sentence.

The information presented to courts may relate to factors, including:

- the harm caused to any victim survivor of the offending (explored in detail in **Chapter 14**);
- details about the offence itself and what happened, and the events leading up to its commission;
- the personal background of the person being sentenced, including their age, educational and employment background, family circumstances, whether they have a mental illness or cognitive impairment and their cultural background, as well as any history of prior offending;
- any action the person has taken since they committed the offence that may demonstrate their remorse, acceptance of responsibility and a willingness to facilitate the course of justice, such as through their cooperation with the investigation and the entering of a guilty plea,[1] as well as any steps taken towards their rehabilitation, such as voluntary engagement in counselling or treatment.

As discussed in **Chapter 10**, in making submissions on sentence, prosecutors and defence practitioners also commonly provide sentencing courts with information about sentences imposed in cases that are factually similar (case comparators), as well as relevant Court of Appeal guidance.

In this chapter, we consider three specific aspects of the information provided to courts:

- the role of professional medical, psychological and other professional reports;
- the use of pre-sentence reports and advice; and
- the use of cultural reports and submissions.

These reports and submissions are of particular relevance to a court in assessing:

- the nature and extent of harm caused to victim survivors of rape and sexual assault;
- the personal background of the person being sentenced, as well as risks of reoffending and factors associated with their offending; and
- the types of interventions available in custody and in the community that might reduce the person's reoffending risks, as well as the existence of family and community supports.

The use of information commonly referred to as 'good character evidence' and contained in personal references is explored in **Chapter 9**.

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1 On the relevance of a guilty plea, see Chapter 15.

12.2 The current situation

12.2.1 The *Penalties and Sentences Act* 1992

The *Penalties and Sentences Act 1992* (Qld) ('PSA') requires a court to consider several matters that can only be properly ascertained through submissions and supporting evidence put before the sentencing court. In relation to the person being sentenced, these include:

- the extent to which the person is to blame for the offence (s 9(2)(d));
- their intellectual capacity, character and age (s 9(2)(f));
- whether they are a victim of domestic violence and if so, whether the commission of the offence is wholly or partly attributable to this, and their history of being abused or victimised (s 9(2)(gb));
- the risk of the person reoffending (ss 9(3)(a) and (6)(d)) – which is also relevant to considering the need for community protection (ss 9(1)(e), (3)(b), 6(d));
- any medical, psychiatric, prison or other relevant report (ss 9(3)(j) and (6)(j));
- the person's prospects of rehabilitation (ss 9(3)(g) and (6)(g) – noting rehabilitation and community protection are also relevant sentencing purposes (ss 9(1)b) and (e)).

Matters relating to the victim survivor to which a court must have regard include:

- any physical, mental or emotional harm done to a victim (s 9(2)(c)(i));
- for offences of a sexual nature committed against children under 16 years, the age of the child and the effect of the offence on the child (ss 9(6)(a)–(b));
- for offences involving the use or attempted use of violence or that resulted in physical harm to another person, the personal circumstances of the victim (s 9(3)(c)).

Where the person being sentenced is an Aboriginal or Torres Strait Islander person, the court is also required to consider 'any cultural considerations, including the effect of systemic disadvantage and intergenerational trauma on the offender'.[2] Section 9(2)(p) of the Act further provides for submissions to be made by a representative of Community Justice Group ('CJG') in the sentenced person's community regarding these cultural factors in addition to the person's relationship to the community and any considerations relating to programs and services.

Both the prosecution and defence, on behalf of the person who is being sentenced, make submissions to the court to assist the court in understanding factors relevant to sentence. It is the responsibility of the prosecution and defence to put forward information on which they intend to rely before the court (meaning they bear the onus of proof).[3]

In Queensland, a sentencing judge or magistrate may act on an allegation of fact that is admitted or not challenged.[4] If it is not admitted or is challenged, the sentencing judge or magistrate may only act on it if satisfied on the balance of probabilities that the allegation is true.[5] However, the degree of satisfaction

2 *Penalties and Sentences Act 1992* (Qld) s 9(2)(oa) ('PSA').
3 See *R v Olbrich* (1999) 199 CLR 270, 281.
4 *Evidence Act 1977* (Qld) s 132C(2).
5 Ibid s 132C(3).

varies according to the consequences adverse to the person being sentenced of finding the allegation to be true.[6]

A court's understanding of any physical, mental or emotional harm done to a victim is often given to the court in the form of a victim impact statement ('VIS'). Issues regarding the current VIS regime are explored in **Chapter 14**.

12.2.2 Pre-sentence reports and psychological reports

Pre-sentence reports

While any report, whether requested by the court or commissioned by the prosecution or defence, may be referred to as a 'pre-sentence report', for the purposes of this chapter we use this term to refer to those reports that are prepared by Queensland Corrective Services ('QCS') under section 344 of the *Corrective Services Act 2006* (Qld) ('CSA').

PSRs are documents for a court, normally prepared at a court's request,[7] to provide information about a person being sentenced and to assist the court in determining the most appropriate form of sentence or other disposition.[8] They may be mandatory or discretionary, but are generally sought to supplement other information before the court about a person's background or the circumstances of the offence.[9] They are additional to any medical, psychological or other reports that may be obtained, typically by the defence in support of submissions made on sentence.[10] .

Section 15 of the PSA expressly allows a court, in imposing sentence, to receive 'any information' including a pre-sentence report made under section 344 of the CSA. However, there is no requirement for a pre-sentence report ('PSR') to be ordered. In practice, PSRs are not commonly requested or prepared with respect to adults sentenced to imprisonment in the higher courts. The findings of our analysis based on a sample of sentencing remarks about the use of these reports are discussed below.

A pre-sentence report ordered under section 344 of the CSA must be given to the court within 28 days of request. The court is required to provide a copy of the report to the prosecution and the convicted person's legal representatives and to ensure they have sufficient time prior to the proceedings to consider and respond to the report.[11] The court may also order that the report, or part of it, not be shown to the convicted person.[12] Information contained in a report is evidence of the matters contained within it and cannot be objected to on the basis that the evidence contained in it is hearsay.[13]

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6 Ibid s 132C(4). This is in effect, a legislative adoption of the 'Briginshaw' test: *Briginshaw v Briginshaw* (1938) 60 CLR 336 as adopted by the Court of Criminal Appeal in *R v Jobson* [1989] 2 Qd R 464 which had been displaced prior to its introduction by a majority of the Court in *R v Morrison* [1999] 1 Qd R 397.

7 *Corrective Services Act 2006* (Qld) s 344 ('CSA') provides that a court may request a pre-sentence report (PSR) to inform sentencing and section 15 of the PSA (n 2) states that a court may receive any information that it considers appropriate to enable it to arrive at the appropriate sentence, including a PSR.

8 Arie Freiberg, Fox and Freiberg's *Sentencing: State and Federal Law in Victoria* (Lawbook Co, 3rd ed. 2014) 173 [2.190].

9 Ibid.

10 Ibid.

11 CSA (n 7) ss 344(5)–(6).

12 Ibid s 344(7).

13 Ibid ss 344(9)–(10).

In contrast to sentencing legislation in several other jurisdictions, there is no legislative guidance regarding the types of matters that may be included in such a report.[14]

Specialist medical, psychiatric or psychological reports

A request for a PSR is separate to a request by a court for a medical, psychiatric or psychological report, although a court may order both at the same time. Queensland Courts is required to fund the preparation of these reports and there is no dedicated funding provided in support of their preparation. It is more common for medical and psychological reports to be privately commissioned by the defence.

These specialist reports generally set out a person's background as well as any medical or psychological conditions from which they suffer. In some cases, they may also express a view about the defendant's assessed risk of reoffending. For example, a 2020 decision of the Court of Appeal refers at some length to a court-ordered psychiatric report which was requested by the court in conjunction with a PSR, which reported on the person's denial of some of the conduct, reported on the offender meeting the diagnostic criteria for several psychiatric conditions, noted his personal background and expressed the opinion that 'his lack of insight into the impact of his offences upon the victims were concerning features'.[15]

In a more recent 2023 decision of the Court in a case involving 2 counts of rape, one count of attempted rape and one count of grievous bodily harm against one victim and one count of assault occasioning bodily harm against another, the Court referred to a psychological report tendered at the time of sentence, which again reported on relevant factors, including alcohol misuse, and expressed the opinion that 'the applicant's risk for committing future acts of explosive violence was moderate to high, and he needed assistance in learning to understand and express his anger appropriately', also recommending 'appropriate treatment programs'.[16]

Other sources of this type of evidence may include expert reports and transcripts from the Mental Health Court, which may be used at sentence. Previously, these reports could only be allowed if they related to the same offence for which the person was referred to the Mental Health Court. This restriction has now been removed.[17]

Sentencing remarks review

The Council's findings from our sentencing remarks analysis suggest that PSRs are rarely used in rape cases and even less so for sexual offence cases.

Psychological reports are more common – being referred to in one-third of rape cases and close to one in 5 sexual assault cases – though were more common for cases sentenced in the higher courts. See further **Appendix 6**, section 6.2.6.

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14 See, for example: *Sentencing Act 1991* (Vic) s 8B, which lists 18 specific matters such a report may address, in addition to 'any other information that the author believes is relevant and appropriate'. It must also include any matter relevant to the sentencing of the person which the court has directed be set out in the report: ibid s 8B(2); *Sentencing Act 2017* (SA) s 17(1) which refers to 'the physical or mental condition' and 'the personal circumstances and history' of the defendant as relevant matters a court may order a report on, in addition to 'any other matter that would assist the court in determining sentence'.

15 *R v McCoy* [2020] QCA 59, 5–6 [23]–[25]. The offender in this case had been convicted following a trial and sentenced for 2 counts of maintaining a sexual relationship with a child, 8 counts of indecent treatment of a child under 16 (under 12) and 9 counts of rape.

16 *R v Wallace* [2023] QCA 22, 3 [3]–[4].

17 *Mental Health Act 2016* (Qld) s 157(2) amended by *Health and Other Legislation Amendment Act 2024* (Qld) s 15.

Acknowledgement of benefits of report in informing sentence

Some judicial officers referred to reports as providing useful information that could not otherwise be ascertained. For example, in one instance it was observed:

> It was quite obvious to me, having regard to the offending … that there were clearly some psychiatric concerns regarding your behaviour that needed to be the subject of a specialised report and an assessment by a psychiatrist. Both the pre-sentence report and the psychiatric report … have been particularly helpful.[18]

> I have found the report of the psychologist commissioned on your behalf for sentencing purposes to be quite helpful in understanding your clinical and personal background as well as your need for rehabilitation.[19]

State of mental health and hardship

In many instances, a report was used to establish the person's mental health, either at the time of the offending or currently, which might help to inform the sentence and in assessing any additional hardship that serving a prison sentence might cause:

> The psychologist states that you would face considerable hardship in a custodial environment because of your psychological vulnerabilities and your history of thoughts of deliberate self-harm. Furthermore, your relationships with other people may prove difficult in prison; however, sensibly, your counsel, XXX, did not suggest that a sentence that did not involve any custodial component was appropriate.[20]

Risk of reoffending and rehabilitative prospects

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

> In determining the appropriate sentence, I must have primary regard to the impact of your offending, and the protection of the community. The impact of your offending has been enormous. The report that has been provided to me indicates that the writer's opinion is that you are a low risk of reoffending. Importantly, you are willing and desirous of undertaking courses in prison in order to reduce any risk you have of reoffending. General and personal deterrence are important considerations in the exercise of my discretion. The sentence I impose must deter others who consider sexually abusing children. It must deter you from doing so again, and it must denounce your conduct on behalf of the community.
>
> … It must also, of course, balance those features against your prospects of rehabilitation, which appear to be good because of your now expressions of regret, your acknowledgment of the impact of your offending, and your desire to undertake courses to reduce any risk of reoffending.[21]

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

> You have been offered multiple opportunities in the form of probation orders to address your offending behaviour, but by virtue of your attitude to those orders and the fact that you reoffended in similar ways, that would suggest, and it is consistent with the report of Dr XXX, that I am sentencing you as an offender who is a medium to high risk of reoffending. The only way to structure your sentence, therefore, will be to structure it such that you would be under the supervision of the parole authorities upon your release, whenever that might be.[22]

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

> As I have indicated, protection of the community, of children, from your risk of reoffending is, in my view, the paramount consideration in determining the appropriate sentence. It is very difficult for me to assess your risk of

18 Rape, regional/remote, imprisonment less than 5 years, #3.
19 Sexual assault, major city, lower courts, custodial, #7.
20 Rape, major city, imprisonment less than 5 years, #1.
21 Rape, major city, imprisonment greater than 5 years, #5.
22 Rape, regional/remote, imprisonment less than 5 years, #3.

> reoffending because there is no material that has been placed before me, psychiatric or psychological, to indicate what your risk of reoffending might be.[23]

Medical and psychological reports substantiating harm to victim survivors

As discussed in **Chapter 8**, one factor to which a court must have regard in sentencing is 'any physical mental or emotional harm done to a victim', including harm referred to in a victim impact statement.[24] In **Chapter 14**, we consider the current role of victim impact statements and the important role these play in informing a court about the harm caused by offences of sexual assault and rape, and for other offences involving personal violence.

It has been acknowledged that:

> Increasingly, as more knowledge is acquired about the long-term and indirect damage caused by various offence categories, courts are more willing to make assumptions about the likelihood of harm being caused by an offence. This obviates the need for evidence to be tendered regarding the existence of such harm. This is especially the situation in relation to sexual offences.[25]

Sentencing magistrates and judges are now free to assume that sexual offences against children cause long-term harm to victim survivors,[26] although '[t]here is a limit to the extent to which judges can draw on their own experience, in other cases or elsewhere, to reach conclusions of fact for the purpose of sentencing'.[27] The special knowledge possessed by sentencing judges and magistrates was recognised in *R v RAZ; Ex parte Attorney-General (Qld)*,[28] a case which concerned the sentencing of a magistrate for sexual offences against his step-grandson, in which the Queensland Court of Appeal found that his position as a magistrate was an aggravating factor because he is assumed to have understood the devastating impact that sexual offences can have on children. The Court commented:

> As a magistrate hearing cases of sexual offences the respondent was in a special position to gather knowledge from the mouths of victims about the effect of sexual offences upon children. While the wider public may not have been aware until recent times about the persistent corrosive effect upon the lives of such victims, those in the legal profession, in law enforcement and in some medical fields have long known that even a single sexual offence against a child may have terrible and enduring consequences.[29]

There may not be the same degree of recognition about how acts of indecent assault committed against adult victims impact the victim survivors in the absence of expert evidence. As we discuss in **Chapters 6, 13 and 14**, these impacts can be significant.

The failure to properly appreciate the extent and level of the harm caused by sexual violence offending can have a significant impact on sentence due to its relevance in assessing the seriousness of this offending (see **Chapter 7**).

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23 Rape, regional/remote, imprisonment less than 5 years, #3.
24 PSA (n 2) s 9(2)(c)(i).
25 Mirko Bagaric and Theo Alexander, 'A rational approach to the evaluation of harm in the sentencing calculus' (2021) 50 *Australian Bar Review* 251, 260.
26 See, for example, *R v Kilic* (2016) 259 CLR 256, 267 [21] (Bell, Gageler, Keane, Nettle and Gordon JJ), 447 [57] (Kiefel CJ, Bell and Keane JJ). See also *Ryan v The Queen* (2001) 206 CLR 267, [42] citing relevant psychiatric studies as to its impacts.
27 *R v Evans* [2011] QCA 135 [33] (Fryberg J, Chesterman JA agreeing).
28 [2018] QCA 178.
29 Ibid 5 [23] (Sofronoff P, Gotterson JA and Boddice J agreeing).

On occasion, courts have the benefit not only of a victim impact statement but also material provided by treating doctors and psychologists. The following is illustrative of how this information might be referred to in the context of sentencing:

> A victim impact statement by the complainant and a letter from a clinical psychologist described the severe short-term impact and the improved, but still very significant, lasting impact the applicant's offending had upon her. She experienced daily panic attacks (having only had one panic attack earlier in her life) and significant anxiety. The psychologist considered that she fitted the criteria for post-traumatic stress disorder.[30]

12.2.3 Cultural reports

Current position

When someone identifies as an Aboriginal or Torres Strait Islander person, submissions can be made from a CJG representative that are relevant to sentencing. This may include information about the 'offender's relationship to the offender's community' and 'any cultural considerations' that a court must consider.[31] These submissions may be provided either in writing or orally during the court proceedings.[32]

The Court of Appeal has acknowledged that submissions from a CJG representative should be given great weight.[33]

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

- any member of the CJG that is responsible for the submission is related to the offender or the victim; or
- there are any circumstances that give rise to a conflict of interest between any member of the CJG who is responsible for the submission and the offender or victim.[34]

CJGs operate in over 52 Queensland communities,[35] and perform a variety of activities to support Aboriginal and Torres Strait Islander people, including preparing and presenting sentencing submissions to the Magistrates Court and Murri Court.[36] In addition to providing cultural advice to inform bail and sentencing decisions, CJGs' other court-related functions are to provide support to Aboriginal and Torres Strait Islander people to enable them to understand and participate in the court process, and to refer people being sentenced and victims to agencies and services that can provide services and support.[37]

The most recent independent evaluation of the CJG Program was released in September 2024.[38] It reported in 2022–23, across the CJG Program, that:

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30 *R v McConnell* [2018] QCA 107, 4 [9].
31 PSA (n 2) ss 9(2)(p)(i)–(ii).
32 The Myuma Group, *Evaluation of Community Justice Groups: Final Report* (November 2023) 92 ('*The Myuma Group, Phase 3 Report*)'.
33 *R v SCU* [2017] QCA 198, 12 [56], 23–4 [113] (Sofronoff P).
34 PSA (n 2) s 9(8).
35 'Community Justice Group Program', *Queensland Courts* (web page, 17 November 2024) https://www.courts.qld.gov.au/services/court-programs/community-justice-group-program ('*Community Justice Group Program*').
36 The Myuma Group, *Phase 1 Report: Evaluation of Community Justice Groups* (November 2021), 68 ('*The Myuma Group,* Phase 1 Report').
37 *The Myuma Group, Phase 3 Report* (n 32) 64.
38 Ibid.

- CJGs attended mainstream court on 1,479 occasions, assisting 6,911 people, making 991 cultural reports and 7,081 referrals;
- CJGs attended Murri Court on 275 occasions, assisting 2,504 people, providing 1,919 Murri Court reports and making 3,072 referrals.[39]

The Phase 2 evaluation report found:

- In 2021–22, CJGs made 444 sentence submissions [367 oral submissions (83%) and 77 written submissions (17%)[40] – but this was likely to be a significant undercount].[41]
- In 2020–21, CJGs made 587 oral submissions and 190 written submissions.[42]

CJGs are funded to operate in the Magistrates Courts, but the Phase 1 evaluation noted CJGs provide cultural reports to Mount Isa and Thursday Island higher courts.[43]

The form of cultural reports adopted varies and there are both formal structured sentence reports used in the Murri Court as well as narrative cultural reports.

The Phase 2 Murri Court evaluation noted advice that CJGs:

> do not provide cultural reports for all defendants in mainstream courts – this will often be decided with the legal representatives and will be affected by whether it is considered that a report will improve the court's ability to make a better decision and whether the defendant is willing to provide information for the report.[44]

As part of the 2019–20 State Budget, $19.4 million was allocated over 4 years to support a grants management system and to increase funding provided to CJGs.[45] An additional $438,000 was allocated in 2023–24 to support engagement with CJGs.[46]

Sentencing remarks review

The Council's review of sentencing remarks did not identify any cases where a submission had been made by a CJG on the sentenced person's behalf. However, a search of the Queensland Sentencing Information System ('QSIS') did reveal a small number of cases in which this had occurred. These included:

- a 2018 decision involving a person sentenced for rape, with reference being made to assistance offered by the CJG to 'continue to help' him with issues including his alcohol use, finding safe accommodation, determining how to relate to his family and finding support and work;[47]

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39 Ibid.
40 The Myuma Group, *Phase 2 Annual Report: Evaluation of Community Justice Groups* (December 2022), 112 ('*The Myuma Group, Phase 2 Report*').
41 Ibid 15. *The Myuma Group, Phase 1 Report* (n 36). The CJGs program has previously been evaluated in 2010, see KPMG, *Evaluation of the Community Justice Groups* (Final Report: November 2010).
4242 *The Myuma Group, Phase 2 Report* (n 40) 112.
43 *The Myuma Group, Phase 1 Report* (n 36) 79.
44 The Myuma Group, Phase 2 Report (n 40) 115.
45 Queensland Government, Framework for Stronger Community Justice Groups <https://www.courts.qld.gov.au/__data/assets/pdf_file/0005/657887/cip-cjg-brochure-stronger-framework.pdf> 3.
46 Queensland Government, *Budget Measures 2024–5* (Budget Paper No 4, 2024) 75.
47 QDC (No 184 of 2018).

- a 2017 decision involving a Torres Strait Islander person sentenced for rape of a child, in which the sentencing judge referred to a report of the CJG reporting on his progress and efforts to make himself 'a better man' and 'better member of the community'.[48]

In a small number of cases identified, the absence of a CJG report was noted.[49]

No cases identified referred to support being provided to the victim survivor by a CJG or submissions made regarding the impacts of the offending on the victim survivor, their family members or the local community.

Although not the focus of specific investigation, we found some examples of judicial officers in sentencing commented on the additional adverse impacts of offending on victim survivors from other cultural backgrounds. For example, in a 2023 appeal decision, one of the factors pointed to as making the offences particularly serious was 'the cultural implications of the blackmail for the complainant [involving the perpetrator threatening to post a video on social media] as "damaged goods"'.[50]

12.3 Previous Queensland reviews

12.3.1 Report of the Special Taskforce on Domestic and Family Violence – *Not Now, Not Ever*

The Special Taskforce on Domestic and Family Violence in Queensland ('Taskforce'), chaired by The Honourable Quentin Bryce AD CVO, was established on 10 September 2014 and tasked with making recommendations to inform the development of a long-term vision and strategy for government and the community to reduce the incidence of domestic and family violence.[51]

The Taskforce acknowledged CJGs as an example of good practice, but concluded that 'such initiatives need to be expanded, well-resourced and adequately supported. It viewed the current context as presenting an 'opportunity to re-visit and improve the CJG model'.[52]

It recommended an expanded role of CJGs in design and implementation of a co-located service response to domestic and family violence, ensuring that they are properly resourced and supported to undertake this role.[53]

It also recommended that, in working with discrete Indigenous communities to develop and support an effective local authority model to respond to crime and violence in those communities, consideration should be given to resourcing and expanding the role of CJGs, Justice of the Peace Magistrates Courts and related local justice initiatives as appropriate, as well as examining the specific role that community justice groups could play in conferencing, mediation and criminal justice system support.[54]

The Taskforce did not expressly consider the role of CJGs in the sentencing process.

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48 QDC (No 96 of 2017);
49 For example, QDC (No 536 of 2017).
50 *R v VN* [2023] QCA 220 [30] (Bowskill CJ and Morrison and Dalton JJA).The victim survivor was from a traditional Tamil family who had fled Sri Lanka.
51 Special Taskforce on Domestic and Family Violence, *Not Now, Not Ever: Putting an End to Domestic and Family Violence in Queensland* (2015) 6.
52 Ibid 261.
53 Ibid rec 9.
54 Ibid rec 92.

12.3.2 The Queensland Productivity Commission 2019 report

The Queensland Productivity Commission, in its 2019 final report on its inquiry into imprisonment and recidivism, reported that screening, particularly for cognitive disability, prior to entry into and within the criminal justice system is important in reducing the potential for reoffending, re-criminalisation and ultimately 'enmeshment' of people with disability in criminal justice systems.[55]

To encourage the use of non-custodial sentencing orders, the Commission recommended reforming sentencing laws to 'create a presumption in favour of courts seeking pre-sentence assessment, including psychological assessment, where there is reason to believe the offender is suffering from a mental illness or intellectual disability and the court is considering imposing a prison sentence'.[56]

While the Commission considered that CJGs may have an important role to play in the development of community-based justice initiatives and proposed deferred prosecutions,[57] their role in the provision of cultural advice and supports at sentence was not expressly considered.

12.3.3 The Council's previous reviews

The Council has considered the use of pre-sentence reports, specialist reports and cultural reports during previous reviews.

During the Council's most recent review of the serious violent offences ('SVO') scheme,[58] legal stakeholders advised that while PSRs – particularly specialist psychological and psychiatric reports – were often desirable to help judicial officers make informed decisions about a person's risk, they were concerned about making such assessments mandatory. In particular, concerns were raised that the availability and quality of such assessments across Queensland would be limited and could lead to substantial delays in sentencing.[59] Assessment of risk made at the time of sentence was also viewed as problematic for those sentenced to longer terms of imprisonment, with the view that risk is best assessed at the time the person is reaching their parole eligibility date.

Responding to those concerns, and acknowledging the potential for the requirement for such reports to further disadvantage defendants who were marginalised or experiencing other forms of disadvantage, the Council recommended that further consultation be undertaken with legal stakeholders to consider the adequacy of existing funding both in support of defendants' legal representation and to fund the preparation of any required specialist reports as part of any implementation strategy.[60]

The availability of PSRs and use of cultural reports was also considered as part of the Council's 2019 review of community-based sentencing orders, imprisonment and parole options. Ultimately, the Council recommended that no change be made to the current power of a court to order a PSR.[61] Support by

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55 Queensland Productivity Commission, *Inquiry into Imprisonment and Recidivism: Final Report* August 2019) 297–8. A similar point was made by the Royal Commission into Violence, Abuse, Neglect and Exploitation of People with a Disability in its *Criminal Justice and People with Disability: Final Report, Volume 8* (2023) in which it referred to previous studies that 'have consistently found that procedures for identifying people with disability, especially cognitive disability, in criminal justice settings are poor': 176.

56 Ibid xlix rec 9.

57 Ibid 452.

58 Queensland Sentencing Advisory Council, *The '80 per cent Rule': The Serious Violent Offences Scheme in the Penalties and Sentences Act 1992 (Qld)* (Final Report, 2022).

59 Ibid 208.

60 Ibid section 19.4 and rec 25.

61 Queensland Sentencing Advisory Council, *Community-based Sentencing Orders, Imprisonment and Parole Options* (Final Report, 2019) 195, rec 26 ('*Community-based Sentencing Orders, Imprisonment and Parole Options Report*').

stakeholders for the expanded availability of PSRs and the court advisory service operating out of the Brisbane Magistrates Court, however, was acknowledged.[62]

With respect to cultural reports, the Council noted that a process evaluation of the Murri Court was then underway. It suggested this review might provide an appropriate avenue for the suitability of cultural reports in the Murri Court to be considered – also identifying the use and impact of cultural reports as 'an important area for future research'.[63]

12.3.4 The Women's Safety and Justice Taskforce's recommendations and government response

The Women's Safety and Justice Taskforce supported the expanded use and availability of PSRs in Queensland, recommending:

> 129. The Attorney-General and Minister for Justice, Minister for Women and Minister for the Prevention of Domestic and Family Violence progress amendments to the *Penalties and Sentences Act 1992* and the *Corrective Services Act 2006* to require a court to consider ordering a pre-sentence report when determining whether a community-based order may be suitable for an offender who is otherwise facing a period of imprisonment …
>
> 130. Queensland Corrective Services develop and implement a plan for the sustainable expansion of court advisory services across Queensland to support greater use of pre-sentence reports …[64]

It noted that, 'as part of the expansion of PSRs, QCS would need to build its capacity to provide a trauma-informed and culturally-safe service for the preparation of PSRs'.[65]

The Taskforce suggested that 'legislative amendments should require a court to consider ordering a PSR, and should enable the court to request specific information from QCS'.[66]

The former Queensland Government provided in-principle support for implementation of the Taskforce's recommendations,[67] and work on the expansion of these services has commenced in support of a trial.[68] QCS also received funding for the Enhanced Community Corrections Pilot in Townsville to enhance court advice and prosecution support services focused on First Nations peoples.[69] The objectives of this pilot include 'to reduce the imprisonment of First Nations peoples, maximise rehabilitative outcomes and put downward pressure on rates of recidivism'.[70]

The Women's Safety and Justice Taskforce further recommended that the District Court consider establishing a Murri Court program within the District Court.[71] This recommendation was supported by

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62 Ibid 426.
63 Ibid 430.
64 Women's Safety and Justice Taskforce, *Hear Her Voice – Report Two: Women and Girls' Experience Across the Criminal Justice System* (2022) vol 2, 575 ('*Hear Her Voice, Report Two*') referring to Queensland Sentencing Advisory Council, *Community-based Sentencing Orders, Imprisonment and Parole Options Report* (n 61) 578, recs 129–30.
65 Ibid.
66 Ibid 577. The type of information the Taskforce suggested might be useful was 'information concerning the offender's parenting responsibilities, domestic and family violence history or other circumstances, how suitable the offender is for particular community-based sentencing, and whether the offender would benefit from particular supports or rehabilitation in the community': ibid.
67 Queensland Government, *Queensland Government Response to the Report of the Queensland Women's Safety and Justice Taskforce, Hear Her Voice - Report Two: Women and Girls' Experiences Across the Criminal Justice System* (2022) 8 ('*Response to Hear Her Voice, Report Two*') 40.
68 Queensland Government, *Women's Safety and Justice Reform Annual Report 2022–23* (May 2023) 7.
69 Submission 31 (Queensland Corrective Services), 3.
70 Queensland Corrective Services, *Annual Report 2023–24* (2024) 12.
71 *Hear Her Voice*, *Report Two* (n 64) rec 122.

the former Queensland Government.[72] Progress on implementation of this recommendations and other recommendations is reported on as part of the Women's Safety and Justice Reform annual report.[73]

12.4 The position in other jurisdictions

12.4.1 Pre-sentence and psychological reports

In other Australian jurisdictions, PSRs are commonly required by a court when imposing a sentence for a community-based order,[74] such as an intensive correction order,[75] a home detention order[76] or a community correction order.[77]

For example, in the Northern Territory, a court may order a pre-sentence report and receive 'such information as it thinks fit to enable it to impose the proper sentence'.[78] This may involve a Forensic Psychological Assessment.[79] PSRs may include details about the person's social, employment, medical and psychiatric histories, educational background, circumstances of any past offending, any special needs and 'any courses, programs, treatment, therapy or other assistance that could be available to the offender and from which the offender may benefit'.[80]

In Victoria, pre-sentence and psychological reports may also be ordered, including in support of the sentencing of people who are being sentenced for rape and other forms of sexual offending. By way of illustration, in a March 2024 decision of the County Court, the Court referred to a report sought by the Court prepared by Forensicare (a body that provides mental health care services in that state) reporting on the results of risk assessment tests administered and their implications for care, support and treatment interventions and its relevance in informing the court as to his rehabilitative prospects;[81]

As in Queensland, however, the ordering of such reports is not mandatory and the Victorian Court of Appeal has stated that even where it is necessary to make a finding of risk: '[i]n many cases … while an opinion will greatly assist a sentencing court, the circumstances of the offences, the offender's prior history, the offender's conduct since offending, and the offender's prospects of rehabilitation will be sufficient without such an opinion to allow a conclusion to the requisite standard as to the existence of risk'.[82]

PSRs also are widely used across the United Kingdom, Canada and the United States.[83] In England and Wales, the *Sentencing Code* provides that pre-sentence reports are made 'with a view to assisting the

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72 *Response to Hear Her Voice, Report Two* (n 67) 38.
73 The most recent Annual Report was released in May 2024. See: Queensland Government, *Women's Safety and Justice Reform: Second Annual Report 2023–24* (2024) <https://documents.parliament.qld.gov.au/tp/2024/5724T894-07F0.pdf>.
74 *Sentencing Act 1995* (NT) s 39B.
75 *Crimes (Sentencing Procedure) Act 1999* (NSW) s 17D.However, this is not required if the court is satisfied there is sufficient information before it to justice the making of an ICO without obtaining a report: s 17D(1A).
76 *Sentencing Act 1997* (Tas) s 42AC(2)(b). This is also required for a home detention condition on an ICO in NSW: *Crimes (Sentencing Procedure) Act 1999* (NSW) s 17D(2).
77 *Sentencing Act 1991* (Vic) s 8A.
78 *Sentencing Act 1995* (NT) ss 103–6.See s 103 regarding orders that require the person to be under supervision.
79 *JF v The Queen* [2017] NTCCA 1, 12–18 [27]–[39] discusses the Forensic Psychological Assessment and pre-sentence reports (requested by the Supreme Court) for the sentencing of the male offender who had pleaded guilty to multiple child sexual offences, including sexual intercourse without consent against his 3-year-old nephew.
80 *Sentencing Act 1995* (NT) s 106.
81 *DPP v Sherman (a pseudonym)* [2024] VCC 299 [115]–[118].
82 *Bowden v The Queen* [2013] VSCA 382 [47].
83 Cyrus Tata, 'Reducing Prison Sentencing through Pre-Sentence Reports? Why the Quasi-Market Logic of "Selling Alternatives to Custody" Fails' (2018) 57(4) *The Howard Journal of Crime & Justice* 472.

court in determining the most suitable method of dealing with an offender'.[84] Such a report must contain 'information as to such matters, presented in such manner, as may be prescribed by rules made by the Secretary of State'.[85]

A PSR in the United Kingdom generally consists of:

- a summary of the facts of the case;
- an expert risk and needs assessment based on the person's individual circumstances and the offence/s;
- an analysis of sentencing options with an independent sentence proposal' and
- additional information not otherwise presented to the court, such as information about the person being sentenced and their view of the offence/s obtained through interviewing the person or liaising with other agencies.[86]

There has been a move in more recent years towards the use of oral rather than written reports in the interests of efficiency and to expedite the disposal of cases.[87]

The 2023 Final Report of Royal Commission into Violence, Abuse, Neglect and Exploitation of People with Disability considered the position regarding the preparation of pre-sentence reports and screening tools across jurisdictions with a focus on screening tools and assessments for disability. Based on information provided to the Commission through submissions, it reported:

- South Australian criminal courts 'do not have any process by which a timely, initial assessment of a defendant can be completed to indicate whether a defendant may be a person with disability' and 'the cost of an expert report in South Australia can be prohibitive (unless the defendant is represented and funded by Legal Aid) and the waiting time for an assessment was usually four months or longer'. This has often led criminal courts to rely on pre-sentence reports prepared by the Department of Correctional Services. Although these are usually available sooner, any information about the defendant's disability in the report 'will tend to be generalist in nature.
- [In NSW] 'court-based assessment and support services for identifying and assessing disability are 'extremely limited'. The state-wide Community and Court Liaison Service operates in 22 local courts and employs mental health nurses who may assist in assessing defendants with cognitive disability, but is not a dedicated disability service.[88]

The Royal Commission referred to a submission by Legal Aid Queensland ('LAQ'), which raised similar issues to those highlighted during the Council's current review (discussed further below), being

- grants to fund expert reports for use in court are usually limited to a set fee which does not generally reflect the cost of the assessments;
- difficulty finding experts in psychiatry, psychology and neuropsychology willing to assess referred clients and significant waiting times for reports.[89]

84 *Sentencing Act 2020* (UK) pts 2–13 ('*Sentencing Code*') s 31(1)(a).
85 Ibid s 31(1)(b).
86 UK Ministry of Justice, *Guidance – Pre-sentence Report Pilot in 15 Magistrates' Courts* (19 May 2021) < https://www.gov.uk/guidance/pre-sentence-report-pilot-in-15-magistrates-courts>.
87 Gwen Robinson, *Pre-Sentence Reports: A Review of Policy, Practice and Research* (UK Sentencing Academy, 2022) 2.
88 Ibid 177–8.
89 Ibid 178.

12.4.2 Cultural reports

Many jurisdictions in Australia and internationally are required to take cultural considerations into account when sentencing. However, few jurisdictions have legislated to require that cultural reports be produced for the purposes of sentencing. In many cases the 'cultural background' of a person is a matter for inclusion in a pre-sentence report, rather than a report in and of itself.[90]

In Canada, when sentencing Indigenous persons, a sentencing judge is required under the *Criminal Code* to consider 'sanctions other than imprisonment that are reasonable in the circumstances' and 'the unique situation' of these offenders.[91] This section was inserted into the *Criminal Code* in 1996. Its operation was first considered by the Supreme Court of Canada in the decision of *R v Gladue*,[92] which established a 'framework' for sentencing courts in applying the new provision.[93]

In response to this decision and the new principles to be applied, special forms of reports referred to as '*Gladue* reports'[94] were developed. These reports are pre-sentence reports prepared by *Gladue* caseworkers at the request of the judge, defence counsel or Crown.[95] The report contains information about the Indigenous person, their family and their community, as well as relevant systemic factors, such as their experiences with colonisation, intergenerational trauma, racism and discrimination.[96]

Gladue report writers interview the offender, their family, friends and other members of the community to tell the complete story of their life and circumstances.[97]

However, there is no one approach or model and different approaches have been adopted in different jurisdictions.[98] In some jurisdictions, Indigenous organisations provide these services, while others maintain a centralised service which make use of contracted writers.[99] In some jurisdictions without dedicated funded services, probation officers include reference to *Gladue* factors in PSRs.[100]

These reports are not meant to replace PSRs. Rather, PSRs are written by corrective services about the offender's previous history with the criminal justice system, whereas *Gladue* reports provide a 'comprehensive picture of both the life and circumstances of the Aboriginal person and emphasize the options available in sentencing'.[101]

Gladue reports take significant time and cost to prepare given the extensive research required for their preparation.[102] In Ontario it has been estimated that a *Gladue* report can take up to 20 hours to complete, compared with 8–10 hours for a PSR and can be often between 20 and 40 pages long.[103]

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90 See for example *Crimes (Sentencing) Act 2005* (ACT) s 40A(b).
91 *Criminal Code*, RSC 1985, c C-46, s718.2(e)
92 *R v Gladue* [1999] 1 SCR 688.
93 Ibid [28].
94 Named after *R v Gladue* [1999] 1 SCR 688.
95 Grahame McConnell, *Indigenous People and Sentencing in Canada* (Background Paper, 2020) section 3.2, 10.
96 Anna Ndegwa, Laura Gallant, Jane Evans, *Applying R v Gladue: The Use of Gladue Reports and Principles* (Research and Statistics Division, Department of Justice, 2023) 6.
97 BearPaw Legal Education & Resource Centre, *Writing a* Gladue *Report* (Booklet) <https://bearpawlegalresources.ca/find-a-resource/adult-justice/writing-a-gladue-report-booklet> 7.
98 Ndegwa, Gallant and Evans (n 96) 4.
99 Ibid 4.
100 Ibid.
101 University of Manitoba, Faculty of Law, *Gladue Handbook: A Resource for Justice System Participants in Manitoba* (2012) 30.
102 Ndegwa, Gallant and Evans (n 96) 7.
103 Jonathan Rudin, *Aboriginal Peoples and the Criminal Justice System* (Ipperwash Inquiry, 2007) 48–50.

A 2023 Canadian Department of Justice report into the use of these reports found that 40 per cent of cases reviewed between 2018 and 2021 referred to the use of a *Gladue* report and the majority were sentencing decisions.[104]

Identified barriers to their broader adoption, in addition to the costs involved in their preparation, included: the lack of trained report writers within the region available at the time due to resourcing issues; judicial views that these reports should only be ordered sparingly or only in exceptional circumstances; the ability to access information through other means, such as PSRs with *Gladue* sections or oral or written submissions by defence counsel or the person being sentenced; and reluctance by some people sentenced to agree to the preparation of a report, which could be for reasons including that the process would be traumatic or because this would delay sentencing and result in them spending more time in pre-sentence custody.[105]

Some criticisms were also made by judicial officers about the inconsistency of reports and lack of national standards, and questions were raised about the extent to which those preparing such reports were objective rather than viewing the person about whom they were preparing the report as a 'client'.[106]

12.5 Evidence of impacts

12.5.1 Pre-sentence reports

Evidence on the impact of PSRs on sentencing outcomes is varied. The provision of high-quality information is generally promoted in the hope that it will enable courts 'to make more informed sentencing decisions and may help to raise levels of confidence in community options'.[107] The form of these reports is considered most helpful where they are advisory in nature, rather than simply a 'gathering of' and recitation of facts.[108]

Independently of the ‘intrinsic quality’ of reports that can be used to inform the sentencer, the ‘extrinsic value’ of these reports in influencing sentencing outcomes is less certain.[109] The fact that a sentencer imposes a sentence in accordance with any sentencing recommendation made (also referred to as ‘concurrence’ or ‘concordance’) is viewed as insufficient to assume a report was influential in the decision-making process.[110]

A review of research evidence referred to by QCS in its submission to the Women’s Safety and Justice Taskforce on the impact and effectiveness of PSRs found the presence of a PSR led to less-punitive sentencing outcomes and more diversion than cases where there was no PSR.[111] For high-risk offenders, the presence of a PSR made no difference.[112] The issue of risk assessments and how this may factor into these decisions made by courts on sentence is discussed below.

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104 Ibid 5. In comparison, PSRs were ordered in 45 per cent of cases reviewed: ibid 20.
105 Ibid 19–21.
106 Ibid 21.
107 Tata (n 83) citing Gemma Birkett, '"We have no awareness of what they actually do": Magistrates’ knowledge of and confidence in community sentences for women offenders in England and Wales' (2016) 16(4) *Criminology and Criminal Justice* 510.
108 Ibid.
109 Ibid.
110 Ibid.
111 Letter from Paul Stewart, Commissioner, Queensland Corrective Services to Taskforce Chair, 27 May 2022, enclosure, 11 cited in *Hear Her Voice, Report Two* (n 64) vol 2, 574.
112 Ibid.

A concern raised in some Australian research is the tendency for these reports in the cases of Aboriginal and Torres Strait Islander persons to focus disproportionately on risk rather than 'pro-social' facts with 'relatively little inclusion of strengths-based cultural-specific information in reports regardless of whether they are prepared for Indigenous sentencing or mainstream court'.[113]

12.5.2 Cultural reports

Queensland evaluations

The most recent evaluation of the CJG program reported:

- Over half of the 20 judicial officers surveyed said the cultural information provided by CJGs or Elders informed their decision-making in court 'quite a lot' and helped them 'quite a lot' to understand the defendant's circumstances.
- Half of the CJG representatives also considered stakeholders in the court understood the impact of culture on Aboriginal and Torres Strait Islander people 'quite a lot' because of CJGs' involvement in court, while 41 per cent considered they understood this to some degree ('somewhat').
- A high proportion (81%) of CJG respondents were of the view the information they provided in court helped the court 'quite a lot' in understanding a person's cultural circumstances, and half considered the court used the information they provided in making decisions 'quite a lot'.
- The information CJGs provide in court was also strongly valued by those who took part in a Stakeholder Survey, with a strong majority (69%) reporting the information CJGs provide helps the court 'quite a lot' to understand a person's cultural circumstances.[114]

The involvement of CJGs was also viewed as having broader benefits in improving judicial officers' and stakeholders' knowledge and understanding of the impact of culture.[115]

The phase 2 evaluation identified a number of elements considered of most value in improving court outcomes, including CJG staff and members having the capacity and confidence to provide quality cultural reports, acting impartially on behalf of all families in the community, involving Elders and respected persons in the process, and the availability of local programs and support that are communicated to the court by the CJG. The willingness by the court to 'accept and value the input from the CJG' was also viewed as important.[116]

Canadian evaluations

Much information about the utility of cultural reports in the context of sentencing is based on the Canadian experience with the use of *Gladue* reports.

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113 Darcy Coulter et al, 'Culture, Strengths, and Risk: The Language of Pre-sentence Reports in Indigenous Sentencing Courts and Mainstream Courts' (2023) 50(1) *Criminal Justice and Behaviour* 76.

114 *The Myuma Group, Phase 3 Report* (n 32) 93, Figure 7. Other response options were 'Somewhat', 'Little or not at all' or 'Don't know enough about this' to respond.

115 Ibid 94–100.

116 *The Myuma Group, Phase 2 Report* (n 40) 15. See also 115–20 of that report.

One study in British Columbia found Gladue reports may contribute to fewer and shorter incarceration sentences for Aboriginal people.[117]

An evaluation of the Aboriginal Legal Services of Toronto's *Gladue* Caseworker Program suggests that the impact of *Gladue* reports is not reflected in Aboriginal incarceration rates; rather, they are seen to have a definitive impact on an individual, micro level.[118] These reports ensure all parties involved in sentencing are better informed about an individual Aboriginal offender's circumstances and background, which then influences the sentencing outcome.

A 2023 Department of Justice evaluation found that in 23 per cent of the cases reviewed, the application of the *Gladue* principles had an impact on the outcome, including reducing or varying the sentence, suspension of the remaining period of imprisonment, or reducing the time for parole eligibility or probation.[119] At the same time, it was noted that other factors, such as the availability of programs, proximity of custodial centres to the person's community and rehabilitative resources may also have impacted the outcomes in these cases.[120]

12.6 Stakeholder views

Legal stakeholders who participated in subject matter expert interviews and who made submissions identified a need to improve the information available to a court in support of sentencing, including with respect to factors associated with a defendant's risk of reoffending, as well as the information available to courts regarding the harm caused to victim survivors.

12.6.1 Pre-sentence reports

Court advisory services and PSRs

LAQ told us that, in their view, '[w]ell informed courts will generally make better sentencing decisions' and that it was important that the information provided to the court is 'current, accurate and complete'.[121] They were concerned that 'currently court ordered PSR writers are underfunded and under resourced', noting the potential benefits of the expanded use of court-ordered PSRs in benefiting vulnerable offenders, 'ensuring that the court is fully informed of their background and all circumstances leading up to the offence'.[122] They submitted that '[h]aving 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'.[123]

The major barrier to the broader adoption of these reports was viewed as resourcing, with consequent court delays:

> [B]efore 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

117 Legal Services Society of British Colombia, *Gladue Report Disbursement: Final Evaluation Report* (2013) 2.
118 'Canada's Approach to Sentencing Aboriginal Offenders', *The Law Report* (ABC Radio National, 23 August 2016), Interview with Jonathan Rudin, Program Director, Aboriginal Legal Services, Toronto <http://www.abc.net.au/radionational/programs/lawreport/canada-gladue/7772298>.
119 Ndegwa, Gallant and Evans (n 96) 24.
120 Ibid.
121 Submission 23 (Legal Aid Queensland) 23.
122 Ibid.
123 Ibid.

introduced prematurely, timeframes for the provision of the reports will inevitably increase and delays will be incurred.[124]

Usefulness of PSRs, psychological reports and other professional reports

Subject matter expert interviews

Subject matter expert interview participants told us psychological reports were on the whole mostly useful, helping judicial officers to understand how the sentenced person's personal history and mental health 'affects their moral culpability for their offence'.[125] Practitioners qualified this view by emphasising that the quality of a report is critical,[126] and some questioned the weight that can be given to a report based solely on a sentenced person's self-reporting.[127]

One practitioner said that although PSRs can be ordered by the court, unless there was also a psychiatric evaluation of the person and 'an ability to verify the information which is provided, they're not all that useful'.[128] Others viewed many psychologist reports as being 'very deficient'[129] because they were not always 'accurate',[130] they sometimes 'uncritically accept everything a defendant has said'[131] and they 'contain no reasoning for the conclusions that are being reached'.[132]

Participants also told us that court-ordered reports, and psychological reports more generally, can be expensive, and are 'only worthwhile' if 'directed at particular issues like the risk of reoffending'.[133]

Some participants also commented that reports prepared by psychologists can be received by sentencing courts and noted that views about them may differ.[134] In particular, it was suggested that some judicial officers were not receptive to reports prepared by psychologists on the mistaken basis that they could not make a formal mental health diagnosis.[135]

The absence of psychological or pre-sentence reports for victim survivors documenting the impacts of offending was an area in which some participants identified the sentencing process could be improved. One participant considered that a potential reason for these types of reports or letters from treating doctors not being more frequently tendered might be that these often had to be obtained by the victim survivor at their own expense.[136] Another participant reflected that if better information were available documenting the harm caused to the victim survivor, including any relevant mental health diagnoses, this might be 'a far more powerful, aggravating feature'.[137]

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124 Ibid.
125 SME Interviews 3, 11, 13.
126 SME Interview 3.
127 SME Interviews 1, 3, 5, 10.
128 SME Interview 1.
129 SME Interview 10.
130 SME Interview 15.
131 SME Interview 10.
132 SME Interview 14.
133 SME Interview 10, 12, 14.
134 SME Interviews 1, 7, 16. See, however, *R v Bassi* [2021] QCA 250 in which the court found there was no justification for the sentencing court to reject the tender of a psychologist's report, further noting the evidence of psychologists had been in admitted in a number of cases regarding post-traumatic stress disorder, major depressive disordered, battered woman syndrome and autism spectrum disorder: [60] and [68].
135 SME Interview 7. See, however, *R v Bassi* [2021] QCA 250, [51], [60], [68].
136 SME Interview 1.
137 SME Interview 16.

Submissions

The Queensland Branch of the Royal Australian and New Zealand College of Psychiatrists ('RANZCP') in its submission saw the value of psychiatric reports in the context of court proceedings as being in 'assisting the court with information about the presence or absence of mental disorder/s or mental health problems, the relationship between mental disorder/s and criminal responsibility and issues related to fitness for trial'.[138]

The RANZCP noted that 'under the RANZCP *Professional Practice Guideline 11: Developing reports and conducting independent medical examinations in medico-legal settings* (2020), reports should be provided by an independent medical expert. Treating doctors can provide letters of fact rather than opinion.'[139]

Disclosure issues, PSRs and psychological reports

PSRs prepared by QCS under the *Corrective Services Act 2006* (Qld)[140] ('CSA') are given to both the prosecution and defence.

Some subject matter expert participants raised concerns about the process of disclosure when a report contains information that is not in the defendant's interests.[141] Practitioners noted that defence counsel will generally not submit specialist reports if findings are likely to be adverse to a client, regardless of a report's quality.[142] One practitioner thought PSRs prepared under the CSA were 'the most effective and powerful kind of presentence report' because they were 'impartial' and the court received it 'irrespective of whether or not there's something prejudicial to the accused' contained in the report.[143]

PSRs were not viewed as particularly useful in focusing on the person's cultural background. For example, the PSR might say the person was an Indigenous man, and state the number of family members and that they live at a particular location, with this being the extent of the information provided.[144]

In contrast to views that PSRs under the CSA are the most useful type of report, LAQ in its submission cautioned strongly against 'any reforms which would mandate the commission of a court ordered PSR in sexual assault and rape cases'.[145] It submitted:

> On the current experiences of the scope of these reports and expertise behind 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.[146]

However, advice on available treatment options was viewed as potentially beneficial, with LAQ expressing the view that:

> 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.

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138 Submission 33 (RANZCP) 1.
139 Ibid.
140 CSA (n 7) s 344.
141 SME Interview 7.
142 SME Interviews 7, 17
143 SME Interview 17.
144 SME Interview 11.
145 Submission 23 (Legal Aid Queensland) 22.
146 Ibid 23.

> … 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.[147]

Some practitioners interviewed during our subject matter expert interviews were concerned there were often delays in defence-commissioned psychological reports being disclosed, with these sometimes being dated much earlier but only provided on the day of sentence.[148]

Concerns about court delays

LAQ raised significant issues associated with the preparation of expert reports, including delays in proceedings, resulting in defendants spending a longer period on remand prior to sentence and placing burdens on all those involved in the criminal justice system, including victims:

> 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.[149]

LAQ reported that such delays were not uncommon – including delays of up to 6 months or more when accessing records from Queensland Health and Hospital Services in districts responsible for records held by Queensland Correctional Centres.[150] They suggested the Right to Information and Information Privacy process in relation to Queensland Health records could be streamlined by authorising access through the person's lawyer with a signed authority from the client as a practical step that might be taken to reduce such delays.[151] They suggested '[a]dditional 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'.[152]

Subject matter expert interview participants similarly highlighted concerns about time required for the preparation of a report and court delays, including where a person might already have spent a considerable period of pre-sentence custody, and be in a regional or remote area of the state, with a view that such reports may not be ordered for this reason.[153]

Cost of specialist reports, expertise and funding criteria

Subject matter expert interviews

Practitioners who participated in our subject matter expert interviews told us it can be difficult to get funding for psychological reports.[154] They also noted the difficulties of accessing suitably qualified forensic psychiatrists and psychologists, particularly in regional and remote areas of the state, with acknowledgement that the quality of these reports can vary.[155]

Additional challenges in courts having access to psychological and psychiatric reports were identified for people who identified as being Aboriginal and Torres Strait Islander, including funding issues and the additional time potentially required to produce such reports.[156]

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147 Ibid 20.
148 SME Interview 20.
149 Submission 23 (Legal Aid Queensland) 22.
150 Ibid 27.
151 Ibid.
152 Ibid.
153 For example, SME Interviews 23, 24.
154 SME Interviews 3, 22.
155 SME Interviews 22, 24.
156 SME Interviews 7, 9.

The allocation of additional funding was considered one way to improve their quality, including the use of psychometric testing,[157] with the comment made that the funding is considerably lower than many private forensic psychologists would generally charge for their services, meaning there was a limited pool of practitioners from which to draw.[158]

Submissions

With respect to the current Legal Aid funding criteria, LAQ noted that in seeking funding, the lawyer must certify that the report will have a significant impact on the sentence, and failure to obtain a report would be a possible ground of appeal. It is not sufficient that a lawyer believes the report could impact the sentence.[159]

They told us that funding available in support of the preparation of these reports is a clear barrier to their broader use:

> 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.[160]

While Legal Aid funding for expert reports is not restricted by financial year, they noted that 'the more highly qualified, experienced sought after experts often limit the number of legally aided assessments and reports they conduct per financial year'.[161] For this reason, '[o]nce their legally aided quota is reached, bookings cannot be made until the next financial year'.[162]

The Aboriginal and Torres Strait Islander Legal Service (Qld) ('ATSILS') also acknowledged the cost of psychological reports being a barrier to obtaining or giving information to a sentencing court.[163]

Taking into account current funding constraints, LAQ submitted 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.[164]

LAQ submitted that defence practitioners were best placed to facilitate this as they are better able to obtain background material, such as previous assessments.

ATSILS recommended that 'consideration be given to government subsidised psychologist reports (preferably delivered by community-controlled service providers)'.[165]

Consultations

Representatives of the Australian Psychological Society's College of Forensic Psychologists shared concerns that current fee rates in Queensland are deficient ($678 for a pre-sentence report prepared by

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157 SME Interview 22.
158 SME Interview 23.
159 Submission 23 (Legal Aid Queensland) 29.
160 Ibid 27. See also Submission 28 (ATSILS) 7.
161 Submission 23 (Legal Aid Queensland) 22.
162 Ibid.
163 Submission 28 (ATSILS) 7.
164 Submission 23 (Legal Aid Queensland) 29.
165 Submission 28 (ATSILS) 7.

a psychologist).[166] In contrast, NSW Legal Aid recently increased its rates (these vary by court level and are $2,000 for a District Court sentencing report).[167] They advised that typically this type of report took their members 8 to 11 hours to prepare in addition to anywhere from between one to 3 hours to interview the person and review relevant documentation (such as QP9s, the criminal history of the person, schedule of facts and also other material and reports). It was estimated that the Queensland fees covered only about one-quarter to one-third of what the reports should be costing in light of the time spent on their preparation. As a consequence, they acknowledged that a number of forensic psychologists are choosing not to do pre-sentence reports and are undertaking other types of work – which may result in psychologists with less experience or from other professions preparing these reports. It was noted that forensic psychologists have specific training in assessment and intervention with sex offenders – which, generally speaking, other non-forensic psychologists do not.

They also told us that to undertake these assessments for Aboriginal and Torres Strait Islander people and those from other cultural groups in appropriate ways, to ensure the reports are supplemented with information about relevant personal, contextual and community factors, cultural advisers may be required to be engaged to support their preparation.[168]

12.6.2 Risk assessments as part of a pre-sentence report

Similar concerns raised with the Council during previous reviews about the use of risk assessments in informing sentence have been raised during the current inquiry.

Submissions from victim survivor support and advocacy stakeholders

The Queensland Sexual Assault Network ('QSAN') supported risk assessments being undertaken by 'independent and experienced forensic psychologists who are using standardised and measurable approaches and have experience with working with victim survivors and therefore have a victim survivor lens'.[169] It was QSAN's view that these experts 'should be engaged and appointed by the court and not by the defence'.[170] They were concerned these assessments need to be undertaken by 'highly qualified professionals who can see through the manipulation and lies of offenders'.[171]

Submissions from legal stakeholders

LAQ highlighted its concerns that the use of risk assessments where included in court-ordered pre-sentence reports 'carry an inherent risk to the fair and impartial sentencing process'.[172] It pointed to dynamic risk factors that 'can change over time as an offender grows older, receives treatment, or as their attitudes, beliefs and behaviours change', and the need for these to be 'regularly reassessed given the potential to significantly change in what can be a relatively short period of time'.[173] LAQ was concerned

166 Meeting with representatives of the Australian Psychological Society's College of Forensic Psychologists, 16 May 2024. This is for a standard grant of aid. Legal Aid advised for a neuropsychological report, involving neuropsychological testing, the standard fee paid is $1 642: Submission 23 (Legal Aid Queensland) 29 citing Legal Aid Queensland, *Grants Handbook: Neuropsychological assessment and report* (2024).
167 See 'Psychologist and Psychiatrist fee scales', *Legal Aid NSW* (web page) <https://www.legalaid.nsw.gov.au/for-lawyers/fee-scales/crime-fee-scales/crime-psychologist-and-psychiatrist-fees>.
168 Meeting with representatives of the Australian Psychological Society's College of Forensic Psychologists, 16 May 2024.
169 Submission 24 (Queensland Sexual Assault Network) 11.
170 Ibid.
171 Ibid.
172 Submission 23 (Legal Aid Queensland) 24.
173 Ibid.

about the future use of these assessments, suggesting that: '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'.[174]

For this reason, LAQ submitted that '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'.[175]

LAQ was also critical of the tools used by QCS to assess risk, suggested such tools were 'outdated' and not suitable when assessing risk for female or First Nations persons:

> QCS primarily employs the Static-99R risk assessment tool when assessing risk of male sexual offenders in custody. 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 selected based on their established empirical relationship with recidivism. There are currently no actuarial risk assessment tools available for female sex offenders.
>
> 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. 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.[176]

The human rights implications of this are discussed below.

Submissions from professional bodies

Representatives of the Australian Psychological Society's College of Forensic Psychologists considered it critical that any risk assessment tool be used only by those with sufficient understanding of how it is to be used and interpreted and the population it has been developed on.[177] In the absence of this, unstructured professional judgment might be applied with high levels of variability. The use of a range of different methods and approaches was also viewed as very important.

Subject matter expert interviews

Subject matter expert interview participants expressed some caution about the use that could be made of risk assessments, and comments reflected those made about psychological reports more generally.

Some interviewees acknowledged a degree of ambivalence when it came to risk assessment reports – noting that while they did not consider these 'particularly helpful', if the person had no prior criminal history, reaching a conclusion about the person's risk of reoffending was 'very difficult' because sentencing judges and magistrate do not have anything to base their judgment on, other than their own personal assessment of the person's likely risk.[178]

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174 Ibid.
175 Ibid.
176 Ibid 24–5.
177 Meeting with representatives of the Australian Psychological Society's College of Forensic Psychologists, 16 May 2024.
178 SME Interview 5. Similar comments were made in SME Interview 15.

In the absence of such assessments, in assessing risk the court would consider factors such as whether the person had a prior history of similar offending[179] and whether there was a pattern of conduct,[180] including where there had been an escalation in the person's offending behaviour and where the offending was premeditated.[181] Other relevant factors included the person's drug and alcohol issues, mental health issues and environmental factors.[182]

Reflecting the views of many of those we interviewed, one participant commented:

> Well that's the $64,000 question … I've had reports where the report writer has opined that there is like a low risk and then you have the comment, 'Well how can they really say that? They only saw him for an hour and a-half.' But that, I suppose, combined with, well now he's on this proper medication and he's engaged with counselling and not using drugs anymore, so all those little things would link in together to perhaps give the court some assurance that … this person is not going to go back to their old ways.[183]

Another participant referred to problems with the actuarial tools often used because they were developed overseas a long time ago, and the assessments may not be accurate for the current context.[184]

It was acknowledged that if the defence commissions the report, which includes an assessment that the person's reoffending risks are high, the reality is that they will not tender it if it is not in their client's best interests.[185]

The required time and costs involved for these reports to be done well were viewed as a barrier to their broader use, with it also being acknowledged that additional time is required for assessments of Aboriginal and Torres Strait Islander persons.[186]

Consultation events

While not a focus of discussion at our consultation roundtable events, at the Cairns consultation event, some participants supported the use of independent risk assessment reports provided to the court for consideration at sentence.[187]

12.6.3 Cultural reports and submissions

Submission from legal stakeholders

LAQ supported CJGs being given additional funding and support, commenting:

> LAQ's experience is consistent with the findings of The Myuma Group's review of community justice group[s]. 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

179 This is consistent with known predictors of recidivism for sexual offenders with studies finding that a sexual offender's criminal history was one of the best predictors of recidivism, along with having an antisocial personality pattern and pro-criminal attitudes. Education and employment were also important factors: James Bonta and DA Andrews, *The Psychology of Criminal Conduct* (Routledge, 7th ed, 2023) 354–5 and Table 14.5.
180 For example, SME Interviews 10, 12, 13, 14, 20.
181 SME Interview 11.
182 Ibid.
183 SME Interview 22.
184 SME Interview 14.
185 SME Interview 7.
186 Ibid.
187 Cairns Consultation Event, 21 March 2024.

> previously applied to implementing preventative strategies in community and supporting prisoners [to] reintegrate in the community to reduce their risk of recidivism.[188]

ATSILS agreed with comments reported in the Consultation Paper that 'pre-sentence reports should include cultural reports, culturally safe screening and assessment tools for people with cognitive disability and should consider the impact to the family of the offender if imprisonment were to be imposed'.[189]

ATSILS supported greater guidance in the PSA regarding what matters might be included in a cultural report with a view to providing further guidance to CJGs in preparing these reports and 'to enhance [their] quality and content'.[190] The types of factors listed as relevant were:

- the protective factors of the individual's connection to community, kin and culture including spiritual wellbeing;
- the protective factors of the individual participating in relevant programs run by local community-controlled organisations to address root causes for offending behaviour including, for example, programs that address underlying trauma via healing programs;
- the:
    - impacts of intergenerational trauma, child removal, dispossession from lands and systemic racism and the role of such in contributing marginalisation of at-risk individuals; and
    - social and economic disadvantage including in relation to housing, employment and education;
    - impacts of trauma that the individual has experienced in their life, for example, if they were the victim of sexual assault or rape prior to the offending including as a child;
    - impacts of physical health and mental health issues that might have been brought on or exacerbated by the aforementioned factors;
    - impacts of substance abuse/misuse that might have been brought on or exacerbated by the aforementioned factors, to identify underlying drivers of the individual's offending;
- the protective factors of diverting the individual into a community-led programs/initiatives as an alternative to incarceration; and
- the long-standing overincarceration of Aboriginal and Torres Strait Islander individual, including the high numbers of individuals on remand, and the commitments under the NACTG to drive down incarceration levels.[191]

ATSILS also supported expanding cultural capability training for judicial officers – including, notably, 'cultural immersion programs on Country to enhance judicial officers' knowledge and understanding of Aboriginal and Torres Strait Islander culture, history and languages, along with the ongoing impacts of colonisation and intergenerational trauma'.[192]

Subject matter expert views

Several participants in the Council's subject matter experts interviews advised that for sexual violence matters, it was rare for there to be a cultural report, CJG report and/or submission at sentence.[193] Where there was cultural information, the quality of cultural information placed before the court at sentence for sexual assault and rape varies.[194] Interviewees considered some reasons for this included limited

188 Submission 23 (Legal Aid Queensland) 30.
189 Submission 28 (ATSILS) 6.
190 Ibid 6–7.
191 Ibid 5.
192 Ibid 7.
193 SME Interviews 10, 11.
194 SME Interviews 3, 9.

funding, services, practitioners being overworked and the experience of the legal practitioner.[195] Two legal stakeholders also considered that where a person was from a First Nations community (either a victim or a person being sentenced), the person may be reluctant to discuss the offence and may experience shame.[196] As explained by one interviewee, 'there was this deeply entrenched culture of you just do not talk about it. It's very – it's considered a very shameful thing to talk about.'[197]

CJG cultural reports and advice were viewed as particularly helpful in more remote areas of the state (such as Cape York and the Torres Strait), with some noting the difficulty obtaining reports in urban centres, particularly in South-East Queensland.[198] In circumstances where submissions were made by a CJG, these were viewed as very useful because of the additional information about the person's background, offering a different perspective and also providing helpful information about the support they were offering the person as well and programs with which they already engaged or attempting to engage.[199]

Improvements suggested were to make submissions and cultural reports more readily available across Queensland.[200]

Some interviewees also told us that, for other cultural groups, it would be beneficial to have more information about the person being sentenced to better understand their upbringing and background.[201] It was noted that sometimes this information was provided by community leaders. A suggestion was made that this practice should be promoted to defence lawyers to ensure this type of information is able to be provided without the need for a court to suggest this, giving rise to a need for an adjournment.[202]

Consultation views

At our consultation events, it was suggested that CJG reports and submissions could be extremely beneficial for and valuable to a court at sentence, and that proper regard should be had to submissions made on sentence.[203] At the same time, some participants were concerned that issues such as childhood and intergenerational trauma should not overshadow the seriousness of the offending when the victim survivor is also likely to have experienced the same types of trauma.[204]

While CJGs are able to provide support to both offenders and victims throughout the court process,[205] individuals who participated in our consultation events had limited knowledge of CJGs being used as a support service for women/victim survivors, with one participant reflecting that that historically this is not a role they have sought to fulfil.[206]

A representative of the Family Responsibilities Commission ('FRC') who met with the Council suggested that local leaders are being underutilised in the sentencing process.[207] While CJGs can be effective, this

195 SME Interviews 1, 3, 9.
196 SME Interviews 1, 4.
197 SME Interview 4.
198 SME Interviews 6, 9, 23.
199 SME Interview 9.
200 Ibid.
201 Ibid.
202 Ibid.
203 Cairns Consultation Event, 21 March 2024; Online Consultation Event, 3 April 2024.
204 Cairns Consultation Event, 21 March 2024.
205 'Community Justice Group Program', *Queensland Courts* (web page, 17 November 2024) <https://www.courts.qld.gov.au/services/court-programs/community-justice-group-program>.
206 Online Consultation Event, 16 April 2024.
207 Meeting 9 May 2024 with representative of the Family Responsibilities Commission.

was viewed as being to some degree dependent on the quality of the coordinator and how effectively the group was managed. Generally, this program was considered to be under-supported by government and not appropriately staffed. Ensuring CJG members are appropriately compensated was viewed as important.

We were advised the FRC has a current Memorandum of Understanding with ATSILS in cases where ATSILS has clients who are engaged with FRC. With the consent of the client, the FRC can provide ATSILS with a report that outlines their engagement with the FRC, including relevant case plans, orders and programs in which the person has participated, which can be tendered at court. There are difficulties, however, where clients may prefer expediency and elect to forego such a report to avoid further delays in their matter being finalised. The FRC representative suggested that both ATSILS and Magistrates have noted that where FRC reports are provided, there is a significant impact on the penalty imposed.

Aboriginal and Torres Strait Islander Advisory Panel members' views

Members of the Council's Aboriginal and Torres Strait Islander Advisory Panel[208] were concerned that CJGs are not sufficiently supported or resourced, and expectations are being placed on CJGs to deliver cultural reports and provide submissions to courts with a lack of investment and capacity. There is also a tendency for CJGs not to deal with those matters due to men's business and women's business.

In the higher courts, Panel members considered that there is not really a role for CJGs. It requires cultural experts who are neutral parties to be able to identify the disadvantages for a particular individual.

Panel members discussed the expertise needing to be in the context of the specific case/charges before the court. The report writers need technical expertise as well as providing advice on cultural aspects.

12.7 Issues and options

Pre-sentence reports

To the extent that sentencing for rape and sexual assault is concerned with ensuring the long-term safety of the community, it is important that courts be informed by the best available evidence about factors including:

- the personal circumstances of the individual being sentenced, factors relevant to culpability and the drivers of their offending behaviour;
- the person's risk of reoffending (while noting the issues associated with these assessments);
- the types of interventions that are likely to be most useful in addressing factors contributing to the person's risk of offending, which is likely to be particularly important for those who are assessed as being at medium to high risk of sexual reoffending;
- the person's insight into their behaviour and motivation to change.

The lack of information prior to sentence may limit the ability to ensure the sentence, as structured, appropriately targets factors that might be important to reduce reoffending risks.

208 Meeting of the Aboriginal and Torres Strait Islander Advisory Panel, 18 April 2024.

The current lack of structured assessments available for adults convicted of sexual offences at the sentencing stage contrasts with the detailed information often available for child offenders referred to the Griffith Youth Forensic Service (GYFS). GYFS describes the process as involving:

> Assessment is undertaken of the young person, their broader ecology (family, peers, school, community), and the offence/s they have committed. A risk assessment is also undertaken. GYFS assessment informs the development of a multisystemic case formulation, which in turn informs the development of an individualised treatment and risk management plan, with a focus on individual-, family-, peer- and community-level interventions.[209]

These assessments provide detailed information to a court at sentence, including factors associated with the commission of the offence, previous cognitive and psychological assessment, details about the defendant's personal circumstances, including prior referrals to services and assessed level of sexual and non-sexual violence recidivism risk with a view to informing treatment interventions.[210]

At the same time, the preparation of PSRs and medical, psychiatric and psychological reports requires significant funding and resourcing, and may contribute to delays in matters being finalised. The benefits of these reports therefore need to be assessed in light of these potential impacts.

Issues with risk assessments

The assessment of risk has long been a contentious area of practice. In *Veen v The Queen*[211] *and Veen v The Queen (No 2),*[212] the High Court established the principle that protection of the community from an offender cannot justify a sentence disproportionate to their culpability and the seriousness of the offence. In doing so, it commented:

> Predictions as to future violence, even when based upon extensive clinical investigation by teams of experienced psychiatrists, have recently been condemned as prone to very significant degrees of error when matched against actuality … However if such, perhaps uncertain, predictions are nevertheless to be employed as aids in sentencing, they should at least be the result of thorough psychiatric investigation and assessment by experts possessing undoubted qualifications for the task.[213]

As discussed above, significant concerns have also been raised that such tools may be racially biased.[214]

Reinforcing issues raised by stakeholders, a 2023 review of expert evidence of risk assessments and the preventive detention of dangerous prisoners published in the *Journal of Law and Medicine* highlighted the problems inherent in these processes: 'While psychiatrists and psychologists may be able to assist the legal process by offering opinion evidence which may be informed by the scores from actuarial tools, psychiatrists and psychologists cannot accurately predict future behaviour for any individual.'[215] For this

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209 'Clinical Service: Griffith Youth Forensic Service', *Griffith Forensic Service* (web page) <https://www.griffith.edu.au/criminology-institute/griffith-youth-forensic-service/clinical-service>.

210 For a recent decision referencing information contained in a GYFS assessment see *R v DCD; Ex parte A-G (Qld)* [2024] QCA 91 [16]–[22].

211 *Veen v The Queen* (1979) 143 CLR 458 ('*Veen*').

212 *Veen v The Queen (No 2)* (1988) 164 CLR 465 ('*Veen (No 2)*')

213 *Veen* (n 211) [14].

214 Melissa Perry, Benjamin Durkin, Charlotte Breznik, 'From Shakespeare to AI: The Law and Evolving Technologies' (2024) 98 Australian Law Journal 272, 281 citing Julia Angwin et al, 'Machine Bias: There's Software Used across the Country to Predict Future Criminals. And It's Biased against Blacks', *Propublica* (web page, 23 May 2016) <https://www.propublica.org/article/machine-bias-risk-assessments-in-criminal-sentencing>; see also Carolyn McKay, 'Predicting Risk in Criminal Procedure: Actuarial Tools, Algorithms, AI and Judicial Decision-Making' (2019) 32(1) *Current Issues in Criminal Justice* 22; MD Abdul Malek, 'Criminal Courts' Artificial Intelligence: The Way It Reinforces Bias and Discrimination' (2022) 2 *AI and Ethics* 233.

215 Russ Scott, Ian Coyle and Ian Freckelton AO KC, 'Expert Evidence of "Risk Assessments" and the Preventive Detention of Dangerous Prisoners' (2023) 30(4) *Journal of Law and Medicine* 917, 958.

reason, the authors recommended that '"experts" should eschew giving the impression of scientific certainty in their risk assessments'.[216]

Risk assessments, however, are considered potentially beneficial where such assessments may give some comfort to a court in assessing someone as being *low* risk. In Virginia, an analysis of the impact of a risk assessment tool on sentencing practices found that sentences for the most serious crimes (such as rape) decreased, with the reason suggested to be

> risk assessment served as a sort of second opinion that made judges feel more comfortable granting leniency for those in the lowest risk category. Without this second opinion, a judge bears the weight of the risk entirely on their own shoulders. Should the person go on to re-offend, there is no one but the judge to blame for being so lenient. With risk assessment, the judge can point to a faulty score when a low-risk person goes on to reoffend, thus mitigating internal guilt and external blame.[217]

Medical and psychological reports substantiating victim survivor harm

As discussed above, where medical, psychological of other specialist reports are made available to a court, these are usually prepared at the defence's request.

Reports substantiating the impacts of the offending on a victim survivor's mental health, such as depression, anxiety, substance misuse, suicidal thoughts and post-traumatic stress disorder,[218] are rarely tendered, with greater reliance on self-reports, including through the making of a victim impact statement.

Those who participated in our expert interviews identified funding as being a barrier to seeking these reports, with the preparation of these reports often being at the victim's own expense.

There may be opportunities for current funding provided through Victim Assist Queensland as part of the financial assistance scheme to support these costs being met without the expectation that the burden for arranging for and paying for such reports should rest with victim survivors.

The establishment of the Office of the Victims' Commissioner may also provide an opportunity to explore these issues more fully than has been possible during our current review.

Cultural advice relating to victim survivors

There are also opportunities to enhance the current cultural information available to a court, which may help a sentencing court to better understand the impacts of an offence on a victim survivor who is Aboriginal or Torres Strait Islander or from another cultural background.

In the most recent evaluation of the CJG Program, it was noted that 'in some cases, CJGs also provide support to victims, especially where the CJG employs DFV court support workers or men's or women's support workers', but this was secondary to their work with offenders.[219] However:

> Some stakeholder respondents to the Phase 3 survey were critical in expressing the view that CJGs do not provide enough support to victims and are too focused on defendants. There can be a conflict of interest if the same staff

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216 Ibid citing Robert A Prentky et al, 'Sexually Violent Predators in the Courtroom: Science on Trial' (2006) 12(4) *Psychology, Public Policy, and Law* 357; Ian R Coyle and Robert L Halon, 'Humpty Dumpty and Risk Assessment: A Reply to Slobogin' in Patrick Keyzer (ed), *Preventive Detention: Asking the Fundamental Questions* (Intersentia, 2013).

217 Megan Stevenson and Jennifer L Doleac, "The Counterintuitive Consequences of Sex Offender Risk Assessment at Sentencing" (2023) 73(Suppl 1) *University of Toronto Law Journal* 59, 70–71, cited in Mirko Bagaric, 'Sentencing Developments in the United States in 2023: Continued Reform Stagnation in a Climate of High Crime Rates' (2024) 47 *Criminal Law Journal* 136, 143.

218 On the common impacts for victim survivors of sexual assault, see Emily R. Dworkin, 'Risk for Mental Disorders Associated with Sexual Assault: A Meta-Analysis' (2020) 21(5) *Trauma, Violence, & Abuse* 1011.

219 *The Myuma Group, Phase 3 Report* (n 32) 105, 175.

> member or Elder seeks to support both the defendant and the victim in a matter. In the CJG's DFV court support work, this can sometimes be managed by a different worker supporting each party.[220]

The very limited nature of the support provided was confirmed by data reported by CJGs in 2022–23.[221]

More encouragingly, the survey of CJGs (n=32) found that CJGs' assessment of support provided to victims was on the whole positive, with 84 per cent of respondents agreeing that CJGs had supported victims during the court process 'quite a lot'.[222]

The evaluation concluded:

> While there is evidence that CJGs are also providing some support to victims of DFV (to a lesser extent than their work with perpetrators), there is currently insufficient evidence to evaluate the impact of this work on empowering victims.[223]

There is no current requirement under the PSA that a court must consider any submissions made by a CJG regarding the impact of an offence on a victim survivor in a similar way as is currently required under section 9(2)(p) when sentencing an Aboriginal or Torres Strait Islander person.

Cultural reports and submissions

There has been increasing support for the broader adoption of *Gladue*-style reports in Australia.

The Australian Law Reform Commission's *Pathways to Justice – Inquiry into the Incarceration Rate of Aboriginal and Torres Strait Islander Peoples* report notes the Queensland provision that supports CJGs making submissions about particular matters under section 9(2)(g) of the PSA was intended to address the over-representation of Aboriginal and Torres Strait Islander peoples in custody, and the need for greater community-based, culturally appropriate options.[224] However, the ALRC noted limitations of the current section, including that the current section relies on CJG submissions and that there is no requirement for such submissions to be made.[225] Section 9 has since been amended to insert section 9(2)(oa), which now expressly provides for a court to consider 'any cultural considerations, including the effect of systemic disadvantage and intergenerational trauma on the offender' without the need for submissions to be made by a representative of a CJG.

The Australian Law Reform Commission, noting development across Australia, recommended:

> **Recommendation 6–2** State and territory governments, in partnership with relevant Aboriginal and Torres Strait Islander organisations, should develop and implement schemes that would facilitate the preparation of 'Indigenous Experience Reports' for Aboriginal and Torres Strait Islander offenders appearing for sentence in superior courts.
>
> **Recommendation 6–3** State and territory governments, in partnership with relevant Aboriginal and Torres Strait Islander organisations and communities, should develop options for the presentation of information about unique systemic and background factors that have an impact on Aboriginal and Torres Strait Islander peoples in the courts of summary jurisdiction, including through Elders, community justice groups, community profiles and other means.[226]

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220 Ibid 105.
221 Ibid. The evaluation noted in mainstream Magistrates Courts, CJGs supported 12 victims for non-DFV related offences and 29 victims in DFV-related offences (these account for 0.6% of the 6,911 people supported). In mainstream Magistrates Courts dealing with DFV proceedings, CJGs supported 413 aggrieved parties (6% of total people supported), while in DFV Enhancement sites, CJGs supported 49 aggrieved in DFV proceedings (10% of total people supported).
222 Ibid 214, Figure 56.
223 Ibid 168.
224 Australian Law Reform Commission, *Pathways to Justice: An Inquiry into the Incarceration Rate of Aboriginal and Torres Strait Islander Peoples* Report No 133, December 2017) 189–190 ('*Pathways to Justice Report*').
225 Ibid 191 citing points raised by the Caxton Legal Centre in its submission to the Inquiry.
226 Ibid.

In 2018, the Australian Research Council funded a project piloting Aboriginal Community Justice Reports over a 5-year period.[227] The reports are modelled on Canada's *Gladue* reports. The Victorian Aboriginal Legal Service is undertaking the project in partnership with the Australasian Institute of Judicial Administration, University of Technology Sydney and Griffith University.[228] The project is also being run in Queensland through Five Bridges Aboriginal and Torres Strait Islander Community Justice Group. More information on the trial is accessible on the VALS website.[229]

The Project's broader objectives are to reduce the over-incarceration of Aboriginal and Torres Strait Islander peoples and improve sentencing processes and outcomes for Aboriginal and/or Torres Strait Islander defendants.[230]

The trialling of this model also responds to research that has found PSRs are deficient in providing the court with 'relevant facts pertaining to the defendant's Indigenous community, cultural background, socioeconomic disadvantage, trauma from institutionalisation' as well as the person's 'individual roles or strengths in their Indigenous community'.[231]

227 See Australian Government, Australian Research Council, 'LP180100759 – University of Technology Sydney', *ARC Grants Data Portal* <https://dataportal.arc.gov.au/NCGP/Web/Grant/Grant/LP180100759>; Victorian Government, 'Burra Lotjoa Dunguludja: Victorian Aboriginal Justice Agreement Phase 4' (2018) 39.

228 'Aboriginal Community Justice Reports', *Victorian Aboriginal Legal Service* (web page) <https://www.vals.org.au/aboriginal-community-justice-reports>.

229 Ibid.

230 Ibid.

231 Thalia Anthony et al, 'Individualised Justice through Indigenous Community Reports in Sentencing' (2017) 26(3) *Journal of Judicial Administration* 121, 135.

12.8 The Council's view

Key Finding

11. **Information available to courts to inform sentence may not be sufficient and could be improved**

It is important that sentencing courts be provided with information to enable the proper consideration of the nature and circumstance of the offence, the personal circumstances of the person being sentenced and the impacts of the offence/s on victim survivors.

There is a risk that judicial officers in Queensland are not being provided with sufficient information to inform the proper exercise of their sentencing discretion noting the following points:

- Criminal justice agencies and legal services operate under significant time and resourcing pressures.
- The availability of those with professional expertise regarding the drivers and impacts of sexual offending, including forensic psychiatrists and psychologists, is limited, and there is currently insufficient funding and capacity to support the provision of expert psychiatric and psychological reports for all sentences.
- Pre-sentence reports prepared by Queensland Corrective Services are not often requested or made available, and may not address all important issues at sentence, including regarding issues of risk and potential treatment options.
- Information provided by community justice groups (CJGs) (including cultural reports) is not routinely available in sexual violence matters, and usually only at the Magistrates Courts level. The availability of this same type of information for people from other culturally and racially marginalised backgrounds is similarly limited.
- Judicial officers may not be provided with sufficient information to understand how the offending has impacted victim survivors, as the long-term impacts are often unknown at the time of sentence, few victim survivors have access to expert reports to document the harm or injury caused to them and/or they may not want the offending person to be aware of how the offending has impacted them by including this information in a victim impact statement.

These issues are exacerbated for Aboriginal and Torres Strait Islander persons due to the impacts of systemic disadvantage and cultural issues, which may limit the ability of prosecutors and defence practitioners to put relevant information before the court.

See **Recommendations 11, 12 and 13**.

Recommendations	
11.	**Legal Aid funding and guidelines in support of the preparation of specialist reports** The Department of Justice consult with Legal Aid Queensland, other legal stakeholders and professional associations representing the interests of forensic psychologist and psychiatrists as a matter of priority to review the adequacy of funding available in support of the preparation of specialist reports for defendants charged with a sexual violence offence and current funding guidelines.
12.	**Court-ordered professional reports and advice** The Department of Justice, in consultation with the Heads of Jurisdiction, explore alternative models of professional advice to inform sentence. This investigation might include, for example, consideration of current arrangements for court-ordered reports and advice and the adequacy of this in supporting the court to both understand factors associated with a person's offending, as well as psychological and emotional harm caused to victim survivors.
13.	**Cultural reports** Queensland Courts actively explore alternative models for the provision of cultural advice to courts in the case of sexual offences, such as rape and sexual assault, including through the engagement of professional report writers, consistent with the current model being trialled through the Australian Research Council-funded project on Indigenous Justice Reports. Consideration should be given not only to the preparation and use of these reports for defendants from an Aboriginal or Torres Strait Islander background or other cultural background, but also separate reports for victim survivors, to better articulate the harm caused and the broader impacts of the person's offending on them.

12.8.1 Overview of the Council's findings and recommendations

Based on our research and consultations, and submissions made to the review, we have concluded that the information available to courts to inform sentence may not be sufficient in some cases and could be improved. In making this finding, we acknowledge the following points:

- Criminal justice agencies and legal services operate under significant time and resourcing pressures.
- The availability of those with professional expertise regarding the drivers and impacts of sexual offending, including forensic psychiatrists and psychologists, is limited and there is currently insufficient funding and capacity to support the provision of expert psychiatric and psychological reports for all sentences.
- Pre-sentence reports prepared by Queensland Corrective Services are not often requested or made available, and may not address all important issues at sentence, including regarding issues of risk and potential treatment options.
- Information provided by community justice groups ('CJGs') (including cultural reports) is not routinely available in sexual violence matters and usually only at the Magistrates Courts level, and

the availability of this same type of information for people from other culturally and racially marginalised backgrounds is similarly limited.

- Judicial officers may not be provided with sufficient information to understand how the offending has impacted victim survivors, as the long-term impacts are often unknown at the time of sentence, few victim survivors have access to expert reports to document the harm or injury caused to them and/or they may not want the offending person to be aware of how the offending has impacted them by including this information in a victim impact statement.

We acknowledge that many of these problems are exacerbated for Aboriginal and Torres Strait Islander persons due to the impacts of systemic disadvantage and cultural issues, which may limit the ability of prosecutors and defence practitioners to put relevant information before the court. In this context, we note that significant work is already underway in response to the Women's Safety and Justice Taskforce's recommendations, including to enhance court advice and prosecution support services focused on First Nations peoples, and suggest that this should continue and, if successful, be considered for expansion.

12.8.2 Applying the Council's fundamental principles

Applying the Council's fundamental principles guiding the review has provided an important basis for considering the need for reform.[232] In particular:

- **Principle 1: Reforms to sentencing laws should be evidence-based with a view to promoting public confidence**: The Council has drawn on observations from sentencing remarks, appeal decisions, past reviews and research, as well as evidence gathered from our subject matter expert interviews, submissions and consultations to identify current challenges in ensuring that courts have access to adequate information to inform sentencing. Based on this evidence, pre-sentence reports and advice, and professional reports, may be most useful in cases where a court is considered whether a sentence involving actual custody is required, and whether any risks the person might pose of reoffending can be safely managed in the community, either with or without supervision.
- **Principle 2: Sentencing decisions should accord with the purposes of sentencing as outlined in section 9(1) of the PSA**: The Council acknowledges that the evidence put before a court is of particular relevance to the sentencing purposes of rehabilitation and risk of reoffending (community protection), as well as substantiating the harm caused to the victim survivor. It may also be relevant to assessing the capacity of the person sentenced to be deterred from reoffending (for example, taking into account whether they have been sentenced in the past for offending of the same or a different kind, and how they responded to any sentence imposed).
- **Principle 3: Sentencing outcomes for sexual assault and rape offences should reflect the seriousness of these offences, including their impact on victims, while not resulting in unjust outcomes**: Specialist professional reports substantiating the harm caused the victim survivor, as well as the personal circumstances of the person being sentenced, may provide courts with important information in support of a sentence. Cultural information and advice may help a sentencing court to better understand factors contributing to the person's offending, the impacts of the order they are making on the person sentenced (for example, in circumstances where the

232 For a full list of the fundamental principles, see Chapter 3.

community may not want that person returned to their community) and the personal circumstances of the victim survivor.

- **Principle 4: People serving sentences in the community for a sexual offence should have appropriate supervision**: As a general starting proposition, we consider that it should be assumed that people who have committed rape and sexual assault require some form of supervision. In **Chapter 11**, we discuss how the current structure of sentencing and parole options in Queensland presents practical barriers to achieving this. The adoption of the reforms we recommend will make it even more important that appropriate use be made of PSRs, court advisory services, professional reports, and cultural reports and submissions, to help guide a court in determining what type of order and conditions are most appropriate based on factors contributing to the person's risk of offending, programs and supports available to the person in custody and in the community, and the person's assessed level of risk.
- **Principle 6: Reforms should take into account likely impacts on the disproportionate representation of Aboriginal and Torres Strait Islander peoples in the criminal justice system**: A significant criticism of pre-sentence reports and risk assessment instruments is that they are culturally biased and fail to adopt a strengths-based approach when assessing reoffending risks. This is why, in our view, it is important that any risk assessments are undertaken by someone with a proper appreciation of shortcomings of such tools. It is also why both PSRs and specialist reports should be prepared as far as possible in a culturally appropriate way, such as through the use of cultural advisers, and supplemented wherever possible with cultural submissions and advice. The type of general information contained in the *Bugmy Bar Book*[233] is a useful guide to the sort of factors that may have an impact, particularly on Aboriginal and Torres Strait Islander people sentenced for these and other offences as well as victim survivors from an Aboriginal or Torres Strait Islander background. Specialists' reports, and cultural submissions and reports, also may be of significant benefit in substantiating the harm caused by rape and sexual assault to victim survivors, their family members and immediate community in support of the court understanding the extent of the harm caused and the seriousness of the offending, As with a VIS, no inference should be drawn from the absence of such evidence (see further **Chapter 14**).
- **Principle 7: The circumstances of each person being sentenced, the victim survivor and the offence are varied. Judicial discretion in the sentencing process is fundamentally important**: PSRs, courts advisory services, specialist and professional reports and cultural submissions and reports, in addition to other information and evidence, including in the form of a VIS and submissions by the prosecution and defence, all give sentencing judges and magistrates a richer understanding of the individual circumstances of the person being sentenced and the victim survivor in support of individualised justice. Judicial discretion, however, is fundamentally important given that all forms of information have limitations and ultimately a court must decide whether it is satisfied with the relevant matters to the requisite standard of proof required under section 132C of the Evidence Act.
- **Principle 9: Sentencing decisions for sexual assault and rape should be informed by the best available evidence of a person's risk of reoffending**: The problems with risk assessments are

233 The Bugmy Bar Book Project Committee, *Bugmy Bar Book* <https://bugmybarbook.org.au>.

well documented.[234] Because of the only moderate predictive efficacy of these tools, it has been argued that 'they should not be used as the sole or primary means for clinical or criminal justice decision making that is contingent on a high level of predictive accuracy'.[235] Further, 'the current level of evidence is not sufficiently strong for definitive decisions on sentencing, parole, and release or discharge to be made solely using these tools'.[236] Such tools also have been criticised on a number of grounds, including being based on variables over which the person has no control (such as the person's age or gender), as well as socioeconomic factors (such as a person's marital status, educational or employment status) over which the state should have no legitimate interest and on which disadvantaged and marginalised groups rate less well than non-minority groups. Another criticism is that they incorporate variables based on previous criminal history, which also disadvantage certain individuals and groups based on differences in policing practices.[237] We acknowledge that these shortcomings are valid and significant. However, when considered alongside other information, including cultural advice and reports and other information available to a court regarding the personal circumstances of the person being sentenced, these assessments may provide a useful tool for helping a court to consider how any risks the person might pose might be successfully mitigated and managed, consistent with the legitimate objective of community protection.[238]

- **Principle 10: Any reforms should aim to be compatible with the rights protected and promoted under the *Human Rights Act 2019* (Qld) ('HRA') or be reasonably and demonstrably justifiable as to limitations**: The use of information and evidence that unfairly disadvantages certain individual and groups, such as regarding reoffending risks, may be viewed as inconsistent with the principles of natural justice and may limit a person's human rights, such as 'rights in criminal proceedings'.[239] The Council is mindful of ensuring that, if a right is limited, it is reasonable and justifiable under the HRA. At the same time, we recognise the importance of recognising the rights of victims and ensuring relevant information can be put before a court substantiating victim harm.

12.8.3 Court-ordered reports and advice

Queensland faces unique challenges, including our geographically dispersed population and the difficulties this causes for service provision, particularly for those who live in regional and remote parts of the state. For this reason, while we see a need for improved information for courts, we do not support the adoption of a 'one size fits all' model without due regard to local circumstances.

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234 For a discussion of some of these problems, see Andrew Day, Stuart Ross and Katherine McLachlan, *The Effectiveness of Minimum Non-Parole Period Schemes for Serious Violent, Sexual and Drug Offenders and Evidence-Based Approaches to Community Protection, Deterrence, and Rehabilitation* (Report, University of Melbourne, August 2021) 3–4; Complex Adult Victim Sex Offender Management Review Panel, *Advice on the Legislative and Governance Models under the Serious Sex Offenders (Detention and Supervision) Act 2009 (Vic)* (Report, 2015) 15–16 [1.59]–[1.65].

235 Min Yang, Stephen C. Wong, and Jeremy Coid, 'The Efficacy of Violence Prediction: A Meta-Analytic Comparison of Nine Risk Assessment Tools' (2010) 136 *Psychology Bulletin* 740, 761 as cited in Michael Tonry, 'Fifty Years of American Sentencing Reform: Nine Lessons' (2019) 48 *Crime and Justice* 1, 14.

236 Seena Fazel et al., 'Use of Risk Assessment Instruments to Predict Violence and Antisocial Behavior in 72 Samples Involving 24, 827 People: Systematic Review and Meta-Analysis' (2012) 345 BMJ 5–6 as cited in Tonry (n 235) 14.

237 Tonry (n 235). As to this last point, see Chapter 2.

238 See *Veen (No 2)* (1988) (n 212) 472 (Mason CJ, Brennan, Dawson and Toohey JJ).

239 *Human Rights Act 2019* (Qld) s 32(2)(h) which provides a person is entitled 'to obtain the attendance and examination of witnesses on the person's behalf under the same conditions as witnesses for the prosecution'.

Our view is that further work is required to support the development of alternative models of professional advice to inform sentence. We recommend that the Department of Justice should lead this work in consultation with Queensland Courts.

This investigation might include, for example, consideration of current arrangements for court-ordered reports and advice and the adequacy of this in supporting the court to both understand factors associated with a person's offending, as well as psychological and emotional harm caused to victim survivors.

Some more modest suggestions have been made to improve current practices, which might be actioned in the short term. For example, Legal Aid Queensland has recommended processes to streamline current arrangements that would allow access to supporting medical records held by Queensland Health.

We acknowledge work underway to expand Queensland Corrective Services' court advisory service and also support this work continuing as an important means of ensuring that courts have access to the information they need when making decisions on sentence. This includes information about the person's likely access to relevant programs and supervision and whether programs and interventions are available custody or in the community, where the nature and seriousness of the offence means a community-based order is reasonably open. Legal stakeholders told us this information is important and that sentencing courts sometimes do not have a good understanding of the programs and interventions available at a local level.

We further note that Queensland Courts are piloting a Sexual Offence Expert Evidence Panel that will allow experts to give relevant evidence in sexual violence proceedings at two locations in Brisbane and Townsville.[240] While the focus of the panel is on providing expert evidence to inform the evaluation of other evidence in a trial context, there may be learnings based on this pilot regarding the use of other forms of expert evidence and reports in a sentencing context.

With respect to specialist reports including risk assessments, we repeat comments made in our review of the serious violent offence scheme regarding the problematic nature of assessing risk. We suggest that a greater focus be placed on human rights grounds in reports that have suggested a person is at low risk of reoffending, rather than reports suggesting a person is at moderate or moderate to high risk of reoffending. While important, this information must be assessed in the context of other information put before the court to inform sentencing. Further, as cautioned by the High Court, a sentence must not be extended beyond that which is proportionate for the purposes of community protection purely on the basis of the person's assessed level of risk.[241]

In addition to the recommended review, we recommend that the Department of Justice consult with Legal Aid Queensland, other legal stakeholders and professional associations representing the interests of forensic psychologist and psychiatrists as a matter of priority to review the adequacy of funding available in support of the preparation of specialist reports for defendants charged with a sexual violence offence and current funding guidelines.

12.8.4 Cultural reports and advice

The Council strongly supports cultural submissions and advice being widely available, noting that these provide an invaluable source of information and advice. As Sofronoff P has suggested, submissions from

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240 See Queensland Courts, 'Sexual Offence Expert Evidence Panel' (web page) <https://www.courts.qld.gov.au/services/sexual-offence-expert-evidence-panel> for more information.

241 *Veen (No 2)* (n 212) 472 (Mason CJ, Brennan, Dawson and Toohey JJ).

a CJG representative should be given great weight, taking into account that opinions are 'expressed by persons who have special local knowledge and whose appointment to the Group carries with it the trust of their community'.[242]

We support efforts already underway to explore opportunities to enhance the provision of this advice and ensure it is available on a statewide basis, such as by continuing to fund and build the capabilities of CJG members to provide oral and written sentencing submissions and considering the outcomes of the current trial of Aboriginal Community Justice Reports in Queensland and Victoria.

We also consider that there are potential benefits in the Queensland Government working with peak bodies, such as the Ethnic Communities Council of Queensland, to develop similar capacities in support of culturally and linguistically diverse communities.

Through professional development and training, there may also be opportunities in support of defence practitioners in making appropriate submissions on sentence. For example, we note in a speech delivered by His Honour Judge Glen Cash QC, His Honour encouraged broader and more imaginative submissions to be made by legal practitioners regarding cultural considerations referred to in the relevant section of the PSA.[243] This might extend, for example, to 'consideration of non-corporal extra-curial punishment (such as exclusion from community or shaming) or … forms of alternative dispute resolution' and factors that might be relevant to assessing a person's level of culpability.[244]

The practice of seeking similar information from community members regarding cultural factors and circumstances, as well as relevant community-based programs available for defendants from other cultural backgrounds, should be promoted to defence practitioners and, where appropriate, included in relevant professional manuals and guidelines.

A current limitation of the reports provided is that they focus solely on the circumstances of people sentenced for these offences rather than those who are most significantly negatively impacted by them – victim survivors. We therefore consider it important that cultural submissions and reports be explored as an option in appropriate cases for victim survivors who are Aboriginal and Torres Strait Islander and from other cultural backgrounds. This would recognise that the impacts of offending can be experienced differently and factors such as the ongoing impacts of colonisation and intergenerational trauma that might impact perpetrators of sexual violence may apply equally to victim survivors. Understanding how these factors impact at an individual level is an important aspect of 'humanising' the sentencing process[245] and giving appropriate recognition and respect to the person who has been harmed.

12.8.5 Systemic disadvantage considerations

As discussed in **Appendix 4**, section 4.3, Aboriginal and Torres Strait Islander peoples represent almost a quarter of offenders sentenced for offences of sexual assault (20.5%) and rape (23.3%). Aboriginal and Torres Strait Islander peoples also are around 3.5 times more likely to have been a victim of sexual assault (including rape and other sexual offences) compared with non-Indigenous Australians.

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242 *R v SCU* [2017] QCA 198, 6 [26], 11–12 [56] and 23–24 [113] (Sofronoff P).
243 His Honour Judge Glen Cash KC, 'Customary Law and the Recognition of Systemic Disadvantage in the Sentencing of First Nations Persons' (Paper delivered to the Sunshine Coast Bar Professional Development Day 28 August 2021) 14.
244 Ibid 15.
245 As to this concept, see also Cyrus Tata, 'The Humanising Work of the Sentencing Professions: Individualising and Normalising' in *Sentencing: A Social Process – Rethinking Research and Policy* (Palgrave Macmillan, 2020) 93.

The use of cultural submissions and reports, in particular, has a unique potential to improve courts' understanding of the context in which a person's offending has occurred and its implications. This includes information not only about the person's community and cultural background, but also any factors of intergenerational trauma that might impact them at an individual level and to better understand that person's role within their community and their strengths.

We consider a much-overlooked aspect of cultural submissions and reports is how this model can be tailored to better capture the experiences and impacts of sexual offending on victim survivors who are Aboriginal or Torres Strait Islander or from other cultural backgrounds. An understanding of the unique experiences of victims is critical, in our view, to ensuring the harm caused to victims is adequately understood in support of better sentencing practices. We explore this issue in detail in **Chapter 14**.

12.8.6 Human rights considerations

Rights relevant to the availability of information and reports to inform sentencing under the HRA include:

- the right to recognition and equality before the law (section 15);
- the right to privacy and reputation (section 25); and
- cultural rights (sections 27 and 28).

Legal Aid Queensland raised concerns about the use of risk assessments applying the current QCS model for all sexual offenders being 'at risk of impacting a defendant's right to equality before the law', also suggesting that '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':[246]

> 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. 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 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.[247]

This is an important reason we consider these types of assessments should only be undertaken by those with expertise in administering them who are transparent in providing their reports for use as a basis for sentencing about the limitations of any such assessments.

It is also why we consider information drawn from risk assessments should only ever be one of several different sources of information which are used by a court in making its determination. Ultimately the seriousness of the offence the person has been convicted of should be the primary determinative factor in deciding sentence, not the person's assessed level of risk.

246 Submission 23 (Legal Aid Queensland) 25 citing *Human Rights Act 2019* (Qld) ss 15, 29.
247 Ibid 25–6 (footnotes omitted).

Chapter 13 – Understanding victim harm and justice needs

13.1 Introduction

The Terms of Reference ask us to 'identify and report on any legislative or other changes required to ensure the imposition of appropriate sentences for sexual assault and rape offences'.[1] This includes the processes and procedures that guide sentencing for these offences.[2]

In doing so, we must also have regard to protecting victim survivors of sexual offences within sentencing processes, holding offenders to account, maintaining judicial discretion and promoting public confidence in the criminal justice system.[3]

This chapter considers the impacts of sexual offences on victim survivors, their rights and role within the criminal justice system and their experiences engaging with the sentencing process. This includes their right to be kept informed and to be treated fairly and with dignity when engaging with, and navigating, the criminal justice system.

We consider how current sentencing practices and processes operate in Queensland and other jurisdictions to respond to the rights and justice needs of victim survivors of rape and sexual assault, as well as relevant reforms currently underway. We also discuss specific feedback provided by victim survivors of these offences, victim support and advocacy services, legal and justice stakeholders and members of the broader community that informed our findings. Our formal views and recommendations to improve the criminal sentencing process in Queensland for victim survivors of rape and sexual assault are presented in the final section of this chapter.

A further discussion of victim survivor harm and acknowledgement within the sentence hearing (including through a victim impact statement ('VIS')) is outlined in **Chapter 14**.

13.1.1 Impact of sexual offences

Sexual offences (broadly defined as 'sexual violence offences') can have significant immediate and long-term impacts for victim survivors who experience them. Offences of this nature can cause serious and lifelong harm to the mental and physical health of victim survivors, as well as adverse impacts upon their relationships, education, employment, financial security, sexual identity and connection with their culture or religion.[4] As outlined earlier in our report, young children who are subjected to sexual abuse are also particularly vulnerable to experiencing prolonged harm, as 'sexual abuse can affect the emotional, social and physical development' of the child, including the development of their brain, with potential long-term negative consequences.[5]

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1 Appendix 1: Terms of Reference, 2.
2 Ibid 1.[3] Ibid.
3 Ibid.
4 Royal Commission into Institutional Responses to Child Sexual Abuse, *Final Report Volume 3: Impacts* (2017) 9–11 ('*Royal Commission into Institutional Responses to Child Sexual Abuse Final Report Vol 3*').
5 Ibid.

The *Victims of Crime Assistance Act 2009* (Qld) defines 'injury' for victims of sexual offences to include the totality of the following 'adverse impacts' suffered:

(i) sense of violation;

(ii) reduced self-worth or perception;

(iii) lost or reduced physical immunity;

(iv) lost or reduced physical capacity (including the capacity to have children), whether temporary or permanent;

(v) increased fear or increased feelings of insecurity;

(vi) adverse effect of others reacting adversely to the person;

(vii) adverse impact on lawful sexual relations;

(viii) adverse impact on feelings.[6]

The Council acknowledges the significant body of literature documenting the prevailing impacts of sexual offences on victim survivors. We have not recited the contents of this literature here, noting that it has been discussed in detail in section 4.4.3 of our **Consultation Paper: Background**.[7] We nevertheless recognise that these impacts are far-reaching and significant.

13.1.2 Measuring victim survivor satisfaction with the criminal justice system

Public confidence is fundamental to the proper administration and operation of the criminal justice system.[8]

Low levels of public confidence leads to dissatisfaction with the justice system (including with the police, prosecution services, and the criminal courts).[9] Alienation and a lack of standing in the process discourages victim survivors from reporting criminal offending to authorities and proceeding with the criminal prosecution process.[10] This is of particular concern for the prosecution of rape and sexual assault offences as, compared with other offences, proportionately few victim survivors of sexual offending currently engage with the justice system[11] and there are already high rates of attrition associated with proceedings for these offences, as discussed at **Chapter 2**.[12] The Australian Bureau of Statistics reports that as few as 13 per cent of sexual violence incidents are reported to police by females.[13]

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6 *Victims of Crime Assistance Act 2009* (Qld) s 27(f). This is in addition to 'bodily injury', 'mental illness or disorder' , 'intellectual impairment', 'pregnancy' or 'disease': ss 27(a)–(e).

7 Queensland Sentencing Advisory Council, *Sentencing of Sexual Assault and Rape: The Ripple Effect - Consultation Paper: Background* (March 2024) 44–7 (‘*Consultation Paper: Background*’).

8 David Indermaur and Lynne Roberts, 'Confidence in the criminal justice system' (Trends & Issues in Crime and Criminal Justice, No 387, Australian Institute of Criminology, November 2009) 1.

9 Ibid.

10 See Sam Garkawe 'The role of the victim during criminal court proceedings' (1994) 17(2) *University of New South Wales Law Journal* 595, 596; Edna Erez and Leigh Roeger, 'The effect of victim impact statements on sentencing patterns and outcomes: The Australian experience' (1995) 23(4) *Journal of Criminal Justice* 363, 374.

11 Jacqueline Fitzgerald, 'The attrition of sexual offences from the New South Wales criminal justice system' (Contemporary Issues in Crime and Justice, No. 92, Crime and Justice Bulletin, NSW Bureau of Crime, Statistics and Research, January 2006) 2; Robyn L Holder and Elizabeth Englezos 'Victim participation in criminal justice: A quantitative systematic and critical literature review' (2024) 30(1) *International Review of Victimology* 25, 26.

12 See a discussion of the barriers to reporting and attrition in the criminal justice system in *Consultation Paper: Background* (n 7) 19–26 [2.3].

13 Australian Bureau of Statistics, *Sexual violence, 2021-22 financial year* (23 August 2023). The Personal Safety Study 2021-22 also found that 9 in 10 women who experienced sexual assault by a male did not report the most recent

Studies have recognised that victim survivor satisfaction with the police, prosecution and courts is impacted by the quality of interpersonal treatment they receive, as well as opportunities for them to have their voice heard.[14]

Key criticisms often made by victim survivors when engaging with the criminal justice process include that:

- the whole process is not victim focused;
- they are made to feel alienated and excluded;
- they are exposed to discourtesy and disrespect;
- information that victim survivors consider to be important is either withheld or not shared with them;
- there is a lack of support, assistance and advocacy when interacting with the justice system;
- they believe that 'process efficiencies trump the proper administration of justice';
- courts impose what victim survivors consider to be 'inadequate' or lenient sentence outcomes;
- they feel as though they are not sufficiently involved or given adequate opportunity to be heard within the justice process; and
- they believe that 'while defendants have rights and representation, victims have neither'.[15]

As discussed in **Chapter 2**, the prevalence of rape myths and stereotypes also acts as a barrier to reporting for victim survivors of sexual offences.

It has also been recognised that public confidence in different justice agencies (including police, courts and correctional centres) diminishes or has an 'evaporation effect' as charges progress through the criminal justice system.[16] As most members of the community do not have direct experience with these processes, they rely on media portrayals or shared experiences of others to inform the prism through which they view them.[17] Improving public perception that these agencies are acting on behalf of the broader community has been acknowledged as one of the best way to improve public confidence in the system.[18]

Victim survivor and community satisfaction with Queensland's criminal sentencing regime – including satisfaction with both the adequacy of the trial or sentence outcome and the sentence procedure (procedural satisfaction) – was therefore a critical issue for the Council to consider in assessing whether sentences for offences of rape and sexual assault are adequate and appropriate. Victim survivor procedural satisfaction is discussed below, noting that satisfaction with sentence outcomes for these offences was considered in **Chapter 5**.

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incident to the police (92%). This is consistent with the average of 14% calculated from earlier studies: Kathleen Daly and Brigitte Bouhours, 'Rape and attrition in the legal process: A comparative analysis of five countries' (2010) 39 *Crime and Justice: A Review of Research* 565, 568, 572.

14 Robyn Holder, 'Satisfied? Exploring victims' justice judgments', in Dean Wilson and Stuart Ross (eds), *Crime, Victims and Policy: International Context, Local Experiences* (Palgrave Macmillan, 2015) 195.

15 Ibid 189.

16 Ibid citing Indermaur and Roberts (n 8) 1–4.

17 Ibid 4.

18 Ibid 6.

13.2 The role, justice needs and rights of victim survivors within sentencing

13.2.1 The role of a victim survivor in criminal proceedings

Prior to a person who is alleged to have committed a sexual violence offence pleading guilty or being convicted, victim survivors' participation in the criminal justice process includes:

- making a formal complaint to police;
- providing a statement about what is alleged to have happened; and
- if the victim survivors' account is contested, being prepared to give evidence at trial and (potentially) subjecting themselves to cross-examination by defence.

This can be a protracted and difficult process and requires ongoing and active participation on the part of victim survivors.

Once a person being convicted (either following a trial or after pleading guilty), victim survivor participation and involvement in the sentencing process are not mandatory.

As a victim survivor is not a party to the proceeding,[19] they are not obliged to attend the sentence hearing if they do not wish to do so. Sentence hearings can (and often do) proceed without the victim survivor being present. Reflecting the views of many victim advocacy and support services, the Queensland Sexual Assault Network ('QSAN') told us this can contribute to victim survivors feeling their 'needs are unimportant and peripheral'.[20] In the context of sentencing proceedings, the process may seem 'even more focused on the offender than the trial and pretrial processes, because victim survivors are even more ancillary to the process'.[21]

The role of a victim survivor as a participant, rather than as a party, is entrenched within Queensland's adversarial system of justice, which considers crime acts committed against the state.[22] The focus of any sentence hearing is on offence and the offender. Usually, only the person being sentenced and the prosecution service have standing to appear as parties in the sentence hearing.[23]

Victims of crime have consistently expressed a desire to be a party to sentence proceedings, including the ability to challenge the sentence on appeal and to be an active party in decisions about the amendment of any charges, rather than merely being consulted in what they consider to be a superficial way.[24] However, victim survivor input within the sentencing process presents challenges for the adversarial system of justice and remains a point of contention.

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19 Arie Freiberg and Asher Flynn, *Victims and Plea Negotiations - Overlooked and Unimpressed* (Palgrave Macmillan, 2021) 10. The Council has not considered whether victim survivors of rape and sexual assault should be granted substantive rights as parties to the criminal proceeding, recognising that this would entail a fundamental alteration to the adversarial system of justice, which is not within the limited scope of this Terms of Reference.

20 Submission 24 (Queensland Sexual Assault Network) 3.

21 Ibid.

22 Edna Erez, 'Victim Impact Statements' (Trends & Issues in Crime and Criminal Justice, No 33, Australian Institute of Criminology, September 1991) 2.

23 Tracey Booth, *Accommodating Justice: Victim Impact Statements in the Sentencing Process* (Federation Press, 2016) 5. In some cases, legislation provides a person is entitled to be heard even though they are not a party. For example, under the *Youth Justice Act 1992* (Qld) s 74: 'The chief executive is entitled to be heard by the court on matters mentioned in subsection (3), even though the chief executive is not a party to the proceeding'. There is no similar provision for a victim survivor.

24 Erez (n 22) 2.

It has been recognised that increased victim survivor participation has the potential to enhance the criminal justice system by providing the court with information surrounding the seriousness of the offence and communicating to the offender the harm experienced by the victim survivor, and may convey therapeutic and restorative justice benefits to the victim and enhance perceptions of fairness within the sentencing context.[25] Comparatively, those who oppose greater participation by victim survivors consider this concept to be inconsistent with the adversarial nature of our system, which may infringe the right of the person being sentenced to a fair hearing and negatively impact the wellbeing of a victim survivor.[26]

While no common law jurisdiction has implemented reforms that permit a victim survivor to be an independent and active participant in the criminal justice process as a party to the proceeding, with standing to appear and make submissions on sentence, a framework for limited legal representation has been established in some jurisdictions throughout the trial and pre-trial process.[27]

While there has been support for enhancing victim rights and victim-orientated reform in previous reports, this is within the existing adversarial framework.[28] The Victorian Law Reform Commission ('VLRC') proposed a victim should be legislated as a 'participant' but did not consider victims should be a party to criminal proceedings as it 'would significantly alter the adversarial system' and would require significant resourcing.[29]

13.2.2 Specific justice needs of victim survivors of rape and sexual assault

There has been a significant shift in Queensland towards recognising the justice needs and rights of victim survivors, as well as the integral role they play within the criminal justice system.[30] The Women's Safety and Justice Taskforce ('WSJ Taskforce') noted that that there has been increasing recognition of victim survivors as 'integral players in criminal justice, rather than mere bystanders'.[31]

Victim survivors who experience rape or sexual assault have various needs when navigating the criminal justice process. In 2021, the VLRC found in its inquiry into improving the justice system response to sexual offences for victim survivors that these needs may include:

- being **given information** about how the criminal justice system works and what to expect;
- being a **participant**, including being provided with knowledge of how their case is progressing and being involved in, or aware of, key decisions and their role in the criminal justice process;
- **having a voice** – being able to tell 'their full story in their own words';
- **receiving validation** by having their story heard and believed, and having a 'concrete outcome' from reporting the sexual violence;

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25 Booth (n 23) 2.
26 See discussion in Victorian Law Reform Commission, *The Role of Victims of Crime in the Criminal Trial Process: Report* (2016) 27–9 [3.40]–[3.48]; 32 [3.65] ('*The Role of Victims of Crime in the Criminal Trial Process*').
27 Women's Safety and Justice Taskforce, *Hear Her Voice, Report Two: Women and Girls' Experiences Across the Criminal Justice System* (2022) (n 13) vol 1, 275–6 ('*Hear Her Voice, Report Two*'). Various models have been adopted in the United States, Ireland, Northern Ireland, England (Northumbria) and India.
28 See Royal Commission into Institutional Responses to Child Sexual Abuse, *Criminal Justice Report: Executive Summary and Parts I to II* (2017) 15; Victorian Law Reform Commission, *The Role of Victims of Crime in the Criminal Trial Process: Report* (2016) 30 ('*The Role of Victims of Crime in the Criminal Trial Process*').
29 *The Role of Victims of Crime in the Criminal Trial Process* (n 28) 30 [3.53]–[3.54].
30 *Hear Her Voice, Report Two* (n 13); Simon Bronitt and Philip Stenning, 'Understanding discretion in modern policing' (2011) 35 *Criminal Law Journal* 21, 31.
31 Ibid 137 citing Michael O'Connell (then Commissioner for Victims' Rights South Australia), Victims' Rights: Integrating victims in criminal proceedings (Speech, no date) <https://aija.org.au/wp-content/uploads/2017/08/OConnell2.pdf>.

- seeing the offender **denounced and held accountable** by having the sexual violence 'clearly condemned' and seeing those responsible face consequences for their actions; and
- being **treated with respect and supported** – including in the form of counselling and support during the court process.[32]

The ability of the Queensland criminal justice system to respond to the justice needs of victim survivors, including both the procedural justice and the substantive justice aspects, is critical to ensuring that victim survivors – and members of the community more broadly – are satisfied with both the sentencing process and sentencing outcomes.[33]

We also know that sexual offences are experienced at higher rates by some cohorts, including women and children of Aboriginal and Torres Strait Islander descent, or people from culturally and racially marginalised backgrounds, which must be considered within this context.[34]

The impacts of sexual offending may be exacerbated in certain settings, including the workplace, particularly where they intersect with other forms of disadvantage and discrimination, such as sexism, racism, ageism and ableism.[35] Sexual offending may also be less visible and less understood for some marginalised groups in the community.[36] For more information on these intersecting forms of disadvantage, see **Chapter 2**.

Recent inquiries have highlighted the experiences of victim survivors within the criminal justice system in Queensland, including:

- the 2021 WSJ Taskforce established to review Queensland's response to domestic and family violence (Report 1)[37] and the experience of women and girls within the criminal justice system (Report 2);[38]
- the 2022 Commission of Inquiry into Queensland Police Service ('QPS') responses to domestic and family violence;[39]
- the 2022 Commission of Inquiry into Forensic DNA testing in Queensland;[40] and

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32 Victorian Law Reform Commission, *Improving Justice System Response to Sexual Offences* (Report, September 2021) 29–32 ('*Improving the Justice System Response to Sexual Offences*').

33 For a summary of relevant research see Royal Commission into Institutional Responses to Child Sexual Abuse, *Consultation Paper: Criminal Justice* (November 2016) 4 citing the Commissioner for Victims' Rights, South Australia, Submission No. 65.

34 Natalie Taylor and Judy Putt, 'Adult sexual violence in Indigenous and culturally and linguistically diverse communities in Australia' (Trends and Issues in Crime and Criminal Justice, No 345, Australian Institute of Criminology, September 2007) 1, 2.

35 For more information on what is intersectionality, see Diversity Council Australia, *Culturally and Racially Marginalised Women in Leadership: A framework for (intersectional) organisational actions* (Factsheet, 2023) <https://www.dca.org.au/wp-content/uploads/2023/09/carm_women_infographic_intersectionality_explained_final.pdf>.

36 Australian Government, *National Plan to Reduce Violence Against Women and their Children 2022–2032* (October 2022) 41 ('*National Plan to Reduce Violence Against Women and their Children*') citing Victorian Government and The Equality Institute, *Family violence primary prevention: building a knowledge base and identifying gaps for all manifestations of family violence* (2017).

37 Women's Safety and Justice Taskforce, *Hear Her Voice – Report One: Addressing Coercive Control and Domestic and Family Violence in Queensland* (2021) ('*Hear Her Voice, Report One*').

38 *Hear Her Voice, Report Two* (n 27).

39 Commission of Inquiry into Queensland Police Service Responses to Domestic and Family Violence, *A Call for Change* (Final Report, 2022) ('*QPSDFV Inquiry - A Call for Change*').

40 Walter Sofronoff, *Commission of Inquiry into Forensic DNA testing in Queensland: Final Report* (2022).

- the 2023 Queensland Legal Affairs and Safety Committee inquiry into support provided to victims of crime.[41]

The Australian Law Reform Commission ('ALRC') has also conducted an inquiry into justice responses to sexual violence in Australia.[42] Of particular relevance to this review is that the ALRC's Terms of Reference require it to consider:

> c. Policies, practices, decision-making and oversight and accountability mechanisms for police and prosecutors
>
> d. Training and professional development for judges, police, and legal practitioners to enable trauma-informed and culturally safe justice responses
>
> e. Support and services available to people who have experienced sexual violence, from the period prior to reporting to the period after the conclusion of formal justice system processes.[43]

The ALRC invited victim survivors and members of the community to provide feedback about whether specialised training is required for judges and practitioners who conduct sexual offence cases and also asked specific questions about how to improve the sentencing process for victim survivors (including the victim impact statement process) and whether a national approach to sentencing practices and outcomes is required.[44]

The ALRC is due to deliver its final report to the Commonwealth Attorney-General by 22 January 2025.

13.2.3 Rights of victim survivors within the sentencing context

There has been increasing recognition of victims as 'integral players in criminal justice, rather than mere bystanders'.[45]

In Queensland, there have been various developments to the sources of recognised rights for victim survivors within the criminal justice context, including:

- the Charter of Victims' Rights ('Victims' Charter')[46] and the recent establishment of the Office of the Victims' Commissioner to address issues of concern for victims of crime;[47]
- the establishment of Victim Assist Queensland (VAQ);
- the statutory processes by which victim survivors may provide VISs to sentencing courts (discussed in **Chapter 14**), and written statements for consideration by the Parole Board of Queensland; and
- the introduction of measures to support special witnesses (which includes victim survivors of rape and sexual assault) when providing evidence in court proceedings.

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41 Legal Affairs and Safety Committee, *Inquiry into Support provided to Victims of Crime* (Report No. 48, Parliament of Queensland, 57th Parliament, May 2023).
42 Terms of Reference: Justice Responses to Sexual Violence, *Australian Law Reform Commission* (web page, 23 January 2024) <https://www.alrc.gov.au/inquiry/justice-responses-to-sexual-violence/terms-of-reference>.
43 Ibid.
44 Australian Law Reform Commission, *Justice Responses to Sexual Violence: Issues Paper* (Issues Paper 49, April 2024) Questions 33, 39–42. The ALRC received over 200 submissions in response to their consultation paper, which can be accessed at <https://www.alrc.gov.au/inquiry/justice-responses-to-sexual-violence/submissions/>.
45 O'Connell (n 31) cited in *Hear Her Voice, Report Two* (n 13), vol 1, 137.
46 Introduced under the *Victims of Crime Assistance and Other Legislation Amendment Act 2017* (Qld). It is now in *Victims' Commissioner and Sexual Violence Review Board Act 2024* (Qld) ch 3; sch 1.
47 *Victims' Commissioner and Sexual Violence Review Board Act 2024* (Qld).

Charter of Victims' Rights ('Victims' Charter')

The Victims' Charter[48] sets out the current principles in 'one easy to read document for victims'.[49] It reiterates the obligation for relevant agencies to provide information to victims proactively if appropriate and practical to do so. In 2024, the Victims' Charter moved from the *Victims of Crime Assistance Act 2009* (Qld) to the *Victims' Commissioner and Sexual Violence Review Board Act 2024* (Qld).[50]

Under the Victims' Charter, and the various Acts prior to it, victim survivors of rape and sexual assault must be kept informed of the progress of criminal proceedings (at both the investigation and prosecution stages) and must be treated with respect, courtesy, compassion and dignity throughout the criminal justice process.[51] The Victims' Charter confers upon victim survivors the right[52] to be provided with information pertaining to:

- the progress of a police investigation (unless this may jeopardise the investigation);
- major decisions made about the prosecution of an accused person, including the charges brought against the accused person (or a decision not to bring charges), any substantial changes to the charges, and the acceptance of a plea of guilty to a lesser or different charge;
- the name of the person charged;
- information about court processes including hearing dates and how to attend court, and the outcome of criminal court proceedings against the accused person, including the sentence imposed and the outcome of any appeal; and
- information about the trial process and the victim's role as a witness (if the victim is a witness at the accused's trial).[53]

The Victims' Charter outlines the right of a victim survivor to provide the court with a VIS. A VIS is a written statement made by a victim survivor about the harm caused to them by the offending.[54] The VIS regime is discussed in **Chapter 14**.

The Victims' Charter applies to a 'prescribed person'[55] dealing with an 'affected victim',[56] such as stakeholders involved in the justice process, including police, prosecutors, the courts, support services

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48 Prior to the introduction of the Victims' Charter, the *Criminal Offences Victims Act 1995* (Qld) was a compensation-based scheme for victims of crime which contained fundamental principles for justice of victims based on the *United Nations Declaration of Basic Principles of Justice for Victims of Crime and Abuse of Power: United Nations Declaration of Basic Principles of Justice for Victims of Crime and Abuse of Power*, UN Doc A/RES/40/34 (adopted 29 November 1985). The Act included a provision requiring 'fair and dignified treatment', 'access to justice', 'information about investigation and prosecution' and that 'the prosecutor should inform the sentencing court of appropriate details of the harm caused to a victim by the crime': *Criminal Offences Victims Act 1995* (Qld) ss 6, 7, 14(1), 15. In September 2009, the *Victims of Crime Assistance Act 2009* (Qld) replaced the *Criminal Offences Victims Act 1995* (Qld). In doing so, it maintained the fundamental principles for government agencies to comply with when providing a service to a victim of crime, and introduced a mechanism for a victim survivor to provide a VIS during sentencing: *Victims of Crime Assistance Act 2009* (Qld) ch 2 and s 15, when introduced by assent on 17 September 2009. In 2017, the fundamental principles were repealed and became a 'Charter of Victims' Rights'. This was introduced in response to a recommendation of the Queensland Government, *Final Report on the Review of the Victims of Crime Assistance Act 2009* (2015) rec 12 ('*Victims of Crime Assistance Act 2009 Final Report*').

49 *Victims of Crime Assistance Act 2009 Final Report* (n 48) 27.

50 *Victims' Commissioner and Sexual Violence Review Board Act 2024* (Qld) sch 1.

51 Ibid sch 1 pt 1 div 1, 1.

52 Albeit not a legally enforceable right: ibid s 43.

53 Ibid sch 1 pt 1, div 2.

54 *Penalties and Sentences Act 1992* (Qld) s 179I ('PSA').

55 *Victims' Commissioner and Sexual Violence Review Board Act 2024* (Qld) s 40: a government entity, non-government entity, an officer, member or employee of a government entity or non-government entity.

56 Ibid s 41(2). For a definition of 'affected victim; see s 38.

and agencies who are funded to provide a service to victims of crime. If these justice and support agencies do not uphold the rights conferred by the Victims' Charter, a victim survivor may make a complaint to either directly to the agency responsible, or to the commissioner.[57]

The rights stated in the Victims' Charter are not enforceable in legal proceedings, do not provide grounds for review of administrative decisions made in contravention thereof, and do not affect the operation of any other laws.[58]

As the prosecution service retains control of the criminal case, and victim survivors are not formal parties to a proceeding, their rights under the Victims' Charter to receive information and for there to be mechanism to inform a sentencing court of the harm they have experienced are critical to the victim survivor's experience of engaging with the sentencing process.

Although fundamental principles and the Victims' Charter have been established in aid of victims of crime, what we have been told in the course of this review indicates that victim survivors continue to experience dissatisfaction with the sentencing process and their lack of acknowledgment within it.

We note that the WSJ Taskforce recommended a review be undertaken of the Victims' Charter to 'consider whether additional rights should be recognised or if existing rights should be expanded.'[59] The Victims' Commissioner has since commenced this work.

Office of the Victims' Commissioner

The need for an independent Victims' Commissioner to promote and protect the needs and rights of victims of crime, and a sexual violence case review board to review sexual violence matters that are not prosecuted or are discontinued, was highlighted in three separate recent inquiries conducted by the WSJ Taskforce,[60] the Independent Commission of Inquiry into Queensland Police Service's Responses to Domestic and Family Violence[61] and the Legal Affairs and Safety Committee.[62]

On 9 May 2024, part of the *Victims' Commissioner and Sexual Violence Review Board Act 2024* (Qld) commenced,[63] establishing Queensland's first Victims' Commissioner,[64] as well as the Sexual Violence Review Board (to be chaired by the Victims' Commissioner).[65]

The Act provides that the role of the Victims' Commissioner is to:

- provide information about the criminal justice system in Queensland;

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57 Ibid ch 3, pt 3.
58 Ibid s 43.
59 *Hear Her Voice, Report Two* (n 13) vol 1, 139–40 rec 19.
60 Ibid recs 18–19, 46, 181. On 21 November 2022, the Queensland government supported 109 recommendations in full, 71 in-principle and noted 14 recommendations: Queensland Government, *Queensland Government Response to Hear Her Voice - Report Two - Women and Girls' Experiences Across the Criminal Justice System* (2022) (*'Response to Hear Her Voice, Report Two'*).
61 *QPSDFV Inquiry - A Call for Change* (n 39) 343, 345 rec 78. On 21 November 2022, the Queensland Government provided in-principle support for all of the recommendations, as well as a $100 million investment.
62 Legal Affairs and Safety Committee, Parliament of Queensland, *Inquiry into Support provided to Victims of Crime* (Report No. 48, 57th Parliament, May 2023) 8 . On 9 August 2023, the Queensland government provided in-principle support for all of the recommendations.
63 *Victims' Commissioner and Sexual Violence Review Board Act 2024* (Qld) ss 1–2 commenced on date of assent, chs 1 (other than ss 1–2, 3 (b)–(c)), 2 pts 1 (other than s 9 (a)–(b), (d)–(f), (h)), 2, ch 5 (other than ss 99–100, 101 (2)), ch 6 pts 1, 3, 5, sch 2 defs commenced 29 July 2024; ss 3 (b), 9 (a)–(b), (d)–(f), (h), ch 2 pts 3–5, ch 3, ss 99–100, 106, 107 (1) (to the extent it ins s 21AZB (2) (ba)), 108(1) (to the extent it ins s 93AA (2) (ba)), 109(1) (to the extent it ins s 103Q (2) (ba)), ch 6 pts 4, 6, schs 1, 2 defs 2 September 2024.
64 Ibid s 7.
65 Ibid ch 4; s 68(1). The Sexual Violence Review Board provisions have not yet been proclaimed into force.

- respond to complaints made by victim survivors surrounding on potential breaches of the Victims' Charter;
- conduct systemic reviews about matters affecting victims of crime;
- consult with victims of crime on matters relating to them;
- provide advice and recommendations to the Minister about things which can be done better to meet the needs of victim survivors;
- monitor the implementation of recommendations made by the Victims' Commissioner.[66]

The Sexual Violence Review Board will 'identify and review systemic issues in relation to the reporting, investigation and prosecution of sexual offences'.[67] This includes:

- reviewing policy, practices, procedures and systems to identify systemic issues;
- reviewing and analysing data and information;
- making recommendations to the Minister, government entities and non-government entities about improvements to policy, practices, procedures and systems arising out of a review; and
- monitoring the implementation of recommendations.[68]

Since her formal appointment as Queensland's first Victims' Commissioner, Ms Rebecca (Beck) O'Connor has served on our Council in a personal capacity.

13.3 Navigating the criminal sentencing process and hearings

13.3.1 Current sources of sentencing information for victim survivors of rape and sexual assault in Queensland

As a witness without formal standing, victim survivors are not separately represented by their own lawyers or advocates at a sentence hearing, so are entirely dependent upon justice and support agencies to provide them with sufficient information to understand and navigate the criminal sentencing process.

Victim survivors receive different sentencing information from various criminal justice agencies and formal victim survivor support services, depending on the type of offence perpetrated against them and whether the sentence proceeds in the lower or higher courts. However, some information is often only provided on request, which relies upon victim survivor's self-advocacy and understanding of what information can be requested.

A high-level overview of the different agencies and the information they provide is outlined below.

66 Ibid s 9.
67 Ibid s 62(1).
68 Ibid s 62(2).

Table 13.1: High level overview of information provided to victim survivors by agencies

Agency	Pre-sentence information	During & post-sentence information
QPS[69] Including investigative police and Police Prosecution Corps (PPC) officers	• Provides updates on the status of criminal proceedings.[70] • Refers a victim survivor to the ODPP Victim Support Service, Victim Assist Queensland or external support providers (for persons who are 'vulnerable, disabled or have cultural needs').[71] • Notifies a victim of their right to provide a VIS and refers them to a support advocacy service when they require further assistance.[72] • Acts as a liaison between the ODPP and the victim survivor.	• Transport to and from court proceedings (where no other option) and support at court (not mandatory). • Assistance with protection from unwanted contact with the offender when attending court proceedings.[73] • Notification of court outcome.
ODPP[74] Including Crown Prosecutors, Legal Officers, administrative staff and Victim Liaison Officers (VLOs)	• Protection of anonymity.[75] • 'If requested by the victim', details about: court processes; diversionary programs; amendment to charges; outcome of proceeding.[76] • Notifies a victim their VIS may be tendered at sentence (at the pre-trial conference).[77] • Referrals to victim support advocacy agencies.[78] • Offers an optional presentence hearing, where it is in the interests of justice and the victim.[79]	• Ensure victim survivors have all necessary protection from violence and intimidation by their offender or an associated person 'proceeding to court, at court and while leaving court'.[80] • Notification of sentence outcome (mandatory). • Post sentence conference with prosecutor (upon request).
Judicial officers	• Nil.	• Can receive a VIS.[81] • Nil requirement to acknowledge a victim survivor's presence (voluntary practice).
Court services	• Procedural updates.	• Provision of copies of transcripts from sentence hearing (on request only).[82]

69 Queensland Police Service, *Operational Procedures Manual* (Issue 102, October 2024) ('*QPS OPM*').
70 Ibid section 2.12.1, 115.
71 Ibid section 2.12.2–2.12.3, 119; 6.3.14 11–13.
72 Ibid section 3.7.10.
73 Office of the Director of Public Prosecutions, *Director's Guidelines* (30 June 2023) 35 [25](v) ('*ODPP Director's Guidelines*').
74 Ibid.
75 Ibid 31, 33 [25](i). Anonymity for victims of sex offences: 'In the initial contact, the victim must be told of the prohibition of publishing any particulars likely to identify the victim. The Court may permit some publication only if good and sufficient reason is shown. During criminal proceedings, the prosecutor should object to any application for publication unless the victim wants to be identified. In such a case, the prosecutor is to assist the complainant to apply for an order to allow publication.'
76 Ibid 33–4 [25](i). Note: 'Where it appears that a victim would be unlikely to comprehend a form letter without translation or explanation the letter may be directed via a person who can be entrusted to arrange for any necessary translation or explanation'.
77 Ibid 34 [25](iii).
78 Ibid 32–5 [25].
79 Ibid 35 [25](v).
80 Ibid 30 [25](i)(d).
81 PSA (n 54) s 179K;
82 *Recording of Evidence Act 1962* (Qld) s 5B(3)(b).

Agency	Pre-sentence information	During & post-sentence information
Queensland Corrective Services	• Nil.	• Information to eligible persons about key events relating to a person serving a period of imprisonment.[83]
Formal victim support agencies (discussed below)	• Emotional support and practical assistance with financial aid applications and VIS writing.	• Emotional support at court.

Queensland Police Service and Police Prosecution Corps

The QPS is responsible for investigating and charging all sexual offences in Queensland pursuant to the *Police Powers and Responsibilities Act 2000* (Qld), as well as prosecuting matters that resolve in the Magistrates Courts.[84] Interactions and communication between both the QPS investigating and prosecuting officers and victim survivors are guided by the *QPS Operational Procedures Manual*.[85] Within the sentencing context, all police officers are required to provide victim survivors with regular updates regarding the progress of the matter and any critical information relevant to the finalisation of the matter – including a sentencing outcome.[86]

Within the charging context, the investigating officer[87] acts as the main point of contact for victim survivors of criminal offences from the time of first complaint to the finalisation of the matter in the courts.[88] An arresting officer may assist a victim survivor by accompanying them to a sentence, particularly where the victim survivor feels unsafe attending alone or does not have another way to attend the proceeding. There is no ongoing duty to provide information post-sentence.

For matters prosecuted in the summary jurisdiction, the QPS Police Prosecution Corps ('PPC') will usually task the investigating officer to notify a victim survivor of any amendment to the charges.[89] PPC prosecutors often have limited interactions with victim survivors due to the high-volume of case files and fast-paced nature of criminal proceedings in the lower courts. This creates extra challenges for PPC prosecutors, who may not have sufficient time to speak with a victim survivor prior to sentence to notify them that the matter has resolved, or that they can attend the sentence and provide a VIS.

The Office of the Director of Public Prosecutions

Offences of rape and sexual assault finalised in the higher courts are prosecuted by the Office of the Director of Public Prosecutions ('ODPP').[90] The ODPP Victim Liaison Officer Service ('VLO') acts as the main

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83 See *Corrective Services Act 2006* (Qld) ch 6, pt 13, div 1.
84 *QPS OPM* (n 69) section 2.1, 7; section 2.6.3, 61–5; section 3.4.9, 16. On occasion, summary matters are prosecuted by the ODPP, but this is less common, and may only occur in some jurisdictions (such as in Brisbane).
85 Ibid section 2.12, 115.
86 Ibid 63 [(xv)]–[(xvii)].
87 An investigating officer (also known as an arresting officer) is the officer who initially made the arrest and investigated the offence.
88 A matter may be finalised through either the discontinuance of proceedings (through offering no evidence with respect to the charge/s in the Magistrates Court or entering a nolle prosequi to the charge/s on indictment) or by way of sentence (through either a finding of guilt at trial, or a plea of guilty to the charges before the court).
89 *QPS OPM* (n 69) section 3.4.4, 14–16. While the PPC officer must attempt to contact a victim survivor and the investigating officer about the decision to amend a charge or withdraw a charge, their views are 'not conclusive. It is the public, rather than the individual, interest which must be served': Ibid 15. Where it is not 'reasonably practical' to consult with either the investigating officer or the victim survivor, the PPC officer must record this.
90 *Director of Public Prosecutions Act 1984* (Qld) s 10.

point of contact (an administrative liaison role) for victim survivors when engaging with ODPP prosecutorial officers (including Crown Prosecutors and Legal Officers). In addition to their liaison role between prosecution staff and victim survivors, VLOs direct victim survivors to appropriate support services and counselling services. See section 13.3.2 for a further discussion of their role within this context.

Interactions between victim survivors and the ODPP are guided by a set of principles outlined in their *Director's Guidelines*.[91] These prescribe that the ODPP must provide victim survivors with updates regarding the progress of court proceedings, information about the trial or sentence process (including the right to provide a VIS), notification of court hearings and information surrounding any amendments to police charges.[92]

Prior to sentence (but post-conviction or a plea), an ODPP prosecutorial officer will contact a victim survivor and notify them of the sentence listing and to ask whether they would like to provide a VIS.[93] Information about the likely sentence outcome (including the type of penalty which may be imposed) may be provided on request, but will not usually be provided before a prosecutor has been allocated to appear on sentence and they have had the opportunity to form a view with respect to their submissions on sentence.

Where an offender is sentenced to a period of imprisonment, the ODPP (through the VLO) will also provide the victim survivor with information surrounding next steps, such as information about how to register to receive notifications from Queensland Corrective Services, including with respect to key events relating to a person serving a term of imprisonment.[94] While the operation of this register is not a sentencing issue, it may also impact a victim survivor's satisfaction with the sentence.

After providing this information, interactions between the prosecution service and the victim survivor will cease.

It is relevant to note that communication between prosecutorial agencies (including both the ODPP and PPC) and victim survivors is strictly limited to the provision of information, rather than therapeutic or emotional support. While the prosecution owes duties to victim survivors and will often endeavour to progress their rights and justice needs (as outlined above), they have an overriding duty to the court and to the administration of justice. The *Criminal Code* outlines that it is 'a fundamental obligation of the prosecution to ensure criminal proceedings are conducted fairly with the single aim of determining and establishing truth'.[95] Where there is any inconsistency, their overriding duty to the state will prevail.

The role of the ODPP is to represent the interests of the state in a criminal prosecution against the person who has been charged. The prosecutor must consider and decide what details of the harm should be given to the sentencing court, taking into account the wishes of the victim.[96] .

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91 *ODPP Director's Guidelines* (n 73) guidelines 22, 25.
92 Ibid.
93 Ibid guideline 25 for information for victims generally, specifically guideline 25(e)(iii).
94 For more information about VLOs and victim opinion survey results see Office of the Director of Public Prosecutions, *Annual Report 2022-23* (2024) 37–8.
95 *Criminal Code Act 1899* (Qld) sch 1 s 590AB ('*Criminal Code* (Qld)').
96 PSA (n 54) s 179K(3)–(4).

Judicial officers and the sentencing court

In Queensland's adversarial system of justice, sentencing proceedings centre around the prosecution of the person being sentenced. The sentencing process is complicated and requires a judicial officer to assess the severity of the offending in all the circumstances, including balancing the mitigating and aggravating features of the case.

In doing so, the sentencing judge will hear submissions from the prosecution service and legal representatives for the offender before stating the sentence outcome and outlining their sentencing reasons. In determining the appropriate sentence, the sentencing judge will assess any harm caused to victim survivors by the offending, which is often conveyed through the facts of the offending and the provision of a VIS.

Judicial officers in Queensland provide their sentencing reasons on an ex-tempore basis; they will often make a finding and provide their reasons immediately after hearing the submissions on sentence. The importance of language in conveying the gravity of the offending at sentence for sexual assault and rape offences is explored in **Chapter 15**, section 15.4.

As victim survivors are not parties to proceedings, there is no positive requirement for a judicial officer to address them directly during a sentence.[97] For this reason, victim survivors' interactions with the sentencing judge are limited.

A judicial officer may refer to a VIS (if provided) and the harm caused to them, and can adopt a practice of addressing the victim survivor directly if they are in the courtroom. However, there are no prescribed requirements to do so. Ultimately, the degree of communication between a victim survivor and the sentencing judge will depend on that judicial officer's own usual course of practice.

This issue is further discussed in **Chapter 14**.

13.3.2 Support services for victim survivors of rape and sexual assault

The criminal sentencing process is often an emotionally charged environment for victim survivors of rape and sexual assault, who are at risk of retraumatisation when preparing for, or attending, the sentencing of the person who offended against them. This experience may be compounded in circumstances where a victim survivor wishes to attend the sentence and/or to provide a VIS, which results in them 'reliving' the traumatic experience.[98]

Support navigating the criminal sentencing process

VLOs provide timely information to victim survivors about the prosecution of the offender, the court process and their roles within this context.[99] They also refer victim survivors to support agencies, including:[100]

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97 While there is no positive requirement, it is best practice for a judicial officer to acknowledge the victim and to: 'In appropriate cases, consider directing remarks towards the victim, maintaining appropriate eye contact and thanking the victim for their participation.': Judicial College of Victoria, *Victims of Crime in the Courtroom: A Guide for Judicial Officers* (August 2023) 8.

98 NSW Sentencing Council, *Victims' Involvement in Sentencing* (Report, 2018) 29 [3.1].

99 Office of the Director of Public Prosecutions, *Annual Report 2022–23* (2023) 37.

100 Ibid.

- Victims Assist Queensland ('VAQ'), which provides support to victims of crime in Queensland by linking them with funded support services and assisting with financial aid applications. While VAQ previously provided to support to victims of crime when writing their VIS, this is now provided through their funded supported services.[101] The VAQ Victim Coordination Program also provides victim survivors in South Brisbane, Cairns, Rockhampton and Townsville with information about the court process and some assistance writing a VIS and help applying for financial assistance with VAQ; it can also refer victims to a specialist agency that can provide practical court support.[102]
- Protect All Children Today ('PACT'), a government-funded organisation that provides impartial and empathetic court support for victims of crime through the provision of information, support throughout the course of court proceedings, help applying for financial assistance with Victim Assist Queensland, writing a VIS and applying for the Queensland Corrective Services Victims' Register.[103] PACT can also refer victim survivors to other support providers and agencies. While this is a professional service, it relies strongly upon PACT volunteers.
- VictimConnect, provides victim survivors with 24 hour support for victim survivors of crime, including multi-session counselling, information surrounding court processes, assistance when applying for financial aid through VAQ, education surrounding the rights of victim survivors and support navigating court processes (including support writing a VIS).[104] VictimConnect can also help to direct victim survivors to more specialised support services that may better meet their needs.
- Sexual Assault Helpline, which is a statewide service which provides daily counselling support (between 7:30am and 11:30pm) to all victim survivors who have experienced sexual offending, as well as for people who support them.[105] Victim survivors who have been impacted by the forensic testing investigation in Queensland can also access this support (including victim survivors of rape and sexual assault who have been impacted).[106]

Queensland also has a network of non-government services funded to provide specialist sexual assault counselling, support and prevention programs throughout Queensland to specific cohorts, including:

- Murrigunyah, which is a community-based sexual assault support service for Aboriginal and Torres Strait Islander men, women and families;[107]
- Working with People with Intellectual and Learning Disabilities ('WWiLD'), which supports people with intellectual or learning disabilities who have experienced or at risk of experiencing sexual violence or other crimes or exploitation;[108]
- The Immigrant Women's Support Service, a specialist domestic violence and sexual assault service that provides direct support to women and their children from non-English-speaking backgrounds who have experienced domestic and/or sexual violence;[109]

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101 Victims Assist Queensland can be contacted by email at victimassist@justice.qld.gov.au or on 1300 546 587.
102 Ibid.
103 PACT can be contacted through its website, or on 1800 449 632.
104 VictimConnect can be contacted through their website, or on 1300 318 940.
105 The Sexual Assault Helpline is available on 1800 010 120.
106 'Sexual Assault Helpline', *DVConnect* (web page, 2024) <https://www.dvconnect.org/sexual-assault-helpline/>. Also 1800RESPECT can be contacted for domestic family and sexual violence counselling services: 1800 737 732.
107 'Who We Are', *Murrigunyah Family & Cultural Healing Centre* (web page) < https://www.murrigunyah.org.au/about-us >.
108 WWILD can be contacted through their website or by telephone on (07) 3262 9877.
109 'Our Services', *Immigrant Women's Support Service* (web page) <https://iwss.org.au/our-services/>.

- Zig Zag Young Women's Resource Centre Inc, which provides services to young women, trans and gender-diverse young people aged 12–25 years and the wider community, including counselling and support those aged 12–25 years who have experienced sexual assault.[110]
- 54 Reasons (formerly Save the Children), which provides trauma-informed support to young victims of violent crimes and to males aged 14 years and over who have been victims of sexual violence offending.[111]

QSAN is also a state-wide network of services that provide specialist support to victim survivors of sexual assault, as well as access to prevention programs across Queensland.[112] QSAN also publishes a directory of relevant support services on their website to assist those impacted by sexual assault, rape or sexual violence.[113]

A Victims of Crime Community Response ('VOCCR') pilot was also established in 2023 to deliver immediate, 24 hour a day, seven days a week support to victim survivors after experiencing an interpersonal violent crime.[114] This includes the provision of basic necessities (food, clothing etc), accommodation and other assistance within the first 72 hours of the incident.[115]

The VOCCR pilot is administered by VAQ in partnership with VictimConnect. [116] The pilot program currently operates in Logan, Cairns and Townsville, and will be extended to include 2 more locations.[117]

Navigating the support service system to find the right support services can be challenging for victim survivors, as multiple agencies can provide support to victims of crime, but offer different services and support.

What do other jurisdictions do?

Some jurisdictions in Australia have established centralised gateways for victim survivors to access. For example, the Victorian and NSW websites both provide information specifically designed for victims of crime surrounding the court process, ways to access support and how to access help writing a VIS.[118] This information is available from one, easy-to-navigate platform.

By hosting information about the criminal justice process, including sentencing, on the same platform, victim survivors in other Australian jurisdictions are able to easily access this information without having to contact multiple agencies/organisations to find the right support.

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110 *Zig Zag Young Women's Resource Centre* (web page) <https://zigzag.org.au>.
111 54 Reasons can be contacted through their website or by telephone on 1800 760 011.
112 'About Us', *Queensland Sexual Assault Network* (web page) <https://qsan.org.au/about>.
113 'Other Support Services', *Queensland Sexual Assault Network* (web page) <https://qsan.org.au/services/>.
114 Department of Justice and Attorney-General, *Government Response to Review to Improve the Efficiency and Timeliness of the Delivery of Support to Victims* (Response Brief, 2024) <https://www.publications.qld.gov.au/ckan-publications-attachments-prod/resources/770581e4-e25b-4c9e-bfa4-0e34e00d1ce7/government-response-to-the-review-of-the-financial-assistance-scheme.pdf?ETag=1d385c4faefbe27101b218e3f4bdd682>.
115 Ibid.
116 Ibid.
117 Ibid. For information on the pilot expanding, see The Office of the Victims' Commissioner, 'Beck's Experience', *About the Victims' Commissioner* (web page, 2024) <https://www.victimscommissioner.qld.gov.au/about/the-victims-commissioner>.
118 See State Government of Victoria, *Victims of Crime* (web page, 5 September 2024) <https://www.victimsofcrime.vic.gov.au/>; *New South Wales Government, Victims Services* (web page, 2024) <https://victimsservices.justice.nsw.gov.au/>.

Financial support attending sentence

As discussed in section 13.2.1, a victim survivor is not a participant or a party in a sentencing proceeding. This means their presence at a sentence is usually not required for it to proceed.

Usually, if a witness is required to attend court and give evidence at a hearing under a summons or subpoena, they may be reimbursed for expenses such as travel, meals, accommodation and loss of earnings.[119] The party requiring their attendance is usually responsible for covering this cost, which for a victim survivor would be the prosecuting authority.[120] Payment for expenses usually applies to hearings or a trial and not a sentence.

Under the *Victims of Crime Assistance Act 2009* (Qld), a 'primary victim of an act of violence may be granted assistance of up to $120,000' as well as up to $500 for legal costs associated with applying to VAQ for financial assistance.[121] However, this cap is usually not reached by most victim survivors, unless significant medical expenses are incurred.[122]

The Act lists the components a victim may claim, including 'reasonable counselling expenses',[123] 'reasonable medical expenses incurred',[124] 'reasonable incidental travel expenses'[125] and, 'if exceptional circumstances exist for the victim, loss of earnings up to $20,000 suffered'.[126] However, loss of earnings will only be compensated for up to 2 years after the act of violence was committed, which presents challenges where there are delays with the prosecution of a matter. When referring to the Guidelines, VAQ may pay for loss of earnings where there is confirmation from QPS or Queensland Courts that the victim attended court.[127] It is unclear whether this is for a sentence hearing. There is no mention of paying for travel expenses to attend court in the guideline for financial assistance for travel expenses.[128]

Additional 'special assistance' is prescribed for particular categories of offences, including $15,000 for rape and repeated sexual assault offences (defined as 'Category A' circumstances).[129]

VAQ will often provide financial support to pay or reimburse the expenses incurred for a victim who chooses to attend a sentence hearing for accommodation or travel where it can be demonstrated the cost is directly related to the act of violence and will assist the victim's recovery, and where this is not

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119 See, for example, Commonwealth Director of Public Prosecutions, 'Guide to claiming witness expenses' (23 January 2017) <https://victimsandwitnesses.cdpp.gov.au/system/files/downloads/0237_was-guide-to-claiming_and_claim-form_v8_2_1.pdf>. See also, Office of the Work Health and Safety Prosecutor, 'Guide to claiming witness expenses' (2021) <https://www.owhsp.qld.gov.au/sites/default/files/2021-04/witness-expenses-claim-form.pdf>.

120 'Being ordered to go to court as a witness', *Legal Aid Queensland* (web page, 13 April 2023) <https://www.legalaid.qld.gov.au/Find-legal-information/Criminal-justice/Being-a-witness/Being-ordered-to-go-to-court-as-a-witness#:~:text=you%20didn't.-,Get%20legal%20advice,provide%20you%20with%20legal%20advice.>.

121 *Victims of Crime Assistance Act 2009* (Qld) s 38.

122 See Department of Justice and Attorney-General (Qld), *Final Report on the review of the Victims of Crime Assistance Act* (December 2015) 11. At the time of the report, the total average grant of financial assistance per victim is $7,970. The report noted 'Maximum amounts for victims are rarely reached in any category except for funeral assistance', noting only 5 matters where the maximum limit of $75,000 (or close to) has been granted: Ibid 11. See also secondary victims: ibid 15.

123 Ibid s 39(a).

124 Ibid s 39(b).

125 Ibid s 39(c).

126 Ibid s 39(e).

127 Victims Assistance Unit, *Guideline 7, Granting Financial Assistance for Loss of Earning* (Guidelines, 1 September 2013) <https://www.publications.qld.gov.au/dataset/victim-assist-queensland-guidelines/resource/1e7118ea-2597-49aa-a0fd-bdc72f0bc16e#:~:text=Loss%20of%20earnings%20amounts%20to,of%20the%20act%20of%20violence>.

128 Victims Assistance Unit, *Guideline 4: Granting Financial Assistance for Travel Expenses*, (Guidelines, 1 December 2009) <https://www.publications.qld.gov.au/dataset/victim-assist-queensland-guidelines/resource/c376c940-5804-4476-adea-7144bb5a2f91>.

129 *Victims of Crime Assistance Act 2009* (Qld) sch 2, ss 1–4.

provided by the QPS or ODPP.[130] During consultation, we were told by one victim survivor who lived interstate that she was reimbursed for one court attendance by VAQ, but had attended court on the other 2 occasions at her own expense.[131]

What do other jurisdictions do?

From our review of other jurisdictions in Australia, we have found that, similar to Queensland, there is information for a victim to claim expenses when required to attend court under a summons or subpoena, but we have not found information for a victim to claim expenses if they choose to attend a sentence hearing. For example, in Victoria, the Director of Public Prosecutions website has information on claiming expenses when attending court under a summons or subpoena but does not mention attending a sentence.[132] There is a similar scheme to Queensland where victims of violent crime can be assisted under the Financial Assistance Scheme, but this does not mention attending court.[133]

Similarly, in New South Wales a witness may be entitled to claim expenses when they go to go court to give evidence, including an attendance allowance and childcare costs.[134] The Director of Public Prosecutions in New South Wales ('NSW ODPP') publishes information on its website that 'Witness expenses are not paid for attending a sentencing hearing.' However, the NSW ODPP will consider providing support in limited circumstances. [135]

In 2024, the Scottish Sentencing Council considered the views and experiences of the sentencing process of victim survivors of rape and other sexual offences in Scotland, noting:

> The importance of attending the sentencing hearing was also linked to a desire for inclusion in the criminal justice process following earlier experiences of exclusion and marginalisation from the process, which stem from their role as a witness in the case. However, not all who wanted to be present at the sentencing hearing were able to attend … practical difficulties such as childcare, transportation and work commitments meant that they were unable to attend. Difficulties in being able to travel to the hearing were compounded by changes to sentencing locations at short notice and a lack of support with the travel costs to attend.[136]

The Scottish Sentencing Council reported it was told by victim survivors that the 'lack of support to attend the sentencing hearing revealed victim-survivors' perceptions that they were superfluous to the process once they have given their evidence'.[137] They were told of victim-survivors requesting to attend the sentence remotely, such as via a live feed, but this was denied; however, the offender was able to appear via video-link.[138]

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130 See Queensland Government, *Claim other recovery expenses*(web page, 20 November 2023) <https://www.qld.gov.au/law/crime-and-police/victims-and-witnesses-of-crime/financial-assistance/types-of-claims/claiming-recovery-expenses/claim-other-exceptional-circumstance-expenses#travel_expenses>.
131 Victim Survivor Interview 2.
132 Office of the Director of Public Prosecutions (Victoria), 'Claiming Witness Expenses', *Going to Court* (web page) <https://www.opp.vic.gov.au/victims-witnesses/going-to-court/#claiming-witness-expenses>.
133 Victoria State Government, 'Financial Assistance Scheme Guidelines', *Victims of Crime* (Guidelines, 15 October 2024) <https://www.victimsofcrime.vic.gov.au/financial-assistance-scheme-guidelines>.
134 Office of the Director of Public Prosecutions (New South Wales), 'Witness entitlements and claims', *Victims and Witnesses* (web page) <https://www.odpp.nsw.gov.au/victims-witnesses/support-services-victims-and-witnesses/witness-entitlements-and-claims>.
135 Ibid.
136 Scottish Sentencing Council, *Victim-Survivor Views and Experiences of Sentencing for Rape and Other Sexual Offences* (Report, 2024) 16–17 ('*Victim-Survivor Views*').
137 Ibid 17.
138 Ibid 18.

One of the Scottish Sentencing Council's recommendations was for victim-survivors' right 'to claim reasonable expenses if they attend court to give evidence should be extended to sexual offence victim-survivors attending sentencing hearings'.[139]

Additional support services for Aboriginal and Torres Strait Islander victim-survivors

In Queensland, the Queensland Indigenous Family Violence Legal Services Aboriginal Corporation (QIFVLS) 'fills a gap in [providing] access to culturally appropriate legal and wrap around support services for Aboriginal and Torres Strait Islander victim-survivors of family and domestic violence and sexual assault.'[140]

In its preliminary submission to this review, QIFVLS noted the findings of the Call for Change report that 'inadequate access to legal representation and assistance is more prevalent in regional and remote communities' and considered this compounded 'the systemic disadvantages faced by Aboriginal and Torres Strait Islander peoples who live in these communities', who are both victims and defendants.[141]

Specialised support available in Townsville: Sexual Assault Response Team

The Sexual Assault Response Team ('SART') was established in July 2016 to provide an integrated response for victims of sexual violence in Townsville. SART has been described as a 'multi-disciplinary, inter-agency group of professionals', and comprises social workers from the Sexual Assault Support Service, detectives from the Sexual Crimes Unit, nurse examiners from the Clinical Forensic Medicine Unit, Allied Health Staff from the Townsville Hospital and Health Service and representatives from the Townsville ODPP.[142]

The specialist team operates from the Women's Centre in Townsville and provides holistic support and guidance to victims of sexual violence as they navigate the criminal justice system from the point of first contact until finalisation.[143] This includes support leading up to, and attending, sentence hearings.[144] This model ensures that victim survivors are supported by a consistent person (where possible) from the reporting stage until sentence.

The SART model was developed to be victim centric and to promote a trauma- and violence-informed framework to represent a best practice response to sexual violence.[145] The SART model is currently not available in other parts of Queensland.[146]

An evaluation of the original pilot of the SART in Townsville reported various positive findings, including with respect to the experience of victim survivors who engaged with the model. However, various

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139 Ibid 48.
140 Preliminary Submission (10) (Queensland Indigenous Family Violence Legal Services Aboriginal Corporation), 1.
141 Ibid 6 citing *QPSDFV Inquiry - A Call for Change* (n 61). Similar findings were noted in Australian Institute of Health and Welfare, *Alcohol and other drug use in regional; and remote Australia: consumption, harms, and access to treatment 2016-17* (Report 2019).
142 Sexual Assault Response Team: Townsville Region (Brochure 2018) <https://www.thewomenscentre.org.au/wp-content/uploads/2019/08/SART-Agency-Brochure-2018.pdf>; Office of the Director of Public Prosecutions, *Annual Report* (2022–23) (2024) 39 ('*ODPP Annual Report*').
143 *Hear Her Voice, Report Two* (n 27) vol 1, 103 103 citing Meeting with Cairns Sexual Assault Network, 20 April 2022, Cairns.
144 Ibid.
145 *ODPP Annual Report 2022–23* (n 142) 39.
146 *Hear Her Voice, Report Two* (n 27) vol 1, 119.

limitations were identified, including challenges associated with transferring matters between jurisdictions and difficulties sustaining 24-hour outreach.[147]

In its report, the WSJ Taskforce described the SART model as an 'excellent example' of how services can work together to provide integrated support services which better meet the needs of victim survivors.[148] However, it recognised challenges with delivery due to there being limited sexual assault service providers across Queensland.[149]

The WSJ Taskforce subsequently recommended that the Queensland Government develop a victim centric, trauma-informed service model that provides a sustainable, accessible and integrated response to sexual violence,[150] informed by the SART in additional locations across Queensland.[151]

13.4 Delays within the sentencing context

Delays within the context of the criminal prosecution have been recognised as anti-therapeutic for victim survivors, with negative implications for their satisfaction with the process more broadly.

Consistent with these findings, we were told that the investigation and prosecution of rape and sexual offences to their finalisation in the higher courts can be a long and protracted experience for victim survivors.[152] To better understand this issue within the sentencing context, we analysed cases of rape (MSO) and sexual assault (MSO) to determine the length of time between conviction and sentence.[153]

Our research also indicates that, for offences of rape (MSO) and sexual assault (MSO) that resolve in a plea of guilty, a victim survivor will usually wait 280 days (approximately 9.2 months) or 250 days (approximately 8.2 months) respectively from the time of committal until a guilty plea is entered.[154] Where the matter is contested (less than one-third of all prosecutions for rape offences and 15.5% of sexual assault offences), that length of time increases to 413 days (approximately 13.6 months) and 331 days (approximately 10.9 months) for offences of rape (MSO) and sexual assault (MSO) respectively.[155]

However, for matters finalised in the higher courts, the time between either a plea of guilty or a conviction after trial and the sentence itself is negligible:

147 Ibid vol 1, 103.
148 Ibid vol 1, 128.
149 Ibid.
150 Ibid rec 11.
151 *Response to Hear Her Voice, Report Two* (n 60) 11, rec 11.
152 Victim survivors told us the approximate number of years it took for their matter to be finalised through the courts: 2–3 years (Victim survivor interview 1); 6.5 years (Victim survivor interview 2); unknown – finalised through restorative justice (Victim survivor interview 3); status of the prosecution was unknown (Victim Survivor Interview 5); an unknown number of years (Victim survivor interview 6); 2 years (Victim Survivor Interview 7); 'a couple of years' (Victim Survivor Support Workers Interview - Group 1); 'years' (Victim Survivor Support Workers Interview - Group 3, 1).
153 We note these findings rely upon the availability of court data and the accuracy of the data at the time of input. We further note that these timeframes do not include the length of time a victim survivor may wait while the charges are investigated, a prosecution brief of evidence prepared, and a legal representative appointed while the matter is in the lower courts..
154 These figures represent the median. See Appendix 4, Figure A8: Median number of days between criminal justice system events for guilty pleas to rape (MSO) sentenced, 2005–06 to 2022–23; Figure 6: Median number of days between criminal justice system events for guilty pleas to sexual assault (MSO) sentenced in the higher courts, 2005–06 to 2022–23.
155 These figures represent the median. See Appendix 4, Figure A9: Median number of days between criminal justice system events for not guilty pleas to rape (MSO) sentenced, 2005–06 to 2022–23; Figure 8: Median number of days between criminal justice system events for not guilty pleas to sexual assault (MSO) sentenced in the higher courts, 2005–06 to 2022–23.

- For offences of rape (MSO), the sentence will usually proceed on the day the plea of guilty is entered, or 5 days after a finding of guilt at trial.
- For offences of sexual assault (MSO), the sentence will usually either proceed on the same day as the plea of guilty is entered, or 2 days after a finding of guilt after trial.

For sexual assault matters (MSO) that resolve in the lower court, a victim survivor will usually wait 11 days for a guilty plea to be entered (from the time of 'lodgement'), with sentences usually proceeding on the same day.[156]

This suggests that delays within the sentencing context specifically were not a significant issue for victim survivors of rape and sexual assault, recognising that this issue persists across the broader investigation and prosecution process and there may be other implications for victim survivors, such as relating to the preparation of a VIS.

13.5 Reforms underway in Queensland to improve the sentence hearing experience for victim survivors

13.5.1 WSJ Taskforce Recommendations

Victim survivor advocacy service

The role of a victim survivor within the criminal justice system in Queensland has recently been considered by the Women's Safety and Justice Taskforce ('WSJ Taskforce'), which was told by victim survivors that they did not understand why they were not afforded standing, 'particularly as the person who has had their bodily integrity violated'.[157]

Recommendations were subsequently made for the Queensland Government to develop, fund and implement a statewide model for the delivery of a professional victim advocate service in consultation with people with lived experience, Aboriginal and Torres Strait Islander peoples and service and legal system stakeholders.[158] Within this model, it was recommended that: 'Victim advocates will provide individualised, culturally safe, trauma-informed support to victims of sexual violence to help them navigate through the service and criminal justice systems and beyond.'[159] Their role will include providing impartial information, rights and needs-based support, liaison and consistency to empower those experiencing sexual violence.[160]

There was a previous Government commitment to consult with the recommended parties to 'develop and pilot the most appropriate statewide professional victim advocate service for Queensland' to ensure a victim-centred and trauma-informed service model for victim survivors of sexual violence.[161] These advocates are intended to serve as a 'consistent point of contact for victim survivors throughout their

156 These figures represent the median. See Appendix 4, Figure A10: Median number of days between criminal justice system events for guilty pleas to sexual assault (MSO) sentenced in the lower courts, 2005–06 to 2022–23.
157 *Hear Her Voice, Report Two* (n 13) 54.
158 Ibid, rec 9.
159 Ibid.
160 Ibid.
161 *Response to Hear Her Voice, Report Two* (n 60) 7–8, 11.

criminal justice system journey' and to liaise with criminal justice entities on behalf of victim survivors,[162] with access to this service to be across the state.[163]

There has also been a commitment to 'strengthen access for First Nations women and girls in implementing statewide initiatives such as victim advocacy services and through legislative and policy reforms', as well as ensuring that 'community legal services are trained in working with victim-survivors of sexual violence, including best practice in working with First Nations women and girls', with a review of 'the Murri Court model through gender-responsive and culturally safe practices.'[164]

The proposed evaluation of this pilot was suggested to involve consideration of whether there is a need for funded legal representation for victim survivors of sexual violence during criminal justice processes.

The current Queensland Government has committed to designing and delivering 'a professional victim advocacy service for victims of crime in Queensland, in consultation with key stakeholders and victims to ensure it is practical and makes a real difference'.[165]

The concept of a victims 'advocate' is discussed in **Chapter 16**. The functions of this service can include:

- acting as an entry point to the justice system;
- supporting victim survivors to understand and exercise their rights;
- helping victim survivors navigate support services, compensation, recovery and justice options, including by through accompanying them to court proceedings;
- being experts in their jurisdiction's victims' rights charter and acting to advocate to ensure a victim survivor's charter rights are upheld.[166]

Trauma-informed practices and procedures

Additional recommendations made by the WSJ Taskforce include:

- **Recommendation 13:** 'The Queensland Government embed a trauma-informed system of safe pathways for victim survivors of sexual violence across the sexual assault and criminal justice systems'.
- **Recommendation 45**: The ODPP and QPS 'review, update and publish the memorandum of understanding relating to the investigation and prosecution of sexual violence cases.'
- **Recommendations 69–74:** establishing a specialist list for sexual violence cases in the District Court of Queensland, and review this to improve efficiency and timeliness for finalisation in accordance with trauma-informed principles and approaches. A sexual violence case management process has recently commenced in the District Court at Brisbane.[167]

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162 *Hear Her Voice, Report Two* (n 13).
163 *Response to Hear Her Voice, Report Two* (n 60) 7.
164 Ibid.
165 Charter Letter from the Honourable David Crisafulli MP, to the Honourable Laura Gerber MP, 8 November 2024, 3 <https://cabinet.qld.gov.au/ministers-portfolios/assets/charter-letter/laura-gerber.pdf> ('*November 2024 Charter Letter from Crisafulli to Gerber*').
166 Respect Victoria, Submission to the Australian Law Reform Commission, *Inquiry into Justice Responses to Sexual Violence*, (June 2024) 18, citing Sexual Assault Services Victoria, Justice Navigator Stakeholder Brief (Brief, 2024).
167 See District Court of Queensland, Sexual Violence Case Management (Practice Direction 3 of 2024, 19 July 2024) <https://www.courts.qld.gov.au/__data/assets/pdf_file/0009/805878/dc-pd-03-of-2024.pdf>

- **Recommendation 95:** The QPS develop a gender-responsive and trauma-informed approach for responding to women and girls in the criminal justice system.[168]

Cultural considerations

In its response to the WSJ Taskforce, recommendations, the former Queensland Government agreed to

> place victim-survivors at the centre of models of response, giving them a strong voice by removing barriers to reporting. We will work with people with lived experience, including First Nations women and girls, service and legal system stakeholders to deliver greater advocacy for victims and trial a victim-centred, trauma informed service model to respond to sexual violence.[169]

It further committed to working with First Nations communities to uplift cultural capability in the service system, as well as reviewing translation/interpretation services used by the QPS. Various reforms are being progressed, including:

- **Recommendations 5 and 96:** QPS is developing initiatives focussed on improving its cultural capability, as well as its ability to respond to sexual violence cases.
- **Recommendation 6:** Improving the translation and interpretation services it uses for First Nations peoples.
- **Recommendation 9:** Developing an appropriate professional victim advocate service for Queensland in consultation with people with lived experience, Aboriginal and Torres Strait Islander peoples and service and legal system stakeholders.
- **Recommendation 51:** Developing and implementing a cultural capability plan with the ODPP in partnership with First Nations peoples.
- **Recommendation 95:** To develop and implement a gender-responsive and trauma-informed approach for responding to women and girls in the CJS. Note: Implementation of this recommendation will be considered further as part of Government's response to the Independent Commission of Inquiry into Queensland Police Service responses to domestic and family violence, so that findings can be appropriately incorporated.
- **Recommendation 121:** Undertaking a contemporary review and strengthening the Murri Court model, including through gender-responsive and culturally-safe practices.
- **Recommendation 126:** Amending section 9(2)(p) to clarify that cultural considerations include the impact of systemic disadvantage and intergenerational trauma on the offender.
- **Recommendation 141:** Delivering a whole-of-government strategy for women and girls to increase rehabilitation opportunities, promote cultural, familial and social connections, and address their general health and well-being, physical and medical support needs while in custody.[170]

The current Queensland Government has signalled its commitment to promoting the rights of victim survivors, including through the establishment of a working group with victims of domestic, family and

168 *Hear Her Voice, Report Two* (n 27).
169 *Response to Hear Her Voice, Report Two* (n 60) 7.
170 Ibid 10–11, 21, 30–1, 38–9, 43.

sexual violence to highlight gaps in the system and opportunities for future reform as part of its 'The First 100 Days' plan.[171]

As part of its youth justice system reforms, the government is proposing to make changes to the *Youth Justice Act 2006* (Qld) to require a court in sentencing a child for an offence to have primary regard to any impact of the offence on a victim, including in the form of a VIS.[172]

Improved engagement between police and victim survivors

Previous reports in Queensland have recognised a need for improved communication practices and processes between the QPS and victim survivors of crime. The WSJ Taskforce recommended clarifying the roles and responsibilities of police Sexual Violence Liaison Officers.[173]

The QPS Sexual Violence Response Strategy 2023-2025 sought to enhance police responses to victim survivors of sexual violence across Queensland.[174] The Strategy outlines actions that seek to promote a 'victim-centric, trauma-informed sexual violence response', as aligned with recent reforms at both the national and state level, including Queensland's Sexual Violence Prevention Action Plan 2023–2027 and the WSJ Taskforce's Report 2.[175] These include actions to promote cultural change and provide victim-centric and trauma-informed training of frontline officers, ensuring victim survivors are kept informed about the criminal justice system and the role of QPS. [176]

The Strategy recognises the lifelong impacts of sexual violence offending and seeks to improve law enforcement practices to ensure they are 'appropriate, effective and supportive through victim-centric and trauma-informed practices'.

To support this, the Queensland Government established the Fast Track Sentencing Pilot ('the pilot') to investigate and identify causes of administrative court delays and, where possible, reduce and address this delay to ensure timely finalisation of matters before the Childrens Court.[177]

As part of the pilot, the QPS received funding for one AO5 Victim Engagement Officer (VEO) in each of the pilot locations to better support victims who suffer personal harm because of youth offending, victim survivors of domestic and family violence perpetrated by young people, or family members of a person who died as a result of youth offending. [178] The VEOs, who are embedded within QPS Prosecution Services:

- update victims with the status and outcome of the relevant Childrens Court prosecution;
- explain the court process and procedures;
- provide a point of liaison between the victim, the prosecutor and the arresting officer;
- refer victims to relevant support agencies, such as Victim Assist QLD;
- provide the victim with a voice in the prosecution process by facilitating the provision of VISs; and

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171 'The First 100 Days: The Right Plan for Queensland's Future', *Liberal National Party Queensland* (web page) <https://online.lnp.org.au/first-one-hundred-days>.
172 Making Queensland Safer Bill 2024 (Qld) cl 15.
173 *Hear Her Voice, Report Two* (n 27) rec 29.
174 Queensland Police Service, *Sexual Violence Response Strategy 2023-2025* (July 2023) 5.
175 Ibid 5–6.
176 Ibid 12–16.
177 The pilot, led by the Department of Justice, operates in Brisbane, Southport, Cairns, and Townsville Childrens Court (Magistrates Court level) and commenced on 1 March 2023: Childrens Court of Queensland, *Annual Report 2022–23* (2023) 2 [6]. The pilot was to run for an initial period of 18 months and has now been extended until 30 June 2025.
178 Email from Executive Director, Legal Division, QPS to Queensland Sentencing Advisory Council, 5 July 2024.

- keep the arresting officer updated with respect to victim interactions.[179]

Interactions between police officers and victim survivors end with the finalisation of criminal proceedings. While many officers will continue to engage with a victim survivor post-sentence on a voluntary basis, they are unable to continue to support victims in any ongoing, official capacity once the QPS file is closed.

The pilot will continue until 30 June 2025.

13.5.2 Queensland Government commitment

The Queensland Government has made a commitment under its Right Plan for Queensland's Future to ensuring that 'victims of crime from across Queensland are appropriately and proactively supported', [180] and are at all times always treated with 'the utmost support and humanity.'[181]

Relevant key deliverables include a commitment to:

> • Deliver a justice system for Queensland that prioritises the rights of victims, is efficient, fair and makes our community safer.
>
> • Boost the capacity of Queensland justice services to ensure victims' cases are heard sooner.
>
> • Provide support and increased transparency for victims of crime as they navigate the justice system.
>
> • Reopen the Childrens Court effectively to victims, their families and media to restore transparency to our justice system. ...
>
> • Work to deliver outstanding recommendations with government support from inquiries and reviews including the Criminal Procedure Review — Magistrates Courts, Women's Safety and Justice Taskforce, review of the *Public Interest Disclosures Act 2010*, and Keeping Queensland's Children more than Safe: Review of the Blue Card System. ...
>
> • Work cooperatively with the Minister for Families, Seniors and Disability Services and Minister for Child Safety and the Prevention of Domestic and Family Violence and the Federal Government, to implement outstanding recommendations from the Royal Commission into Institutional Responses to Child Sexual Abuse.
>
> • Work with the Minister for Families, Seniors and Disability Services and Minister for Child Safety and the Prevention of Domestic and Family Violence and other relevant Ministers, to progress implementation of recommendations from the Royal Commission into Violence, Abuse, Neglect and Exploitation of People with Disability and the National Disability Insurance Scheme Review.[182]

In addition, '[d]esign and deliver a professional victim advocacy service for victims of crime in Queensland, in consultation with key stakeholders and victims to ensure it is practical and makes a real difference.'[183]

13.5.3 National Work Plan to strengthen Criminal Justice Responses to Sexual Assault

Under the Meeting of Attorneys-General's Work Plan to Strengthen Criminal Justice Responses to Sexual Assault 2022–2027 (Work Plan) all Australian jurisdictions have agreed to take collective and individual action to improve the experiences of victim survivors of sexual assault in the criminal justice system. The Work Plan is focused on improving justice outcomes and reducing the retraumatisation of victim survivors

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179 Ibid.
180 *November 2024 Charter Letter from Crisafulli to Gerber* (n 165) 2.
181 Ibid. Charter Letter from the Honourable David Crisafulli MP, to the Honourable Deb Frecklington MP, 8 November 2024 2 <https://cabinet.qld.gov.au/ministers-portfolios/assets/charter-letter/deb-frecklington.pdf>. ('*November 2024 Charter Letter from Crisafulli to Frecklington*').
182 *November 2024 Charter Letter from Crisafulli to Frecklington* (n 181) 2–3.
183 *November 2024 Charter Letter from Crisafulli to Gerber* (n 165) 3.

of sexual assault across Australia. The Work Plan is being considered within the context of various national, state and territory sexual and domestic violence agendas, including the Queensland WSJ Taskforce report, *Hear Her Voice – Report Two*.[184]

As a part of the Work Plan, the Australasian Institute of Judicial Administration and the Commonwealth Attorney-General's Department commissioned the *Specialist Approaches to Managing Sexual Assault Proceedings: An Integrative Review*.[185] Any outcomes or actions arising from this work will likely impact the future experiences of victim survivors in Queensland.

13.6 Stakeholder views

13.6.1 Lack of confidence in the criminal justice system (including sentencing) and attrition

Our consultation revealed a lack of confidence in the criminal justice system's ability to reliably deliver justice for victim survivors. We were told that, from a victim survivor perspective, there is a widespread lack of confidence in the criminal justice process – including with respect to investigation and prosecution decisions – and outcomes, contributing to high attrition rates in proceedings for these offences.

As summarised by Angela Lynch AM, Executive Officer and Chair of the National Women's Safety Alliance Sexual Violence Working Group, at the Brisbane roundtable consultation event:

> In many ways a sentencing experience for a victim survivor is an extension of the entire criminal justice system approach, or how they feel about the whole approach. Despite the crime being inflicted on their body, attacking their sense of self, and many believing they were in danger of losing their life, and their own body being the 'crime scene', they are mere witnesses to the case and their needs and rights can be easily forgotten in a large system that has minimal focus on them.[186]

Submissions from victim survivor support and advocacy stakeholders and justice reform and advocacy bodies

We were told that the criminal justice system is 'failing to meet the needs of most victim survivors'.[187] For example, Fighters Against Child Abuse Australia ('FACAA') reflected that it had 'not heard a single respondent say that they even think we have a justice system. Most said we have a legal system at best and some said we don't even have that.'[188] FACAA further reflected that the criminal justice system is often retraumatising for victim survivors and raised concerns that there is no justice for them at the end, particularly when they 'see their perpetrator receive a slap on the wrist instead of a decent custodial sentence'.[189]

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184 *Hear Her Voice, Report Two* (n 27). Plans and reports of other reviews include: *National Plan to Reduce Violence Against Women and their* (n 36); National Summit on Women's Safety, Statement from Delegates – 2021 National Summit on Women's Safety (Report, 2021); Kate Fitz-Gibbon et al, National Plan *Victim Survivor Advocates Consultation Report* (Report, 2022); ACT Government, *Listen. Take Action to Prevent, Believe and Heal Report* (Sexual Assault Prevention and Response Program Steering Committee Final Report, 2022) ('*Listen, Take Action Report*'); New South Wales Law Reform Commission, *Consent in Relation to Sexual Offences* (2020); *'Improving the Justice System Response to Sexual Offences*' (n 32); WA Office of the Commissioner for Victims of Crime (OCVOC) and Department of Communities, *Sexual Violence Prevention and Response Strategy* (1 August 2023).

185 Amanda-Jane George et al, *Specialist Approaches to Managing Sexual Assault Proceedings* (August 2023).

186 Angela Lynch AM, presentation at Brisbane Consultation Event, 11 March 2024.

187 Submission 32 (Sisters Inside) 3. See also Submission 24 (QSAN) 3; Submission 15 (Fighters against child abuse Australia) 5–6.

188 Submission 15 (Fighters against child abuse Australia) 6.

189 Submission 15 (Fighters against child abuse Australia) 7.

Various submissions attributed the low reporting rates and high attrition for sexual offences to a lack of confidence in the justice system, particularly where sentence outcomes are not perceived to reflect the seriousness of the offending and the harm caused to victim survivors, as well as concerns that victim survivors will not be believed.[190] For example, the Queensland Network of Alcohol and Other Drug Agencies ('QNADA') said victim survivors of sexual violence offences are often seen as less credible by criminal justice stakeholders – particularly where they have a history of illicit substance abuse – and are consequently more reluctant to report offences.[191] Similarly, Sisters Inside raised additional barriers for victim survivors who had previously been convicted of an offence:

> Criminalised women are not considered to be victim-survivors: they are not believed to be good witnesses; their claims are not believed by police; their matters are not progressed by prosecution; and when their matters are progressed negotiations are made and lesser charges are plead to. This systemic disregard discourages criminalised women from reporting assaults.[192]

QSAN stated that '[m]any Aboriginal and Torres Strait Islander women have no confidence in formal processes and have concerns about the inherent racism and misogyny', indicating the 'systemic failure' of the criminal justice system.[193] QSAN noted that it is 'damning of a system that a system set up to provide justice and accountability for all, is too risky and culturally unsafe for Aboriginal and Torres Strait Islander women to use'.[194] It was also noted that these 'issues are exacerbated in small communities and regional towns where everyone knows, despite the anonymity of the process, who is involved. Of course, some victim survivors will withdraw from the process because of the intimidation.'[195]

Victim survivor support advocate views

Similar views were expressed by victim support advocates in group interviews with us. We were told the criminal justice system, and the sentencing process more specifically, can be retraumatising for victim survivors. Some reflected that they feel like they are 'leading lambs to slaughter' when they first meet with a victim survivor to discuss their options and whether they want to proceed with a criminal complaint.[196] One victim advocate reflected:

> Even the women that I have supported who have had a positive outcome from this, a number of them have been re-offended against. They have not gone through the system [again]. I haven't spoken to a single woman who said, 'I would do this again'. (Victim Support Advocate Interview 1)

Various support advocates reflected that it is their role to provide victim survivors with sufficient information to make an informed decision about whether they would like to proceed with the criminal justice process and to ensure that they are 'not blindsided by anything'. [197] In doing so, the victim support advocates reflected that 'you won't ever catch me here calling it a justice system … I will constantly refer to it as a legal process.'[198]

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190 See discussion in Chapter 7. See Preliminary submission 23 (Full Stop Australia) 2–3; Submission 13 (Justice Reform Initiative) 2 [4]; Preliminary submission 6 (Brisbane Rape & Incest Survivors Support Centre) 1, 3–4; Submission 25 (Respect Inc and Scarlet Alliance) 2; Submission 17 (QNADA) 3.
191 Submission 17 (QNADA) 3.
192 Preliminary submission 28 (Sisters Inside) 2.
193 Submission 24 (QSAN) 4.
194 Ibid.
195 Ibid 6–7.
196 Victim Support Advocate Interview 3.
197 Victim Support Advocate Interview 1.
198 Ibid.

Another victim support advocate expressed their view that the sentence and the trial process more broadly are 'deeply flawed'.[199] The advocate considered that victim survivors are not treated appropriately, and that, rather than the offender, the 'state is taking [the victim] to court. She's just a file number … evidence, a witness … and she's treated as such.'[200]

Individual submissions

One victim survivor told us that when she was sexually assaulted in public and reported the matter to police, they asked whether she was wearing any underwear and told her that 'this would change the outcome of the investigation'.[201] While not specific to sentencing, the victim survivor felt she was not taken seriously; nor were appropriate steps taken to investigate the assault.[202]

Submissions from legal stakeholders

In its preliminary submission, the Women's Legal Service Queensland ('WLSQ') expressed the view that Queensland's current criminal justice system does not protect victim survivors of sexual violence, hold offenders to account or meet community standards.[203]

In their submission, TASC (Advocacy Service) recognised that attending to the rights and needs of victim survivors of rape is vital:

> The challenge is in finding ways to meet these rights and needs, and the rights and needs of the community, while providing a sentence to offenders which ensures that the harmful impacts of punishment and attempts at denunciation do not negatively impact pathways towards rehabilitation – the aspect of sentencing with the most potential to better both individuals and society.[204]

13.6.2 Sentencing procedures and processes should be more trauma informed

Submissions

QSAN stated that the criminal justice process is 'horrendous' for victim survivors.[205] Delay was raised as a key concern, with QSAN noting that a 'victim survivor's stability and confidence, understandably, can deteriorate through constant delays and adjournments.'[206] It further described victim survivors as being 'ancillary' to the sentencing process:

> At least in the trial and pre-trial the victim survivor has utility as a witness to the system, whilst this role is concluded by the time of sentencing. Arguably this lack of utility means victim-survivors is even less visible, as sentencing is principally focussed on the offender.
>
> For victim-survivors to engage more fully, the [sentencing] process needs to be much more victim centric, and trauma informed.[207]

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199 Ibid.
200 Ibid.
201 Preliminary submission 27 (Name Withheld) 3 [14].
202 Ibid.
203 Preliminary submission 21 (Women's Legal Service Queensland) 1.
204 Submission 22, Chapter 2 (TASC Legal and Social Justice Services) 9 citing D Brown 'The limited benefit of prison in controlling crime' (2010) 22(1) *Current Issues in Criminal Justice* 137; D Johns 'Confronting the disabling effects of imprisonment' (2018) 45(1) *Social Justice* 27.
205 Submission 24 (QSAN) 6.
206 Ibid 6.
207 Ibid 3–4.

QSAN advocated for reforms to 'bring the victim-survivor and their needs much more into view at the time of sentencing', as well as for their rights to be promoted through this process.[208] It expressed concerns that there is 'no organisation tasked with prioritising or advocating to protect them in the broader system.'[209]

DVConnect outlined that many victim survivors describe Queensland's criminal justice system – including the sentencing process – as 'the second trauma'.[210] It stated that '[t]he rights of victim survivors are repeatedly and substantially undermined by both the person who offended against them and the criminal justice system',[211] noting that that 'more words are spent outlining the protection of rights of a person who is being charged and detained as an accused and/or defendant than any other right. Victim/survivors feel this in real life.'[212]

FACAA recommended that

> judges should get the specific training of listening to rape and sexual abuse survivors tell their stories and traumas … We believe if judges had more empathy for victim-survivors by hearing the trauma they have endured and continue to endure, then they could hand out sentences' society would deem appropriate and that would leave victim-survivors with a sense of justice and safety.[213]

The Your Reference Ain't Relevant Campaign expressed their view that victim survivors 'should not have to choose between their own well-being and the pursuit of justice'.[214]

The Justice Reform Initiative ('JRI') commented that a contested sentence hearing process that may involve the 'robust cross-examination' of a victim survivor is a 'core aspect of the adversarial criminal justice process and an important right for an accused person', but noted that this experience can be 'deeply traumatic' for victim survivors of violent offences.[215]

The Queensland Mental Health Commission ('QMHC') recognised the importance of '[c]reating an effective trauma-informed court and sentencing system in relation to sexual violence and rape offences':[216]

> A trauma-informed system places the potential needs and wellbeing of victim survivors at its core. This approach involves providing choice, control, and respect throughout the legal process. Operational policies, procedures, and processes that facilitate clear and effective communication, ethical handling of cases, fully informed consent, and consideration of the person's comfort and safety are ways to reduce the potential for retraumatisation because of court processes.
>
> Ongoing training focused on understanding trauma is required for all professionals involved in court proceedings and operations including judges, legal representatives, and court personnel. Training should be identified and tailored to the needs of the audience. For example, specialist training may be required for judges; however, all staff should be required to have a minimum level of 'trauma awareness'.[217]

The QMHC suggested system wide reforms to improve the sentence experience for victim survivors of rape and sexual assault, including:

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208 Ibid 5.
209 Ibid 3.
210 Preliminary submission 11 (DV Connect) 4.
211 Submission 20 (DV Connect) 4 (emphasis removed).
212 Ibid 5 (emphasis removed).
213 Submission 15 (Fighters Against Child Abuse Australia) 8–9.
214 Submission 14 (Your Reference Ain't Relevant Campaign) 2.
215 Submission 13 (Justice Reform Initiative) 1 [2].
216 Submission 29 (Queensland Mental Health Commission) 1.
217 Ibid 1–2.

- enhancements to the availability of victim survivor advocacy and support services 'from the point of contact through to the conclusion of the legal process with options provided for referral and ongoing support';
- promotion of enhanced restorative justice options (discussed in **Chapter 16**);
- increased flexibility within sentencing practices to better consider the 'victim survivor's needs and wishes';
- enhanced privacy and confidentiality for victim survivors, particularly for young people;
- the development of a 'trauma-informed court and sentencing system' that 'responds to sexual violence and rape offences [which] requires a shift from traditional methods to those that prioritise healing respect and justice for victim survivors'.[218]

The Royal Australian and New Zealand College of Psychiatrists ('RANZCP') indicated that it is becoming 'increasingly concerned about patient-psychiatrist confidentiality being undermined by the use of subpoenas to gain access to clinical records' to potentially 'cast unwarranted doubts upon the credibility and character of victims'.[219] It described confidentiality as being 'necessary to encourage victims to both seek counselling and report a crime' and reflected that the therapeutic purpose of counselling is being undermined where leave is granted to subpoena protected counselling notes, and for these to be disclosed.[220]

Views of victim survivors

Consultation with victim survivors

We were told by a victim survivor about their experience in the courtroom:

> [I felt like I was] shoved in a corner. (Victim Survivor Interview 1)
>
> I felt like we were the ones being sentenced, not him [the offender], because it was … just always directed at him … it was quickly mentioned that it has done harm to [name withheld] and her family, but … it was just mainly focused on how he's trying to fix his life, not really acknowledging how it has changed our life forever. (Victim Survivor Interview 1 – Parent)
>
> Because you have this thing in your head that you think justice is going to be served and then when you don't get what you think that he should have got, and then you think, okay, so the only other thing I can do to get closure is face this person and make him sit there and listen. No matter if he doesn't take it in, but he still has to sit there and listen to what we have to say. (Victim Survivor Interview 1)

Although the prosecutor told the judge they were there, the victim survivor did not consider that the judge looked at, acknowledged or interacted with them in any way.[221]

The victim survivor told us that having to sit in the same courtroom as the offender and their families was a challenging experience:

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218 Ibid 2.
219 Submission 33 (Royal Australian and New Zealand College of Psychiatrists) 2.
220 Ibid. We note in Queensland sexual assault counselling privilege applies and access is restricted. This process is prescribed by Part 2, Div 2A of the *Evidence Act 1977* (Qld).
221 Victim Survivor Interview 1.

> And just seeing his family looking at us and staring at us like we were the bad people … the worst part is too, like … that courtroom session ended, he walked back to his family and his lawyer sat there going, 'Mate, you've got to be happy with this. This is really good.' We're right there. So that was just devastating. And his family staring at us like, that was terrible. It's almost better if you'd have been in a different room but watching it on a screen or something. Or if you were there but not having to confront them or they had to watch it from somewhere else, I suppose. I reckon maybe they should have had to not be in there and stare at us like we were the ones ruining his life. Because otherwise you're putting the victims away. (Victim Survivor Interview 1)

Another victim survivor told us about the lack of promotion by the prosecution service of alternative ways to attend the sentencing hearing:

> So it was almost like, if you're not going to be in person, you won't hear it, or you won't, there's no other option … It was only based on prompting that kind of made that [attending by video link] happen. (Victim Survivor Interview 4)

Another victim survivor told us about the lack of financial support for attending the sentencing hearing:

> I flew up there, but at my own expense. So, that is another big downfall is that as victims, we, like I paid to travel up there three times for this. I got paid back once for everything. The other two times I lost my wages. I had to pay for my own food. Victims Assist paid for my flights and my accommodation but everything else was at my own expense and I missed a lot of time off work. I'm just lucky my company is so understanding. (Victim Survivor Interview 2)

However, one victim survivor said that they felt 'very' supported throughout the sentencing process and that all justice stakeholders were very respectful - acknowledging the strong support they received from the prosecutor and their support person.[222]

Consultation with victim survivor support advocates

Support advocates noted that the sentence hearing is an offender-centric process and that 'survivors of that process were definitely not out front and centre … they were a little side note to everything.'[223] Another support advocate reflected that they need to prepare victim survivors for what to expect from the sentence hearing, as 'it is victim expectation versus legal reality. They're on two spheres and they don't overlap very much.'[224]

Victim support advocates considered that attending the sentence itself can be retraumatising, including the layout of the courtroom. For example, some courthouses (particularly in regional areas) are not designed so victim survivors can enter the courthouse or wait comfortably for the hearing to commence without a risk of coming into contact with their offender or their family and friends. One victim support advocate reflected that they and the victim survivor they were supporting were 'kept in a storeroom', which was not a positive or victim-centric experience.[225] Some support advocates suggested that there could be a requirement for the offender's family and friends, rather than the victim survivor, to be in another room.[226]

222 Ibid.
223 Victim Support Advocate Interview 1.
224 Victim Support Advocate Interview 3.
225 Ibid.
226 Victim Support Advocate Interview 1.

Victim support advocates heard from victim survivors that they wanted to attend the sentence but were discouraged from doing so by the ODPP.[227] They felt attendance should be the victim survivor's own choice.[228]

SME interviews

Some participants told us there are opportunities to improve the sentence experience for victim survivors to ensure it is more trauma-informed, including ensuring:

- all courthouses (including those in rural, regional and remote areas) are equipped to allow victim survivors to enter the courtroom without fear of seeing their offender;[229]
- the prosecution proactively notifies victim survivors of the option to attend a sentence remotely when it is in their interests to do so, or where they live overseas, but where they wish to participate in the sentence hearing;[230]
- all legal practitioners and judicial officers have a deeper understanding of the true impacts of these offences;[231] and
- the privacy of the victim survivor is protected, and that practitioners are sensitive to this need.[232]

However, one participant considered that, despite reforms, victim survivors will likely never gain a sense of resolution from this process.[233]

Another participant expressed their view that it could be retraumatising for victim survivors to hear the offence facts repeated during sentencing remarks.[234] This may be why some judicial officers avoid restating the facts out of sensitivity to the needs of victim survivors.[235]

Consultation events

Participants commented that the criminal justice process is not victim centric and is very dehumanising, particularly in its language.[236] For example, it was noted that the 'victim's body is the crime scene', and that the language used to refer to them objectifies their body or reduces them to a sexual act, rather than recognising them as an individual.[237]

Other issues raised with respect victim survivor satisfaction with the sentencing hearing include the collegiate relationship between prosecutors and defence practitioners, which can be 'upsetting' for some victim survivors.[238]

Victim advocates told us making the sentencing processes more trauma-informed would be important for victim survivors, as some reflected that procedural justice (including through recognition) is more

227 Victim Support Advocate Interview 3.
228 Ibid.
229 SME Interview 19.
230 Ibid.
231 SME Interview 12.
232 SME Interview 5.
233 SME Interview 20.
234 SME Interview 5.
235 Ibid.
236 Brisbane Consultation Event, 11 March 2024; Cairns Consultation Event, 21 March 2024.
237 Brisbane Consultation Event, 11 March 2024.
238 Cairns Consultation Event, 21 March 2024.

important than the sentence outcome.[239] It was noted that if victim survivors feel validated and heard, they may not rely solely upon the outcome of the proceeding for satisfaction.[240]

Suggestions for improving the criminal justice process included:

- redesigning the courtroom setting and layout to ensure victim survivors feel comfortable and safe, with options to not be in the same room as the offender;[241]
- enhanced training for all legal stakeholders surrounding trauma-informed practices in the sentencing process, including with respect to the language and tone used in communicating sentencing submissions and remarks.[242]

Victim advocates supported the establishment of specialist sexual violence courts in Queensland (discussed in section 13.3.4) where justice professionals are specifically equipped to understand the nuance of sexual violence offending and the impacts on victim survivors (including recognising that a resilient victim can still have suffered serious harm), as well as adhering to concepts of 'swift and certain justice' for victim survivors.[243]

13.6.3 Communication and support for victim survivors and understanding of the process

Submissions from victim survivor support and advocacy stakeholders

The Salvation Army Australia noted that there is a lack of 'intentional communication' with victim survivors (particularly victim survivors of family violence), which causes additional anxiety.[244]

We were told by the NQWLS that it has received regular feedback from victim survivors that they do not often attend the sentence hearing because they were not informed of the sentence date – particularly in the lower courts.[245] Similarly, Respect Inc and Scarlet Alliance reported that this issue is also prevalent for cases involving sex worker victim survivors, who report that they are often not 'informed that the case was to be heard (particularly in the Magistrates Court)'. Both the NQWLS and Respect Inc and Scarlet Alliance described victim survivors as being 'locked out of sentencing processes' when this occurs.[246]

With respect to prosecutorial decision-making, Sisters Inside stated that the position and views of victim survivors are not considered throughout the criminal justice process – including at sentence – and recommended that greater regard be had to the 'autonomy and wishes of the victim-survivors' in deciding how sentences proceed.[247]

The NQWLS also recognised that those victim survivors who do attend the sentence often have no, or limited, knowledge of the sentencing process or the likely outcome.[248] It was acknowledged that it can

239 Brisbane Consultation Event, 11 March 2024..
240 Ibid.
241 Ibid.
242 Online Consultation Event, 16 April 2024.
243 Brisbane Consultation Event, 11 March 2024.
244 Preliminary submission 14 (The Salvation Army Australia) 9 [1.17].
245 Preliminary submission 20 (North Queensland Women's Legal Service) 4.
246 Ibid; Submission 25 (Respect Inc and Scarlet Alliance) 4.
247 Preliminary submission 28 (Sisters Inside) 2.
248 Preliminary submission 20 (North Queensland Women's Legal Service) 4.

be beneficial for a victim survivor to attend a sentence and receive validation of their experiences from the judicial officer.[249]

Views of victim survivors

Consultation with victim survivors

Information and communication with prosecution services about the sentence process, outcome and charges

Victim survivors expressed mixed views about whether they were satisfied with the information and communication with prosecution services. Most victim survivors agreed that they had a limited understanding of the sentencing process before experiencing it, but that 'nothing prepares you for that kind of thing'.[250]

One victim survivor reported a positive experience and considered that they were supported very well by both the ODPP and in court, as well as by police, throughout the process.[251]

Another told us her experience engaging with police investigators was positive, as the arresting officer stayed in regular communication with her, which was beneficial and that this support 'every step of the way affirmed my trust in the Queensland legal system'.[252] However, while the prosecutor 'did his best', she did not have much communication with the prosecution service.[253]

One victim survivor told us they received a telephone call from the prosecutor about a week prior to sentence, and that they were happy with the information they received – including with respect to the likely sentence outcome.[254] However, the victim survivor's support person noted that there had been a seven-week gap between notification of sentence from the VLO and the telephone call with the prosecutor, which was described as a 'big gap of information'.[255] Despite this, the victim survivors did not understand the role of the prosecution service, referring to the prosecutor as 'my lawyer'.[256]

Another victim survivor thought that in some areas she felt as if she had enough information, while in others she did not feel sufficiently prepared.[257]

In contrast, another victim survivor said she was not provided with sufficient information prior to sentence to prepare her for the process, or the likely sentence outcome:

> Like, no one bothered to sit us down and say, this is what's going to happen, this is what he could possibly get … I've done so much research, because no one ever bothered to tell us that here's the consequences of what he could, you know, could he go to jail, could he get probation, could he get this. So we're walking into a courtroom, basically having no idea what the outcome's going to be. (Victim Survivor Interview 1)

In considering what reforms are needed, the victim survivor noted:

249 Ibid.
250 Victim Survivor Interview 6.
251 Ibid.
252 Submission 35 (Name Withheld; Victim Survivor Interview 7) 3.
253 Victim Survivor Interview 7.
254 Victim Survivor Interview 4.
255 Ibid – Support person.
256 Victim Survivor Interview 4.
257 Victim Survivor Interview 6.

> Well, we should have been treated with more dignity and respect. I think maybe there should have been more communication. And more focus on the victim … We've never broke the law. We don't know how the system works. They should have sat us down. And when we first got there, the second time, it was like, come on, let's go, let's go, let's go. This is what could happen right now. There's a chance he's walking away and that's it. Everyone's going to be unhappy. They're just like, come on in, come on in. You just sit there in your head guessing over and over because you don't know the law. You don't know what the consequences are. I think they need to have way more communication with the victims. And try and understand how they feel and how they can make it easier for the victims. At the end of the day, it just felt like they're just doing their job. And that's it. (VS Interview 1)

Where the charges were changed before the sentence, one victim survivor said they were not told the reasons for the change, which made it feel like a 'guessing game' and 'left us with so many more questions'.[258]

Another victim survivor told us they were not told the factual basis for the sentence.[259] As a consequence, they were surprised by some of the facts read out in court.[260]

Another victim survivor with whom we spoke told us that her communication with both the investigating police and police prosecution service had been 'so unsatisfactory' that she did not know whether the matter had been finalised or not.[261] She told us that, despite making a complaint of serious sexual violence offending to police, the matter had not progressed and she was not kept informed.[262]

Information and communication from prosecution services about victim rights and referrals to support services

We were told there are 'not enough supports out there', and it is the responsibility of the victim survivor to find and reach out to support services rather than being referred to them automatically, which a victim survivor was dissatisfied with, as they are constantly reliving and reminded of the offence:

> You're left on your own after those appointments [with police]. You just, you're left with everything that you've just talked about and experienced, and then it's like, "okay, bye." Like, it's not enough support. Mentally, that's really, it messes you up. It does a lot of things to your head because you're reliving it over and over again. And the more detectives and the more lawyers and things that you see, you've got to replay it over and over again. And it's really hard. (Victim Survivor Interview 5)

> [I] was having to reach out [to] organisations for support, instead of, oh, here, there's all the numbers, or we can do referrals for you, or something like that. (Victim Survivor Interview 5)

They considered that accessing support services would be even more challenging for victim survivors who did not speak English very well.[263]

Another victim survivor thought police should be more proactive in assisting victim survivors to get help. While they were provided with pamphlets for formal support services, neither the police nor the prosecution service encouraged the victim survivor to engage with counselling services.[264]

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258 Victim Survivor Interview 1. See section 10.3 of our Consultation Paper for a discussion of the charge resolution process, and the obligations held by the prosecution service to consult with victim survivors on the resolution of any charges.
259 Victim Survivor Interview 1.
260 Ibid.
261 Victim Survivor Interview 5.
262 Ibid.
263 Ibid.
264 Victim Survivor Interview 1.

When we asked victim survivors with whom we consulted, all said they were not told about the Victims' Charter or provided with a copy by any of the justice agencies they engaged with.[265]

Experiences with external support services

Some victim survivors indicated that they were supported at the sentence hearing by either a member of their family, friends or a dedicated support person.[266]

Another victim survivor told us about the benefits of external support services:

> ... they [the Women's Centre] care. That's the main thing. And they walked us through the whole process. Every step of the way, one of them was with us on the phone or, you know, through everything. If we didn't know something, they would help us find out. You know, it was a whole holistic help through the process. I don't even know what happens in places where we don't have a centre like this. I don't know where you would go. I was still so fortunate that we did, that I was living in Townsville at the time and had access to that ... I feel, for those people who wouldn't have that as an option, because that's probably where a lot of, you know, this falls by the wayside and doesn't get reported ... (Victim Survivor Interview 3)

Another victim survivor also reported a positive experience with a support agency, describing VAQ as 'angels of strength and support through the challenges of experiencing a criminal trial as a victim'.[267] She reflected that they 'provided a safe space ... for me to sit out of the courtroom where I wouldn't have to be confronted by the perpetrator'.[268] She said each step of the process was adequately explained, which gave her a sense of safety and comfort.[269] Within this context, she reflected that she did not receive much information from the public prosecutor regarding this process.[270]

Not all victim survivors reported positive experiences with all support services they had contact with. One told us a service provider did not get back to her after saying they would make referrals and another only had limited contact with the agency.[271]

Consultation events

Participants noted that the degree of information varies depending on whether the matter proceeds in the lower or higher courts: victim survivors in the higher courts are provided with 'some support' by the ODPP (specifically, 'just keeping people up to date with the process, but not much else'), while noting that 'this does not happen' for lower court matters prosecuted by the police prosecution service.[272]

We were told communication could be given in more trauma-informed ways to recognise that the criminal justice process for a victim survivor is 'scary' and 'unknown'.[273] It was noted that 'sometimes [prosecution services] expect people who have been traumatised to remember information', which they may not.[274] There were concerns that prosecutor agencies that do not act in a trauma-informed way may inadvertently add to a victim survivor's trauma.[275]

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265 Victim Survivor Interview 3.
266 Victim Survivor Interview 6.
267 Submission 35 (C Murphy) 3.
268 Victim Survivor Interview 7.
269 Ibid.
270 Ibid.
271 Victim Survivor Interview 5; Victim Survivor Interview 1.
272 Brisbane Consultation Event, 11 March 2024.
273 Ibid.
274 Ibid. This was also mentioned in Victim Survivor Support Workers Interview - Group 3.
275 Cairns Consultation Event, 21 March 2024.

Participants reflected that victim survivors need to be provided with more knowledge, including about their rights, how to make complaints, consultations and the type of sentence that could be imposed.[276] This may enhance self-determination and autonomy for victim survivors, as well as reducing feelings of re-victimisation at the conclusion of proceedings.[277]

It was recognised that resourcing is required to enhance interactions with victim survivors, not only for prosecution services but also for support agencies.[278] Victim support services should be provided with sufficient information to explain sentencing processes and outcomes for victim survivors.[279] One participant noted the [then interim] Victims' Commissioner was raising awareness about the rights of victim survivors, as well as options and support services available to them.[280] However, support agencies should not have the sole responsibility for communicating with the victim:

> [W]e're not legal people. We've certainly had a lot of experience in supporting people in court, but we've made sure that they know about those things. Because they might not have heard it from anyone else. So I think that would be something that, you know, that needs to, yes, it's an option, but who's got the responsibility for putting that option before the victim? [281]

Several participants strongly felt that victims need a representative or an advocate during the court and sentencing process.[282] Support for the implementation of a statewide victim advocate service (as a recommendation of recommendation 9 of the WSJ Taskforce) was provided.[283] Participants recommended that this service should be separate from police and prosecutors, recognising their overriding duty to the state and the courts. [284]

Therapy and treatment options were considered to be important for victim survivor healing. Suggestions were made for victim survivors to engage with a psychologist during their first contact with the criminal justice system (at the time of reporting the offence).[285]

One participant suggested that at the sentencing hearing, after the sentence is imposed on the offender, the judicial officer could make an order for the victim survivor to be able to attend a government-funded support service for counselling and support.[286] This suggestion was supported by other participants, who agreed that it recognises the victim survivor at the sentence, provides them with the opportunity to access support and in this way recognises the harm caused.[287] It was suggested this order should not be limited to a sentencing hearing but be available at any point in the proceedings, even where the matter does not result in a conviction.[288]

Participants from the Brisbane event noted that victim survivors are prevented from engaging in some therapy techniques, such as EMDR, as this is classified as an 'altered thought pattern'.[289] However,

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276 Brisbane Consultation Event, 11 March 2024.
277 Brisbane Consultation Event, 11 March 2024.
278 Ibid.
279 Ibid.
280 Ibid.
281 Victim Survivor Support Workers Interview - Group 3.
282 Brisbane Consultation Event, 11 March 2024.
283 Ibid.
284 Ibid.
285 Ibid.
286 Ibid.
287 Ibid.
288 Ibid.
289 Ibid.

participants thought such processes may be necessary for victim survivors to feel strong enough to report the offending.[290]

Aboriginal and Torres Strait Islander Advisory Panel members' views

The Panel recognised that there are several aspects of the legal process that can be alienating and intimidating for victim survivors, including the physical courtroom environment, which was described as a 'high-stress environment' for victim survivors.

The Panel provided support for the use of victim advocates, and for them being permitted to tell the court about the impact on a victim. This would ensure the decision-maker would have 'the full ambit before them to make a decision', and that victim survivors would be heard and the offender held to account - leading to enhanced satisfaction with their experience.

13.6.4 Post-sentence: Understanding of sentence outcomes and post-sentence communication

Submissions from victim support and advocacy services

The Office of the Interim Victims' Commissioner recognised there may be opportunities to 'improve the information provided to victim survivors post-sentencing, including information about the [Queensland Government's] Victims Register and a copy of sentencing remarks'.[291]

The Salvation Army Australia noted limitations with the Victim Information Registrar, as it only applies to some orders, and recommended the implementation of a dedicated liaison person to ensure communication and support for all victim survivors.[292] It also recommended that the courts should consistently publish written documentation of the 'summing up process' as well as sentencing remarks in both the lower and higher courts.[293]

Views of victim survivors

Consultation with victim survivors

While most victim survivors confirmed that they received a sentence outcome letter from the ODPP,[294] they told us they would find it beneficial to receive a copy of the sentence transcript after the sentence:

> I think that would have helped [receiving a copy of the sentencing remarks], because often if you're there, you're not really there... I think it's almost like you're somewhere else. You sort of dissociate in a way. (Victim Survivor Interview 1)

> I don't know how other people feel, but I would actually like that [to receive a copy of the sentencing remarks] because it would help me in, of course, after a certain point I wasn't hearing anything that was being said. Yeah, it just was all too much for me like, and I didn't understand ... he got, the 16 years for the rapes ... but at the time

290 Ibid.
291 Submission 26 (Office of the Interim Victims' Commissioner - now permanently established as the Office of the Victims' Commissioner).
292 Preliminary submission 14 (The Salvation Army Australia) 6, rec 3.
293 Submission 4 (Rita Lok) 2.
294 Victim Survivor Interview 1.

> I was like, hang on, that adds up to 19 and a half years, but no, he didn't, he just got 16 years. (Victim Survivor Interview 2)

When we told those victim survivors that they had a right to request a copy of the transcript, they were surprised.[295] Two victim survivors confirmed that they did apply for, and receive, a copy of sentencing remarks.[296]

If a victim survivor wanted to be told about the offender's eligibility for parole and released from custody, we were told this process needed to be simplified with less paperwork and legal jargon.[297] One victim survivor suggested a 'tick box' on the day of sentence for victim survivors to confirm whether they would like to receive this information, rather than using their own counselling/support sessions to get help navigating these forms.[298]

Another victim survivor told us the sentencing outcome did not appear to be communicated to other agencies as her offender had not been automatically disbarred from his position as a health practitioner, despite the sentencing judge considering this would be a result of the sentence.[299] She told us she had to petition the Queensland Health Ombudsman, which took '[a] year and a half of time, energy, focus and resilience on top of a criminal trial, four years of legal process and the experience and ongoing effects of the crime' to do this'.[300]

Interviews with victim support advocates

Victim advocates agreed that having transcripts automatically provided to victim survivors for them would be beneficial.[301] We were told that victim survivors often dissociate and do not hear or understand sentence outcomes during the hearing:

> They're overwhelmed. They're going through this horrendous trauma. Their brain can't take in … There's just too much trauma and they're overwhelmed by the legal [language] that's thrown at them. It's such an unsafe space for survivors … I think it feels so cold and informal, and hostile, and not victim-friendly or centric at all. (Support Advocate Interview 1)

In addition, there should be opportunities for an appropriate person, such as the prosecutor, to explain the sentence to the victim survivor:

> I feel like I wouldn't be in a position at all to explain these types of [parole eligibility] complications to a survivor, who's been through the court system. We would hope that the ODPP would sit down and take the time needed to explain and to unpack what that means, but I don't think they always have the time to do that. But somebody needs to be able to hear the anguish of the victim, with regard to that. It's not something that we as a team of counsellors have enough expertise in to feel we could do that. And nor should we really be. That's not really our role … (Support Advocate Interview 1)

One advocate further suggested that the provision of a 'toolkit' of sentencing information would be beneficial for victim survivors.[302]

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295 Victim Survivor Interview 1; Victim Survivor Interview 2.
296 Victim Survivor Interview 4; Victim Survivor Interview 7.
297 Victim Survivor Interview 4.
298 Ibid.
299 Submission 35 (Name Withheld) 2.
300 Ibid 2; Victim Survivor Interview 7.
301 Victim Survivor Support Workers Interview - Group 1.
302 Victim Survivor Support Workers Interview - Group 3.

Advocates also noted that 'sometimes people don't know that they can go on the Victim's Register so that they can be kept informed about what's happening with [the offender] if [they] are incarcerated. And we encourage people to do that.'[303]

SME interviews

One participant reflected that justice is done when the broader community understands the sentence outcome.[304] For this reason, it is important that, even if anonymised, sentencing remarks should be published on the Supreme Court Library website for the public (including the victim survivor).[305]

Consultation events

Participants at consultation events also recommended that victim survivors of sexual violence offences should be provided with transcripts of the sentencing submissions and remarks as a matter of course.[306] Participants agreed that this would bring the process back to the victim and would elevate their feelings of inclusion and participation.[307] Participants considered that this would also ensure that victims who are unable to attend the sentence in person, but who later access the sentencing transcript, see that they were recognised.[308]

Some participants reflected that this should occur 'free of charge' and that 'this is a cost that some victims are unable to afford', which demonstrates that some members of the community are not aware that victim survivors can apply to obtain a free copy of sentencing transcripts for their own matters.[309]

Some participants regarded the lack of support services available for victim survivors post-sentence as a 'major issue'. It was noted that police support for victim survivors ends with court proceedings, which means victim survivors are left without support to process proceedings and outcomes.[310]

13.6.5 Victim survivors who experience disadvantage and discrimination

Submissions from victim survivor support and advocacy bodies

BRISSC also told us that victim survivors with intersectional identities may experience additional challenges reporting their experiences. For example, members of the LGBTQI+ community or Aboriginal and Torres Strait Islander peoples may be more hesitant to report sexual violence incidents where it would 'out' them, or where the perpetrator is a prominent member of their community.[311]

QIFVLS expressed the view that judicial discretion must be exercised 'in conjunction with strong and frequent cultural awareness training together with an appreciation of historic and current community factors to mitigate against discrimination'.[312] QIFVLS further agreed with the position taken by the ALRC

303 Ibid.
304 SME Interview 14.
305 Ibid.
306 Brisbane Consultation Event, 11 March 2024.
307 Ibid.
308 Ibid.
309 Ibid.
310 Cairns Consultation Event, 21 March 2024.
311 Preliminary submission 6 (Brisbane Rape & Incest Survivors Support Centre) 2.
312 Preliminary submission 10 (Queensland Indigenous Family Violence Legal Service) 6, referring to the Australian Human Rights Commission, *Wiyi Yani U Thangani Report* (2020) 184.

in its *Pathways to Justice Report* that any criminal justice responses should be developed in consultation with Aboriginal and Torres Strait Islander women.[313]

QSAN recommended mandatory training for court staff to better understand the inherent disadvantage experienced by many victim survivors of Aboriginal and Torres Strait Islander descent.[314] In their submission, QSAN told us that Murrigunyah is the only specialist sexual violence service funded in Queensland for Aboriginal and Torres Strait Islander women. While Murrigunyah has supported victim survivors over an 8-year period, only one person it has supported had her matter proceed to sentence.[315] This illustrates the distrust Aboriginal and Torres Strait Islander victims, in particular, have in the criminal justice system.

QSAN also noted the importance of ensuring that quality interpreters are available for victim survivors to engage with at all stages of the criminal justice system, including in preparation for, and at, sentence.[316] It was noted that, similar to the position in the UK, the interpreter service be run and certified by the Justice Department to ensure 'more oversight and monitoring for quality'.[317]

13.7 What we know from earlier research and reviews

Victim survivor experiences when engaging with the criminal justice system have been considered in earlier research and reviews. Some have related to the criminal justice process generally, while others have focused on sentencing and sexual offences. This section briefly discusses some of this earlier research and key findings from reviews.

13.7.1 Views and experiences of victim survivors of rape and other sexual offences

Scottish Sentencing Council

In 2024, the Scottish Sentencing Council considered the views and experiences of the sentencing process of victim survivors of rape and other sexual offences in Scotland.[318] While noting that each victim survivor has a different experience, there were common concerns that led the Scottish Sentencing Council to made key findings in relation to the victim survivor experience and understanding of sentencing, including:

- There was a strong desire from victim survivors for procedural fairness ('being treated with fairness, dignity, respect and given a “voice”'), but this was rarely experienced.
- Most victim survivors considered that they were given little to no information about the sentence process or sentencing options prior to or after the sentence, and did not understand the sentence imposed.

313 Preliminary submission 10 (Queensland Indigenous Family Violence Legal Service) 6–7, referring to the Australian Law Reform Commission, *Pathways to Justice — An Inquiry into the Incarceration Rate of Aboriginal and Torres Strait Islander Peoples* (Report No 133, 2017) 17.
314 Submission 24 (QSAN) 4.
315 Ibid.
316 Ibid.
317 Ibid.
318 *Victim-Survivor Views* (n 136).

- The sentencing hearing was considered an important part of the criminal justice process, but many didn't attend despite wanting to, even via video-link. Reasons for this included fear of seeing the perpetrator and a lack of support (emotional, practical and financial).
- Victim survivors who did attend described 'feeling unprepared and unprotected' and that their rights were neglected.
- The way a judicial officer delivered their remarks (i.e. the tone and content of the remarks) had a significant impact on the victim survivors' sense of justice.
- Victim survivors had difficulty navigating the criminal justice system and understanding who was responsible for providing information about a sentence. There was a preference to speak with someone who could help them to understand the sentence.
- Victim survivors wanted to receive transcripts of the sentence hearing (without charge) to improve their understanding of the sentence outcome.[319]

The Scottish Sentencing Council subsequently made various recommendations to improve the sentencing experience for victim survivors of sexual violence at different stages of the proceeding:

- **Pre-sentence:** Victim survivors should consistently be provided with information about sentencing options (including potential factors a judge may consider and the reasons why); key agencies should provide 'clear and consistent information about sentencing' to victim survivors; training opportunities for key agencies in contact with victim survivors; and the 'opportunity to provide a Victim [Impact] Statement should be given after reporting to the police and then closer to the court case to provide a more representative account of impacts on victim survivors.'[320]
- **During the sentence hearing:** There should be greater recognition of the importance of attending a sentence hearing for victim survivors, with options to attend via video-link promoted and having their rights serve as a 'central consideration in conducting the hearing' (including protection from attacks to their character).[321] It also recommended victim survivors be: provided with emotional and practical support (where sought), compensated for reasonable expenses associated with attending a sentence, and receive information prior to sentence surrounding the processes and practices to be followed at sentence.[322]
- **Regarding sentencing decisions:** Victim survivor safety should be protected by automatically issuing a non-harassment order unless it can be 'demonstrated that the victim-survivor will be safe without one'. Guidelines should also be developed on how judicial officers should sentence sexual offences and what to consider (including the 'enduring impact on their lives').
- **Post sentencing:** Communication of the sentence outcome, the reasons given by the judge and the practical implications of the sentence should be provided 'verbally and in writing to victim-survivors' using plain English, with opportunities for victim survivors to ask questions. They further recommended that meetings be arranged with victim survivors 'as a matter of course'. Where a victim survivor does not attend the sentence, access to the transcript should be provided as soon as possible at no cost. All victim survivors should be provided with information about any

319 Ibid 1–2.
320 Ibid 48.
321 Ibid.
322 Ibid.

programs or rehabilitative work undertaken in custody by an offender with respect to sexual offending.[323]

13.7.2 Trauma-informed practices and victim survivor satisfaction with the sentencing process

Understanding complex trauma and how it impacts people who have experienced sexual violence should be part of a criminal justice response and is essential when engaging with victim survivors. Trauma-informed practice is increasingly being recognised as important to achieving more effective and compassionate responses to those who have been victimised. This practice is a 'strengths-based framework which is founded on five core principles – safety, trustworthiness, choice, collaboration and empowerment as well as respect for diversity'.[324]

A trauma-informed sentencing process involves having 'an understanding of trauma and an awareness of the impact it can have across settings, services and populations'.[325] Adopting this perspective helps courts and others involved in the sentencing process to understand the impacts of particular types of offending behaviour on victims, including sexual assault and rape, as well as the impacts on defendants.[326] The objective of responding in a trauma-informed way is to reduce, and ideally avoid, further trauma.

Some recent reports and inquiries in Australia and internationally have identified the need for ongoing training in trauma-informed practices for legal practitioners and judicial officers.[327]

The Queensland Centre for Domestic and Family Violence Research has developed an approach to trauma-informed practice for sexual violence. This approach is

> underpinned by strengths-based principles and grounded in an understanding of the impact of trauma on the victim. It underscores how to respond to victims while emphasising their physical, psychological and emotional safety. It also involves creating opportunities for victims to become empowered and rebuild their sense of personal control.[328]

The US-based Substance Abuse and Mental Health Services Administration ('SAMHSA') recommends 6 key principles:

> **Safety:** throughout the courtroom, all participants feel physically and psychologically safe.
>
> **Trustworthiness and transparency:** operations and decisions are conducted with transparency with the goal of building and maintaining trust with all court participants.

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323 Ibid 49–50.

324 Cathy Kezelman, 'Trauma informed practice', *Mental Health Australia* (blog post, 4 February 2021) <https://mhaustralia.org/general/trauma-informed-practice>.

325 Sheryl P Kubiak, Stephanie S Covington and Carmen Hillier, 'Trauma-Informed Corrections' in D Springer and A Robert (eds) *Social Work in Juvenile and Criminal Justice Systems* (Charles Thomas, 2017) 92 cited in Katherine McLachlan, 'Same, same or different? Is trauma-informed sentencing a form of therapeutic jurisprudence?' (2021) 25(1) *European Journal of Current Legal Issues* 738.

326 See McLachlan (n 325).

327 See, for example, Amanda-Jane George et al. *Specialist Approaches to Managing Sexual Assault Proceedings: An Integrative Review* (Report, August 2023) 221; Legislative Council Legal and Social Issues Committee, Parliament of Victoria, *Inquiry into Victoria's Criminal Justice System: Volume 1* (Report, 2022) finding 72, 760 ('*Inquiry into Victoria's Criminal Justice System*'); Sir John Gillen, *Report into the Law and Procedures in Serious Sexual Offences in Northern Ireland: Part 1* (2019) 209; Royal Commission into Institutional Responses to Child Sexual Abuse, *Criminal Justice Report: Executive Summary and Parts I to II* (2017) rec 3, 20.

328 Queensland Centre For Domestic and Family Violence Research, *Trauma-informed Responses to Sexual Assault* (Research to Practice Paper, 2020).

Peer support: peers are understood as individuals with lived experiences of trauma; peer support and mutual self-help are key vehicles for establishing safety and hope.

Collaboration and mutuality: importance is placed on partnering and levelling the power differences in the courtroom.

Empowerment, voice and choice: the courtroom fosters a belief in the primacy of the people served, in resilience.

Cultural, historic and gender issues: the courtroom actively moves past cultural stereotypes and biases (e.g. based on race, ethnicity, sexual orientation, age, religion, gender); leverages the healing value of traditional cultural connections; incorporates policies, protocols and processes that are responsive to the racial, ethnic and cultural needs of individuals served and recognises and addresses historical trauma.[329]

Considering the above principles and the experiences of victim survivors, judicial officers can be:

- aware of the impact that trauma experiences may have on the experience of the court process;
- attuned to 'what has happened' to a person rather than 'what is wrong' with a person; and
- aware that a court participant's memory and recall may be affected by trauma.[330]

13.7.3 Reviews into improving criminal justice experiences for victim survivors

Various reviews have been conducted into ways to improve the criminal justice experiences for victim survivors of sexual violence. Broadly, these reviews found a need for more trauma-informed interactions with victim survivors and recommended reforms in response to their findings.

The VLRC undertook an inquiry into Victoria's response to sexual offences, including rape and associated adult and child sexual offences in 2021 at the request of the then Attorney-General.[331] The VLRC made 91 recommendations, including:

- the introduction of a victim advocate to provide continuous support for people who have experienced sexual violence across services and legal systems, including providing information about justice options, to help them to understand and exercise their rights, to support their individual needs, including through referrals to services, and to liaise and advocate for them with services and legal systems;[332]
- the funding of legal advice and representation until the point of trial and in related hearings to ensure victim survivors can exercise their rights and protect their interests, including options for compensation under the *Sentencing Act 1991* (Vic), victims of crime compensation and civil or other compensations scheme and the implications of taking part in restorative justice;[333]
    - the establishment of an independent body, such as a Commission for Sexual Safety, responsible for preventing and reducing sexual violence, and supporting people who experience sexual violence;[334] and

329 Judicial Commission of New South Wales, *Equality Before the Law Bench Book* (25 February 2024), section 12.4 ('*NSW Equality Before the Law Bench Book*').
330 Ibid (citations omitted).
331 *Improving the Justice System Response to Sexual Offences* (n 324).
332 Ibid rec 45.
333 Ibid rec 46. A legal advice service for victim was also supported by the Centre for Innovation Justice, *Strengthening Victoria' Victim Support System: Victim Services Review* (2020).
334 *Improving the Justice System Response to Sexual Offences* (n 32) rec 90.

- greater specialisation of judges, magistrates and barristers and specialised training.[335]

Reforms relating to the trial process, introducing an affirmative model of consent and making it more explicit that the act of 'stealthing' is a crime, were given effect to by the passage of the *Justice Legislation Amendment (Sexual Offences and Other Matters) Act 2022* (Vic) and the *Justice Legislation Amendment Act 2023* (Vic).

Other reforms introduced by the Victorian Government since the report's release, aimed at better supporting victims, have been extensive. They include reforms to defamation laws to remove barriers to reporting[336] and a commitment to introduce 'justice navigators' as part of the government's 'Changing Laws and Culture to Save Women's Lives' funding package 'to make sure survivors of sexual assault can easily navigate support, recovery and justice options'.[337]

An earlier inquiry by the VLRC in 2016 into the role of victims of crime in the criminal trial process also made 51 recommendations to improve services and support for victims (although this was not specific to victims of sexual violence).[338] Relevant recommendations made by the VLRC following this inquiry are discussed throughout this chapter.

The ALRC has been asked to consider training and professional development for judges, police and legal practitioners to enable trauma-informed and culturally safe justice responses as part of its current inquiry into justice responses to sexual violence.[339] The ALRC is due to report by 22 January 2025.

13.7.4 Cultural considerations

As a separate but closely related issue to trauma-informed practices, several reports and inquiries have recommended improving judicial cultural competency in relation to Aboriginal and Torres Strait Islander peoples and CALD groups, and increasing awareness of particular issues experienced by the LGBTIQA+ community and experiences of people with a disability.[340]

In the context of sexual offending, the need for professional development and training can be viewed as particularly critical, given the higher rates of victimisation of these groups, which can be further exacerbated where people experience intersecting forms of discrimination and disadvantage.

A Canadian review into the criminal justice experiences of Aboriginal people[341] who were victim survivors of sexual violence found race to be a 'key determinant in the manner in which a victim will be perceived by the people in the justice system and the manner in which the victim will approach the judicial process'.[342]

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335 Ibid recs 69–73.
336 See *Justice Legislation Amendment (Integrity, Defamation and Other Matters) Act 2024* (Vic).
337 Premier of Victoria, 'Changing Laws and Culture to Save Women's Lives' (Media Release, 30 May 2024) <https://www.premier.vic.gov.au/sites/default/files/2024-05/240530-Changing-Laws-And-Culture-To-Save-Women%27s-Lives.pdf>
338 *The Role of Victims of Crime in the Criminal Trial Process* (n 28).
339 See Australian Law Reform Commission, 'Terms of Reference', Justice Responses to Sexual Violence (web page, 23 January 2024) <https://www.alrc.gov.au/inquiry/justice-responses-to-sexual-violence/terms-of-reference> <https://www.alrc.gov.au/inquiry/justice-responses-to-sexual-violence/>.
340 *Inquiry into Victoria's Criminal Justice System* (n 327) finding 72, 760; *Hear Her Voice, Report Two* (n 13) vol 1, 284.
341 In-depth interview participants with 11 participants included 10 women and one participant who identified as transgender: Arielle Dylan, Cheryl Regehr and Ramona Alaggia, 'And justice for all? Aboriginal victims of sexual violence' (2008) 14(6) *Violence Against Women* 678, 681–2.
342 Ibid 678.

The review recognised that the experiences of Aboriginal people who experience sexual violence in Canada are framed by the broader context of 'social dislocation, poverty, unemployment, neglect and violence'.[343]

Broadly, the review identified 5 key themes:

1. Police were disrespectful, dismissive and unsupportive,[344] with only one of the 11 participants reporting a positive experience engaging with police.[345]
2. Interactions with 'Key Players in the Courtroom' (including the prosecution service and defence lawyers) were mixed, and occasionally dependent upon whether the 'victim felt the crown attorney and the court heard her and valued her input.'[346] The authors further concluded that there was a lack of understanding of the legal terms used in the courtroom, which 'reduces the ability to participate in the discourse and diminishes one's power in the given system'.[347]
3. There was limited understanding of the legal process and available support services.[348] Relevantly, many participants reflected that being more informed about the justice process would have made it less overwhelming.[349]
4. Most participants sought retribution through the justice system and felt a greater sense of resolution when their offender was found guilty, validating their experience, while others felt that being heard contributed to their sense of resolution.[350] In contrast, where the matter did not progress or returned a not guilty outcome, the victim survivor felt a lack of resolution.[351]
5. Racism continues to exist and influences criminal justice interactions.[352]

Similar to the position in Australia, the review recognised that Aboriginal people are over-represented in Canadian penal institutions.[353]

343 Ibid 683.
344 Ibid 684.
345 Ibid.
346 Ibid 686.
347 Ibid 686–7.
348 Ibid 687.
349 Ibid.
350 Ibid 689.
351 Ibid.
352 Ibid 690.
353 Ibid 680.

13.8 The Council's view

13.8.1 Trauma-informed sentencing processes for victim survivors of rape and sexual assault

Key Findings

12 **Trauma-informed practices which recognise the rights of victim survivors should be encouraged, while maintaining principles of fairness for the person being sentenced**

Current sentencing practices and processes can operate in a way that is anti-therapeutic for victim survivors of rape and sexual assault, and that results in victim survivors' retraumatisation. While the focus of sentencing is necessarily on the person who is being sentenced and ensuring that principles of fairness are maintained, it is important for the sentencing process to operate in a way that respects the rights and interests of victim survivors – including those outlined in the Charter of Victims' Rights – and seeks to minimise any risks of retraumatisation.

See **Recommendations 14, 16, 17, 21, 22 and 23**.

13 **Enhanced and trauma-informed communication with victim survivors is needed**

The Charter of Victims' Rights outlines the rights that victim survivors have within the criminal justice system, including the right to be kept informed. Despite these rights, many victim survivors of rape and sexual assault are dissatisfied with the sufficiency of information provided to them regarding the sentencing process, as well as their experiences engaging with the criminal sentencing process.

Improving communication with victim survivors, as well as their interactions with the sentencing process, will have corresponding positive impacts upon their sentencing experience more broadly. This communication should include the provision of regular, timely, effective, consistent and accessible information surrounding the progress of the criminal prosecution (provided by the prosecution service), as well as information about support to navigate the criminal justice system process (provided by an independent, victim survivor support service).

Improving communication between justice agencies (including the Queensland Police Service, the Office of the Director of Public Prosecutions, and Queensland Corrective Services, where relevant) will also ensure that victim survivors are provided with the right information, when they need it.

See **Recommendations 14, 15 and 16.**

14 **Sentencing processes and support services should be enhanced to ensure they are culturally safe for victim survivors**

There is a risk that sentencing processes and support services for victim survivors of sexual assault and rape are not currently culturally safe for Aboriginal and Torres Strait Islander people and are not meeting the needs of other victim survivors, such as LGBTIQA+ people, people with disability and people from culturally and racially marginalised groups, with a corresponding impact on their willingness to engage with, and their experience of, the criminal justice/sentencing process.

See **Recommendations 14, 16, 17, 18, 19 and 20**.

We acknowledge the potential for the current system to operate in a way that may be anti-therapeutic for victim survivors of rape and sexual assault, which has the potential for retraumatisation. Based on our key findings (above) and the application of our fundamental principles,[354] we consider that trauma-informed and culturally safe communication, support and sentencing practices are necessary in order to improve the experiences of victim survivors of rape and sexual assault. We specifically recommend:

- enhanced communication with victim survivors by the ODPP and the QPS PPC (**Recommendation 14**);
- the automatic provision of sentencing transcripts to victim survivors or rape (and possibly sexual assault) at the close of proceedings (**Recommendation 15**); and
- the implementation and progression of related recommendations made by the WSJ Taskforce (**Recommendation 16**).

We recognise that the sentencing experience of victim survivors is intrinsically linked to their broader criminal justice experience, their perception of the criminal justice process and the justice of the outcomes it produces. The intention of our recommendations is to minimise the harm to victim-survivors who are exposed to the sentencing process where offences of rape and sexual assault are concerned.

Understanding why trauma-informed sentencing processes and practices are required

The impacts of sexual violence are different for each victim survivor. In this chapter, we have outlined that for many victim survivors, sexual offending can have significant, immediate and ongoing negative impacts on their mental and physical health and wellbeing.

We have also highlighted that these impacts can be greater for children, as 'sexual abuse can affect [their] emotional, social and physical development'[355] as well as the 'chemistry, structure and function of the developing human brain, especially when it is repeated or ongoing'. This means that very young children are particularly at risk of lasting effects of trauma 'because their brains are still developing and also because brain development is profoundly guided by experience'.[356]

We understand from this review and other research that the criminal justice process can compound the trauma that survivors have already experienced, and may cause secondary trauma or retraumatisation.[357]

There has been a growing awareness of trauma, and in particular complex trauma, over recent decades. This includes a greater awareness of different kinds of trauma – including trauma caused by a single incident (resulting in consequences such as post-traumatic stress disorder) and intergenerational trauma – and the intersection between these. This has led to the development of a trauma-informed practice framework for several practitioner groups, including legal professionals and judicial officers.[358]

How people respond to traumatic events differs from person to person. Understanding why this happens can assist legal stakeholders to make informed decisions that consider the impacts of rape and sexual assault when engaging with victim survivors about sentencing processes and practices.

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354 See Chapter 3.
355 *Royal Commission into Institutional Responses to Child Sexual Abuse Final Report Vol 3* (n 4) 77.
356 Ibid 80.
357 Ibid 73; Australian Institute of Health and Welfare, *Sexual Assault in Australia* (Infocus Report, August 2020) 7.
358 See, for example *NSW Equality before the Law Bench Book* (n 329) section 12.2.

This is particularly important as the criminal justice system is reliant on the willing cooperation of victim survivors to report crime and participate in the prosecution by giving evidence. It is therefore vital that victim survivors are supported and empowered throughout the process (including at the sentencing hearing, following conviction) to ensure they are not subjected to further trauma, which may impact their willingness to continue to engage with the process. As previous reviews have acknowledged, this requires a trauma-informed approach across all aspects of the criminal justice process.[359]

Consideration of Queensland's Sexual Violence Case Management Pilot may inform best practice for trauma-informed engagement with victim survivors of rape and sexual assault across the criminal prosecution process.

We recognise that the focus of sentencing is on the person being sentenced. However, it is important not to lose sight of the rights (including those outlined in the Victims' Charter) and justice needs of victim survivors to ensure that they are not subjected to additional trauma, while still ensuring that principles of fairness are maintained in sentencing.

13.8.2 Improving communication with victim survivors

Recommendation

14. **Office of the Director of Public Prosecutions and Queensland Police Service – improved communication with victim survivors of rape and sexual assault**

Consistent with the rights recognised under the Charter of Victims' Rights – including the right to be kept informed, and to be treated with respect, courtesy, compassion and dignity throughout the criminal sentencing process – that relevant criminal justice agencies should provide victim survivors with regular, timely, effective, consistent and accessible information delivered in a trauma-informed way throughout the criminal justice process. This should include information regarding the progress of criminal proceedings and the sentencing process, as well as greater support navigating the criminal justice system process, such as with the assistance of a Victim Survivor Navigator. To ensure that this process is trauma-informed, victim survivors should have personal agency to decide how much information and support they would like to receive from justice agencies.

Noting that the role of the Office of the Director of Public Prosecutions ('ODPP') and the Queensland Police Service ('QPS') does not currently extend to delivering therapeutic support to victim survivors, the ODPP and QPS should continue to review current communication practices, processes and training, and referral pathways, as required (including in support of promoting victims' rights recognised in the Charter of Victims' Rights) to ensure regular and effective communication occurs with victim survivors of rape and sexual assault. This should include an ongoing commitment to keeping victim survivors informed of key events (unless they have asked not to be kept informed), as well as the identification of roles and responsibilities of justice agencies, and consideration of improved communication processes between them (such as between the QPS, the ODPP and Queensland Corrective Services, where relevant) to address current gaps in the provision of consistent information.

359 *Hear Her Voice, Report Two* (n 27) vol 1, 103, 125–41.

Rights to enhanced information

As outlined earlier in this chapter, victim survivors have rights under the Victims' Charter to be kept informed of the progress of the criminal prosecution of the offender, and to be treated with respect, courtesy, compassion and dignity throughout the criminal sentencing process, which convey obligations on relevant justice agencies.[360] In addition to these rights and obligations, formal guidelines regulate their interactions with justice agencies – including the prosecution service – and prescribe that victim survivors must receive specific information at different stages of the criminal justice and sentencing process.[361]

However, despite these rights and guidelines, we have found that many victim survivors of rape and sexual assault remain dissatisfied with the information provided about the sentencing process and outcome. This dissatisfaction extends across different stages of the criminal sentencing process:

- **Prior to sentence**: Victim survivors want it to be made clearer to them that the sentence hearing will have a strong focus on the person being sentenced and will include considerations such as the offender's 'good character' and other factors that may be relied upon in mitigation of their sentence. Victim survivors ought to be told that these matters are not intended to reduce or lessen the seriousness of the offence, or the impact of the harm the victim survivors have experienced. Additional information and support surrounding the likely sentence outcome and the provision of a VIS was also raised. This is further discussed in **Chapters 13 and 14**.
- **Post sentence:** Victim survivors want someone with legal experience to explain the sentencing outcome to them, and what it means for their offender, as well as enhanced information about available support services, how to obtain a copy of the sentence hearing transcript and how to be added to the victims register.

In addition to wanting enhanced information, it became apparent to the Council that how this information is conveyed was equally important to victim survivors. We heard it is important for consistent information to be communicated repeatedly, both verbally and in writing.

Verbal communication should involve an assessment of a victim survivor's starting point of knowledge, be delivered in small amounts, repeat any information not clearly understood, limit the use of legal jargon and ask the victim survivor what they need to understand what is being told to them.[362]

Visual methods of conveying written information (including flow charts) could be utilised to reduce barriers to communication between victim survivors and justice agencies and assist a victim survivor understand and recall sentencing information.[363]

Options to enhance communication through automated notifications could also be explored to provide administrative information to victim survivors in a timely and consistent fashion[364] – reserving personal

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360 *Victims' Commissioner and Sexual Violence Review Board Act 2024* (Qld) sch 1, pt 1, div 1, 1; div 2, 1–5.
361 See section 13.3 for more information.
362 Rhiannon Davies and Lorana Bartels, *The Use of Victim Impact Statements in Sentencing for Sexual Offences: Stories of Strength* (Routledge, London, 2021) 162.
363 Ibid 160–3.
364 Ibid 168–9. For example, it was noted that many states in the US utilise automated methods for communicating with victims, including 'notifications about scheduled court hearings and outcomes via a range of mechanisms, including telephone, email, and text message'. It was also noted that similar automated notifications have been trialled in New Zealand (information is provided through a text messaging system), England and Wales ('track my crime' online system) and Canada (receive information about the person who harmed them through a secure website).

communication for explaining legal processes and outcomes and answering questions. Privacy concerns and resourcing would need to be considered in this context.

As victim survivors are not a party to proceeding, they are entirely dependent upon justice and support agencies to provide them with sufficient information to understand and navigate the criminal justice process, including sentencing.

As our Terms of Reference are confined to sentencing for rape and sexual assault offences only, we have not considered whether it is appropriate or necessary for the role of a victim survivor to be reformed to that of an active participant, or legislatively entitled to be heard by a court within the criminal sentencing process. Such considerations would require a fundamental alteration to Queensland's current adversarial system of justice, which is far beyond our function. However, we believe it is critical that victim survivors are provided with enhanced information to help them through the sentencing process.

We specifically recommend that people working in the criminal justice system tailor their communication with victim survivors to enhance understanding and, most importantly, take their specific needs into account – particularly for victim survivors who face linguistic or other barriers to comprehension.[365] This information should be provided in written form, with a focus on consistently repeating the same information to reinforce important sentencing information and improve victim survivor understanding.

Communication should include the provision of regular, timely, effective and accessible information at all stages of the criminal sentencing process, including information about:

- options to participate;
- support navigating the criminal justice system process;
- the progress of the criminal prosecution;

the sentencing process itself, including what to expect within the courtroom and their role (including the right to provide a VIS, and what this means – discussed in section 14.3 below);

- the likely sentence outcome;
- the actual sentence outcome and what this actually means for the person being sentenced (to be delivered by a person with legal experience);
- the limited basis on which a sentence can be appealed; and
- available safety options, including on the day of sentence, for both the victim survivor and their family members.

Information about support navigating the criminal justice system process should be provided by an independent victim survivor support service, while information about legal aspects of the progress and sentence outcomes should be provided by the prosecution service.

There also needs to be greater clarity about which justice agency is responsible for providing different information, as well as ensuring that any information is transferred between relevant agencies to address issues that the system is fragmented and difficult for victim survivors to navigate.

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[365] See, for example, Rhiannon Davies and Lorana Bartels, 'Challenges of effective communication in the criminal justice process: Findings from interviews with victims of sexual offences in Australia' (2020) 9(4) *Laws* 31, cited in *Listen,. Take Action Report* (n 184) 62. Davies and Bartels suggest a number of strategies to address issues identified to promote victim understanding.

We recognise that providing information at key stages of the process is more challenging for victim survivors who identify as Aboriginal and Torres Strait Islander people, people from culturally and racially marginalised groups, people from a CALD background or with disability and members of the LGBTQIA+ community. Sentencing processes may not be responsive to the needs of all victim survivors, or safe (**Key Finding 14**). Specifically, as recognised in the Judicial College of Victoria Victims of Crime in the Courtroom: A Guide for Judicial Officers and equal treatment benchbooks:

- Victim survivors of Aboriginal and Torres Strait Islander descent have a history of negative experiences engaging with authorities, as well as language barriers with respect to legal terms, which may impact their communication with justice stakeholders in an adverse way. Cultural concepts of 'women's business' also limit the willingness of Aboriginal and Torres Strait Islander women who have experienced rape or sexual assault to speak about the offending. Victim survivor understanding of the English language and how best to communicate with these victim survivors (such as through the Aboriginal and Torres Strait Islander people's oral tradition of 'transmitting information through storytelling',[366] avoiding interruption) should be considered, as well as ways to encourage victim survivors to inform the court about the harm caused to them by sexual offences.[367]
- Victim survivors who hold particular diverse religious beliefs may be impacted in terms of their willingness or ability to testify under oath, or to attend conferences or court proceedings on days of particular import.[368]
- Victim survivors who are from culturally and racially marginalised backgrounds may need to be addressed in different ways (naming conventions) and using particular words or tones.[369] It is important to recognise that these victim survivors may be reluctant to admit that they require assistance (such as translations services), avoid eye contact or approach communication with silence.[370]
- Victim survivors with a disability 'can face barriers to effective participation in criminal proceedings, from inaccessible courtrooms to misconceptions about their reliability as witnesses'.[371] We were told during consultation of concerns that convictions where the victim survivor has a disability are often overturned on appeal.[372] Practitioners should be aware of any steps that should be taken to provide information about sentence proceedings to these victim survivors in a way that is appropriate to their justice needs, such as using Easy English, Braille, large fonts or audio recordings, ways to familiarise the victim survivor with the courtroom layout prior to a sentence hearing and ensuring they are connected to appropriate support services.[373]
- These communication needs should be considered and addressed within the sentencing context to ensure that all Queenslanders are appropriately supported through sentencing. In doing so, we appreciate that additional resources may be required to enable the prosecution service to deliver enhanced information.

366 Dylan, Regehr and Alaggia (n 341) 681.
367 Judicial College of Victoria, *Victims of Crime in the Courtroom: A Guide for Judicial Officers* (August 2023) 17.
368 Ibid 20–2.
369 Ibid 21.
370 Ibid 17–20.
371 Ibid 25.
372 Victim Survivor Support Workers Interview - Group 3.
373 Ibid.

We acknowledge that the Victims' Commissioner is currently working to raise awareness of the rights of victim survivors in Queensland, as well as the support services available across the state and how to access them, which may promote the provision of enhanced information to victim survivors of rape and sexual assault.[374]

Access to sentencing remarks

Recommendation

15. Sentencing remarks for victim survivors

The Department of Justice, in consultation with the Heads of Jurisdiction, consider processes to support the provision of sentencing remarks for matters involving rape (and possibly sexual assault) to victim survivors as a matter of course within a reasonable period after sentence to enhance their understanding of the sentencing process and outcome.

We also acknowledge that victim survivors have a high degree of emotional investment in the sentence outcome, and in ensuring that it recognises the harm caused to them by the offending.[375] Moreover, we acknowledge that 'victims often perceive that the length of a sentence reflects the way the court viewed the seriousness of the crime and the impact of the criminal act upon them'.[376]

We were told by victim survivors and support advocates that victim survivors who attend the sentence hearing often dissociate, and do not always hear or understand the reasons for the sentence outcome.[377]

There are also many barriers to a victim survivor attending court for a sentencing hearing. These include practical and financial issues that prevent a victim survivor attending, such as costs for travel, meals, accommodation, time off work, loss of earnings, and childcare arrangements and costs. While VAQ will support victim survivors to attend a sentence hearing in certain circumstances (discussed above at 13.3.2), some victim survivors may still not attend the hearing for various reasons, such as fear of seeing the perpetrator, having a lack of support or being unfamiliar with the court building or process.

Victim survivors – particularly those who are unable to attend the sentence hearing – are reliant upon receiving a call or outcome letter from the prosecution service.[378] However, this often only includes a high-level overview of the sentence outcome (such as listing the penalty imposed and whether any additional orders were made). The ODPP outcome letter does not provide any information with respect to the reasons for the decision of the judicial officer, nor whether the judicial officer mentioned the victim survivor, nor the harm caused to them during the hearing.

We understand there is the option for the victim survivor to arrange a post-sentence conference with the ODPP to understand the reasons given by a judicial officer for their sentencing decision. We support this process and consider that there should be a proactive requirement to invite the victim survivor to

374 Victims' Commissioner, 'Submission to the Queensland Government on the Making Queensland Safer Bill 2024' (Submission 96) 4 <https://documents.parliament.qld.gov.au/com/JICSC-CD82/IMQSB2024-B002/submissions/00000096.pdf>.
375 Carol McNaughton et al, *Attitudes to Sentencing Sexual Offences* (Centre for Gender and Violence Research, University of Bristol for the Sentencing Council for England and Wales, 2012) 25–6.
376 Garkawe (n 10) 602.
377 Victim Survivor Interview 1; Victim Survivor Support Worker Interview - Group 1.
378 Victim Survivor Interview 1.

participate in a post-sentence interview with the prosecutor who appeared at the sentence to explain the reasons for the decision and answer any questions.

We also recommend that the provision of sentencing remarks as a matter of course (in addition to an opportunity to participate in a conference) should be available to a victim survivor in an accessible way to help them understand the orders imposed and the reasons of the court for the sentence imposed.

In making this recommendation, we note that remarks are the best source of written information from the sentencing hearing, providing an opportunity for victim survivors to review them in their own time, when they are ready to do so.

However, we recognise the current process of requiring a victim survivor to make a request for a copy of the sentencing transcript is not trauma-informed. Further, it can be a challenging process for some victim survivors, particularly those who come from culturally and racially marginalised backgrounds, and those who have difficulty with literacy, are subject to socioeconomic or systemic disadvantage or live in rural locations.

We consider that victim survivors of rape (and potentially sexual assault, depending on funding constraints) should be provided with a copy of sentencing transcripts as a matter of course post-sentence, unless it is indicated to the court that they do not wish to receive a copy. Notwithstanding this decision, a victim survivor should be able to amend their position at any time.

Consideration of opportunities for victim survivors to 'tick' whether they would like to receive a copy of the sentence hearing transcript at the time of the sentence (rather than submitting a separate request form after the fact) may offer a more considered and trauma-informed way for victim survivors to 'opt in' to this.

13.8.3 Improving support for victim survivors

Recommendation

16. **Improving support for victim survivors of rape and sexual assault and the criminal justice system's capacity to respond to victim survivors and perpetrators of sexual violence**

The Queensland Government continues to commit funding and resources in support of the implementation of the following recommendations of the Women's Safety and Justice Taskforce *Hear Her Voice – Report Two: Women and Girls' Experiences Across the Criminal Justice System* (2022):

- **Recommendations 5 and 96:** The Queensland Police Service develop initiatives focused on improving its cultural capability, as well as its ability to respond to sexual violence cases.
- **Recommendation 6:** The Queensland Police Service improve the translation and interpretation services it uses for First Nations peoples.
- **Recommendations 9 and 64:** The Queensland Government develop and pilot a statewide professional victim advocate service, and the planned evaluation of this model, including consideration of whether there is a need for funded legal representation for victim survivors of sexual violence during criminal justice processes.

- **Recommendation 11:** The Queensland Government co-design, fund and implement a victim-centric, trauma-informed service model that responds to sexual violence.
- **Recommendation 13:** The Queensland Government embed a trauma-informed system of safe pathways for victim survivors of sexual violence across the sexual assault and criminal justice systems.
- **Recommendation 19:** The Queensland Government review the Charter of Victims' Rights in the *Victims of Crime Assistance Act 2009* and consider whether additional rights should be recognised or if existing rights should be expanded. Ideally, this review would be undertaken by the Victims' Commissioner (Recommendation 18).
- **Recommendation 45:** The Office of the Director of Public Prosecutions and the Queensland Police Service review, update and publish the memorandum of understanding relating to the investigation and prosecution of sexual violence cases.
- **Recommendation 51:** The Office of the Director of Public Prosecutions develop and implement a cultural capability plan to improve the cultural capability of staff.
- **Recommendation 95:** The Queensland Police Service develop a gender-responsive and trauma-informed approach for responding to women and girls in the criminal justice system.
- **Recommendation 121:** The Department of Justice undertake a review of the Murri Court model to consider how it can be strengthened and improved.

Challenges for support services

We know victims of crime, particularly those of sexual offences, can experience intersecting forms of disadvantage which impact their justice needs. Ensuring consistent support throughout the entire criminal justice process is therefore critical to their sentencing experience.

We heard about the importance of access to support for victim survivor engagement through this review. However, we were also told that there are challenges surrounding victim survivor understanding of the different support agencies available, and how to access the most appropriate service for them. This is a concern, as victim survivors may not be connecting with support services that could enhance their sentencing experience.

A key concern which became apparent during this review was that support services are fragmented, inconsistent and limited.

We further heard during this review that there are challenges with the delivery of support services as a consequence of limited resourcing to respond to demand. We note there are wait times to access services.

Additional challenges arise when delivering services to victim survivors who live in rural, regional and remote areas, as a result of Queensland's decentralised landscape. A lack of support service hubs in these areas limits the ability of a victim survivor to obtain in-person support. Additional challenges arise when there is only one person in a rural community (or neighbouring community) who can provide this support.

For victim survivors who must travel to attend court proceedings, we heard that there are additional practical challenges that may limit their ability to attend the sentence hearing. This is important, as we know that the ability to attend court proceedings is important to victim survivors' feelings of inclusion.[379]

In addition to these barriers, we heard there is a risk that sentencing processes and support services for victim survivors of sexual assault and rape are not culturally safe, as they may not consider the unique cultural barriers associated with discussing sexual offences within a particular community.

We are of the firm view that sentence hearings should be accessible and culturally appropriate for victim survivors, so they are empowered to participate and engage in the criminal justice system and the sentencing process if they would like to do so. This includes ensuring that there is access to support services at court proceedings, with staff who are appropriately trained; that security staff are trained on how to keep victim survivors safe and separated if needed; information is conveyed in multiple forms (e.g. using visual aids) and in multiple languages; and that appropriately funded translation services are made available. Having videos about the sentencing process (in plain English and other languages) may also help a victim survivor to prepare to come to court.[380]

Concerns were also raised about legislative provisions that enable the defence to request access to protected counselling communications between victim survivors and their psychologist during the criminal hearing process. We note that this may impact a victim survivor's willingness to seek professional support, which may be important to their healing journey. If access to psychological support were increased for victim survivors, opportunities for professionals to provide information about the impact of the offending on a victim survivor may be provided to the court and relied upon at sentence (in addition to, or in support of, a VIS).

Support services and criminal sentencing practices require reform

We recognise that some of the challenges we have identified through this review as they relate to trauma-informed and culturally appropriate sentencing processes and practices are not new. The WSJ Taskforce has made various recommendations that are intended to significantly improve upon the justice experiences of victim survivors in Queensland. We endorse these recommendations and support their implementation in Queensland to improve the criminal justice experience for victim survivors of rape and sexual assault (**Recommendation 16**).

The current Queensland Government has committed to progressing a professional victim advocate model for victims of crime in consultation with key stakeholders in response to the WSJ Taskforce recommendations.[381]

Although these fundamental principles and the Victims' Charter have been established with the aim of positively impacting victims of crime, from what we have been told in this review, victim survivors continue to feel that they are not provided with sufficient information to guide their understanding of criminal proceedings, before, during and after the sentence. As a consequence, they often feel excluded from the criminal justice process (including at sentence), that their voices are not heard, and that the offender's rights are put above theirs. These findings are consistent with those of the Scottish Sentencing Council.

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379 *Victim-Survivor Views* (n 136).

380 For example, the Queensland Courts have videos on the domestic violence court process which is also available in Auslan and 6 languages: 'Videos on domestic violence court process', *Queensland Courts* (web page, 27 June 2018) <https://www.courts.qld.gov.au/going-to-court/domestic-violence/videos-on-domestic-violence-court-process>

381 *November 2024 Charter Letter from Crisafulli to Gerber* (n 165).

It also became apparent to us that some victim survivors feel disempowered through the sentence process, particularly where the judicial officer predominantly addresses the offender and does not appear to sufficiently acknowledge the victim (or their family) and the harm experienced (**Key Finding 12** and **Recommendations 17 and 18**).[382]

The Council endorses the justice needs of victim survivors identified by the VLRC. In particular, we note the importance of receiving validation for many victim survivors and not only having their story heard and believed but also a concrete outcome ensuing. Ensuring the appropriate exercise of the rights of victim survivors and the duties owed to them by those who hold the relevant information is central to a positive experience for a victim survivor and impacts their satisfaction with the sentence imposed.

Information to support victim survivors prior to sentence includes the layout of the courthouse and courtroom; the possibility of seeing the offender's family and friends before or after the sentence; how the sentence will be conducted; information about their offender's life and any mitigating factors personal to the offender; legal terms that will be used; the likely penalty options the court may consider; what they mean; and safety options to address any concerns.

While the provision of timely and accurate information by prosecutors to victim survivors can dramatically increase their satisfaction with the criminal justice system,[383] it is important that the role of the prosecuting authorities (DPP and QPS) is not confused with a therapeutic function for a victim survivor. There needs to be appropriate separation between the role of prosecutors as independent advisers to the court and support services that provide emotional support and assistance to victim survivors.

However, it is also important to recognise that some victim survivors do not want to be kept regularly informed, particularly where the increased information and participation results in increased emotional distress and secondary trauma.[384] It is therefore important for the criminal justice system to take a trauma-informed approach to victims' rights within the sentencing process, rather than mandating that information be shared in all circumstances, but that opportunities to either 'opt-in' or 'opt-out' are enhanced to be more trauma-informed.

The ODPP and QPS should continue to review current communication practices, processes and training, and referral pathways as required (including in support of promoting victims' rights recognised in the Charter of Victims' Rights) to ensure that regular and effective communication occurs with victim survivors of rape and sexual assault. This should include an ongoing commitment to keeping victim survivors informed of key events (unless they have asked not to be kept informed).

Enhancements to communication processes and procedures need to be underpinned by technology solutions that provide choice, control and transparency for victim survivors, consistent with trauma-informed communication practices. Consideration of an adequately resourced victim survivor portal which contained all relevant administrative information could support the better provision of information.

Within this context, the pilot for the victim advocate program could be of benefit to victim survivors in conveying information from the prosecution service to the victim survivor in a way that is trauma-informed.

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382 Victim Survivor Interview 1: It felt like the judge had 'total disregard for the victim', and that they were 'shoved in a corner' during the sentence.

383 Garkawe (n 10) 609.

384 Arie Freiberg and Asher Flynn, *Victims and Plea Negotiations - Overlooked and Unimpressed* (Palgrave Macmillan, 2021) 11.

It is critical that, in piloting this model, regard is had to the role of the victim survivor navigator, as well as their intersections with criminal justice agencies.

We note the WSJ Taskforce recommended a review be undertaken of the Victims' Charter (ideally by the Victims' Commissioner) to 'consider whether additional rights should be recognised or … existing rights should be expanded.'[385] We understand that the Victims' Commissioner has commenced work to review the Charter of Victims' Rights, which may provide an opportunity for our findings and recommendations regarding the provision of information to be considered further. [386]

13.8.4 Applying the Council's fundamental principles

In applying the Council's fundamental principles guiding the review, we determined that a number of recommendations were required to respond to these findings:

- **Principle 1: Reforms to sentencing laws should be evidence-based with a view to promoting public confidence**: It is clear from victim survivors and victim support and advocacy organisations that victim survivors are dissatisfied with the sufficiency of information provided to them during the criminal justice process, particularly the sentencing process. We consider that regular, timely and effective information delivered in a trauma-informed way throughout the criminal justice process will assist to increase the satisfaction and has the potential to reduce retraumatising of a victim survivor. This should include information regarding the progress of criminal proceedings and the sentencing process, as well as greater support in navigating the criminal justice system process, such as with the assistance of a victim survivor navigator. Providing victim survivors with a copy of the sentence hearing transcript as a matter of course will also promote victim survivor satisfaction and public confidence. To ensure that sentencing processes and practices are trauma-informed, victim survivors should have the ability to decide how much information and support they would like to receive from justice agencies. Empowering victim survivors and improving their satisfaction can promote public confidence.
- **Principle 6: Reforms should take into account the likely impacts on the disproportionate representation of Aboriginal and Torres Strait Islander peoples in the criminal justice system**: In recommending these reforms, we have considered whether amendments to improve the sentencing experiences of victim survivors through enhanced communication and support practices would infringe upon the rights of people being sentenced – noting that Aboriginal and Torres Strait Islander people are disproportionately represented within the offending cohort. We consider enhanced interactions with victim survivors will have no such negative or disproportionate impact.
- **Principle 10: Any reforms should aim to be compatible with the rights protected and promoted under the *Human Rights Act 2019* (Qld) ('HRA') or be reasonably and demonstrably justifiable as to limitations**: We consider that these recommendations are compatible with the rights protected and promoted under the HRA. Providing victim survivors with clear, timely and regular information and trauma-informed support can be addressed without limiting the rights of the person being sentenced in criminal proceedings as outlined in section 32 of the HRA.

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385 *Hear Her Voice, Report Two* (n 27) vol 1, 139–40 rec 19.
386 Victims' Commissioner (n 374) 4.

13.8.5 Systemic disadvantage considerations

As discussed throughout this report, Aboriginal and Torres Strait Islander peoples are around 3.5 times more likely to have been a victim of sexual assault (including rape and other sexual offences) compared to with non-Indigenous Australians.[387] We consider that any recommendations for reform to better support victims through the sentencing process needs to acknowledge this, while noting that there are many barriers to reporting and points of attrition for sexual violence cases, including those involving Aboriginal and Torres Strait Islander victims.

Stakeholders have noted the need for better communication with Aboriginal and Torres Strait Islander peoples, as both offenders and victims, and for greater cultural sensitivity. Members of the Aboriginal and Torres Strait Islander Advisory Panel considered that there should be enhanced information provided to victim survivors surrounding the likely penalty and the actual sentence imposed. It was acknowledged that all participants, both victim survivors and perpetrators of these crimes, need to understand the consequences of the sentence and to feel like the person being sentenced did not 'get away with it'.

With respect to the consideration of trauma-informed practices, the Panel recognised the importance of considering the most appropriate way for the sentencing court to take into account systemic disadvantage considerations. The Panel also suggested that the physical courtroom environment needs to be considered to ensure it is more trauma-informed, recognising that courts are high-stress environments for victim survivors.

We consider that opportunities to enhance the experience of victim survivors within existing traditional criminal justice processes may have a significant, positive impact upon the criminal justice experiences of both Aboriginal and Torres Strait Islander victim survivors without compromising the rights of the person being sentenced. However, opportunities to improve supports for victim survivors during the sentencing process will benefit Aboriginal and Torres Strait Islanders Islander people only if such supports are culturally safe and appropriate. While some CJGs provide support to both to victims as well as defendants, it is the responsibility of the individual CJGs to determine whether sexual violence matters fall within scope of the services they provide.

The WSJ Taskforce recommendation for the establishment of a professional statewide victim advocate service, expressly requires the Queensland Government to consult with people with lived experience and Aboriginal and Torres Strait Islander peoples in the development of a model to ensure services and support provided are 'individualised, culturally safe and trauma informed'. This same approach should be adopted in any reform work to ensure their benefits can be realised by victim survivors from all cultural backgrounds.

13.8.6 Human rights considerations

Greater recognition of victims' experiences in the sentencing process is consistent with the right enshrined within the Victim's Charter to be treated with 'courtesy, compassion, respect and dignity, taking into account the victim's needs'.[388]

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387 Australian Institute of Health and Welfare, *Family, Domestic and Sexual Violence in Australia* (Report, 2018).
388 *Victims' Commissioner and Sexual Violence Review Board Act 2024* (Qld) sch 1.

We note that the Victorian Victims of Crime Commissioner recently recommended that the *Charter of Human Rights and Responsibilities Act 2006* (Vic) be amended to include victims' high-level rights,' including a right for a victim of a criminal offence to be:

- acknowledged as a participant (but not a party) with an interest in the proceedings;
- treated with dignity and respect; and
- protected from unnecessary trauma, intimidation and distress when giving evidence and throughout criminal proceedings.[389]

We further noted that the WSJ Taskforce recommended a review be undertaken of the Charter of Victims' Rights to 'consider whether additional rights should be recognised or if existing rights should be expanded' and that '[i]deally, this review would be undertaken by the victims' commissioner' once established.[390] We support this recommendation.

An independent review of the *Human Rights Act 2019* ('the Act') has been undertaken in Queensland.[391] The Terms of Reference for this review require an assessment of the effectiveness of the current provisions in the Act, including any issues that have arisen since is commencement on 1 January 2020.

The review was asked to consider whether recognition of victims' rights under the Charter of Victims' Rights should be incorporated into the Act.[392] The review report will be tabled in Parliament.[393]

389 Victim of Crime Commissioner (Victoria), *Silenced and Sidelined: Systemic Inquiry into Victim Participation in the Justice System* (November 2023) 326–7, rec 5.

390 *Hear Her Voice, Report Two* (n 13) vol 1, 139–40 rec 19.

391 See 'Human Rights Act 2019 Review' Queensland Government (web page, 20 May 2024) <https://www.justice.qld.gov.au/initiatives/human-rights-act-2019-review#:~:text=The%20scope%20of%20the%20review,General%20by%2020%20September%202024>.

392 See 'Terms of Reference', First independent review of the Human Rights Act 2019 (Qld) (8 April 2024) <https://www.publications.qld.gov.au/ckan-publications-attachments-prod/resources/1cb8019c-3783-4111-bb8b-66e449dce257/terms-of-reference-human-rights-act-2019-review.pdf?ETag=ea905e564bdf3f86710aa7d6a71d433a>.

393 The report was delivered in September 2024. Pursuant to section 95(5) of the *Human Rights Act 2019* (Qld), the report must be tabled within 14 sitting days following its receipt.

Chapter 14 – Victim impact statements and recognition of harm at sentence

14.1 Introduction

The Terms of Reference asked us to identify any changes to ensure that sentences imposed for rape and sexual assault offences are adequate and appropriate.[1]

As discussed in **Chapter 13**, this required the Council to consider whether the significant impacts of sexual offending on victim survivors is being appropriately understood and recognised within the sentencing context. In that chapter, we also considered the impacts of sexual offences on victim survivors, their rights and role within the criminal justice system and their experiences engaging with the sentencing process.

This chapter specifically considers how the sentencing court acknowledges and recognises the impacts of sexual offences on victim survivors, including through consideration of a victim impact statement ('VIS').

We consider how Queensland sentencing courts receive evidence of the impacts of sexual offending on victim survivors, how the VIS regime operates in Queensland and other jurisdictions and what we know from earlier reviews of these processes. We also discuss specific feedback we received on the operation of the VIS regime in Queensland, as well as how victim survivors (and the harm they have experienced) is being acknowledged within the sentencing court, which informed our findings. Our formal views and recommendations to improve the criminal sentencing process in Queensland for victim survivors of rape and sexual assault are presented in the final section of this chapter.

14.2 Assessment of harm

In Queensland, a court must have regard to the nature of the offence and how serious the offence was in sentencing an offender, including 'any physical, mental or emotional harm done to a victim, including harm mentioned in information relating to the victim given to the court'.[2] The harm experienced by the victim survivor is one of the sentencing factors, together with others, which a court must consider at sentence.[3]

Information about the harm caused to a victim survivor is usually conveyed to the court at sentence through an agreed statement of facts (on a plea of guilty), evidence presented at trial upon which the court or the jury has made a finding of fact (where the charge was contested) or through the provision of a formal VIS under the victim survivor's own hand.

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1 Appendix 1, Terms of Reference.
2 *Penalties and Sentences Act 1992* (Qld) ('PSA') s 9(2)(c)(i). See for example, *R v Pham* (2009) 197 A Crim R 246 [7].
3 PSA (n 2) s 9; see also *R v Pham* (2009) 197 A Crim R 246 [7].

The Victims' Charter outlines that victim survivors have a right to provide a VIS to the court to be considered at sentence.[4] Upon receipt, a prosecutor 'must decide what, if any, details are appropriate to be given to the sentencing court' and provide those details.[5] This recognises victim survivors as the best source of direct information on the harm experienced by them because of the offending.

It is open for the court to make a finding of fact on the harm (including the degree of harm) experienced by a victim survivor, based upon the information provided to it.[6] The court can accept (and act on) any information which is admitted or not challenged.[7]

However, providing a VIS is entirely voluntary; the absence of a VIS 'does not, of itself, give rise to an inference that the offence caused little or no harm to the victim'.[8] In circumstances where a VIS is not provided, the judicial officer can still infer the offence caused harm, having regard to the circumstances of the offence and the definition of harm (any physical, mental or emotional harm).[9]

Recently, a Bill was introduced that elevates the harm to the victim as a primary sentencing consideration under the *Youth Justice Act 1992* (Qld):

> (1AB) In sentencing a child for an offence, a court must have primary regard to any impact of the offence on a victim, including harm mentioned in information relating to the victim given to the court under the Penalties and Sentences Act 1992, section 179K.[10]

14.3 Victim impact statements

14.3.1 Introduction

A VIS is a statement by a victim survivor that tells the court about the impact of the offence on them. As victim survivors do not have standing to make submissions at sentence, the opportunity to provide a VIS is recognised as the primary way to ensure 'the victim's voice plays a substantive role in sentencing'.[11]

> The statements provide an opportunity for those whose lives are often tragically altered by criminal behaviour to draw to the court's attention the damage and sense of anguish which has been created and which can often be of a very long duration. For practical purposes, they may provide the only such opportunity. Obviously the contents of the statements must be approached with care and understanding. It is not to be expected that victims will be familiar with or even attribute significance to the many considerations to which a sentencing judge must have regard in the determination of a just sentence in the particular case. Nor would it normally be reasonable or practicable for a sentencing judge to explore the accuracy of the assertions made. Nevertheless, there has been an increasing level of appreciation by the courts of the value of victim impact statements. In my view they play an important role with respect to an aspect of the criminal law to which reference is not often made. They play their part in achieving what might be termed social and individual rehabilitation. Rehabilitation, in this sense, is not perceived from the perspective of the offender, but from that of those persons who have sustained loss and damage by reason of the commission of an offence.[12]

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4 *Victims' Commissioner and Sexual Violence Review Board Act 2024* (Qld) sch 1, pt 1, div 2, right 7. This right only applies if the person was 'found guilty of an offence relating to the relevant offence'. As discussed in Chapter 13, this right is not legally enforceable.
5 PSA (n 2) s 179K(3).
6 Ibid s 15; *Evidence Act 1977* (Qld) s 132C.
7 *Evidence Act 1977* (Qld) s 132C.
8 PSA (n 2) s 179K(5).
9 *R v Abdullah* [2023] QCA 189, 5–6 [23] (Bowskill CJ, Flanagan JA and Buss AJA agreeing).
10 Making Queensland Safer Bill 2024 (Qld) cl 15.
11 Peter Kidd, 'An Evolving Justice System' (Judicial College of Victoria, Managing Sexual Offence Cases, 28 June 2024) 2.
12 *DPP v DJK* [2003] VSCA 109 [17].

A VIS is a point-in-time statement; it reflects the harm suffered by a victim survivor at the time of its provision. While future or potential harm can be inferred by the court based on the nature of the offence and the learned knowledge of a judicial officer,[13] it cannot meaningfully account for the actual harm that will be sustained by the victim survivor in the future – recognising that the harm can compound or extend throughout the duration of their life. This is particularly relevant for children who experience sexual offending, and who may not know or understand its true impacts for years to come.

However, it has been acknowledged that the practical ability of VIS to 'meaningfully satisfy victims by giving them input into the sentencing phase remains a work in progress'.[14]

While all jurisdictions in Australia have established legislation to enable victim survivors to provide a VIS to the court, there is no nationally consistent approach.[15] A table comparing the approaches in other Australian jurisdictions is available at **Appendix 18**.

This section provides an overview of the approach in Queensland and compares it with those of other jurisdictions, where relevant.

14.3.2 The current approach in Queensland and what other jurisdictions do

A victim survivor of a prescribed offence (including rape and sexual assault) 'is permitted to give the prosecutor … details of the harm caused to the victim by the offence, for the purpose of the prosecutor informing the court'.[16] Often, this is given by way of a VIS.

The statutory basis which enables a victim survivor to provide a VIS initially was introduced in 2009.[17] It was intended that 'any proposed provisions should avoid being overly prescriptive so that the courts may deal with VIS in a flexible manner and avoid time and cost implications'.[18] In 2017, the PSA was amended to insert the current process for making a VIS.[19]

How is the VIS presented to the court? (the 'form')

A VIS should be a written and signed statement,[20] which is provided to either the arresting officer or a representative of the prosecution service,[21] who may then present that information to the court.[22]

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13 Recognising there are limited findings a court can make about long-term harm: see *R v Evans* [2011] QCA 135 [33] (Fryberg J, Chesterman JA agreeing). The court discussed the conclusions drawn about the long-term harm. See also McMurdo P (in dissent) who agreed with the error and considered it did affect the sentence and would have allowed the appeal: [10].

14 Rhiannon Davies and Lorana Bartels, 'The Use of Victim Impact Statements in Sexual Offence Sentencing: A Critique of Judicial Practice' (2021) 45 *Criminal Law Journal* 168.

15 PSA (n 2) ss 9(2)(c), 179I–179N; *Sentencing Act 1991* (Vic) ss 8K–8S; *Crimes (Sentencing Procedure) Act 1999* (NSW) ss 26–30G; *Sentencing Act 1995* (WA) ss 23A–26; *Sentencing Act 1995* (NT) ss 106A–106B; *Crimes (Sentencing) Act 2005* (ACT) ss 47–53; *Sentencing Act 2017* (SA) ss 13–16; *Sentencing Act 1997* (Tas) ss 80–81A.

16 PSA (n 2) s 179K(1). A 'victim' for the purpose of this section is as defined under 'affected victim' in *Victims' Commissioner and Sexual Violence Review Board Act 2024* (Qld) s 38. It may also be another person if the victim cannot give a statement because of their age or impaired capacity: s 179L(2).

17 *Victims of Crime Assistance Act 2009* (Qld) ss 15–15B introduced as recommended by Queensland Government, *Victims of Crime Review Report* (November 2008) rec 26.

18 Queensland Government, *Victims of Crime Review Report* (November 2008) rec 26.

19 PSA (n 2) pt 10B. Prior to 1 July 2017, the process was under *Victims of Crime Assistance Act 2009* (Qld) ss 15–15B, which was amended by *Victims of Crime Assistance and Other Legislation Amendment Act 2017* (Qld).

20 PSA (n 2) ss 179I, 179L. A VIS can also be signed electronically.

21 Department of Justice and Attorney-General, Preparing a Victim Impact Statement (Factsheet) <https://www.publications.qld.gov.au/ckan-publications-attachments-prod/resources/6048e39f-617f-415d-9fc0-df5b3a2e991c/victim-assist-victim-impact-statement-factsheet.pdf?ETag=7712fa772962bd9ebd4792b78e1b6ceb>

22 PSA (n 2) s 179K(3).

Special provisions exist to enable the VIS to be read aloud at sentence by the victim survivor or by someone else[23] for therapeutic benefit.[24] It is therefore 'not necessary for a person, reading aloud the VIS before the court under this section, to read the statement under oath or affirmation'.[25] However, where there is any objection from defence to the material within a VIS, only the relevant and admissible sections should be read aloud.[26]

Additional arrangements to support a victim survivor when reading their VIS can be accommodated on application, including to have the offender obscured from sight, the court closed, to have a support person present or to read their statement from a remote room using audio visual link.[27]

There is no provision in Queensland that permits a victim survivor to pre-record the reading of their VIS.

What do other jurisdictions do?

All other jurisdictions have introduced options for victim survivors to provide a written VIS and to read it aloud in court.[28] However, South Australia is the only jurisdiction in Australia that permits a VIS to be pre-recorded and relied upon at sentence.[29]

In the Northern Territory, a prosecutor is also able to prepare a 'victim report', an oral or written statement prepared by the prosecutor on behalf of the victim survivor that provides information about the harm suffered by a victim arising from the offence if this information is not already before the court (if there is no VIS).[30]

What can and cannot be included in a VIS

Legislation briefly says a VIS should state 'the particulars of the harm caused to a victim by an offence'.[31] It may include details about any physical injuries, as well as mental and/or emotional harm.[32]

A VIS can also include financial impacts to the victim survivor and their family, as well as social impacts such as how their life has changed as a consequence of the offending.[33]

Additional supporting material can be provided to assist the court to understand the harm caused to the victim survivor,[34] including 'any doctor's description of injuries and photographs of the injuries'[35] or any

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23 Ibid s 179M.
24 Ibid s 179M(4)(a).
25 Ibid s 179M(4)(b).
26 Ibid.
27 Ibid s 179N.
28 See Appendix 16.
29 *Sentencing Act 2017* (SA) s 14(3). Canada also permits victim survivors to pre-record their VIS: 'Victims' Rights in Canada' *Government of Canada*, (web page, 10 May 2024) <https://justice.gc.ca/eng/cj-jp/victims-victimes/rights-droits/victim.html>.
30 *Sentencing Act 1995* (NT) s 107B(5A).
31 PSA (n 2) s 179I def (b) 'victim impact statement'.
32 Ibid s 179I def 'harm'.
33 See 'What is a victim impact statement', *Office of the Victims Commissioner* (web page) <https://www.victimscommissioner.qld.gov.au/pathways/sexual-violence>; Department of Justice and Attorney-General, Preparing a Victim Impact Statement (Factsheet) <https://www.publications.qld.gov.au/ckan-publications-attachments-prod/resources/6048e39f-617f-415d-9fc0-df5b3a2e991c/victim-assist-victim-impact-statement-factsheet.pdf?ETag=7712fa772962bd9ebd4792b78e1b6ceb>; PACT, *PACTs Guide to Writing Victim Impact Statements (VIS)* (Guide, May 2023) <https://pact.org.au/wp-content/uploads/VIS-Guide-FINAL-May-2023.pdf>
34 Office of the Director of Public Prosecutions, *Director's Guidelines* (30 June 2023) [29(iv), 47(ii)] 52 ('*ODPP Director's Guidelines*').
35 Ibid.

other documents (such as poems, photographs or drawings)[36] 'if they help [the victim] communicate the effects the crime has had'.[37]

Although not legislated, the VIS fact sheet outlines that a VIS should not include information about:

- details relating to the facts of the crime (as opposed to details of the harm), particularly where these details are inconsistent with the agreed basis for which the person is being sentenced;
- other crimes committed by the offender, including offences for which the offender may have been charged with, but not yet found guilty of;
- any medical conditions the victim survivor alleges were caused by the offending that are not, or are unable to be, supported by medical documentation;
- anything that is unsupported by the evidence before the court;
- the victim survivor's own opinion about the character of the person or the sentence they think the offender should receive; and
- offensive or inappropriate language.[38]

The prosecution is required to review the VIS to determine which details are appropriate to be given to the sentencing court. [39] In considering this, they 'may have regard to the victim's wishes'.[40] In making this assessment, the prosecutor will usually edit (strike through and remove) the content of a VIS if it contains any inadmissible or inappropriate evidence prior to sentence:

> Inflammatory or inadmissible material, such as a reference to uncharged criminal conduct, should be blocked out of the victim impact statement. If the defence objects to the tender of the edited statement, the unobjectionable passages should be read into the record.[41]

In discharging their duty to ensure a court 'acts only on truthful information', the prosecution will also scrutinise a VIS for 'reliability and relevance'.[42]

A VIS must relate to an offence which the person is being sentenced.[43] If it also includes details of an uncharged or unconvicted act or offence, a court may still accept and have regard to the admissible portions, but should 'exercise caution' and be 'expressly cognisant of the need to disregard any reference to the count in respect of which the applicant had been found not guilty'.[44]

What do other jurisdictions do?

In summary, Victoria, New South Wales and the Northern Territory permit a VIS to be provided to the court without any prior redaction:[45]

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36 PSA (n 2) s 179I.
37 Department of Justice and Attorney-General, *Preparing a Victim Impact Statement* (Factsheet) <https://www.publications.qld.gov.au/ckan-publications-attachments-prod/resources/6048e39f-617f-415d-9fc0-df5b3a2e991c/victim-assist-victim-impact-statement-factsheet.pdf?ETag=7712fa772962bd9ebd4792b78e1b6ceb>
38 Ibid.
39 PSA (n 2) s 179K(3).
40 Ibid s 179K(4).
41 *ODPP Director's Guidelines* (n 34) [47(iv)] 52.
42 Ibid [47(d),(ii)] 51.
43 *R v Karlsson* [2015] QCA 158 [77]–[78] (Carmody CJ).
44 Ibid [17], [19] (Morrison JA and Boddice J).
45 See Appendix 16.

- In Victoria, a VIS may be provided to the court without the redaction of subjective, emotive, objectionable or inadmissible material prior to sentence.[46] Upon receipt, the sentencing judge exercises their discretion to disregard any material they consider to be inadmissible, without specifying which parts of the material are not being relied upon.[47] However, while there is no requirement for a written and filed VIS to only contain admissible material, victim survivors are only permitted (on request) to read the admissible parts of their VIS aloud in court[48] – decided prior to sentence at a sentence indication hearing.[49] In circumstances where the victim reads their statement aloud, counsel for the defence may cross-examine a victim on their VIS during the sentence.[50] Guidance on how to rely upon a VIS is outlined by the Victims of Crime in the Courtroom: A Guide for Judicial Officers.[51]
- New South Wales ('NSW') permits a VIS to be provided to the court without redaction by a prosecutor. Upon receipt of a VIS, a sentencing judge must not consider or take into account any material that is not specifically authorised by 'this Division'[52] to be included in a VIS (administrative requirements).[53]
- The Northern Territory appears to permit a VIS to be provided to the court without redaction (and also permits victims to include submissions on the appropriate penalty/sentence).[54]

The Australian Capital Territory and Western Australia limit the redaction of content in prescribed circumstances:

- In Western Australia ('WA'), a VIS cannot include submissions about the way, or the extent to which, the offender ought to be sentenced.[55] Excluding this, a sentencing court may receive a VIS without prior redaction and the court may rule as inadmissible the whole or any part of it.[56]
- The Australian Capital Territory ('ACT') appears to only limit the extent to which a VIS should be redacted to content which is offensive, threatening, intimidating or harassing.[57]

Timeframes, inconsistent statements and cross-examination

There is no statutory restriction or practice direction guiding when the VIS must be provided to the prosecution, other than prior to sentence. However, in the District Court, written outlines of submissions

46 *Sentencing Act 1991* (Vic) ss 8L(4)–(5).
47 Ibid s 8L(6).
48 Ibid s 8Q. Prosecutors and defence counsel are expected to work together prior to the heading 'to identify and remove inadmissible material from the statement: Judicial College of Victoria, Victims of Crime in the Courtroom: A Guide for Judicial Officers (August 2023) 15.
49 See Appendix 16.
50 *Sentencing Act 1991* (Vic) s 8O.
51 Judicial College of Victoria, *Victims of Crime in the Courtroom: A Guide for Judicial Officer*s (August 2023) 15. The Guide instructs judicial officers to be mindful that victim survivors hold differing views about whether content from their VIS should be quoted in sentencing remarks. The Guide suggests when a victim survivor has chosen not to read out their statement, judicial officers should consider whether it is appropriate to read aloud from the statement or include them verbatim in published sentencing remarks. The Guide refers to remarks made in the case of *DPP v Latimer* [2017] VCC 87 [18]–[19] as best practice. This case involved child sexual offices.
52 A VIS can include any personal harm, emotional suffering or distress, harm to relationships with other persons, economic loss or harm that arises from any matter: *Crimes (Sentencing Procedure) Act 1999* (NSW) ss 23A, 25.
53 *Crimes Act* (NSW) s 30F(2).
54 *Sentencing Act 1995* (NT) s 107B(5A).
55 *Sentencing Act 1995* (WA) s 25(2).
56 Ibid s 26.
57 *Crimes (Sentencing) Act 2005* (ACT) s 51(7).

are encouraged (which may include details of the impact of the offence on a victim survivor) and should be emailed by 4.00 pm on the day prior to the sentence.[58]

The prosecutor may receive a VIS close in time to the sentencing hearing. Some reasons for this include:

- The victim survivor wants to wait for the offender to be convicted, to help manage their own expectations. The issue with this is that a sentence can immediately follow a jury verdict.
- There is a sudden, or late, plea and the victim survivor has not been informed of the resolution and given the opportunity to provide a VIS due to compressed timeframes. For example, in the Magistrates Courts a matter may proceed to sentence even if it is listed for a 'mention'.
- Prosecuting authorities or police may experience difficulties contacting the victim to discuss the provision of a VIS, such as where they are transient/avoidant, the victim survivor is a child and relies on a support person or parent, their contact number has changed or they require a translator.
- The victim survivor does not feel supported earlier in proceedings, which may lead to disengagement from the criminal justice process.
- The victim survivor wants the VIS to reflect the entirety of the harm they have experienced, including and up to sentencing.[59]

There are legal obligations on the prosecutor if a VIS is provided, particularly if this is prior to a conviction. A VIS must be disclosed to the accused person,[60] This is because there is a 'fundamental obligation of the prosecution to ensure criminal proceedings are conducted fairly' and the prosecution has a disclosure obligation to 'give an accused person full and early disclosure of … all evidence', including 'a copy of any statement of the witness in the possession of the prosecution' as soon as practicable.[61] Non-disclosure of evidence, including a VIS, could result in a miscarriage of justice and a retrial being ordered, particularly if it is considered fresh evidence.[62]

Where a VIS contains information that is inconsistent 'in a material way' with a victim survivor's prior evidence, or where it may raise concerns with respect to the victim survivor's credibility, the *Director's Guidelines* state that it must be provided to defence as soon as possible, to ensure the defendant is provided with the opportunity to question the complainant on any inconsistency,[63] and may rely upon the 'documents (or information contained within them) in an attempt to discredit the principal Crown witness'.[64]

Where a VIS is inconsistent with a victim survivor's prior statement or evidence and is provided before they give evidence, the victim survivor may be cross-examined on its contents at trial. The purpose of doing so is often to demonstrate that the victim survivor is not a reliable or credible witness:

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58 District Court of Queensland, *Practice Direction 5 of 2023: Sentencing Proceedings - Outline of Submissions*, (19 June 2023) <https://www.courts.qld.gov.au/__data/assets/pdf_file/0011/767423/dc-pd-05-of-2023.pdf>.

59 Stakeholder views from this review. See section 14.5 for more information.

60 *Criminal Code* (Qld) ss 590AB; 590AH(2)(e)(i).

61 Ibid.

62 See *R v Agnew* [2021] QCA 190 [81] (Flanagan J, Sofronoff P and Morrison JA agreeing); *R v Cox* [2010] QCA 262 [13] cited with approval in *R v Grimley* [2017] QCA 291 [4], [31], [35]–[36] (McMurdo J, Fraser and Gotterson JJA agreeing). See, for example, the following cases where a re-trial was ordered due to a failure on the prosecution to disclose the VIS: *Dunkerton v Queensland Police Service* [2018] QDC 71 [39]–[40] (Fantin DCJ); *R v Cornwell* [2009] QCA 294 [40]; *R v HAU* [2009] QCA 165 [40]–[43] (Keane JA, Cullinane and Jones JJ agreeing).

63 *ODPP*, *Director's Guidelines* (n 34) [29(iv)] 40.

64 *Dunkerton v Queensland Police Service* [2018] QDC 71 [28] (Fantin DCJ) citing *R v Spizzirri* [2001] 2 Qd R 686 [33].

> [t]he aim is to destroy the reliability of the evidence given in court by demonstrating that the witness was prepared to give a different version of events on a prior occasion.[65]

The court has noted the fundamental right of the defendant to a fair trial, and the importance of ensuring that defence are not deprived of 'documents which could be of assistance to the accused' person.[66]

Where a VIS is provided to the prosecution service prior to the victim survivor giving evidence but is not disclosed to defence in accordance with their obligations, the conviction can be overturned on appeal on grounds that there was a miscarriage of justice, as the defendant must have the opportunity to cross-examine the complainant where there is any inconsistency with their previous statements.[67]

An appeal of conviction may be granted where the contents of the VIS were deemed to be materially relevant, such as where there is something 'in the document [which] amounted to an inconsistent statement or raised a concern about the complainant's truthfulness or reliability in giving evidence'.[68] For example, in granting an appeal of conviction, it was recognised in *R v HAU*[69] that, in such a circumstance:

> defence should have been given the opportunity to raise with the complainant the differences in her account of events. The loss of the opportunity because of the prosecution's failure to meet its obligations of disclosure went to 'the root of the fairness of the trial'.[70]

However, where there is nothing in the statement that 'amounted to an inconsistent statement or raised a concern about the complainant's truthfulness or reliability in giving evidence', its lack of disclosure will not represent a miscarriage of justice, or constitute grounds for the conviction to be overturned on appeal.[71] The test is whether there is anything in the undisclosed document which 'could have made a difference to the verdict'.[72]

Where a VIS is disclosed to defence after conviction and is the subject of an appeal, a victim survivor may be cross-examined on the contents of their VIS where the Court of Appeal deems it 'necessary or expedient in the interests of justice' to do so.[73] However, this power cannot be used 'to permit a fishing expedition'.[74]

Queensland courts have also recognised that 'honest witnesses are frequently in error about the details of events. The more accounts that they are asked to give the greater the chance that there will be discrepancies about details and even inconsistencies in the various accounts.'[75]

Other reasons why information new information is introduced in a VIS may be because the victim survivor was not aware they were important, and no one had asked them before.[76]

For this reason, victim survivors are usually discouraged from discussing the facts of the offending within their VIS and are encouraged to instead focus on the harm caused.

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65 *R v Etheridge* (2020) 3 QR 481 at 486 [12]; [2020] QCA 34 [12].
66 *R v Spizzirri* [2000] QCA 469, 694 [35].
67 *R v HAU* [2009] QCA 165.
68 *R v Demos* [2012] QCA 165 [23].
69 *R v HAU* [2009] QCA 1.
70 Ibid 10 [42].
71 *R v Demos* [2012] QCA 165 [16] citing *R v BBU* [2009] QCA 385. See also *R v Grimley* [2017] QCA 291.
72 *R v HAU* [2009] QCA 165 [40], citing *R v Spizzirri* [2000] QCA 469.
73 *Criminal Code* (Qld) s 671B(1). See, for example, discussion in *R v Demos* [2012] QCA 165.
74 Ibid [23].
75 *M v The Queen* (1994) 181 CLR 487, 534 [63].
76 A J Rafter, 'The impact and use of inconsistent statements in a criminal trial' (Paper presented at a CPD event sponsored by the Crown Prosecutors' Association of Queensland in conjunction with the Bar Association of Queensland, 7 May 2024) 5 [18].

What do other jurisdictions do?

Some other jurisdictions in Australia provide victim survivors with clear guidance surrounding when their VIS should be provided to either the prosecution or the court. For example, NSW states that a VIS should be provided to the prosecution service 10 days before the sentence.

While the ACT does not set numerical timeframes, it prescribes that a VIS should only be provided to the court after conviction or a plea of guilty, but before sentence.[77] The ACT provides additional guidance surrounding the cross-examination of victim survivors, dependent on when they provide their VIS:

- If provided prior to conviction/a finding of guilt, defence are not permitted to cross-examine a victim survivor on their statement unless the court is satisfied that the statement has substantial probative value to justify allowing the cross-examination.[78]
- If provided after conviction, but before sentence, defence are not permitted to cross-examine a victim survivor on their statement unless the court is satisfied that it would materially affect the sentence and gives defence leave to do so.[79]

This process encourages VISs to be provided to the court earlier in proceedings, without the risk that the victim survivor will be cross-examined unless it is so probative or relevant to the fundamental principles of ensuring a fair trial for the defendant, such as the defendant's fundamental right to cross-examine a witness at trial.

Delaying a sentence hearing for the provision of a victim impact statement

In Queensland, the prosecution may request an adjournment for a VIS to be obtained. However, the prosecution has the discretion to proceed without providing a victim with the opportunity to produce a VIS where 'it is reasonable to do so in the circumstances, having regard to … (a) the interests of justice; (b) whether… [it] would unreasonably delay the sentencing of the offender; (c) anything else that may adversely affect the reasonableness or practicality of permitting details of the harm to be given'.[80] The sentencing judge retains their discretion to refuse an adjournment and to proceed straight to sentence.

What do other jurisdictions do?

Only legislation in WA and the ACT expressly prescribes that a sentence hearing may (or, in certain circumstances in the ACT, must) be adjourned for the purpose of enabling the victim to prepare a VIS and for this to be provided to the court:

- WA permits a court to adjourn the sentencing of an offender to either: (a) obtain information about the offence, the offender, or a victim; or … (c) to enable a victim impact statement to be given to the court.[81]
- The ACT prescribes that where a matter is a 'serious offence' (an offence punishable by 5 years' or more imprisonment) and the prosecution requests an adjournment for the preparation of a VIS, 'the court must grant the adjournment for a "reasonable period" to allow the statement's

77 *Crimes Act* 1900 (ACT) s 52(2).
78 *Evidence (Miscellaneous Provisions) Act 1991* (ACT) s 96(1).
79 Ibid s 96(2).
80 PSA (n 2) s 179K(2).
81 *Sentencing Act 1995* (WA) s 16(1).

preparation'.[82] The legislation further qualifies that 'the court must not adjourn the proceedings if satisfied that special circumstances justify refusing the adjournment'.[83]

Community impact statements in other Australian jurisdictions

In South Australia, legislation permits a 'community impact statement' to be made. Any person can tell the Commissioner of Victims' Rights about the impact of an offence.[84] The prosecutor or the Commissioner for Victims' Rights may tell the sentencing court about 'the effect of the offence … on people living or working in the location', known as a 'neighbourhood impact statement', or the impact 'on the community generally', known as a 'social impact statement'.[85]

14.3.3 The role of victim impact statements in Queensland

There are two legislative purposes of a VIS:

- The purpose of a victim survivor providing details of the harm caused to them (including by way of VIS) to a prosecutor is to enable the prosecutor to present this information to the court.[86] A court must have regard to the nature and seriousness of the offence, including the physical, emotional or mental harm mentioned in a VIS.[87]
- The purpose of allowing a VIS to be read aloud in court is to 'provide a therapeutic benefit to the victim'.[88]

While the therapeutic benefit or purpose of writing a VIS has not been legislated, there has been some commentary in the Court of Appeal on the purposes of writing a VIS, and how it should be relied upon at sentence.

The Court of Appeal has indicated that caution should be exercised in giving weight to, and acting on, allegations in a VIS if it is not within the victim survivor's knowledge or experience, or where there is no supporting evidence.[89] This reflects the general rules of facts at sentence: a court may 'act on an allegation of fact if it is admitted or not challenged'.[90] If challenged, a court may act on the allegation of fact if it 'is satisfied on the balance of probability that the allegation is true'.[91] The degree of satisfaction will vary depending on the consequences to the person being sentenced.[92]

In 2006, Fryberg J stated:

> Sentencing judges should be very careful before acting on assertions of fact made in victim impact statements. The purpose of those statements is primarily therapeutic. For that reason victims should be permitted, and even encouraged, to read their statements to the court. However, if they contain material damaging to the accused which is neither self-evidently correct nor known by the accused to be correct (and this includes lay diagnoses of medical and psychiatric conditions) they should not be acted on. The prosecution should call the appropriate supporting

82 *Crimes Act 1900* (ACT) s 51A.
83 Ibid.
84 *Sentencing Act 2017* (SA) s 15(1).
85 Ibid s 15(2), see *R v Wagner* [2019] SASC 70 [10]–[19] (Parker J) for how courts have received this information.
86 PSA (n 2) ss 179K(1), (3), (7).
87 Ibid s 9(2)(c)(i).
88 Ibid s 179M(4).
89 *R v Evans* [2011] 2 Qd R 571 [30] citing *R v Singh* [2006] QCA 71. See also *R v Anthony* [2013] QCA 95 [30]; *R v Margaritis* [2013] QCA 401; *R v Williams* [2014] QCA 154 [12].
90 *Evidence Act 1977* (Qld) s 132C(2).
91 Ibid s 132C(3).
92 Ibid s 132C(4).

> evidence. It is unfair to present the accused with the dilemma of challenging a statement of dubious probative value, thereby risking a finding that genuine remorse is lacking, or accepting that statement to his or her detriment.[93]

In subsequent decisions, His Honour clarified that the sentencing court, in determining the appropriate outcome,

> was not limited to the facts in the statement of agreed facts. Facts put forward by the prosecution in the victim impact statement are not to be ignored. They must be given their due weight. The passage in Singh was concerned to ensure that the defence were not placed in a position of embarrassment or dilemma, often at the last minute, by assertions the truth of which they did not know and were unable to ascertain.[94]

Another member of the Court of Appeal considered 'it is not clear (at least to me) that the primary purpose of a victim impact statement is therapeutic … [it] may serve other purposes, such as informed the court of … the harm caused'.[95] The 'care' required is based on section 132C of the *Evidence Act 1977* (Qld).[96]

Recently, in *R v HYQ*,[97] the Court of Appeal said:

> I cautiously observe that some care must be taken in relation to the weight to be given to victim impact statements tendered at sentencing hearings. That is not intended to diminish the impact of harm on a victim of offending, such as the complainant in this case; nor the therapeutic benefit of enabling such a person to articulate for the court the subjective impact of the offending on them, or the importance of the court understanding that impact. But the statement tendered in this case contains material that appears to overstate some aspects; matters which are not reflected in the agreed factual basis for the sentence (such as the complainant's parents entrusting his care to the applicant; that the applicant "exploited" him; or that all of the difficulties he has experienced in his life since are attributable to the applicant). Some care is therefore required, before accepting the statement unquestionably, or allowing it to overwhelm other features of the case.[98]

Where a VIS includes additional information that is 'outside of [its] purpose' or that includes 'material [that] goes beyond that which is relevant', the court may place 'little to no weight' on those portions.[99] For example, Smith DCJ recently said:

> I find that significant harm has been caused by the offending and it will continue to cause harm to many victims and/or their families even those who have not provided such statements. Insofar as the statements stray into matters outside of their purpose I note they are of therapeutic value to the families and the victims. I consider the statements in that light and place little to no weight on matters outside of their purpose.[100]

What the court has said about the degree of harm and its impact on sentence

The harm suffered because of an offence is relevant to a court's assessment of the nature and seriousness of the offence.[101] The injury and harm caused by an offence can increase the criminality and seriousness.[102]

Court of Appeal decisions demonstrate that courts have relied upon probative evidence outlined in a VIS in assessing harm.[103] It has also been acknowledged that this can be a feature that distinguishes one

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93 *R v Singh* [2006] QCA 71, 8 (Fryberg J) (emphasis added).
94 *R v Major;* Ex *parte A-G (Qld)* [2011] QCA 210 [102] (Fryberg J).
95 *R v Evans* [2011] 2 Qd R 571 [17] (Chesterman JA).
96 Ibid [18] (Chesterman JA).
97 *R v HYQ* [2024] QCA 151.
98 Ibid [80].
99 *R v Griffith* [2024] QDC 207 [71]–[74], [115] (Smith DCJ).
100 Ibid [74] (Smith DCJ).
101 PSA (n 2) ss 9(2)(c); (3)(c), (d); (6)(c).
102 *R v Wallace* [2023] QCA 22 [37] (Dalton JA).
103 *R v Downs* [2023] QCA 223 [46]–[47].

case from another.[104] However, Holmes JA also commented: 'I am not sure that there is much to be gained by comparing victim impacts of two horrific crimes.'[105]

Recently, in *R v Wallace*,[106] it was noted that

> the impact of the defendant's initial attack upon the victim must have been substantial, and the defendant's overall actions resulted in serious physical injury to the victim, as well as severe psychological harm, both with ongoing consequences – matters which place this case within that range of 10 to 14 years; rather than in the lower range referred to by Henry J in Benjamin.[107]

In *R v VN*,[108] the Court of Appeal noted how courts focus on the physical harm, which is a primary factor in the PSA:

> The tendency to use physical injury and harm as a tool for comparison of sentences seems to have developed in cases where the rape or rapes occurred on one violent occasion … It is hard to see how it could be said the psychological harm caused to a complainant such as in the present case can be said to be any less significant … To diminish the harm caused by serious sexual offending of the kind the applicant committed by contrasting it with physical harm is to misunderstand the real impact of offending of this kind.[109]

The absence of a VIS does not mean the harm is a neutral factor at sentencing.[110] And a court may not draw an inference that there is no harm.[111] It is open for the court to rely upon 'common sense' and 'life experience' in making a finding of fact.[112]

For example, it has previously been acknowledged that '[v]ictims of incest and other forms of intra-familial sexual abuse take years to recover from its psychological effects and sometimes never do.'[113]

However, the Court of Appeal has made findings where there was a lack of evidence with respect to the degree of harm caused. For example in *R v Al Aiach*,[114] the Court noted that 'there was no evidence of any long term adverse physical or psychological effect upon any of the complainants'.[115] In *R v Quinlan*,[116] the Court of Appeal noted that 'it was not submitted to have resulted in serious or long-term consequences for the complainant'.[117]

In *R v Evans*,[118] the original sentencing judge found that the victim would 'continue to suffer for a long time'. However, the Court of Appeal found this to have been unsupported by the evidence, reflecting that, 'There is a limit to the extent to which judges can draw on their own experience, in other cases or elsewhere, to reach conclusions of fact for the purpose of sentencing.'[119] Despite this error, the majority considered it 'made no significant difference to the sentence'.[120]

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104 See *R v Williams; Ex parte A-G (Qld)* [2014] QCA 346 [62]–[68] (McMeekin J, Henry J agreeing). At [68] it was stated: 'In Dowden the short description of the impact on the victim suggests a lesser impact there than here.' (footnotes omitted).
105 Ibid [12] (Holmes JA).
106 *R v Wallace* [2023] QCA 22.
107 Ibid [18] (Bowskill CJ, Bond JA agreeing).
108 *R v VN* [2023] QCA 220
109 Ibid [32] (Bowskill CJ and Morrison and Dalton JJA).
110 Ibid [22]–[23].
111 PSA (n 2) s 179K(5).
112 *HG v The Queen* (1999) 197 CLR 414.
113 *R v DD (No 2)* [2008] VSCA 15 (Neave JA).
114 *R v Al Aiach* [2007] 1 Qd R 270.
115 Ibid [32] (Keane JA).
116 *R v Quinlan* [2012] QCA 132.
117 Ibid [30] (Fraser JA, Fryberg and Martin JJ agreeing).
118 *R v Evans* [2011] QCA 135.
119 Ibid [33] (Fryberg J, Chesterman JA agreeing). McMurdo P agreed with the error but considered it did affect the sentence and would have allowed the appeal: [10].
120 *R v Abdullah* [2023] 39 QLR [23] (Bowskill CJ, Flanagan JA and Buss AJA agreeing).

Why clarifying the purpose is important

The purpose of a VIS is relevant to consideration of how the court should receive and use a VIS, and what information (if any) 'should' be removed prior to sentence.

If the purpose were primarily to convey a therapeutic benefit to the victim survivor without having an impact on the penalty imposed at sentence (conveying an '*expressive purpose*'), the importance of redacting inadmissible content would be lessened. This is because the contents of the VIS would not be considered by the judge in determining the appropriate sentence. Rather, the focus would be on providing a victim survivor with a platform to speak freely about the offending in a way that is cathartic without restricting their voice through a redaction process.

Comparatively, if the purpose was to provide information about the harm caused to a victim survivor by the offence, to be taken into account by the judge in their assessment of harm and in imposing the most appropriate penalty (being for an *'instrumental purpose*'), then it becomes important for the person being sentenced to have the opportunity to test that evidence. The court would then need to be satisfied of the veracity of the allegation of fact to the requisite standard prior to placing any weight on it. In those circumstances, consideration of whether inadmissible material should be redacted prior to sentence, or whether it should still be admitted to limiting a victim survivor's voice, becomes pertinent.

This duality creates challenges for both the community (including victim survivors) and legal stakeholders, who have different expectations with respect to how a VIS should be used by the court and which purpose is more important: victim survivors expect to be able to tell their story without restriction to facilitate the therapeutic benefits, while legal stakeholders believe that it should only contain admissible, relevant material, in line with the rules about fact-finding at sentence.[121]

14.4 Support for writing a victim impact statement

14.4.1 Support services for victim survivors when writing their VIS

Police and prosecution agencies both have a responsibility to notify victim survivors that they can prepare a VIS to be considered by the court at sentence.[122]

Victim survivors are not supported by the prosecution service when writing their impact statement. While the prosecution service can direct a victim survivor to publicly available information and support agencies,[123] they are not responsible for assisting victim survivors to write their VIS and are not funded to provide this service.

Support for writing an impact statement was previously provided to victim survivors by VAQ. During consultation, VAQ advised that it no longer directly assists victim survivors with this process unless necessary, instead referring victim survivors to other support organisation (including those outlined

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121 See *Evidence Act 1977* (Qld) s 132C.

122 Queensland Police Service, *Operational Procedures Manual* (Issue 102, October 2024) section 3.7.10 ('*QPS OPM*'); *ODPP Director's Guidelines* (n 34) [25(iii)] 34.

123 Victim Assist Queensland, 'Preparing a Victim Impact Statement' (Department of Justice and Attorney-General, accessed 19 November 2024) <https://www.publications.qld.gov.au/ckan-publications-attachments-prod/resources/6048e39f-617f-415d-9fc0-df5b3a2e991c/victim-assist-victim-impact-statement-factsheet.pdf?ETag=30bc17d39214623bf53b67487751adac>.

below). However, VAQ continues to produce and publish an information sheet on how to write a VIS on its website.

Responsibility for supporting victim survivors of rape and sexual assault to prepare a VIS now lies with separate non-government organisations, which support specific cohorts of victims, including:

- PACT: for children and adults who have experienced sexual violence; and
- Victim Connect (which is funded by VAQ): for victims of a violent crime;
- Working with People with Intellectual and Learning Disabilities ('WWiLD'): for victim survivors with intellectual or learning disabilities that have experienced or at risk of experiencing sexual violence, other crimes or exploitation;[124] and
- QSAN: for victim survivors of a sexual offence.

Inconsistent public information

During this review, we found that available information is inconsistent when outlining which organisation or support service supports victim survivors when writing their VIS.

For example, the QPS OPM states that, 'For a matter appearing before a district or Supreme Court, officers from the ODPP will assist the victim in the process of preparing a VIS.'[125] An ODPP VLO will 'provide information' about the process[126] (for example, they may provide victim survivors with VAQ's fact sheet on what can be included in a VIS). However, this does not include providing any further procedural support (including with respect to the content of the VIS) or emotional support to victim survivors.[127]

The QPS OPM further states that police can refer a victim survivor to VAQ for assistance with completing a VIS for production in court.[128] However (as discussed above), VAQ has advised that it generally no longer provides this service.

14.4.2 Resources available to support victim survivors

In Queensland, the Office of the Victims Commissioner has produced a Victim's Pathway online resource and a podcast to assist adult victim survivors of sexual violence.[129] For a VIS, the page directs a person to a two-page fact sheet on 'Preparing a Victim Impact Statement' produced by VAQ.[130] This document includes high-level information surrounding how to write a VIS, what to include and exclude, how to submit a VIS and who will see it. The document also notifies victim survivors of the right to either read their VIS aloud, or to have another person do this.[131]

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124 WWILD can be contacted through their website or by telephone on (07) 3262 9877.
125 *QPS OPM* (n 122) section 3.7.10.
126 Office of the Victims Commissioner, 'Victim Liaison Officers' (web page) <https://www.victimscommissioner.qld.gov.au/pathways/sexual-violence/definitions/victim-liaison-officers>.
127 Brisbane Consultation Event, 11 March 2024.
128 *QPS OPM* (n 122) sections 3.7.10, 2.12.3.
129 'A victim's pathway', *Office of the Victims' Commissioner* (web page, 2024) <https://www.victimscommissioner.qld.gov.au/pathways/sexual-violence>.
130 Victims Assist Queensland, 'Preparing a Victim Impact Statement' (Department of Justice and Attorney-General), accessed 19 November 2024: <victim-assist-victim-impact-statement-factsheet.pdf>.
131 Ibid.

Queensland does not provide victim survivors with a template to guide them on how to structure their VIS. The fact sheet outlines that there is 'no set form or style. You can write it as if you're writing a letter to the sentencing judge to describe the effect of the crime on you and your life.'[132]

What do other jurisdictions do?

Jurisdictions have different resources available to support victim survivors prepare their VIS (see **Appendix 17**):

- NSW, South Australia and Victoria have dedicated websites and portals that are designed to support victim survivors, and have direct links to support services.[133]
- NSW, Victoria, the Northern Territory, South Australia and Tasmania all provide templates and clearer guides for victim survivors to utilise when preparing their VIS. [134]
- Other jurisdictions produce detailed resources on the process of preparing a VIS.[135]

For example, NSW produces a bundle of VIS documents including a guide, checklist and template:

- The guide provides general information about the process (including listing services available to help them to prepare their VIS), specific information about preparing the VIS (including procedural requirements) and who to provide it to (the prosecution service) and when (10 days before the sentence hearing).[136]
- The checklist guides victims through each step of the VIS preparation process. This checklist includes a suggestion to 'request or locate documentation that may assist with your victim impact statement', including any documents from a medical professional. It also asks victim survivors to 'tick' whether they would like to read their VIS aloud, or to have someone else do this, and whether there are any other arrangements they would like in place during the sentence hearing, such as to close the court, read their VIS using CCTV or have a support person present.
- The template includes a cover sheet with a check box to indicate whether the victim survivor would like their VIS to be read aloud and, if so, by whom or are undecided. It also has headings with questions to prompt victim survivors and spaces to write a response, including opening comments; emotional suffering or psychological harm; physical harm; economic (financial) loss; social harm; and general comments.

In a submission to the ALRC's review, the South East Monash Legal Service in Victoria emphasised the importance of victims being provided with proper support during this process, telling the ALRC:

> Our clients' experiences surrounding Victim Impact Statements (VIS) varies depending on what support they have had prior to and during the preparation of a VIS. Some informants have sent our clients who are a victim of horrific sexual violence home to prepare a VIS with no further support or assistance in preparing a statement. This can be extremely distressing for some, as they do not know what to write or how to structure their statement to express what they would like to say.[137]

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132 Ibid.
133 See Appendix 17.
134 Ibid.
135 Ibid.
136 Ibid.
137 South East Monash Legal Service (Victoria) submission to the ALRC inquiry into Justice Responses to Sexual Violence, submitted 16 June 2024.

14.5 Stakeholder views

14.5.1 The purpose and use of a victim impact statement (including where one is not provided)

While some consultation participants recognised the importance of a VIS in allowing victim survivors to inform the court of the harm experienced,[138] victim support and advocacy organisation and legal stakeholders also commented on the issues and limitations with the current approach to these statements.

Submissions from victim survivor support and advocacy bodies

The Office of the Interim Victims' Commissioner ('OIVC') considered allowing a court to receive the whole, un-redacted VIS 'may better reflect the purpose of victim impact statements'.[139] The OIVC also raised concerns that '[w]here there is only a cursory reference to the presence of a VIS within sentencing remarks, this risks the court record being deficient with respect to the victim's voice and the harm suffered by the victim.'[140] The OIVC also told us that there may be an opportunity to clarify the purpose of providing a VIS for victim survivors, as well as its role in sentencing, through the ODPP's review of the *Director's Guidelines* (currently underway).[141]

Fighters Against Child Abuse Australia ('FACAA') emphasised:

> There is also a need for judges to hear directly from victim-survivors so they can get a better understanding of the trauma endured which will hopefully lead to more appropriate sentences and less plea deals for perpetrators of rape and sexual abuse.[142]

However, the Queensland Sexual Assault Network ('QSAN') noted that some victim survivors do not want to provide a VIS to the sentencing court, as they 'do not want the perpetrator to know how deeply the crime impacted on their life'.[143]

Views of victim survivors

Consultation with victim survivors

Victim survivors had mixed experiences of providing a VIS.

One victim survivor told us she was grateful for the opportunity to provide a VIS and found the process to be 'cathartic' and 'very valuable':[144]

138 For example, Submission 25 (Respect Inc and Scarlet Alliance) 4; Submission 30 (Youth Advocacy Centre) 8; Submission 23 (Legal Aid Queensland) 31.
139 Submission 26 (Office of the Interim Victims' Commissioner) 3. This is now permanently established as the Office of the Victims' Commissioner.
140 Ibid 3.
141 Ibid 4.
142 Submission 15 (FACAA) 12–13.
143 Submission 24 (QSAN) 12.
144 Victim Survivor Interview 7.

> It's cathartic in a way, and, and the way a trial runs … The opposing counsel questioned me for over 2 hours … So being able to, to write the impact statement and then share it out loud, I found very valuable, and I was grateful for that. (Victim Survivor Interview 7)

She also reflected that having the sentencing judge refer to her VIS during sentencing remarks led her to have 'full faith in him as a judge during that process. He seemed really objective and neutral.'[145]

However, we were also told by another victim survivor that she thought providing a VIS would help her, but that 'the judge barely read it. And he didn't care … I don't think anyone in that courtroom really cared … It didn't change anything.'[146]

> We were told that the judge 'quickly mentioned that it has done harm to [XXX] and our family… it was just mainly focused on how he's trying to fix his life, not really acknowledging how it has changed our life forever.

This made them feel as if they 'weren't important'.[147]

There was a broad consensus that while judicial officers may attempt to understand the harm done to victim survivors, they think the judicial officer can never understand the harm caused to them, or that the sentence did not sufficiently take their harm into account:

> I reckon the judge did the best he can with what he could do. They've got the laws that they've got to abide by. It's not the judge, it's the laws. (Victim Survivor Interview 4)

Interviews with victim survivor support advocates

Support advocates recognised that victim survivors have different expectations and experiences of providing a VIS:

> Some of them find it helpful. Some of them find it confronting. Some of them don't want to have to do it because they feel like they have to re-live it again. Some of them don't believe it will do a damn thing. So[me] just don't care. (Victim Support Advocate Interview 1)

> [There is a] victim survivor expectation and [belief] that the VIS will carry a huge amount of weight, because that's the first time they've been able to put their reality before the court. [148]

> I just wanted a bit more knowledge and information given to the woman about what the victim impact statement's for and how you know, what will it be helpful, that sort of [thing] … she wasn't really fully aware why she was doing this – she thought she just got to have a chance to say what she wanted to say. But there was no understanding of how that could have actually been used or taken within the court – that maybe it would help you in sentencing in one way or the other. (Victim Support Advocate Interview 1)

Some advocates reflected that reading a VIS aloud in front of their perpetrator can be 'incredibly powerful' for some victim survivors, as well as a way for them to reclaim their voice in an environment where they are not 'fearful of consequences from him for being able to say what she said in that courtroom'.[149]

Participants expressed strong views that the sentence hearing should focus more on the victim survivor and the impact or harm caused to them.[150] However, it was also stated that not too much weight should be placed on a VIS and that 'caution' should be exercised, lest it be detrimental to a resilient victim

145 Ibid.
146 Victim Survivor Interview 1.
147 Ibid.
148 Victim Support Advocate Interview 3.
149 Victim Support Advocate Interview 1
150 Victim Support Advocate Interview 1; Victim Support Advocate Interview 3.

survivor who does not provide one, or a victim survivor who may be illiterate or face challenges articulating the harm:

> So I think they're fantastic and have a really good place but they can't be too weighty because you could have somebody who is very articulate and able to [state the harm] very clearly … you can never tell, because people feel their emotions differently, and what the long-term effects are likely to be … I think they're really important, but I would hate to see sentences only weighed towards the victims [who provide one].[151]

We were told that the lack of support and assistance for victim survivors mean some are concerned about what a court will consider if there is no VIS:

> It's not very clear the weight that it has either because there can be that fear 'if I don't write something. They'll think I'm not impacted. It's going to be used against me and that it didn't impact me.' [The offender will] get a lighter sentence … Yeah, there's not a lot of education around preparing for sentencing, for victim impact statements, what it all means.[152]

Other submissions

The Dispute Resolution Branch suggested that the purpose of providing a VIS could be expanded to allow victim survivors to not only outline the impacts of the crime, but also to indicate whether the offending person had taken responsibility for their actions, and any steps that they had taken to address the harm caused. It was recognised that this may provide the court with increased insight into the outcome of a resolution while maintaining a victim-centric approach.[153]

Submissions from legal stakeholders

Legal Aid Queensland ('LAQ') outlined that, 'One of the principal purposes of a VIS is to enable a victim survivor to tell the court and the person who harmed them how the offending behaviour impacted them.'[154] Similarly, the Youth Advocacy Centre ('YAC') reflected that VIS are 'beneficial for understanding the harm caused to the victim.'[155]

SME Interviews

One participant observed that a VIS can contain very compelling information, which assists the judicial officer at sentence.[156] This may include information about the impact of a breach of trust, or the long-term impacts it has had on relationships and the victim survivor's mental health.[157] Another recognised that reading a VIS also serves a therapeutic purpose, by providing an opportunity for the victim survivor to talk about their feelings and the impact of the offending on them in the courtroom.[158]

Some participants thought the VIS itself should serve a predominantly therapeutic purpose as the harm 'goes towards setting the overall tariff that courts look for particular types of offences':[159]

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151 Victim Support Advocate Interview 1.
152 Victim Support Advocate Interview 3.
153 Submission 21 (Dispute Resolution Branch) 3.
154 Submission 23 (Legal Aid Queensland) 31.
155 Submission 30 (Youth Advocacy Centre) 8.
156 SME Interview 14.
157 Ibid.
158 SME Interview 16.
159 SME Interviews 1, 25.

> I don't know that the specific VIS necessarily sways the sentence to be imposed, well, it shouldn't do that. It is an opportunity for the complainant to tell the court - or their family - what the impact of the offence is. But that's where it starts and stops.[160]

Where there is no VIS, 'it's just judicial notice of how awful it would be. But nothing … individualised.'[161]

We were told that there are challenges if the victim survivor does not provide material to support some types of harm mentioned in the VIS or they don't provide a VIS at all.[162] For example, one participant told us that a VIS

> can be really problematic because they'll assert matters which are not the subject of charges, are not in sworn statements, and can be prepared and provided after trial … And there can be an inconsistency between the victim impact statement and the facts of the trial which can lead to a mistrial.[163]

We were told that it is clear there is lack of assistance and funding to help a victim survivor prepare a VIS. As a result, this means it:

- may lack utility where the victim survivor was likely not told what the purpose of the statement was;[164]
- Is 'an unsophisticated document' written by the victim survivor,[165] which may contain prejudicial or procedurally unfair content[166] that 'strays well beyond [the] permissible purpose' and is often unusable, in that it does not discuss the harm or impact to the victim survivor;[167]
- may 'overstate' the causal connection between the offence and the harm, while this may be caused by other factors in their lives;[168]
- can contain content that is 'exaggerated' but is then used 'in the defendant's favour'.[169]

If a VIS is not useful, the court can only infer the harm as if no VIS were provided at all.[170]

One participant explained that the lack of funding and support creates an imbalance in the sentencing hearing because the person being sentenced can show the judge 'the 30-page psychologist's report that discusses this horrible tragic history for the defendant' but there is no similar funding for a victim to obtain a psychologist to show the sentencing court.[171]

Where there is no VIS

It was recognised victim survivors may not provide a VIS for a variety of reasons, including:

- where they do not want to provide one because do not want to disclose personal information;[172]
- where there is a relationship or power imbalance between the victim survivor and their offender, which may lead a victim survivor to not want to provide a VIS – particularly within some cultures

160 SME Interview 1.
161 SME Interview 6.
162 SME Interview 11.
163 SME Interview 26.
164 SME Interview 14
165 SME Interview 3.
166 SME Interview 25.
167 SME Interviews 3, 8, 13, 14.
168 SME Interview 12.
169 SME Interviews 7, 21.
170 SME Interview 13.
171 SME Interview 3.
172 SME Interview 10.

where a victim survivor may feel compelled not to speak to others about the offending,[173] the victim survivor was not provided with adequate information to produce one;[174]

- a victim may not want to relive their experience through writing a VIS.[175]

Where a victim survivor does not have the necessary literacy skills, feels incapable of writing their VIS because it is too challenging or has a psychological barrier to doing so, other ways to gather that information should be offered.[176] For example, the prosecution should speak with the victim survivor, write down the facts and present them to the court in order to at least provide some information on the direct impact on the victim survivor.[177]

It was also noted that matters in the lower courts can resolve quickly and without any notice, so it is unusual for a VIS not to be provided in these proceedings due to time restraints.[178] The practice of failing to request an adjournment for a VIS to be obtained was described as both disappointing[179] and 'unacceptable'.[180]

Where there is no VIS, judicial officers will need to make assumptions with respect to the harm caused to the victim survivors, but that there can be limitations to this.[181] Participants reflected that, while an inference can be drawn on a very superficial level as to the impact of the offending, 'of course, direct evidence from the victim survivor on the actual impact is going to be so much more relevant to a sentencing outcome',[182] and the absence of anything specific to the victim survivor limits understanding of the true extent of the harm, as well as the influence this will have on the sentence outcome.[183]

Another participant noted that while it is possible to infer the harm caused, they did not believe it was as effective as 'hearing it from someone's own mouth', with a marked difference in sentencing outcomes.[184]

Others reflected that judicial officers need to be careful not to speculate too much where a VIS is not provided, as this could involve the exercise of sentencing discretion 'for something that is not there'.[185] It was noted that a person's experience of harm will likely depend upon their resilience and whether they have access to treatment.[186]

In some cases – particularly child sexual abuse – while there is knowledge of the impact at the time, 'any sort of sexual assault or rape can have long-lasting impacts. You just don't know.'[187]

It was suggested that one way to ensure there is a VIS is for 'the victim impact statement [to] be prepared at the same time [the victim is] preparing a statement to the police. And [the VIS] can be updated if necessary.'[188]

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173 SME Interviews 11, 14.
174 SME Interview 16.
175 SME Interview 16.
176 SME Interview 14.
177 SME Interview 14. This process is similar to what the provision of a 'Victim report' in the Northern Territory pursuant to s 106B(2) *Sentencing Act 1995* (NT).
178 SME Interviews 6, 12.
179 Ibid.
180 SME Interview 5. See also SME Interviews 4, 9.
181 SME Interview 6, 19, 20.
182 SME Interview 5
183 SME Interview 6, 10, 20.
184 SME Interview 17.
185 SME Interview 12.
186 SME Interview 14.
187 Ibid.
188 SME Interview 26.

Consultation events

Participants reflected that there is a therapeutic benefit associated with reading a VIS aloud. It was also noted that this serves an important function for the person being sentenced, the court and the community to directly hear from victim survivors about the impact of the offending on them,[189] such as the ongoing and often long-term or lifelong effects and multiple impacts (such as mental health/family/social relationships, etc).[190]

We were told a VIS is 'a marvellous thing', as it is important for victims to have a voice, 'but we need to take steps to prevent it being weaponised'.[191] We were told there were some appeals that succeeded because of the contents of a VIS and an accused should have had the opportunity to cross-examine the victim on it.[192] We were told the process of providing a VIS 'is valuable but we want to take away the opportunity to exploit that'.[193] One suggestions was to legislate that the contents of a VIS are 'off limits' for cross-examination.[194]

One participant suggested that it could be beneficial for judges to sign an 'acknowledgment of harm' document, which is then provided to the victim as further recognition.[195] However, participants recognised the importance of making sure this would not become tokenistic and would be done in a meaningful way during sentencing, as opposed to becoming something judicial officers feel they must merely tick off.[196]

Additional challenges were raised within the sentencing context when referring to how a penalty should be imposed where a victim survivor does not produce a VIS, or where they were compassionate or resilient victims who said no long-term harm was done, compared with a victim who experienced greater harm.[197] For example, we were told 'some victims may cope really well, while others don't, so the courts don't attach as much weight to a specific person's response, but they do take into account the harm generally'.[198]

Some other participants described the VIS regime as a false promise (a 'fallacy'), because the VIS was not considered in deciding the penalty.[199] Within this context, participants who believed the VIS to have had no value in impacting the penalty felt there was no point in producing one.[200]

Aboriginal and Torres Strait Islander Advisory Panel members' views

Members of the Aboriginal and Torres Strait Islander Advisory Panel considered that VIS' are under-utilised and may cause more trauma, especially if there is dispute between the parties regarding what is admissible. Although the defence is entitled to challenge the inclusion of inadmissible material, it was acknowledged that this can have significant impacts on a victim survivor.

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189 Cairns Consultation Event, 21 March 2024.
190 Online Consultation Event, 3 April 2024, Table 2.
191 Online Consultation Event,16 April 2024, Table 1.
192 Ibid.
193 Ibid.
194 Ibid.
195 Brisbane Consultation Event, 11 March 2024.
196 Ibid.
197 Ibid.
198 Online Consultation Event, 16 April 2024, Table 2.
199 Brisbane Consultation Event, 11 March 2024.
200 Ibid; Cairns Consultation Event, 21 March 2024.

14.5.2 Procedural rules surrounding providing a victim impact statement

Submissions from victim survivor support and advocacy bodies

QSAN considered that the therapeutic benefit of having a 'voice' and providing a VIS is lost because a VIS 'must be meticulous in their framing to comply with these rules and regulations'', which 'reinforces the system's offender centric approach.'[201]

QSAN also noted it is not therapeutic when a VIS is prepared and not used:

> The victim-survivor can spend many hours on their statement and … are told '*This is your chance to have your say*' often by other participants in the system rather than sexual violence services, and then when a not guilty verdict is returned the process of writing the victim impact statement has zero therapeutic value. This is not trauma informed and can have a profound impact on the victim-survivor whose reality is never heard in court. It is not uncommon for victim-survivors to be very angry about this.
>
> We do not want to extend or draw out the sentencing process, but the system needs to understand the victim- survivor is buoyed by doing the statement and it gives them hope for a just outcome.
>
> There needs to be thought about how the process can be changed to better accommodate victim-survivor needs and to be more trauma informed.[202]

In its submission, the OIVC referred to the key issues identified by the Victorian Victims of Crime Commissioner in its systemic inquiry into victims' participation in the criminal justice system, including:

- victims wanting (or in practical terms needing) to prepare a VIS 'early', leaving them vulnerable to their VIS being used by the defence
- insufficient time to prepare a VIS after a plea or finding of guilt, particularly in the Magistrates' Court
- the potential for victims to be cross-examined on the contents of their VIS
- VISs being 'edited'
- lack of assistance preparing a VIS.[203]

The OIVC suggested the Council consider:

- ACT and Canadian legislation, 'which enables an adjournment to be granted for a reasonable time to allow a victim to prepare a Victim Impact Statement';[204]
- legislative reform to follow the Victorian approach to VIS, allowing the court to 'receive the whole of a VIS, even where it contains inadmissible material',[205] to promote the communicative or expressive function of a VIS; alternatively, ways were suggested to amend a VIS in consultation with a victim survivor; [206]

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201 Submission 24 (QSAN) 12.
202 Ibid.
203 Submission 26 (Office of the Interim Victims' Commissioner) 2 citing Victims of Crime Commissioner (Victoria), *Silenced and Sidelined: Systemic Inquiry into Victim Participation in the Justice System* (November 2023) 432 (citations omitted).
204 Ibid 2 citing *Crimes (Sentencing) Act 2005* (ACT) s 51A..
205 Ibid 3 citing *Sentencing Act 1991* (Vic) s 8L(5)–(6).
206 Ibid.

- increasing victim survivor options to provide a VIS, including pre-recorded statements to be heard in court, as adopted in Canada[207] and South Australia;[208]
- recommendations by the Victorian Victims of Crime Commissioner to 'quarantine' a VIS until after a finding of guilt, to protect victim survivors from having their statements used in cross-examination.[209]

In its submission to the Queensland Government on the Making Queensland Safer Bill 2024, the Victims' Commissioner recommended:

- the provision of adequate information and accessible and timely support for victim survivors;
- legislative amendments to enable the prosecution (on request) to seek an adjournment for a victim survivor to prepare a VIS (similar to the ACT and Canada, and as recommended by the Victorian Victims of Crime Commissioner);
- that a VIS be received by the sentencing court without redaction (similar to Victoria) or for any amendment to be done in collaboration with the victim survivor to promote understanding of why the content is being redacted;
- the consideration of alternative mechanisms to provide a VIS, including through a pre-recorded VIS;
- there be greater recognition of harm caused to a victim survivor in the judicial officer's sentencing remarks, in consultation with the wishes of the victim survivor on whether they want their VIS read aloud in court; and
- the use of Community Impact Statements be considered (similar to South Australia).[210]

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207 Ibid citing 'Victims' Rights in Canada' *Government of Canada* (Web page) < https://justice.gc.ca/eng/cj-jp/victims-victimes/rights-droits/victim.html>.

208 Ibid citing *Sentencing Act 2017* (SA) s 14(3)(a). YAC also supported alternatives to a written VIS such as 'allowing young victims to express their harm [to] the Court through recorded statements': Submission 30 (Youth Advocacy Centre) 8.

209 Ibid 2 noting the position in Queensland as decided in *R v Agnew* [2021] QCA 190.

210 Victims' Commissioner, 'Submission to the Queensland Government on the Making Queensland Safer Bill 2024' (Submission 96) 10–11. <https://documents.parliament.qld.gov.au/com/JICSC-CD82/IMQSB2024-B002/submissions/00000096.pdf>.

Victim survivor views

Consultation with victim survivors

One victim survivor told us they were not informed about the importance of obtaining a medical report:

> At that stage, we were in the middle of getting a diagnosis for [victim survivor] that she is autistic. So, she [the prosecutor] basically said to me, 'if we don't have that report by the time it goes to sentencing, it won't be important', so we just felt like, okay, we didn't have it. We got it four days later. (Victim Survivor Interview 1 - Parent)

The mother of the victim survivor thought it would have helped the court to have a document that spoke about how the offending had affected their home environment.[211]

Consultation with victim survivor support advocates

During interviews, a support advocate reflected that the process of writing a VIS for one victim survivor was 'very triggering and that in and of itself was a difficult process for her'. [212]

It was acknowledged that a victim survivor may be restricted in what they can include in a VIS when their offender is convicted only of particular offences:

> Victim impact statements don't always reflect someone's full experience because … if there's a long history of violence and perpetration, what they're found guilty on might be very limited. And so … [the victim survivor] will get directions about what they can and can't refer to in that, so it's not really reflective of their whole experience of violence …[213]

Another advocate reflected that where charges change, a victim survivor may consider their 'voice and their experiences [are] being silenced or [are being] taken away again by this person, because of how the system has played out'.[214]

Advocates also raised issues surrounding the timing of providing a VIS. [215] Some noted issues surrounding the early provision of a VIS, noting that a victim survivor 'may spend a lot of time, a lot of emotional investment in writing their VIS and if there is a not guilty finding … [it has] no place now. It's completely invalidated, and it's invalidated their experience.'[216]

Advocates noted that this is one example of the DPP wanting to be prepared in case the matter proceeds straight to sentence (particularly for circuit matters), but that it is 'not victim-focused, it's system-focused. It's what's going to best suit the system.'[217]

Some support advocates raised additional challenges for some victim survivors to be able to articulate the harm. For example, if a victim survivor is a child, there is no way to know the full impact; if the victim survivor has a limited understanding of the English language, or is illiterate, it may be difficult to communicate.[218]

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211 Victim Survivor Interview 1.
212 Victim Support Advocate Interview 1
213 Victim Support Advocate Interview 3.
214 Victim Support Advocate Interview 1
215 Ibid.
216 Victim Support Advocate Interview 3.
217 Ibid.
218 Victim Support Advocate Interview 1

When reflecting on how information about providing a VIS should be conveyed to victim survivors, an advocate reflected that this information needs to be victim-centric, trauma-informed, easy to understand and produced by people who support victims and understand the procedural requirements:

> I think there needs to be a variety of places and I think the assumption that everyone can access the internet and get everything off that is not correct. A lot of time people like to have something tangible that they can look at, that they can put down, that they can write on, that they can go back to. The stuff that comes out of government departments is not really written for the average person in the community.[219]

> I still think there's a need for it [information] to be available throughout the state, online, printed, and we all need to be saying the same thing. If you get information that comes out of a system, that information is likely to be useful for that system. It's not always focused, yes we can say trauma informed, we can say victim centric, but the justice system is offender centric. So you can say that, but the information may not end up like that. So sometimes it's better to have that information and we did it in conjunction with DPP and in conjunction with our own local legal firms, that the information comes from the community, from someone who's supporting victims in a way that they could understand.[220]

Other submissions

With respect to the provision of supporting material, the Royal Australian and New Zealand College of Psychiatrists ('RANZCP') acknowledged that it 'may be beneficial for a court to have access to … psychiatric reports for victims to supplement and support information contained in victim impact statements'.[221] The RANZCP further recommended that reports should only be provided by an independent medical expert and that '[t]reating doctors can provide letters of fact rather than opinion.' [222]

Submissions from legal stakeholders

LAQ commented on the late provision of a VIS, as it is 'often [received] the day before or morning of sentence' and that this 'can result in a delay in the proceeding'.[223] It recommended that early disclosure would benefit all parties:

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.[224]

SME Interviews

Concerns were raised surrounding the admissible content of a VIS, and whether it should be redacted prior to sentence and with respect to the timing of its disclosure. For example, some legal practitioners recognised that the prosecutor does not want to upset the victim survivor by redacting their statement, and because defence does not want to appear to be 'putting the victim through it', inappropriate material is often placed before the court, which is challenging.[225]

Participants reflected that the provision and disclosure of a VIS is often 'last minute' In nature.[226] Where this occurs when the offender has been remanded in custody, it was indicated that magistrates will often

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219 Victim Support Advocate Interview 3.
220 Ibid.
221 Submission 33 (Royal Australian and New Zealand College of Psychiatrists) 1.
222 Ibid 1.
223 Submission 23 (Legal Aid Queensland).
224 Ibid 31.
225 SME Interview 7
226 Ibid.

read the VIS aloud, or will summarise parts of it, to ensure that the offender has the opportunity to hear what is being relied upon.[227] It was also noted that this can serve an important purpose in communicating the harm to the offender.[228]

One participant expressed their view that a VIS should not be provided until after conviction (either after trial or by plea of guilty) to ensure it captures the impact of talking about the offending and giving evidence, which can be traumatic.[229]

Participants expressed strong views that supporting material that speaks to the impact of the offending on the victim survivor is particularly beneficial within the context of the provision of a VIS. One participant reflected that where a VIS outlines some psychological impact or a diagnosis, it could be a far more 'powerful, aggravating feature if [the court] was armed with some sort of evidence to substantiate this'.[230]

For example, one participant noted that providing the sentencing court with psychological reports means the sentencing judge will have really good-quality information to refer to and draw upon in determining the penalty to be imposed.[231] However, it was acknowledged that this is an expense that not every victim survivor can afford.[232] Another participant agreed that additional supporting material that speaks to the consequences of the offending on the victim survivor would be beneficial, but suggested no one is going to fund the provision of a psychologist report for every victim survivor.[233] This issue is exacerbated where a VIS is not provided, and the judicial officer can only say, 'I infer harm, and that's about it.'[234]

A participant reflected upon complaints that there an imbalance between consideration of the perpetrator's circumstances and the impact of the offending on the victim survivor. The participant noted that without additional source information to rely upon when considering the impact on the victim survivor, it is challenging for a judicial officer to do much more.[235]

One participant reflected that some judicial officers have refused to permit the prosecution service to read the VIS aloud unless there is some real purpose in doing so.[236] Contrary to this view, another participant reflected that they found it to be particularly compelling when a victim survivor attends court to read their VIS, and sought to encourage this.[237] It was noted that it is the second best option to have someone else read out the VIS, because there is a 'big difference between words on a page' and speaking it aloud in court.[238]

It was noted that reading the VIS aloud can also have a profound impact on the perpetrator.

Consultation events

Participants reflected that while victim survivors want empowerment form providing a VIS to be used at sentence, procedural requirements limit its effectiveness and the regime requires improvement.[239]

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227 SME Interview 6.
228 Ibid.
229 SME Interview 21.
230 SME Interview 17.
231 SME Interview 14.
232 Ibid.
233 SME Interview 3.
234 Ibid.
235 Ibid.
236 SME Interview 14.
237 SME Interview 17.
238 Ibid.
239 Brisbane Consultation Event, 11 March 2024.

Participants considered 'only about 10% of the sentence' involves the consideration of the harm caused to a victim as outlined in the VIS, while the rest of the sentence focuses on the offender and their life.[240]

Participants indicated that they had been told victim survivors wanted the ODPP to not only conference victims about what could be included in a VIS, but also to provide this information in writing, as any information told to a victim orally is often not retained. [241] One participant considered it 'unjust' for this information not to be provided in another form.[242]

We were told that content editing of VIS can be retraumatising for the victim survivor; by prescribing what a victim survivor can or cannot say in their VIS, the process loses its therapeutic value as it takes away the victim survivor's agency.[243] Participants subsequently expressed a strong view that information should not be redacted from a VIS. Rather, it was suggested that judicial officers should receive the VIS in full and disregard any information they may consider to be inadmissible.[244] In making this suggestion, some participants reflected that it is disrespectful to the judiciary to assume they cannot disregard inflammatory comments within a VIS, and that we should place greater trust in the judiciary to not take this into account, rather than redacting or controlling the information in the VIS.[245]

Participants also raised concerns that a VIS can only reflect the harm suffered at a particular point in time. As a consequence, it is challenging to truly understand the broad-reaching impacts of the offending to include in their VIS at the time one is written.[246] These challenges are enhanced for young victim survivors, who may not understand the impacts of the harm due to their age.[247]

14.5.3 Support writing a victim impact statement

Submissions from victim survivor and support agencies

The OIVC told us that there is currently 'limited support available for victim-survivors to assist them in preparing a Victim Impact Statement', particularly for victim survivors whose matters resolve in the lower courts, or who have not previously been supported by a support service.[248]

One submission highlighted a need for a 'separate support service such as a social worker or of a similar service to support the victim with making such statements', as the process of preparing a VIS is 'overwhelming and stressful'. It was noted that this is particularly important for children.[249]

Consultation with victim survivor support and advocacy bodies

Advocates reflected that they have supported victim survivors through the VIS process, but they are not funded to do this.[250] Some advocates also noted that counsellors are not encouraged to support a victim survivor early on in proceedings, as their records may be subpoenaed.[251]

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240 Cairns Consultation Event, 21 March 2024.
241 Brisbane Consultation Event, 11 March 2024.
242 Ibid.
243 Ibid.
244 Ibid.
245 Ibid.
246 Ibid.
247 Ibid.
248 Submission 26 (Office of the Interim Victims' Commissioner) 3–4.
249 Submission 27 (Name withheld) 3.
250 Victim Support Advocate Interview 3.
251 Ibid.

SME Interviews

While victim survivors are provided with a high-level overview of what types of information can and cannot be included in a VIS from the ODPP VLO, it was noted that this is challenging when they are told not to deal with the facts, and only to focus on the effect and the impact.[252]

It was recognised there would be benefit in the DPP having access to a cultural liaison officer who could provide advice to bridge the gap with Aboriginal and Torres Strait Islander victim survivors, or victim survivors from CALD backgrounds.[253]

Consultation events

Many participants were unclear about which agency (if any) is funded to support a victim survivor through this process, with many assuming this responsibility fell to the ODPP. [254]

It was noted that producing (and potentially reading) a VIS can be a retraumatising experience for victim survivors, as they must recount the harm they experienced.[255] For this reason, participants reflected that better assistance and support are required for victim survivors when writing their VIS to ensure they have a better understanding of what can and cannot be included.[256]

It was further recognised that victim support services are limited in the support they can currently provide because of funding constraints, which means victim survivors may not receive adequate support when writing their VIS; this exacerbates the challenge of writing one.[257]

14.5.4 Use of trauma-informed language during the sentence hearing

Views of victim survivors

Consultation with victim survivors

One victim survivor told us that her satisfaction with the criminal justice process 'unravelled' because the sentencing judge said to the defendant:

> It is not entirely clear what your motivation was, but you must have felt some fondness towards the complainant … and in light of that, you gave in to temptation.[258]

She reflected that the judge's words had

> created an after-effect of feeling less safe in the world, because if a judge says 'Oh, you must just have been overcome with temptation … you can walk out and you can go back to your life', then when I'm walking down the street and there's a man, or I'm in a situation where I feel uncomfortable, the thought is 'what if he's just overcome by temptation?', and I hope later at trial he could be found guilty and the judge is going to say, 'Oh well, he was just too tempted.' Like, that's not setting up a world [I] want to live in.[259]

252 SME Interview 15.
253 SME Interview 21.
254 Brisbane Consultation Event, 11 March 2024.
255 Ibid.
256 Ibid.
257 Ibid.
258 Submission 35 (C Murphy) 1. The Council has reviewed the transcript of the remarks from this hearing to confirm its veracity.
259 Victim Survivor Interview 7.

Victim survivor advocacy groups

Victim support advocates also suggested that there should be enhanced training for judicial officers surrounding the importance of using trauma-informed language within the courtroom:

> I think I would like judges to have some education around gendered violence and the nature of sexual violence. I think it would change their language. I think it would change their sentencing. (Victim Support Advocate Interview 1)

> I would change [how victim survivors are treated in that space] 100 per cent and the language. Nothing else, just the language … (Victim Support Advocate Interview 1)

SME Interviews

One participant reflected that there is a general minimisation of the offence itself during submissions, including through the absence of a discussion on the aggravating circumstances. It was further observed that this could be because it is genuinely challenging to truly understand the impact of this offence unless a person has experienced it.[260] Within this context, another participant reflected on the challenges of truly appreciating and understanding the harm done to victim survivors, and female victim survivors in particular,[261] and suggested that there needs to be better education for all legal practitioners about the true impacts of sexual violence.[262]

In these circumstances, some participants reflected that it is the responsibility of the ODPP to explain to victim survivors prior to sentence that 'whilst this is a reflection of an offence that's been committed against [them], what needs to be spoken about today is the offender, and whether the sentence on this offender is right with the circumstances of the offence itself'.[263] It was noted that this could help victims understand the sentence hearing process before they experience it to alleviate any concerns.[264]

Consultation events

It was suggested that judicial officers should address victim survivors and acknowledge the harm suffered by them when delivering their sentencing remarks.[265] Participants reflected on how best to achieve this, with some participants suggesting this could be facilitated through judicial training.[266] However, others thought it should involve a procedural change, rather than merely occurring through optional judicial training.[267] It was also noted that it can be challenging to change sentencing practices where judicial officers are highly experienced and have been delivering remarks in a particular way for years.[268] There was a suggestion that updating the sentencing purposes to include community harm as a sentencing consideration could require judicial officers to do this, and to take harm to a victim survivor into account.[269]

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260 SME Interviews 9, 12, 19.
261 SME Interview 12.
262 SME Interviews 9, 12.
263 SME Interviews 7, 19.
264 SME Interview 7.
265 Cairns Consultation Event, 21 March 2024; Brisbane Consultation Event, 11 March 2024.
266 Ibid.
267 Ibid.
268 Brisbane Consultation Event, 11 March 2024.
269 Ibid.

One participant noted a positive experience where the magistrate had effectively 'humanised' the court process by speaking in a civil but authoritative voice and explaining the sentence outcome - which was referred to as 'unusual'.[270]

Aboriginal and Torres Strait Islander Advisory Panel members' views

The Panel outlined that the use of simple language and avoiding legal jargon is an important aspect of improving the legal process for Aboriginal and Torres Strait Islander victim survivors.

14.6 Sentencing remarks analysis on acknowledgement of victims and the impact of the offence at sentence

The Council wanted to understand how victim survivors were being addressed in the courtroom and whether VIS are being relied upon by judicial officers within the sentencing context. To do this, we used findings from our:

- thematic analysis of sentencing remarks for offences of rape and sexual assault; and
- content analysis of a sample of sentencing submissions and remarks for offences of rape and sexual assault in the District Court.

14.6.1 Thematic sentencing remarks data analysis

Prevalence of VIS at sentence

The Council reviewed the following sentencing remark data (which differed for each offence):

- **Rape:** a selection of 75 cases randomly selected from all rape (MSO) cases sentenced between 2020–21 and 2022–23 (n=75);[271]
- **sexual assault:** A selection of 75 cases randomly selected from all sexual assault (MSO) cases sentenced between 2020–21 and 2022–23 across the Magistrates and District Courts (n=75).[272]

We found VIS were not always provided in sexual violence matters: across the sample of rape and sexual assault offences analysed by the Council,[273] VIS were only expressly mentioned as having been provided to the sentencing court in less than half of all cases (44 per cent).[274] Of these, victim survivors of rape (MSO) were more likely to provide a VIS (60.0 per cent)[275] compared with victim survivors of sexual assault (28.0 per cent).[276]

However, when a VIS was provided in a sexual assault matter, it was more likely to have been sentenced in the higher courts than the lower courts. Our analysis showed that almost three-quarters of the lower

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270 Ibid.
271 For the methodology on the sample used, see Appendix 5.
272 For the methodology on the sample used, see Appendix 5.
273 Referring to the Council's thematic analysis of a sample of sentencing remarks for sexual assault and rape, discussed in Appendix 5.
274 n=66/150.
275 n=45/75.
276 n=21/75.

court sentencing remarks did not mention a VIS (72.1 per cent), compared with the District Court, where there was no mention of an impact statement being provided in only 13.3 per cent of the cases (n=10).[277]

There was no mention of whether a VIS was provided in 13 per cent of rape (MSO) cases and 54.7 per cent of sexual assault cases. It is therefore unknown whether a VIS was provided and not specifically referred to in those remarks.[278]

Acknowledging the victim survivor's presence by the sentencing court

The Council's analysis found that judicial officers do not usually address victim survivors directly during sentence proceedings. However, where the VIS was read aloud during the proceedings (either by the victim themselves or on their behalf by the prosecutor or a family member), the sentencing judge usually acknowledged both their presence and courage within their remarks:

> The impact of what you did to her has been profound. Three years later her suffering is still raw. She has bravely spoken in Court about the terror that she felt at the time and the terror she has suffered since. She is determined to overcome the trauma you inflicted upon her, but there can be no question that it will be a hard-fought battle. (Rape, regional/remote, imprisonment > 5 years, #4)

> There is a victim impact statement from the complainant which she read aloud in court in your presence. That would have taken a great deal of courage. (Rape, regional/remote, imprisonment > 5 years, #8)

> My view in that regard is fortified by the complainant's victim impact statement, which she read out in open court. It is clear that the complainant has suffered considerably as a consequence of your sexual abuse upon her. (Rape, regional/remote, imprisonment < 5 years, #4)

In circumstances where the victim survivor did not read their VIS aloud, the judicial officer would often summarise the contents of the VIS and the harm caused to them:

> [The victim survivor] talks of the fact that you stole his innocence before he even had a chance to even understand what sex was and how wrong the things were that you did to him. You abused your position as his employer and his mentor. You manipulated him, with your mental control and threats about harming him and his family, to groom him into having sex with you. He suffers from mental health issues now. He finds it hard to see the positives and he feels that he has missed out on so many opportunities because of his self-doubt and low self-esteem, that he contributes to you. (Rape, major city, imprisonment > 5 years, #8)

> I note that the complainant is present in Court here today and it is obvious from his victim impact statement that your offending upon him has had long-standing and grave consequences for him. Indeed, he falls into that category of complainant who has been sexually abused by his father in circumstances where he was entitled to look up to you as someone who protected him, not someone who sexually abused him. (Rape, regional/remote, imprisonment > 5 years, #10)

However, the Council found that, even when the victim survivor was present and had their impact statement read aloud, there were occasions where the victim survivor was not directly addressed by the sentencing judge when delivering their remarks.[279]

Acknowledging the harm to the victim survivor by the sentencing court

Where a VIS was provided and referred to within the sentencing remarks, the degree of acknowledgement varied. Where VIS were referred to, judicial officers often summarised the impact of the offending on the victim survivor. We found the length and depth of these summaries varied greatly.

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277 Table A33: Victim impact statements for sexual assault.
278 Table A32: Victim impact statements for rape; Table A33: Victim impact statements for sexual assault.
279 Queensland Sentencing Advisory Council analysis of a sample of sentencing remarks.

There were examples of sexual assault offences where the judicial officer merely referred to receiving a VIS and made no further comment about the harm experienced:

> And I have read the victim impact statement and while I note, of course what [the prosecutor] has said about it, that you are not responsible for everything that the complainant has suffered, once she learnt about what [you] had done [rubbing his bare penis on her bare genitals while she was unconscious], it is not surprising that she was upset about it. (Sexual assault, major city, higher courts, custodial, #13)

> I have read the victim impact statement which is exhibit 3. (Sexual assault, major city, higher courts, non-custodial, #1)

There were examples where judicial officers discussed the harm caused to the victim survivor at length, sometimes even using the victim survivors' own words drawn from their VIS.[280] However, incorporating a more fulsome acknowledgement of the victim-survivor's harm within the sentencing remarks was not the usual practice.

In one sexual assault case, the judge declined to read out the VIS, 'given that we are in open court', but stated that it

> is made clear from the victim impact statement your offending upon her has both impact her significantly, not only psychologically and emotionally, but it also has had some devastating consequences for her in terms of her career options and her employment. (Sexual assault, regional/remote, higher courts, custodial, #5)

Generally, judicial officers summarised the impacts to the victim survivor in their own words. This was either in short, general remarks:

> She sets out in her victim impact statement, which is exhibit 9, the consequences of your offending upon her. These include self-harming, suffering significant anxiety, suffering from nightmares, and having difficulties trusting other people. (Rape, major city, imprisonment > 5 years, #2)

> The complainant has provided two victim impact statements. She has suffered immeasurably from your callous, cowardly, and degrading acts. She was sickened and terrified during the ordeal. Sadly, she continues to suffer devastating emotional adverse impact. (Rape, major city, imprisonment < 5 years, #11)

> The victim impact statement indicates that the impacts to the victim were substantial and ongoing. She indicates eloquently in the statement the degree of her humiliation and distress at these events. The impacts to the victim are quite serious. (Rape, major city, imprisonment < 5 years, #2)

> The offending has had an impact on the complainant. I note the contents of exhibit 6. None of it surprises me. It's caused her considerable distress. It's caused her confusion and difficulties with other people. As she says, it's affected her in so many ways, mentally, emotionally and psychologically she fears - feels for the breach of trust associated with the offending. (Rape, regional/remote, imprisonment < 5 years, #6)

Or it was in greater depth and detail about the harm caused:

> I have been provided with a victim impact statement from the complainant, which was read out in Court by the Prosecutor, which describes the devastating effect these offences have had upon her, and I take that into account. She says that you stole her identity and robbed her of her life. Her schoolwork suffered, and she has no trust in people. Over the years, she has lost many relationships because of the damage caused to her by this offending. (Rape, major city, imprisonment < 5 years, #18)

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

[280] For example, sexual assault remarks (Sexual assault, major city, lower courts, custodial, #3) and (Sexual assault, major city, lower courts, custodial, #7) and rape remarks (Rape, major city, imprisonment < 5 years, #21) and (Rape, major city, imprisonment > 5 years, #3).

> has been, it would seem to me, a significant psychological impact upon the complainant, as a result of your offending. (Sexual assault, regional/remote, higher courts, non-custodial, #2)

> The offending has had a profound effect upon the complainant. She wrote a victim impact statement, which is Exhibit 3. She read out her statement here in court and described the terrible impact that your conduct has had upon her life. She has endured pain. She has been traumatised mentally. She feels anxious and fearful. Her symptoms of endometriosis have been exacerbated by constant distress. She feels unsafe and insecure. She has become withdrawn, moody and aggressive. Therefore, your rape of the complainant has had a devastating impact upon her. (Rape, major city, imprisonment < 5 years, #1)

> Your offending on her has had obvious consequences. I have before me a victim impact statement which speaks of the sorts of impacts which offending of this kind can have on vulnerable young women. It speaks of the emotional impact upon the complainant and upon her family. It speaks of the effect it has had on how she sees herself, as well as others. It details self-loathing that the offending has triggered and the self-harming that she has taken to. It is to her credit that she had the courage to report the offences and to go through the legal process to give evidence, notwithstanding the effects upon her, such effects being evident in her emotionally fragile state whilst she gave evidence, and again today as she read parts of her victim impact statement. (Rape, major city, imprisonment < 5 years, #6)

The physical pain caused by the offending was noted by judicial officers – particularly in rape matters where the victim survivor was a child.

> She felt pain. It hurt her stomach. You threatened her and she felt pain when defecating for some days afterwards … and that was excruciatingly painful in light of her young age at the time. (Rape, major city, imprisonment < 5 years, #16)

> I accept her evidence that it hurt when you penetrated her vagina with your finger. (Rape, regional/remote, imprisonment > 5 years, #13)

> As a result of your violence, the complainant suffered some areas of bruising to parts of her body but in particular to her vulval area. There was medical evidence during the trial as to the nature of that injury. It caused the complainant considerable pain at the time, and she continues to suffer the effects of the offences as evidenced by her victim impact statement and the medical certificate tendered by the Prosecution. Those effects include psychiatric ones. (Rape, major city, imprisonment > 5 years, #17)

The long-term psychological and social implications of the offending were treated seriously by judicial officers and often discussed in detail in the remarks:

> The offending had caused her significant distress. She has noted to have lost confidence in herself, developed negative thoughts. It has impacted her education. The loss of confidence in particular has impacted her capacity to study and take on employment in the field of acting, which was an area of interest for her. She suffered from episodes of depression and anxiety and then experienced difficulties in her relationships with other males. Additionally, other situations triggered the stress, occasioning flashbacks. She observed, understandably, that she felt disgusting and somewhat devalued. She felt self-loathing. (Rape, major city, imprisonment < 5 years, #15)

> Your conduct has gone on to have a devastating impact upon the complainant. The child herself has gone from feeling carefree and a happy young child to being someone who is withdrawn from her friends. She has become emotional, suffered from flashbacks and emotional outbursts. She has become sad and angry at what you did to her. She has been fearful of the same thing happening again. She has had that sense of security destroyed in that she is worried that other kids at school have an inkling about what has happened to her. She has lost her friendship with your daughter, who she had considered to be her best friend. (Sexual assault, regional/remote, higher courts, custodial, #8)

Where a VIS was not provided, judicial officers stated this, and often acknowledged the harm caused by sexual violence offences and the potential for significant long-term consequences:

> Though there's no victim impact statement before me, it would be something that would distress any woman and it would be something that would have, I would expect, a significant effect on any person. (Sexual assault, major city, lower courts, non-custodial, #4)

> Whilst no victim impact statement has been provided, the reality of sexual assault is that it can have unique and longstanding adverse consequences for victims. His distress at what you did immediately after your offending against him is apparent from the statement of facts. (Sexual assault, major city, higher courts, custodial, #8)

> Your younger sister has not provided a victim impact statement, but I have no doubt, and I know that you would accept, that she also suffered significantly as a result of your offending. (Rape, major city, imprisonment < 5 years, #3)

> There is no victim impact statement, but I accept that a rape of this sort [penile-vaginal rape and penile-anal rape] would have had a significant emotional effect upon her. (Rape, regional/remote, imprisonment > 5 years, #1)

> Unfortunately, there is no victim impact material provided, but one can only begin to imagine the feeling of shame and disgust that the complainant must have felt. (Rape, regional/remote, imprisonment > 5 years, #2)

In one case where no VIS was provided, the judge explained why victim survivors of sexual violence may not wish to make an impact statement:

> The complainant did not wish to provide a victim impact statement. That is not uncommon in cases of this kind. I have no doubt it would have been a terrifying event for her. She was clearly distressed immediately after the event. She has provided instructions that she wishes to extend the domestic violence protection order for as long as possible and does not wish to vary any of the conditions in it. I have no doubt that the complainant suffered significant emotional harm during the incident. (Rape, regional/remote, imprisonment > 5 years, #9)

In some instances, the judicial officer noted that they are required under section 179K(5) of the PSA to not infer that the lack of a VIS indicates there was no harm caused to the victim survivor:

> Although I have been provided with no information about the mental or emotional harm done to the victim, I must not assume that there has been no impact, according to section 179K(5) of the Act. (Rape, regional/remote, imprisonment < 5 years, #8)

We also found examples where the judicial officer spoke to the VIS in a way that may have been distressing to a victim survivor. In one case involving a father being found guilty by a jury of 11 counts of sexual assault, 8 counts of rape and one count of doing an indecent act, all perpetrated against his daughter (aged 15–17 years), the judge made the following remarks about the VIS:

> I have read the lengthy victim impact statement of the complainant. Some aspect of the impacts referred to in it are the product of other aspects of your parenting style and the consequences of that, rather than this sexual offending. There is imprecision in many respects in identifying the consequences of the charged conduct and the consequences of other conduct. Nevertheless, it is difficult to think that the conduct in respect of which have been convicted, did not play a material, and indeed significant role in relation to many of the impacts described by the complainant. In other words, while it would be speculation to attempt to determine the extent to which the complainant would have suffered impacts only from the charged conduct, it does seem reasonable to conclude that the conduct played a not insignificant role in many of the impacts described by her. Ongoing emotional and mental consequences are almost in inevitable result of offending of the nature of which you have been convicted. (Rape, major city, imprisonment > 5 years, #4)

14.6.2 Content analysis of sentencing submissions and sentencing remarks

The Council reviewed the transcripts of sentencing submissions and remarks for offences of rape involving either digital or oral rape (see **Chapter 4** for the methodology). Part of that work involved analysing how VIS were relied on at sentence and identifying any issues with practice. The Council sought to better understand the submissions and any supporting material being put forward by the prosecution regarding the impact of the offending on victim survivors, and how these are being received by the court.

Alignment between submissions on harm and acknowledgment in sentencing remarks

The Council's content analysis revealed that, in circumstances where submissions were made in relation to the harm caused to the victim survivor (either by reference to a written VIS or verbal submissions), the harm was often acknowledged directly by the sentencing judge in their remarks and considered in imposing an appropriate sentence.[281] The following table presents some direction examples.

Table 14.1: Examples of sentencing submissions and acknowledgement of harm in sentencing remarks

Prosecution submissions	Sentencing remarks
Your Honour would have noted that the offending has had a significant and traumatic effect on her. She describes herself as being torn apart. She has installed security cameras at her doors. She has advised that she cannot sell her house where it occurred because of her financial instability. She cannot accept gifts or other forms of affection due to the fact that the incident arose from a Valentine's Day present. She avoids crowds, social gatherings and dealings with strangers. She has lost her desire to be intimate with her life partner, has lost motivation and gained weight. She sees a psychologist fortnightly since this event and has described a strained relationship she now has with her children as a result of the depression she has had since this incident. (QDC1)	I have a victim impact statement from the complainant, which I have read. I note that the complainant's partner is in court today. I can only hope that the completion of this process may help the complainant to overcome the traumas caused by your offending. The effect upon the complainant is obviously one of the relevant considerations I must take into account. The victim impact statement of the complainant speaks of the profound and ongoing impacts of your offending. She speaks of the fear she has even being in her own home and a desire to sell her home. She speaks of having been broken and torn apart. She refers to her internal anger, her avoidance of crowds, social gatherings and dealings with strangers. The impact on the intimacy of the relationship with her partner and the now strained relationship with her own children. She speaks of feelings of disgust and being dirty and of her excessive weight gain. She continues two years hence to attend fortnightly upon a psychologist and describes the feeling of numbness and emptiness left as a result of your actions. (QDC1)
Your Honour, as noted in the victim impact statement, she was a tender age at the time, and it's taken a toll on her in terms of her future relationships and how she views the world. She speaks about that in the victim impact statement, as well as having an impact on the family unit, tearing the family apart effectively. (QDC15)	This is extremely serious and concerning criminal offending. You brazenly abused your position as guardian of your 11- or 12-year-old stepdaughter, someone who was entitled to feel safe and protected in your presence. These are heinous acts that have had a devastating consequence, unsurprisingly, on this young woman, who, despite telling someone at the time, was not believed. Unsurprisingly, too, this offending has torn apart the family. (QDC15)
The next is a victim impact statement of [victim survivor 1] taken on the 19th of April 2023. The next is the victim impact statement of [victim survivor 2] taken on 19th of April 2023. (QDC19)	It will impact them for a significant period. They've written about their experience which has been placed in the documents. How it has impacted their own selves. Their outlook on you and others. And how they may be able to contemplate moving

281 QDC1, QDC15, QDC18, QDC19, QDC20, QDC21.

Prosecution submissions	Sentencing remarks
	forward with the disruption of having to deal with the circumstances and how it's impacted their relationship. And their attention to their schoolwork Their childhood has been significantly affected dealing with the shame and the circumstances of being offended against by you. (QDC19)
Victim impact statements have been provided by each of the complainants....I tender each of those. Those three victim impact statements will together be Exhibit 5 ... The Crown submits those victim impact statements indicate that there has been a profound emotional and psychological impact on each of those complainants and it is a lasting impact on them. (QDC20)	Unsurprisingly, the victim impact statements from your two complainant daughters and your wife indicate that there has been a significant emotional and psychological effect upon the victims of your offending. That is a relevant factor I need to take into account, along with those other matters in section 9(6) of the Penalties and Sentences Act. (QDC20)
[The prosecutor read the VIS aloud]	The fact that your serious offending has had a dreadful impact on the children and their families and their mothers and wider families is clearly established by the victim impact statements that were attended and read out by [the prosecutor]. I can only hope that the children and their family get the support and counselling to go forward in life. I hope that the children can get the appropriate psychological treatment and counselling. They'll never forget what you did, but they can at least learn to live with it with guidance and support and they won't be held back in life. So I can only hope that that occurs. (QDC21)
With regard to the victim impact case, both the complainant and the complainant's mother have quite succinctly described how this offending has had the effect of this offending on them, both emotionally and financially. (QDC22)	There were two victim impact statements. I read those carefully. There is one from the complainant. It has had a dreadful effect on him. And there is a statement from the mother. It has had a financial and emotional effect on all of the family. It is terrible to imagine a father could do that to their son. (QDC22)

In one circumstance involving a victim survivor who suffered from an intellectual impairment, the offender pleaded guilty on the on the morning of trial (after the victim survivor had her evidence pre-recorded), and the sentence proceeded immediately.[282] In their remarks, the sentencing judge commented:

> I note the indications with regard to her having NDIS support and being to some extent self-sufficient, but there is obviously a very real need to recognise the trauma for her of her own circumstances, and then the escalation of the difficulties as a result of this offending by [the defendant].
>
> In her brief impact statement contained within the text that was sent, she makes some statements about her own experience. One would expect that there would be consequences for any person the subject of offending of this nature. But of course, in respect of her and her particular difficulties, it is perhaps not unsurprising that she feels insecure, that she does not like going to people's houses and that she feels sad and upset, that she says she suffers

[282] QDC6.

> from anxiety and panics, and she has difficulties entrusting men after the incident and that, as she rather simplistically describes it, as being something that ruined her life.
>
> I accept that there were obvious consequences for her as a result of the offending here and that it is a matter that I do need properly to take into consideration when I look at appropriate punishment in relation to this matter. (QDC18)

Where the victim survivor was present and read their statement aloud, the sentencing judge noted this in their remarks. For example:

- One sentencing judge thanked the victim survivor immediately after she finished reading her VIS aloud in court.[283] In his remarks, the sentencing judge noted that he had 'had regard to the victim impact statement, and of course had listened to it when Miss [XXXX] had read it out'. The judge further acknowledged that it was not surprising that she had been substantially traumatised, probably for the rest of her life, as a result of the offending. His Honour further reiterated that the victim survivor had been having counselling, but that 'she's still dealing with the memory of what you did to her, and the trauma'. He stated that he had 'taken that all into account' in sentencing the offender.
- Another sentencing judge acknowledged that they had heard the VIS read aloud.[284] In referring to the harm in their sentencing remarks, the sentencing judge also acknowledged that 'conduct of this kind has ramifications not only for the individual, it has ramifications for the family also in terms of the distress that they feel and the helplessness that they feel. You've breached their trust, they brought you into their home and you've imposed distress on all of them for your own selfish reasons.'

However, on one occasion where the victim survivor read their VIS aloud in court, there was no immediate recognition of the event, and limited reference was made in remarks.

In one instance, it was noted that the victim survivor had asked for her VIS to not be read aloud, which was respected by both the prosecutor and sentencing judge.[285] On another occasion, the prosecutor read the VIS aloud.[286]

In other cases where there was no VIS, the sentencing judge still referred to the impact of the offence.[287] For example:

> I have no impact statement before me, but clearly offending of this kind has the potential to have adverse impacts on victims, including later in their lives. (QDC14).
>
> In determining the appropriate penalty, I must give primacy to the impact to the victims and the need to protect the community. There have been no victim impact statements tended. However, it is well known to these courts that childhood sexual abuse can have profound and long-lasting effects upon the victims that can last well into adulthood throughout all of their lives and pervade almost every aspect of their lives. It is simply unknown what impact your offending will ultimately have on any of your victims. (QDC23)
>
> There is no victim impact material that has been provided to me, but I'm prepared to accept that following her complaint some years later in 2021 that there would have been significant harm caused to her. (QDC24)

In one circumstance, it was noted by the prosecutor that there 'is no victim impact statement. I understand one of the victims is in the back of the court. I haven't had an opportunity to speak with

283 QDC11.
284 QDC16.
285 QDC17.
286 QDC21.
287 QDC14, QDC23.

her.'[288] However, where the prosecutor made no submissions as to the impact of the sentence, the sentencing judge did not either.[289]

Inadmissible content

In circumstances where there was inadmissible material contained within the VIS, including allegations or diagnoses that could not be supported by evidence at sentence, the sentencing judge often stated that this portion was excluded from their consideration.

For example, in one case involving multiple rapes of a 7-year-old child,[290] which proceeded to sentence immediately after conviction at trial, there was a discussion about the content of a VIS provided by the child's mother:[291]

> Prosecution: The Crown in no way relies on the statement regarding the harassment or threats being attributed to the offender. It is just a consequence of her feelings as to why it remains in the victim impact statement.
>
> Sentencing judge: The victim impact statement is very scant on detail with respect to the child, and I suspect that you're not relying heavily on it.
>
> Prosecution: No, my only response is that seeing panic attacks or the child being anxious does not need to be supported by medical evidence.
>
> HH: No … And you concede [defence] clearly there would have been a traumatic effect of a child?
>
> Defence: Yes, that is a standard finding of any sentencing judge.

In other circumstances, the sentencing judge questioned the prosecutor on aspects of the VIS, such as statements with respect to her loss of wages subsequent to the offence.[292] In doing so, the sentencing judge noted that 'this questioning is not intended to take away in any respect, and I do need to place that on the record, from clearly the profound impact that this offending has had'.[293]

The sentencing judge also challenged part of a report tendered under the hand of the victim survivor's counsellor (a social worker), which stated that they had observed 'presentations fitting for PTSD diagnosis'. In recognising that this person could not make such a diagnosis, and without additional supporting material (a medical certificate) at the time of sentence, the sentencing judge noted that 'it would be inappropriate therefore on what the court has before it at the moment to be saying that it has resulted in PTSD diagnosis'. However, His Honour accepted that it was clear there had been 'significant impacts upon her', noting that

> it has affected the way she is at home. She is scared to be on her own. She will either talk to her mum on the phone to be able to go to sleep or she will make her friends come and stay with her. She left her job because she worked in a male-dominated environment. She felt uncomfortable physically being around men. She was anxious in social situations. She had nightmares. She was experiencing body images and then her own life. (QDC17)

Within the submissions, it was also noted that, despite an offer of compensation being made to the victim survivor as part of the sentencing submissions, the victim survivor was not supportive of it.[294]

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288 QDC23.
289 QDC6.
290 QDC5. The offender was found guilty of two counts of rape, and one count of indecent treatment of a child under 12 years.
291 QDC5.
292 QDC17.
293 QDC17.
294 QDC17.

Late disclosure of a VIS

VIS were sometimes disclosed the day before[295] or on the morning of sentence.[296] In these circumstances, the sentencing judge provided an opportunity for defence counsel to take the offender through the VIS.[297]

On another occasion where the offender was found guilty after trial and the sentence proceeded immediately after the verdict (with a 10-minute adjournment for the judge to read the comparable cases provided), the sentencing judge refused to accept or receive the VIS.[298] The prosecutor notified the court that the 'complainant has provided a victim impact statement. It's just come through to our office and a member of our office is bringing up copies right now.' However, the sentencing judge immediately announced that they were 'probably going to disregard it' as 'it's meant to have been provided to the other side before trial'. When the sentencing judge asked whether it was mandatory to adjourn the sentence to receive the VIS, the prosecutor noted that it was not. His Honour stated that they did not want to 'create all sorts of problems' in receiving it as 'it may contain further disclosures' and they would 'be much more comfortable if we just keep a lid on everything and deal with this as a straight sentence'.[299] The prosecution did not oppose this course or make any submissions to adjourn the sentence.

The Council recognises that this is an unusual case.

14.7 Relevant reforms underway in Queensland

The Women's Safety and Justice Taskforce ('WSJ Taskforce') has recently recommended that the Attorney-General progress amendments to the *Evidence Act 1977* to: [300]

- allow expert evidence to be admitted to the court about the nature and effect of sexual violence, as well as domestic and family violence (similar to the position taken in Victoria);[301] and
- adopt relevant provisions from the Uniform Evidence Law in criminal proceedings for sexual offences, as well as domestic and family violence offences.[302]

These amendments are intended to provide the court with specialist knowledge of the impact of sexual (and domestic and family violence) offences on victim survivors.

We note that these amendments will not be progressed until an expert panel on sexual offence proceedings is established to guide these processes.[303]

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295 QDC18.
296 QDC4.
297 QDC4.
298 QDC10.
299 QDC10.
300 Women's Safety and Justice Taskforce, *Hear Her Voice, Report Two: Women and Girls' Experiences Across the Criminal Justice System* (2022) 386 recs 79 , 349–55 ('*Hear Her Voice, Report Two*').
301 *Criminal Procedural Act 2009* (Vic) s 388.
302 The relevant sections supported for adoption are ss 76–80, 108C.
303 *Hear Her Voice, Report Two* (n 300) rec 80.

14.8 What we know from earlier research and reviews

14.8.1 Victim survivor recognition within the criminal sentencing process and challenges navigating it

Despite having limited contact with victim survivors, judicial officers can play an important role in their experience of the sentencing process by:

- establishing a safe sentencing court environment where victim survivors of sexual violence feel 'confident that their wellbeing and safety will be prioritised';[304]
- increasing victim survivor satisfaction with the sentencing process by acknowledging their presence and the impact of the harm caused to them (including with respect to their impact statement);[305]
- providing well-reasoned and transparent sentencing remarks; this enables victim survivors to better understand the sentence imposed and to see that their experience has been acknowledged, ensures that the community sees that the offender is being held accountable and that the offender understands their sentence, and provides future guidance to courts in making informed treatment and risk assessments;
- using clear and simple language – the sentence judge can assist a victim survivor, and the broader community, to have a better understanding of the reasons for the sentencing decision, which encourages them to accept the sentence as the appropriate outcome.[306]

In their review into the use of VIS in sexual offence sentences in Australia, Davies and Bartels found there to be 'clear anti-therapeutic outcomes arising from minimal judicial acknowledgement of victim harm'.[307] However, they identified challenges identifying which judicial practices affect therapeutic outcomes for victim survivors.[308]

They further identified examples of 'satisfactory victim acknowledgment', including:

- In *R v Ballantyne*,[309] Murrell CJ 'vindicated the victim, by specifically stating that "the Court acknowledges [her] suffering"' and 'encouraged the victim to see the resolution of the criminal proceedings as a turning point in her life';
- In *R v Scrivener*,[310] Judge McIntrye acknowledged the victim survivor and 'drew attention to the way that the victim's words had moved her personally';

304 Vicki Lowik et al, 'The Trauma-informed Court: Specialist Approaches to Managing Sexual Offence Proceedings – Part 1' (2024) 33(1) *Journal of Judicial Administration* 1.
305 Lacey Schaefer et al, *Sentencing Practices for Sexual Assault and Rape Offences* (Final Report, prepared for the Queensland Sentencing Advisory Council by Griffith University, 2024) 71–2.
306 As Philip Wilson and Rob Ellis commented, 'Limited understanding of sentencing, and confusion over terminology, undermines confidence and engagement with the criminal justice system and limits its perceived effectiveness': Philip Wilson and Rob Ellis, 'Communicating sentencing: Exploring new ways to explain adult sentences' (Ministry of Justice Analytical Series, 2013) 1.
307 Davies and Bartels (n 14) 177.
308 Ibid.
309 (Unreported, Supreme Court of the Australian Capital Territory, 1 April 2014).
310 (Unreported, District Court of South Australia, 6 June 2014).

- In *R v QMT*,[311] Wood J 'recognised the victim, by detailing the physical and emotional harm caused as a consequence of the offending', acknowledged the offending as 'wrong' and vindicated the victim survivor; and
- In *Director of Public Prosecutions v Barbat*,[312] Judge Sexton 'recognised the victim, by summarising the contents of her impact statement'.

It has been widely recognised that judicial acknowledgement of the presence of a victim survivor and the harm that they have suffered can have positive therapeutic consequences, including addressing the justice needs of victim survivors for validation and vindication within the sentencing process.[313] However, studies have demonstrated that the degree of acknowledgement varies, with corresponding impacts on how vindicated victim survivors of sexual violence feel.[314]

Victorian Law Reform Commission: Navigating support services

In its report on *Improving the Justice System Responses to Sexual Offence*s, the Victorian Law Reform Commission ('VLRC') found that there were multiple sources of information about the justice system published by different organisations, including surrounding sentencing and support services, which were limited and difficult to navigate for victim survivors.[315]

The VLRC subsequently recommended the establishment of a central website with practical information on sexual offences, and options for support, reporting and justice pathways, including:[316]

- connections with support services 24hours a day (online or via telephone);
- information on ‘how to identify sexual violence, support options, reporting options and justice options, and possible outcomes’; and
- be delivered in a way that is easy to use, and tailored to the needs of victim survivors, people with diverse needs and interested parties (friends and families etc).

Victorian Sentencing Advisory Council

The Victorian Sentencing Advisory Council ('VSAC') reviewed sentencing remarks for rape and sexual penetration with a child under 12 offences.[317] The way sentencing remarks are delivered and the language used by legal practitioners and judicial officers to describe offending and its impact on a victim survivor are important to their experience of being heard and having the perpetrator held accountable.

The findings of the VSAC are discussed in **Chapter 15**.

311 *R v QMT* (Unreported, Supreme Court of Tasmania, 11 May 2015).
312 *DPP (Vic) v Barbat* [2014] VCC 42.
313 Kate Warner et al, 'Public perspectives on judges' reasons for sentence' (2021) 95 *Australian Law Journal* 685, 686; Davies and Bartels (n 14) 174–6.
314 Ibid 686–87.
315 Victorian Law Reform Commission, *Improving the Justice System Response to Sexual Offence*s (Report, September 2021) 114–50 ('*Improving the Justice System Response to Sexual Offence*s').
316 Ibid rec 18, 150.
317 In Queensland, this offence would be charged as rape, as there is no distinct offence for non-consenting sexual intercourse where the victim is a child under 12 years.

Tasmanian Sentencing Advisory Council

In 2015, the Tasmanian Sentencing Advisory Council published its report reviewing sentencing for sexual offences. It noted:

> It is the Council's view that effective victim services and a formal process to inform and involve the victim in decision making are crucial and considers that these steps are important initiatives to increase victim satisfaction with the criminal justice response to sexual violence.[318]

The Tasmanian Sentencing Advisory Council was told that victim survivors who witnessed their victim impact statement being read in court at the sentencing hearing 'felt more satisfied with the sentence'.[319]

14.8.2 Relevant research into the VIS regime

In a recent review into how the Australian judiciary are using VIS within sexual assault sentencing, Davies and Bartels found that judicial acknowledgement can be 'validating and therapeutically beneficial for victims, especially when judicial officers refer to "specifics from [victim impact statements]" when handing down the sentence'.[320] However, this was contrasted with circumstances where the justice professional gave 'minimal acknowledgment, with one-sentence reference described as "tokenistic"'.

Davies and Bartels subsequently recommended the development and publication of a victim-focused benchbook, as well as the introduction of victim-focused pre-sentence hearings for sexual offence cases.

14.8.3 Reviews in Victoria

Report on the Role of Victims of Crime in the Criminal Trial Process (2016)

During its review into the role of victim survivors within the trial process, the VLRC identified challenges with procedural rules surrounding the admissibility of a VIS, including the practice of redacting statements prior to sentence or having portions objected to in court proceedings, which was described as a 'distressing' experience for victim survivors.[321]

The VLRC noted that while rules of admissibility surrounding the trial process were predominantly to 'keep from juries evidence that may be misused by them', the same concerns do not arise within the sentence context. They concluded that this 'weighs against taking a strict approach to determining the admissibility of victim impact statements'.[322]

While the VLRC considered whether judicial officers should have responsibility for assessing the admissibility of material outlined in a VIS to 'avoid the distress and awkwardness caused by the current practice of editing victim impact statements or raising objections in court' (similar to the position in NSW at the time of the report), it ultimately recommended that this should not be the position.[323] In doing so, the VLRC acknowledged the risk that receiving a VIS in full without clarifying what was being relied upon undermines transparency in sentencing.[324] Additional concerns were raised that this may also enhance

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318 Sentencing Advisory Council (Tasmania), *Sex Offence Sentencing* (2015) 7.
319 Ibid 63.
320 Davies and Bartels (n 14) 168–9, referring to Mary Lay Schuster and Amy Propen, *Victim Impact Statement Study* (WATCH, 2006) 24.
321 Victorian Law Reform Commissioner, *The Role of Victims of Crime in the Criminal Trial Process: Report* (2016) 153 [7.124].
322 Ibid [7.119].
323 Ibid [7.124].
324 Ibid [7.125].

the expectations of victim survivors that their entire VIS would impact the sentence, leading to dissatisfaction where this does not occur.[325]

Inquiry into victims' participation in the criminal justice system (2023)

The Victorian Victims of Crime Commissioner recently released a report that looked at victims' experiences of participating the criminal justice system and whether they have been able to participate in the process.[326] The Victims of Crime Commissioner made 55 recommendations for improvement.

These included amendments to the Victims' Charter to extend information and consultation requirements and require a court to ensure that prosecution have met their obligations under the Victims' Charter.[327] The Commission also recommended amendments to its Human Rights Charter, including to be 'acknowledged as a participant (but not a party) with an interest in the proceedings'.[328] It recommended that resources for victims should be reviewed and revised and the case management system in courts should enable 'real time' information to be provided to a victim about their case.[329]

With respect to sexual offence matters, the Commission recommended a 'sexual offences legal representation scheme'.[330] It was recognised that this service could provide 'assistance with ensuring the impact on a victim is considered at the sentence indication stage, including liaison with prosecution as necessary', advise on the admissibility of a VIS and assist if the VIS was questioned by defence and advise on the entitled to seek a restorative justice process.[331]

With regard to sentencing, the Commission made a number of recommendations, including VIS prepared early being 'quarantined',[332] or requiring an adjournment of the sentence if the victim wished to prepare a VIS.[333] In relation to the DPP (Victoria), there were recommended requirements, including to 'seek the views of victims in relation to sentence indications' and confirm that this has been done with the court.[334] The DPP (Victoria) must also advise the court at a sentencing indication if there is insufficient information available about the harm and the reasons why.[335]

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325 Ibid.
326 Victims of Crime Commissioner, *Silenced and Sidelined: Systemic Inquiry into Victim Participation in the Justice System* (November 2023).
327 Ibid rec 1–2 .
328 Ibid rec 5.
329 Ibid rec 19.
330 Ibid rec 21.
331 Ibid, part 3, 374–5.
332 Ibid rec 40.
333 Ibid rec 41.
334 Ibid rec 36.
335 Ibid rec 38.

14.9 The Council's view

14.9.1 Enhanced recognition of victim survivors and the impact of the offending at sentence

Key Findings

15. **Appropriate and trauma-informed language should be used in the courtroom to support appropriate sentencing practices.**

The language used by judicial officers, defence practitioners and prosecutors in rape and sexual assault sentence proceedings impacts how sentences are understood and viewed by victim survivors, perpetrators and the wider community.

Using appropriate and trauma-informed language in sentencing is essential to addressing long-standing systemic issues within the community relating to the understanding of sexual violence offences and the harm they cause. It is also an important aspect of ensuring sentences are adequate and appropriate.

Using inappropriate language that is not trauma-informed may:

- minimise the harm experienced by victim survivors;
- retraumatise victim survivors, impacting their long-term recovery;
- unfairly shift blame for the offending onto victim survivors; and
- minimise acknowledgment of the wrongfulness of the person's actions, thereby undermining the sentencing purpose of denunciation.

Language that is not trauma-informed or that is inappropriate may influence, or be perceived to influence, the way a judicial officer determines the seriousness of the offence for the purposes of sentencing and may retraumatise the victim survivor by appearing to minimise the seriousness of the rape or sexual assault.

It is critical that all justice agencies use trauma-informed language within the sentencing context, as language used by:

- legal practitioners and within professional expert reports may impact the language used by judicial officers during proceedings;
- judicial officers can impact both the person being sentenced and the victim survivor;
- the Court of Appeal (or accepted without comment) sets precedents for how sexual violence is understood and approached in future criminal proceedings.

See **Recommendations 17, 18, 19 and 20.**

16. **Victim impact statements require improvement within the sentencing process**

There is strong dissatisfaction among victim survivors and members of the community with respect to the victim impact statement regime. This dissatisfaction permeates all aspects of the process, including with respect to its purpose, content, form of presentation, arrangements for cross-examination, timeframes and degree of acknowledgement of the victim survivor and the harm they have suffered by the sentencing court:

- Agency roles and responsibilities regarding information and support for victim survivors of rape and sexual assault offences in the preparation of a victim impact statement are unclear, meaning victim survivors may not be provided with sufficient support when

preparing a statement, and the information conveyed to the courts may be of limited utility.

- There is a pervasive lack of understanding of the purpose and use of victim impact statements in sentencing, which means stakeholders hold different (often unmet) expectations with respect to how a victim impact statement should be used.
- Victim survivors are dissatisfied with the process of redacting or 'content editing' victim impact statements by the prosecution service prior to sentence. The way this information must be provided to the court may not meet victim survivors' needs.
- Victim survivors may not be offered an opportunity to provide a statement prior to sentence due to concerns about this causing delays in the proceedings and matters being finalised.
- Victim survivors are often dissatisfied with the degree of acknowledgement by the sentencing court of the harm they have suffered as a consequence of the offending (as outlined in their victim impact statement).

See **Recommendations 21, 22 and 23**.

We were told many times during this review that it is important for victim survivors to have a voice within the sentence context and to have their experience validated by legal practitioners and the court. The opportunity for victim survivors of rape and sexual assault to provide a statement to the court in their own words was recognised as a critical way to satisfy this justice need, with corresponding impacts on their broader criminal justice experience.

However, the use of a VIS in its current form proved a challenging issue for our consideration. It became clear to the Council that there are differing views within the criminal justice system regarding how a VIS should be used in sentencing (including how judicial officers should acknowledge victim survivors and weigh the harm caused to them in the exercise of their sentencing discretion), and which agencies should provide support to victim survivors when writing one.

While a VIS can have an important role within the sentence hearing, we acknowledge that there is broad dissatisfaction surrounding the VIS regime; there are aspects of the VIS regime that are not fit for purpose and do not serve the interests of victim survivors of rape and sexual assault, those of the offending person or those of the court:

- There is a pervasive lack of clarity among legal justice entities, victim survivors and victim support services regarding the purpose of providing an impact statement.
- There is a lack of clarity across all stakeholders regarding which agencies are funded to assist victim survivors in preparing a VIS, with a corresponding impact on the experiences of victim survivors who want to be supported through this process.
- Resources to support victim survivors to prepare a VIS are limited.
- Victim survivors report being disappointed and frustrated by procedural rules that restrict their voice in their VIS, such as with respect to the form, admissible content and redaction of, and timeframes for providing, a VIS.
- Victim survivors want to be acknowledged by the judicial officer and know the sentencing court has regard to the impacts of the offending on them in sentencing the offending person.

We acknowledge that these issues likely extend to all victim survivors who have a right to provide a VIS in Queensland under this regime. We have subsequently recommended that a broader review be conducted into the VIS regime to determine the extent of these challenges, and to enable holistic recommendations to be made surrounding the purpose of providing a VIS, and any reforms to procedural requirements (**Recommendation 21**).

We intend that our observations on the challenges which arose through this review, and our preliminary consideration of the potential implications of reforms to the Queensland approach, will serve as an initial guide within the context of any such review.

In the interim, we have identified a need for some immediate changes to improve the sentencing experience of victim survivors of rape and sexual assault in Queensland, including through:

- in support of enhanced, trauma-informed interactions with victim survivors, the development of enhanced resources to engender a greater awareness among members of the judiciary, prosecution services and defence practitioners that the language they use, as well as how they refer to victim survivors and the harm they have experienced, can positively or negatively impact victim survivors (**Recommendations 17, 18, 19 and 20**);
- clarification of which agencies are funded to assist victim survivors through the preparation of their VIS and enhancing existing VIS resources to ensure victim survivors are appropriately supported through the process, and are aware of any procedural requirements surrounding the process (**Recommendation 22**); and
- legislative amendments to section 179K(5) of the PSA to ensure that victim survivors who do not provide a VIS are not negatively impacted within the sentencing context (as per legislative intent) (**Recommendation 23**).

These issues should also be considered within the context of a broader review (**Recommendation 21**) to ensure it produces a comprehensive and considered VIS regime for victim survivors, support advocates, legal professionals and the broader community.

Why trauma-informed language is important for the sentencing experiences of victim survivors

As discussed at section 13.8, trauma-informed practices within the sentencing context are critical to the experiences of victim survivors of rape and sexual assault.

We know the language used by prosecutors, defence practitioners and judicial officers, and the way a sentence hearing is conducted, can have a significant negative impact on the entire criminal justice experience of victim survivors of rape and sexual assault.

While we received general feedback about the lack of judicial acknowledgement of victim survivors within the courtroom (including acknowledgement of the harm caused to them as detailed in their VIS), one victim survivor stated that her confidence in the sentencing judge was compromised by the language used by the judicial officer in delivering their remarks.[336]

In sentencing remarks for rape and sexual assault, the Council observed examples of language being used when describing the offending behaviour that risked minimising the harm caused to victim survivors

[336] Victim Survivor Interview 7.

or the culpability of the person being sentenced contrary to the objective of promoting perpetrator accountability. From our review, we have concluded that some practices were problematic. This issue is discussed further in **Chapter 15**, section 15.4.

We note that there is no legislative requirement for a court to refer to the fact that a VIS has been made by the sentencing court and, if provided, the form and the degree of acknowledgement required. As with many other relevant sentencing factors, this is a matter for individual judicial discretion.

However, research with victim survivors of sexual violence has found that this form of acknowledgement can respond to the justice needs of victim survivors and convey a therapeutic benefit to them by validating their experience, particularly when the judicial officer refers to specific details outlined in the VIS when delivering their remarks, rather than brief and 'tokenistic' forms of acknowledgement.[337] Conversely, 'an apparent failure of the system to recognize the real significance of what has occurred in the life of [the victim survivor] as a consequence of the commission of the crime may well aggravate the situation'.[338]

The reference made by judicial officers to a VIS may also impact on victim survivors' satisfaction with the sentencing process more broadly. Consistent with this, we observed that victim survivors may be more satisfied when they're acknowledged by the sentencing judge,[339] while victim survivors who feel excluded or as if they are not adequately acknowledged may be more dissatisfied with the process.[340]

While the focus on sentencing is necessarily on the person who is being sentenced and ensuring that principles of fairness are maintained, it is important for the sentencing process to operate in a way that respects the rights and interests of victim survivors and seeks to minimise risks of further harm through involvement in the process. Within this context, it is important for practitioners and judicial officers to ensure that victim survivors and the impact of the offending on them are sufficiently and visibly recognised in both sentencing submissions and remarks.

The Council notes the trauma-informed principles recommended by SAMHSA (see section 13.4) and the opportunities for courts to improve communication with victim survivors of sexual violence.

Enhanced understanding of sexual violence offending and its impact on victim survivors

Recommendations	
17.	**Resources to assist the courts to respond to the needs of victim survivors of rape and sexual assault within the courtroom** The Department of Justice, in consultation with the Heads of Jurisdiction, and with reference to work being led by the Judicial College of Victoria, support the development and provision of practical information for courts about responding to the needs and interests of victim survivors of rape and sexual assault in criminal proceedings, including preferred ways to acknowledge victim survivors and the harm they have experienced.
18.	**Resources and professional development for judicial officers** Until such time as a Queensland Judicial Commission is established, the Queensland Government ensure appropriate funding and resources are provided to Queensland Courts to

337 Davies and Bartels (n 14) 168–9,
338 *DPP v DJK* [2003] VSCA 109 [18].
339 Victim Survivor Interview 7.
340 Victim Survivor Interview 1.

enable judicial officers to continue to participate in national judicial officer training programs focused on sexual violence and in support of the development of Queensland-based sentencing resources (see also **Recommendation 6.1**).

The use of trauma-informed language is particularly important for sexual offences due to long-standing systemic issues relating to understanding of these offences, and the harm caused. As discussed in **Chapter 6,** how legal practitioners and judicial officers describe the seriousness of an offence is important to ensure that the gravity of offending is appropriately recognised and sentenced. When language is used to describe offending that may not reflect the offending gravamen, it minimises both the harm caused and the culpability of the perpetrator, as well as not properly denouncing the offender's conduct. This issue is further discussed in **Chapter 15**, section 15.4.

We recognise the findings of the VLRC (outlined in **Chapter 13**) that victim survivors have various needs that must be met to improve their experience of the sentence hearing.[341] These include the importance of having a voice, receiving validation, seeing their offender denounced and held accountable, and being treated with respect.[342] We concur with these findings and believe that these needs can better be met with appropriate resources and trauma-informed training for all legal stakeholders, noting that they can be promoted without limiting the rights of the person being sentenced.

Within this context, we consider that there are opportunities for resources to be developed to assist judicial officers and provide ways to enhance the acknowledgement of victim survivors and the harm they have experienced (including with respect to their VIS) during the sentencing hearing.

Earlier in this report, we recommended the development of enhanced resources such as an updated Benchbook on Sentencing (**Recommendation 6.1**). We also consider it important for there to be practical information and opportunities for training for all justice stakeholders involved in court processes to enhance responses to the needs of victim survivors in sentencing proceedings (**Recommendations 17 and 18**).

One aim of additional resources and training is to ensure that judicial officers are made aware of the positive impacts their acknowledgement can have on a person who has experienced rape or sexual assault. Specifically, this can be achieved by conducting the hearing in a trauma-informed way and acknowledging the harm caused to victim survivors more frequently and deliberately during the delivery of their remarks.[343]

The Judicial College of Victoria has developed and published a comprehensive resource to guide interactions with victim survivors,[344] which might serve as a foundation or guide for a Queensland resource. In relation to the VIS, the guide recognises the importance of judicial officers explaining the sentencing process and how their VIS may be used to victim survivors, including:

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341 *Improving the Justice System Response to Sexual Offences* (n 315) 29–32.

342 Ibid.

343 See a discussion of Davies and Bartels' recommendations for best judicial practice when acknowledging victim survivors at sentence, which included the development of a victim-focused benchbook to guide judicial officers on best practice for acknowledging victim survivors at sentence: Rhiannon Davies and Lorana Bartels, *The Use of Victim Impact Statements in Sentencing for Sexual Offences: Stories of Strength* (Routledge, London, 2021) 182.

344 Judicial College of Victoria (n 51) 3. In addition to members of the judiciary, the Judicial College of Victoria consulted with 'prosecutors, defence lawyers, the Victims of Crime Commissioner, the Victims of Crime Consultative Committee, the Office of Public Prosecutions' Witness Assistance Service, the Department of Justice and Community Safety, Child Witness Service and Court Network.

- explaining the purpose and process of the hearings;
- acknowledging that it may be difficult for victims to hear;
- referring to the factors that must be weighed in reacting a decision; and
- explaining the role of a VIS in sentencing.

Best practice surrounding how to acknowledge victim survivors without naming them in proceedings was also provided by way of an example:

> The law requires that a victim of sexual offending not be identified. Because of the relationship between the parties in this case, it is necessary to use a pseudonym for the offender to prevent identification of the victim. The name I will use in these remarks is Conrad Leon.
>
> For the same reason, I will refer to the victim of the offending as 'the complainant', and not refer to any other person in the family by name, only by relationship. I mean no disrespect to anyone in not using their names.[345]

This may inform how Queensland can appropriately acknowledge victim survivors at sentence without compromising their anonymity.

In considering how to facilitate changes to current sentencing practices, we did not consider it appropriate to mandate judicial acknowledgement within the sentencing hearing through legislation. In doing so, we recognise that judicial officers – when aware of the impacts of language on victim survivors – should retain discretion to moderate how they facilitate recognition. We also note that mandatory recognition may result in anti-therapeutic consequences, leaving victim survivors to feel as if their acknowledgement was tokenistic, or merely to 'check' something off from a list.

Improving trauma-informed practices and interactions with victim survivors at sentence

Recommendations	
19.	**Resources for prosecutors** The Office of the Director of Public Prosecutions and the Queensland Police Service review guidance and training materials to ensure that prosecutors are employing trauma-informed practices, and that the language being used in the context of the prosecution of rape and sexual assault matters continues to promote recognition of the objective seriousness of this form of offending and the significant impacts it has on victim survivors.
20.	**Resources for defence practitioners** The Queensland Government consider making appropriate funding or resources available to Legal Aid Queensland, the Queensland Law Society and the Queensland Bar Association to enable similar resources and training to be made available to defence practitioners with respect to the importance of employing trauma-informed practices and language in the context of submissions made on sentence.

In addition to recognition within the courtroom, we recognise that it is important for all legal stakeholders to be aware of trauma-informed practices, and to consider not only the 'substantiative law and procedure,

[345] Ibid 16, citing *DPP v Leon (a pseudonym)* [2014] VCC 237 [1].

but [also] … the way in which they interact with people in court and the potential impact of their actions on the wellbeing of those affected by them'.[346]

We recognise that there is an opportunity for the Queensland Government to signal the serious nature of sexual violence offending to members of the legal profession, as well as recognising the significant and lifelong impacts caused to victim survivors of rape and sexual assault through enhanced sentencing information on this topic. We recommend that the Queensland Government explore alternative options for the development of resources for use by legal practitioners in consultation with relevant legal bodies, criminal justice agencies, and victim survivor legal and support services.

This should include funding for training and resources for prosecutors and criminal defence practitioners to promote recognition of the objective seriousness of this form of offending and its significant impacts on victim survivors. Language used by prosecution and defence practitioners in their submissions potentially impacts the adequacy of sentencing practices because it may:

- influence or be perceived to influence the way judicial officers determine seriousness for the purposes of sentencing;[347]
- retraumatise the victim survivor by appearing to minimise the seriousness of the offending and/or the offender's culpability; and
- provide inadequate information about the offence and offending for both parties, as well as other essential parts of the justice system, including for QCS to risk-manage and provide treatment to the sentenced person and the Parole Board to make informed decisions about the person's parole suitability.

Applying the Council's fundamental principles

In making these recommendations trauma-informed sentencing practices to be deployed within sentencing court, we have had regard to the fundamental principles guiding our review:

- **Principle 1: Reforms to sentencing laws should be evidence-based with a view to promoting public confidence**: It is clear from victim survivors and victim support and advocacy organisations that there is general dissatisfaction with the degree of victim survivor acknowledgment within the sentencing court, particularly with respect to recognition of the harm caused to them as a consequence of the offending. Ensuring judicial officers and legal stakeholders are aware of the importance of language and the impacts of enhanced recognition of victim survivors within the courtroom will assist with increasing victim survivor satisfaction with sentences and has the potential to reduce the risk of retraumatising. Empowering victim survivors and improving their satisfaction can promote public confidence.
- **Principle 6: Reforms should take into account the likely impacts on the disproportionate representation of Aboriginal and Torres Strait Islander people in the criminal justice system**: In recommending these reforms, we have considered whether amendments to improve the sentencing experiences of victim survivors through greater recognition and the use of trauma-informed practices would infringe upon the rights of people being sentenced – noting that Aboriginal and Torres Strait Islander people are disproportionately represented within the

346 Davies and Bartels (n 343) 173.
347 See comments in *WA v Wynne* [2024] WASCA 20 [73] 21 (Buss P, Mazza JA and Hall JA agreeing).

offending cohort. We consider enhanced, trauma-informed processes with victim survivors will have no such negative or disproportionate impact.

- **Principle 10: Any reforms should aim to be compatible with the rights protected and promoted under the *Human Rights Act 2019* (Qld) ('HRA') or be reasonably and demonstrably justifiable as to limitations**: We consider that these recommendations are compatible with the rights protected and promoted under the HRA. Recognition of the victim survivor within the courtroom and the use of trauma-informed language can be addressed without limiting the rights of the person being sentenced in criminal proceedings as outlined in section 32 of the HRA.

14.9.2 A comprehensive review of the VIS regime in Queensland is required

Recommendation

21. **Comprehensive review of the victim impact statement regime**

The Department of Justice or other appropriate entity undertake a comprehensive review of the victim impact statement regime under the *Penalties and Sentences Act 1992* (Qld), including with respect to the purpose of providing a victim impact statement, the content, form of presentation, arrangements for cross-examination, timeframes and degree of acknowledgement by the sentencing court of the victim survivor and the harm they have suffered as a result of the offending – ensuring that victim survivors who do not provide information about the specific harm caused to them, or who are limited in their ability to do so (including child victims), are not disadvantaged at sentence. This should include consideration of trauma-informed practice.

The purpose of providing a VIS is unclear, which leads to dissatisfaction for all parties

We are of the view that the VIS regime has the potential to provide strong value for victim survivors, who are otherwise alienated by the system:

- A well-prepared VIS that focuses specifically on the impact of the offending can provide an instrumental benefit to court by conveying critical information about the harm suffered by the victim survivor, which would be otherwise unknown to the sentencing judge.
- The VIS, in providing the court with information about the personal circumstances of the victim survivor, 'constitute[s] a reminder of what might be described as the human impact of crime',[348] and may therefore serve to 'humanise' the person who has been most directly affected by the person's offending and, through the court's recognition of their individual experiences, serve a broader therapeutic purpose.[349]

The purpose of providing a VIS is to inform the court of the harm the victim has suffered, and this must be taken into account as part of the nature and seriousness of the offence.[350] The purpose of reading a VIS is 'to provide a therapeutic benefit'.[351] In this way, a VIS has a dual informative (instrumental) and a

348 *DPP v DJK* [2003] VSCA 109 [17].
349 Cyrus Tata, '"Ritual Individualization": Creative genius at conviction, mitigation and sentencing (2019) 46(1) *Journal of Law & Society* 11. See also Cyrus Tata, *Sentencing: A Social Process – Rethinking Research and Policy* (Palgrave Macmillan, 2020) Chapter 5 – The Humanising Work of the Sentencing Professions: Individualising and Normalising.
350 PSA (n 2) ss 9(2)(c)(i), 179K(1), (3), (7).
351 Ibid s 179M(4)(a).

therapeutic (expressive) role. However, these purposes conflict when considering how evidence in a VIS should impact the sentence outcome.

This duality creates challenges for both the community (including victim survivors) and legal stakeholders, who have different expectations of how a VIS should be used by the courts and which purpose is more important: victim survivors expect to be able to tell their story without restriction to facilitate the therapeutic benefits, while legal stakeholders believe that it should only contain admissible, relevant material in line with the rules about fact finding at sentence.[352]

Commentary from the Court of Appeal demonstrates that a VIS is a relevant consideration within the sentence hearing. However, there can also be issues about the weight given to the information contained therein if it is not sufficiently detailed or supported with reliable evidence, or where it contains details that are broader than the specific impact of the offence on the victim. There can also be uncertainty regarding how a court makes an assessment of harm where there is no VIS.

By clarifying the purpose of a VIS, this may be relevant to the consideration of how the court should treat it, what information (if any) 'should' be excluded by the prosecution service prior to sentence and processes surrounding the timing of providing the VIS and the mechanism for doing so:

- If the purpose is **purely expressive** and has no impact on the penalty, the courts could adopt a more relaxed approach to the restriction of its content to ensure that the victim survivor feels that they can speak freely about what happened to them in a way that is cathartic, without having their voice suppressed or edited by the prosecution service or the courts.
- If the purpose is to inform the court of the harm suffered for consideration in deciding the penalty (an instrumental purpose), then it is important for the veracity of the statement to be tested by the person being sentenced prior to it being relied upon at sentence. In these circumstances, it would become more important to ensure that any inadmissible content is redacted from a VIS prior to sentence.

Our observations are consistent with a study by Davies and Bartels, who considered the use of VIS in sentencing for sexual offences across four Australian jurisdictions (Victoria, South Australia, Tasmania and the ACT). They identified that: [353]

> Participants experienced numerous practical difficulties because the Australian impact statement legislation, case law, policies, and guidelines are inconsistent in their guidance around the actual purpose of impact statements. Consequently, justice professionals are unable to provide coherent and consistent advice to victims about the type of information they can include in their statement and how the statement may be used by the court.

Our findings in this review indicate that a comprehensive review of the regime is required to determine, among other things, the purpose of a VIS.

In **Chapter 8**, we noted that one of our concerns is that the factors listed in section 9(3) of the PSA (to which a court must have primary regard when sentencing offences of personal violence such as rape) are framed in a way that places a strong focus on the existence and reduction of the risk to members of the community of physical violence, rather than a concern to protect community members (most usually women and girls) from the psychological and emotional harm that is more relevant in the case of sexual assault and rape. This may contribute to a sentencing court focusing on whether there was physical harm

352 See *Evidence Act 1977* (Qld) s 132C.
353 Davies and Bartels (n 343) 7.

(often referred to as involving violence), rather than the significant emotional and mental harm often caused by these offences. This can further be exacerbated by a lack of evidence about emotional and mental harm in a VIS, which may be due to the victim survivor not being able to get psychological support, a victim survivor being unsure about what to include due to limited guidance or no VIS being submitted.

In addition, earlier in this report we recommended the development and enhancement of existing resources for prosecutors, defence practitioners and judicial officers to ensure that Court of Appeal guidance is more consistently applied and that recent case law is relied upon to ensure submissions made on sentence reflect current sentencing practices (**Recommendation 6**). This is in addition to ensuring training and resources for prosecutors and criminal defence practitioners to promote recognition of the objective seriousness of this form of offending and the significant impacts it has on victim survivors (**Recommendations 19 and 20**), as well as to ensure judicial officers have access to resources and ongoing professional development focused on sexual violence (**Recommendations 17 and 18**).

We recognise that, if the VIS are to serve a truly therapeutic purpose, processes surrounding their preparation and use need to be informed by principles of trauma-informed practice. Acknowledging that there is currently a lack of research into trauma-informed best practice for the provision of a VIS,[354] we suggest that any review into the VIS regime in Queensland should include consideration of how a more trauma-informed approach can be achieved. Applying general trauma-informed principles, important elements might include, for example:

- ensuring victim survivors are consistently and accurately informed about how the VIS will be used and options for providing them;
- putting protections around how they are provided to safeguard the victim survivors' safety, and ensure they are not subject to further trauma;
- ensuring all those who provide support to victim survivors in preparing a VIS receive appropriate training;
- offering victim survivors choice about how the VIS is provided, including technological solutions for the making of a VIS, and about whether it is provided in writing, as well as options for the victim to ask for it to be read by another person, such as a family member, on their behalf;
- providing victim survivors with a copy of their VIS if it is redacted or amended so they can view it in its final form; and
- ensuring professionals acting on the victim survivor's behalf, such as victim advocate, can reassess their needs throughout the criminal justice process and beyond, including linking them with therapeutic supports.

The redaction of victim impact statements is anti-therapeutic for victim survivors

Victim survivors told the Council that Queensland's current practice of redacting a VIS prior to sentence is often upsetting. This is particularly the case where charges (or counts on the indictment) have been

354 The Council was unable to locate any research into trauma-informed practices and processes for the provision of a VIS specifically. See, however, Davies and Bartels (n 343) which discusses the use of victim impact statements in Australia based on the perspectives of 6 female victim survivors and 15 justice professionals, supplemented by an analysis of 100 sentencing remarks. They discussed trauma-informed communication practices with victim survivors more generally (at 160–69), and recommended that urgent research is 'required to inform the implementation of a victim-focused pre-sentence mechanism to settle both prosecution and defence issues around impact statements, as well as automated notification systems to help keep victims informed throughout the justice process.': at 183.

amended (e.g. from rape to sexual assault), and they want to talk about their entire experience and the harm it has caused.

We appreciate these concerns. We also recognise the challenges for the court in not redacting the VIS within the current VIS regime prior to sentence, including:

- risks that the judicial officer may be seen to take into account information which is inadmissible or inappropriate; and
- creating an additional obligation for the court to expressly state what information is not being considered in delivering their remarks to avoid the risk of falling into error. We note that this process could be upsetting for some victim survivors.

Within our current VIS framework, we have recommended reforms to the support services and resources available to victim survivors when writing their VIS. As a consequence, we believe there will be less risk of this information being included at first instance.

However, in conducting a broader review and considering whether a VIS should be subject to redaction by the prosecution service, and how to make this process more trauma-informed for victim survivors, it will be important to have regard to its purpose (once clarified).

We also acknowledge that regimes in other jurisdictions may provide information to guide the review of this process. For example, in South Australia the court is required to declare which portions they are not relying upon, while in Victoria consideration of any information is at the discretion of the sentencing judge and there is no requirement for the judge to declare which information has been excluded from consideration.

The South Australian model may provide some guidance for Queensland in considering how to respond to the needs of victim survivors without limiting the rights of the person being sentenced to understand which information is not being considered within the VIS. While we consider that the practice of stating which information will be disregarded in court may potentially be traumatic for victim survivors, it is important to recognise that this process already occurs in Queensland, albeit in a less-formal manner: the prosecution tells a victim survivor that content must be redacted or, where it is admitted, there may be discussions during the sentence hearing whereby the content is excluded (see the discussion at section 14.6.2 regarding medical diagnosis). Indeed, a failure of a judge in Queensland to do this can result in the sentence being overturned on appeal (discussed below).

Disclosure and content issues are having unintended adverse impacts on victim survivors

We observed Court of Appeal cases where the content of a VIS was the subject of argument on appeal, or where issues with disclosure caused a conviction to be overturned.[355] We realise that this can have devastating impacts on a victim survivor if their VIS is the reason for a sentence to be reduced or a conviction overturned.

This signals to us that there is a need for victim survivors to be better supported and guided when preparing their VIS to ensure these statements are providing reliable information that is of benefit to the

[355] See *R v Agnew* [2021] QCA 190 [81] (Flanagan J, Sofronoff P and Morrison JA agreeing); *R v Cox* [2010] QCA 262 [13] cited with approval in *R v Grimley* [2017] QCA 291 [4], [31], [35]–[36] (McMurdo J, Fraser and Gotterson JJA agreeing). See, for example, the following cases where a re-trial was ordered due to a failure on the prosecution to disclose the VIS: *Dunkerton v Queensland Police Service* [2018] QDC 71 [39]–[40] (Fantin DCJ); *R v Cornwell* [2009] QCA 294 [40]; *R v HAU* [2009] QCA 165 [40]–[43] (Keane JA, Cullinane and Jones JJ agreeing).

sentencing court and will not lead to an appeal. We believe that improvements to a VIS at the outset may limit the need for legal arguments surrounding its contents at sentence and on appeal (and potentially a retrial) and ensure it is given appropriate weight.

Within this context, we recognise the importance of encouraging the provision of additional material to support assertions of fact made within a VIS. However, we note that this could raise challenges where this information is then relied upon by defence as a mechanism by which to cross-examine a victim survivor, which is not the intention.

Consideration of adjournment options to provide a VIS

We also found victim survivors are not always provided with sufficient time to prepare a VIS. While an adjournment may be requested and granted in Queensland to enable a VIS to be provided, this process depends on the prosecution service requesting an adjournment and the court exercising its discretion in granting it.[356]

Our review also revealed this issue is exacerbated in the lower courts, where VIS are rarely provided and adjournments are not being sought to obtain them.

Our review found that sentences often occur immediately after a person enters a plea of guilty to sexual assault or rape, or after two days (sexual assault, MSO) or five days (rape, MSO) where there is a guilty verdict after trial. On one hand, this ensures people who are at risk of spending too much time in custody are sentenced as soon as possible, and concludes the matter for victim survivors without undue delay, which may benefit them by providing closure. One the other, it may mean victim survivors cannot participate in a sentence hearing by submitting a VIS.

While we found (consistent with other reviews) that delays within the criminal justice process can cause anxiety for some victim survivors, we also know that for some victim survivors the opportunity to participate in the sentencing process through the provision of a VIS is important. Taking this opportunity away to have their voice heard through this process in order to facilitate an expeditious resolution will likely have severe anti-therapeutic consequences for victim survivors and does not reflect best trauma-informed practices.

A review of the VIS regime should also consider how to maximise the therapeutic benefit of providing a VIS and limit potential adverse impacts on victim survivors. This should include consideration of whether legislative changes are required to:

- clarify the procedural aspects associated with the provision of a VIS for a victim survivor, including when they should provide their VIS and to whom, as well as ensuring that they are aware of the opportunity to put supporting medical material before the court to support the court's consideration of any allegation of harm psychological or physical harm outlined in a VIS;
- address concerns raised by legal stakeholders regarding untested statements of fact in a VIS by encouraging victims to attach any medical material in support of their statement;
- provide sufficient information for a sentencing judge to appropriately exercise their discretion when considering statements of fact made by victims in their VIS;[357]

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356 PSA (n 2) s 179K(2).
357 This is similar to the ACT: see *Crimes Act 1900* (ACT) s 52(2).

- ensure that the prosecution has sufficient time to receive and disclose a VIS and any supporting material to defence practitioners and the defendant prior to sentence; and/or
- create a presumption that the courts must grant an adjournment (on the request of the prosecution) for a reasonable period to ensure victim survivors have the opportunity to provide a VIS and, following a finding of guilt at trial, to be consulted on the conviction of the offender (and to understand any changes in charges that may have happened.

In doing so, we recognise that it is important for judicial officers to retain the discretion to proceed immediately to sentence in circumstances where it is necessary for the interests of justice.[358]

In the interim, changes to prosecutorial training and guidelines should be enacted to ensure that prosecutors and legal officers appearing on these matters are aware of the importance of requesting an adjournment where they have not had the opportunity to consult with the victim survivor on the outcome (particularly after trial), or for them to provide a VIS. It is understood that enhanced processes are currently being trialled in children's Magistrates Court proceedings in select jurisdictions by PPC.

Alternative mechanisms of providing a VIS

We also considered whether there should be alternative mechanisms for providing a VIS. The current requirement for a VIS to be produced as a formal signed and written statement (including an electronic statement) can be limiting for some victim survivors, particularly those who may experience additional challenges articulating the harm caused to them in writing, such as children, those requiring an interpreter, Aboriginal and Torres Strait Islander people or people from culturally and racially marginalised backgrounds. This issue persists even where a VIS is read aloud, as a victim survivor must read their written statement verbatim rather than speaking ad hoc to limit the risk of inadmissible evidence being spoken into the court record.

In considering alternative mechanisms to a written VIS, it is noted that opportunities for the prosecution to produce a victim report – similar to the provisions in the Northern Territory – may provide an alternative, more trauma-informed approach to the traditional form of a VIS for some victim survivors. A victim report would enable the impact of the offending to be conveyed to the court without subjecting the victim survivor to the challenging experience of writing down the harm caused to them. Such a process may be of benefit for particular cohorts of vulnerable victim survivors, as well as in circumstances where a victim survivor is pressed for time, but still wishes for the harm caused to them to be considered by the court. For example, subject matter experts told us it can be particularly difficult for Aboriginal and Torres Strait Islander victim survivors or those from CALD backgrounds to disclose details about the offending (and therefore the impact and harm) due to cultural taboos and shame related to sex.

Additional issues were raised surrounding the requirement for a victim survivor to read their VIS aloud in court, rather than providing victim survivors with agency to decide when to record their VIS. By enabling a VIS to be pre-recorded prior to sentence and played to the court, a victim survivor may regain a sense of control over the process, as well as potentially obtaining closure earlier, rather than feeling anxious about the upcoming sentence hearing.[359]

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358 See, for example, *Crimes (Sentencing) Act 2005* (ACT) s 51A.

359 Judicial College of Victoria (n 51) 20. See also Victims' Commissioner, 'Submission to the Queensland Government on the Making Queensland Safer Bill 2024' (Submission 96) 10 <https://documents.parliament.qld.gov.au/com/JICSC-CD82/IMQSB2024-B002/submissions/00000096.pdf>.

While the Council observed this practice in other jurisdictions, we concluded there would be significant practical challenges associated with this process in Queensland, such as how victim survivors would record their VIS, and provide these to the prosecution, to then be disclosed in a timely way to defence – especially for victim survivors living in regional or rural parts of the state.

The decentralised nature of Queensland must be considered, such as ensuring that all courthouses have sufficient resourcing capabilities to facilitate a change in process, and that no victim survivor is disadvantaged because of their geographical location or limited access to technology.

Applying the Council's fundamental principles

In making this recommendation for a comprehensive review of the VIS regime, we have had regard to the fundamental principles guiding our review:

- **Principle 1: Reforms to sentencing laws should be evidence-based with a view to promoting public confidence**: It is clear from victim survivors, victim support and advocacy organisations and legal stakeholders that there is a problem with the current VIS regime. We have been told that confusion about the predominant purpose of providing a VIS is prevalent, with flow on impacts for how this evidence is being provided to, and used by, the sentencing court, including with respect to the cross-examination of a victim survivor. We recognise that without a review, this issue will continue to persist, limiting public confidence in the regime. We recommend that a review be progressed which will enable the responsible agency to consider whether there is a broader case for change within the context of all offences, and to consider any impacts of reforms (including those identified through our review and outlined above).
- **Principle 6: Reforms should take into account the likely impacts on the disproportionate representation of Aboriginal and Torres Strait Islander people in the criminal justice system**: The potential impacts on Aboriginal and Torres Strait Islander persons as defendants and victims should be considered within the context of a broader review.
- **Principle 10: Any reforms should aim to be compatible with the rights protected and promoted under the HRA or be reasonably and demonstrably justifiable as to limitations**: We do not consider that this reform will result in any limitations on a person's human rights, noting that we are recommending there be a review, rather than any legislative change. However, we are of the view that any reforms to the VIS regime should balance the human rights of both victim survivors and perpetrators of these offences, including through greater recognition of the significant infringements sexual offending has on the human rights of victim survivors.

14.9.3 Victim survivors need to be provided with greater and clearer support when preparing their VIS

Recommendation	
22.	**Clarification surrounding the roles and responsibilities of agencies with respect to the preparation of victim impact statements** As a matter of priority, the Department of Justice or other appropriate entity, such as the Office of the Victims' Commissioner, undertake work to map agency roles and responsibilities with respect to victim impact statements and to make this information available to all relevant agencies and

services with a view to promoting better understanding and identification of current gaps in service provision.

On completion of this work, existing resources and information for victim survivors should be updated, or new resources developed, to provide clear advice to victim survivors about how to seek support when writing their victim impact statement and what can be included.

A trauma-informed approach to sentencing requires victim survivors to be supported when considering whether they would like to provide a VIS and, if so, throughout the writing stage.

Writing a VIS may cause victim survivors to relive the trauma of their experience. This may be exacerbated if parts of the statement must be redacted to remove 'inadmissible' content where victim survivors did not understand the procedural rules limiting this process.

This is also relevant to assist victim survivors to better understand that 'harm' is significantly broader than 'physical', 'emotional' or 'psychological' harm, and to help them better articulate the impacts of the offending on them in their VIS to allow the court to consider this harm. For example, it can extend to reproductive, financial and cultural harm.

Through our review, we identified that there are many services in Queensland that can support victim survivors through the process of writing a VIS, but as a system, this support can be disjointed and under-resourced. The different roles and responsibilities for agencies supporting victim survivors are not always clearly understood.

For example, the QPS OPM states that, 'For a matter appearing before a District or Supreme Court, officers from the ODPP will assist the victim in the process of preparing a VIS.'[360] However, while a ODPP VLO will provide victim survivors with VAQ's factsheet on what can be included in a VIS, it is not funded to provide any further procedural support (including with respect to the content of the VIS) or emotional support to victim survivors.[361]

The QPS OPM further states that police can refer a victim survivor to VAQ for assistance with completing a VIS for production in court.[362] However, VAQ has advised that it no longer (usually) provides this service, instead referring victim survivors to other organisations that are funded to provide such assistance.

The DPP also told us that the role lies with either the arresting police officer or other support services such as VAQ. However, VAQ suggests that this service should be provided by the ODPP; VAQ has commissioned several support organisations to provide this assistance, depending on the circumstances of the victim survivor and the offence, and whether it previously has had involvement with the person.

Independent support services also provide support to victim survivors on a voluntary basis in some circumstances.[363] However, they are not funded for this. There was also confusion expressed at our consultation events, with many participants erroneously suggesting that this was the DPP's responsibility.

360 *QPS OPM* (n 122) section 3.7.10.
361 *ODPP Director's Guidelines* (n 34).
362 *QPS OPM* (n 122) sections 3.7.10, 2.12.3 (emphasis added).
363 Victim Support Advocate Interview Group 1.

Our finding aligns with the views expressed by the Victims' Commissioner, that support services are 'fragmented and limited due to the lack of awareness and proactive provision of information to victims on their right to make a VIS.'[364]

As this review has revealed, the current VIS process is unclear to legal experts. We believe it is also likely to be poorly understood by victim survivors and support services. For victim survivors who are anxious about discussing the offending or engaging with the criminal justice system, this lack of clear information surrounding who is best placed to help them at the outset may contribute to feelings of dissatisfaction and lead them to disengage from these support services, potentially leading to greater dissatisfaction with the court process more generally.

It is our view that immediate steps should be taken to map which agencies are responsible for supporting victim survivors through the process of writing their VIS to gain a deeper understanding of current gaps in service provision. Ideally, this support should be provided through one victim survivor support advocacy service on a proactive basis, rather than requiring victim survivors to independently make contact with support services.

In considering which agency is best placed to support victim survivors with this service, it is important to recognise their roles and functions. For example, while some stakeholders have expressed the view that this responsibility should lie with the prosecution (either the PPC or the ODPP),[365] prosecutors in Queensland have an overarching responsibility to act in the public interest, rather than in the interests of victims of crime, where there is a conflict.[366]

We agree that it is important for the prosecution service to remain independent and impartial from the VIS process, particularly to ensure that there is no perception of 'coaching' or leading a victim survivor to provide particular information to the court. Irrespective of this requirement for impartiality, prosecutors are not funded to provide this service, and it would require significant additional funding to support victim survivors through this process.

We also note that there is a victim advocate service is to be piloted in Queensland. Once established, further consideration could be given to roles and responsibilities within this broader context and mapping, including with respect to the provision of any assistance to victim survivors when preparing a VIS. The role of the victim advocate/navigator should also involve consideration of how best to support children who experience sexual offending, noting that they will likely experience significant challenges articulating the actual or potential harm to them in their VIS.

We also compared existing resources to support victim survivors through the VIS process in Queensland to other jurisdictions and identified opportunities for existing resources to be enhanced to provide victim survivors with clearer and more helpful information to guide the preparation of their VIS.

This could include additional information to support victim survivors, such as listing the support services available to assist with the preparation of their statement, clarifying how the VIS will be used by the sentencing court and additional procedural information, such as when to provide a VIS, as well as the legal consequences for doing so at different points of the prosecution process.

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364 Victims' Commissioner, 'Submission to the Queensland Government on the Making Queensland Safer Bill 2024' (Submission 96) 10 <https://documents.parliament.qld.gov.au/com/JICSC-CD82/IMQSB2024-B002/submissions/00000096.pdf>

365 Meeting with Victim's Assist Queensland, 19 April 2024.

366 Arie Freiberg and Asher Flynn, *Victims and Plea Negotiations - Overlooked and Unimpressed* (Palgrave Macmillan, 2021) 2, 10

We further recommend that, similar to the position in other jurisdictions, any updates to existing resources should include consideration of a checklist and template to guide victim survivors regarding the structure for how to write their VIS and what should be included and attached in support. In designing this template, we recommend that regard be had to the templates produced in New South Wales, which includes headings to help victim survivors in structuring their statement, and a 'Checklist' to guide victims through the steps required to prepare and provide their statement (see **Appendix 17**). We believe this could be a useful tool for victim survivors to rely upon when engaging with what can be a very difficult and painful task, to ensure that they include the information most relevant to the sentencing court's consideration.[367]

Upon completion, the 'map' of support services and any updated resources should be provided to all relevant justice agencies and services to ensure that clear and consistent information is provided to victim survivors about how to seek support when writing their VIS, and what can be included in it.

Once complete, mechanisms (whether by linking to relevant resources, through the delivery of training or otherwise) should also be implemented within the ODPP and the QPS to ensure legal staff and police understand support services available to victim survivors, and agency roles and responsibilities with respect to the preparation of VIS, as well as how to refer victim survivors to them.

We believe clarification of the roles of respective justice agencies and enhancements to front-end processes surrounding what can and cannot be included within a VIS will have an immediate positive impact on the experiences of victim survivors of rape and sexual assault by ensuring that they are appropriately supported through this process. This will also reduce the risk of inadmissible material being included in a VIS at first instance, limiting the need for subsequent redaction by the prosecution, or contest by defence prior to sentence.

However, the Council is of the view that this recommendation alone will not address concerns surrounding the purpose of providing an impact statement (discussed below). Without clarification from the legislature or the courts on how an impact statement should be utilised at sentence, victim survivors will continue to see a VIS as an opportunity for them to have their voice heard and to impact the sentence imposed, while legal stakeholders will continue to redact their statements to only present 'appropriate' and 'admissible' details of harm to the court.[368]

Applying the Council's fundamental principles

In applying the Council's fundamental principles guiding the review, we determined that a recommendation was required to respond to this finding:

- **Principle 1: Reforms to sentencing laws should be evidence-based with a view to promoting public confidence**: Victim survivors and support advocates have told us that better support services must be provided to victim survivors ensure that they understand what needs to be included in a VIS, and to support them through this process. Legal practitioners and other justice stakeholders have highlighted concerns for the admissibility of a VIS when inadmissible information is not included, or where it does not serve an informative purpose. Supporting victim

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367 Department of Justice and Attorney-General, *Preparing a Victim Impact Statement* (Factsheet) <https://www.publications.qld.gov.au/ckan-publications-attachments-prod/resources/6048e39f-617f-415d-9fc0-df5b3a2e991c/victim-assist-victim-impact-statement-factsheet.pdf?ETag=7712fa772962bd9ebd4792b78e1b6ceb>

368 PSA (n 2) s 179K(3).

survivors through the VIS process will also promote victim survivor satisfaction and public confidence.

- **Principle 6: Reforms should take into account the likely impacts on the disproportionate representation of Aboriginal and Torres Strait Islander people in the criminal justice system**: The potential impacts on Aboriginal and Torres Strait Islander persons as defendants and victims are considered. It is envisaged that this reform will benefit victim survivors while having a minimal impact in terms of changing sentencing outcomes for those sentenced for these offences.
- **Principle 10: Any reforms should aim to be compatible with the rights protected and promoted under the HRA or be reasonably and demonstrably justifiable as to limitations**: We do not consider that this reform will result in any limitations on a person's human rights. In any case, the Council considers strengthening section 179K(5) to prohibit a court from drawing 'any inference' about whether the offence caused harm from the fact that a VIS was not given is reasonable and justifiable under the HRA, taking into account that sexual assault and rape, in particular, result in significant infringements on the human rights of victim survivors.

14.9.4 Legislative amendment is required to ensure victim survivors are not negatively impacted because they did not provide a VIS

Recommendation	
23.	**Amendment to section 179K(5) of the *Penalties and Sentences Act 1992* (Qld)** The Queensland Government amend section 179K(5) of the *Penalties and Sentences Act 1992* (Qld) to ensure a court does not draw any inference about whether the offence had little or no harm caused to the victim survivor from the fact that a victim impact statement was not given.

As discussed in section 14.2, under the PSA a court must have regard to the nature of the offence and how seriousness the offence was, including 'any physical, mental or emotional harm done to a victim, including harm mentioned in information relating to the victim given to the court under section 179K'. In accordance with section 179K(5) of the PSA, the absence of an impact statement 'does not, of itself, give rise to an inference that the offence caused little or no harm to the victim'.

There is no requirement for a victim survivor to make a VIS and we do not think this should change. There are valid reasons why a victim survivor may choose not to make a statement, and this should not detract from the harm caused by the offending. However, we consider that the current wording of section 179K(5) could be strengthened to prohibit a court from drawing 'any inference' about whether the offence caused harm from the fact that a VIS was not given.

We are concerned that if the current wording is not strengthened, it may place pressure on a victim survivor to make a VIS.

A VIS contains highly personal information about distressing and traumatising events[369] and the physical, mental and/or emotional harm the victim survivor has experienced as a consequence.[370] While a VIS has provides an opportunity to deliver a therapeutic benefit to victim survivors by allowing them to share this information with the court, the offender, and the public,[371] equally some victim survivors may make a conscious decision not to make a VIS on the basis that they do not wish to broadcast the depth and extent of their pain. The decision not to make a statement may be made for self-protective reasons.[372]

The Victorian Sentencing Council acknowledged: 'All VISs are likely to contain highly personal information, and by making and reading a VIS, a victim may open themselves to embarrassment and further trauma and distress.'[373]

While a VIS can 'increase offenders' awareness of the harm have caused',[374] a victim survivor may 'not want the offender to be fully aware of the harm caused to them'.[375] This is particularly the case if a victim survivor is concerned an offender will extract enjoyment from hearing about their harm, as this will defeat any potential therapeutic benefit for a victim survivor in providing a VIS.

Amending s 179K of the PSA will promote victim survivors' right to be treated with respect and dignity and right to have their personal information protected[376] and remove any pressure on a victim survivor to provide a VIS.

This approach does not prevent a court from considering other empirically supported research or evidence or the judicial officer's own learned experiences to conclude there was, or is likely to be, harm experienced by a victim survivor. [377]

We note the proposed wording is consistent with the wording in other jurisdictions such as New South Wales,[378] ACT[379] and the NT.[380] A similar recommendation was made by the NSW Sentencing Council,[381] which was subsequently implemented.[382]

The Terms of Reference are focused on sentencing practices for sexual assault and rape. A potential inconsistency would arise if our recommendation was limited to these two offences. To limit sentencing

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369 Victims of Crime Commissioner, *Silenced and Sidelined: Systemic Inquiry into Victim Participation in the Justice System* (Report, November 2023), 438.

370 In a US study analysing the contents of VISs, they noted common themes of 'psychological and physical effects, feeling "robbed," … insulted by lack of remorse … disillusioned with the criminal legal system …. Victimization in broader terms … internalized blame, and defenselessness (sic)': Miltonette Craig and Daniel Sailofsky, 'What happened to me does not define who I am': Narratives of resilience in survivor victim impact statements' (2024) 19(2) *Victims and Offenders* 329, 334–38.

371 Davies and Bartels (n 343) 15.

372 Lieke C.J Nijborg et al, 'Grief and delivering a statement in court: a longitudinal mixed-method study among homicidally bereaved people' (2024) 15(1) *European Journal of Psychotraumatology* 1, 6–8.

373 NSW Sentencing Council, *Victims' Involvement in Sentencing* (Report, March 2018) 35 [3.22].

374 Davies and Bartels (n 343) 30 citing J Roberts, 'Victim impact statements and the sentencing process: Recent developments and research findings' (2003) 47 *Criminal Law Quarterly* 365.

375 Australian Law Reform Commission, *Sentencing* (Report No 44, 1988) n 71, citing the Australian Victims of Crime Association, Submission, 10 November 1987. See also Davies and Bartels (n 343) 41 citing Fiona Tait, *Testaments of Transformation: The Victim Impact Statement Process in NSW* as *Experienced by Victims of Crime and Victim Service Professionals* (2015).

376 *Victims' Commissioner and Sexual Violence Review Board Act 2024* (Qld) sch 1 'Charter of Victims' Rights'.

377 See, for example, *R v Stefanac* [2022] NSWCCA 129, [56]–[57] (Hamill J).

378 *Crimes (Sentencing Procedure) Act 1999* (NSW) ss 30E(5)–(6).

379 *Crimes (Sentencing) Act 2005* (ACT) s 53(1)(b).

380 *Sentencing Act 1995* (NT) s 106B(6).

381 NSW Sentencing Council, *Victims' Involvement in Sentencing* (Report, March 2018) 43 [4.25], rec 4.6.

382 *Crimes Legislation Amendment (Victims) Act 2018* (NSW) sch 3, subdiv 3.

inconsistencies, anomalies and complexities, this recommendation should not be limited to sexual assault and rape, but rather applied to all matters where a VIS can be provided.

Applying the Council's fundamental principles

In applying the Council's fundamental principles guiding the review, we determined that a recommendation was required to respond to this finding:

- **Principle 6: Reforms should take into account the likely impacts on the disproportionate representation of Aboriginal and Torres Strait Islander people in the criminal justice system:** The potential impacts on Aboriginal and Torres Strait Islander persons as defendants and victims are considered. It is envisaged that this reform will benefit victim survivors while having a minimal impact in terms of changing sentencing outcomes for those sentenced for these offences.
- **Principle 10: Any reforms should aim to be compatible with the rights protected and promoted under the HRA or be reasonably and demonstrably justifiable as to limitations**: We do not consider that this reform will result in any limitations on a person's human rights. In any case, the Council considers strengthening section 179K(5) to prohibit a court from drawing 'any inference' about whether the offence caused harm from the fact that a VIS was not given is reasonable and justifiable under the HRA, taking into account that sexual assault and rape, in particular, result in significant infringements on the human rights of victim survivors.

14.9.5 Systemic disadvantage considerations

As discussed throughout this report, Aboriginal and Torres Strait Islander people are around 3.5 times more likely to have been a victim of sexual assault (including rape and other sexual offences) compared with non-Indigenous Australians.[383] We consider that any recommendations for reform to better support victims through the sentencing process (including the VIS process) need to acknowledge this.

As discussed in **Chapter 13**, stakeholders have recognised a need for better communication with Aboriginal and Torres Strait Islander people, as both offenders and victims, and for greater cultural sensitivity. Members of the Aboriginal and Torres Strait Islander Advisory Panel considered that VIS are under-utilised and may cause more trauma, especially if there is dispute between the parties as to what is admissible. Although the defence is entitled to challenge the inclusion of inadmissible material, it was acknowledged that this can have significant impacts on a victim survivor.

We consider that opportunities to enhance the recognition and acknowledgement of victim survivors and their experiences within the sentence hearing may have a significant, positive impact on Aboriginal and Torres Strait Islander victim survivors when engaging with the criminal justice system without limiting the rights of the person being sentenced.

We note that opportunities to improve supports for victim survivors when providing their VIS will benefit Aboriginal and Torres Strait Islander people only if such supports are culturally safe and appropriate. This includes greater recognition of the concept of 'Women's Business' and that some victim survivors may be hesitant to speak about the harm they have experienced. While some Community Justice Groups ('CJGs') provide support to victims as well as defendants, it is the responsibility of the individual CJGs to determine whether sexual violence matters fall within scope of the services they provide. Greater consideration of

383 Australian Institute of Health and Welfare, *Family, Domestic and Sexual Violence in Australia 2018* (Report, 2018).

how Aboriginal and Torres Strait Islander women and children should be supported through this process needs to be considered.

The WSJ Taskforce's recognition of the importance of the Queensland Government consulting with people with lived experience and Aboriginal and Torres Strait Islander people in developing any recommendations to ensure they are 'individualised, culturally safe and trauma informed' should be adopted in any reform work to ensure their benefits can be realised by victim survivors from all cultural backgrounds.

An additional consideration is the way recognition of victim harm and perpetrator accountability is communicated and given effect to in sentencing, with a view to ensuring that this is done in a culturally safe and appropriate way for both victims and offenders. A further discussion of the impacts of language within the sentencing context is provided in **Chapter 15**, section 15.4.

14.9.6 Human rights considerations

Victims have an express right under the Victims' Charter to 'make a victim impact statement under the *Penalties and Sentences Act 1992* for consideration by the court during sentencing of a person found guilty of an offence relating to the crime'.[384] Greater recognition of their VIS is consistent with the right enshrined within the Victim's Charter to be treated with 'courtesy, compassion, respect and dignity, taking into account the victim's needs'.[385]

Promoting opportunities for victims to make a VIS and for the VIS process to operate in a way that meets their intention and does not retraumatise a victim and supports victims' rights is vital. However, VISs often contain personal information and concerns have been raised that this can give rise to 'significant privacy issues for victims'.[386]

We note that the Victorian Victims of Crime Commissioner recently recommended that the *Charter of Human Rights and Responsibilities Act 2006* (Vic) be amended to include victims' high-level rights, including a right for a victim of a criminal offence to be:

- acknowledged as a participant (but not a party) with an interest in the proceedings;
- treated with dignity and respect; and
- protected from unnecessary trauma, intimidation and distress when giving evidence and throughout criminal proceedings.[387]

We further note that the WSJ Taskforce recommended a review be undertaken of the Charter of Victims' Rights to 'consider whether additional rights should be recognised or if existing rights should be expanded' and that '[i]deally, this review would be undertaken by the Victims' Commissioner' once established.[388] We support this recommendation.

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384 *Victims' Commissioner and Sexual Violence Review Board Act 2024* (Qld) sch 1, div 2, right 7.
385 Ibid sch 1.
386 Victim of Crime Commissioner (Victoria), *Silenced and Sidelined: Systemic Inquiry into Victim Participation in the Justice System* (Report, November 2023) 438, rec 44.
387 Ibid 326–7, rec 5.
388 *Hear Her Voice, Report Two* (n 300) vol 1, 139–40 rec 19.

Chapter 15 – Other issues relevant to sentence

15.1 Introduction

In this chapter, we consider some other issues identified through this review, which impact current sentencing practices for sexual assault and rape offences, including:

- reducing a sentence to recognise a guilty plea;
- cumulative vs concurrent sentences; and
- language in sentencing.

These issues are relevant to sentencing of sexual assault and rape but also have wider implications for sentencing of other offences.

This chapter explores each of these issues, what other jurisdictions do and what we heard from stakeholders and consultation. We then present our key findings and recommendations.

15.2 Reducing a sentence to recognise a guilty plea

15.2.1 The current approach

As discussed in **Chapters 6** and **9,** a person's guilty plea is recognised as a statutory and common law mitigating factor.

Under section 13(1) of the *Penalties and Sentences Act 1992* (Qld) ('PSA'), a court 'must take the guilty plea into account' and 'may reduce the sentence it would have imposed had the offender not pleaded guilty'.[1] There is 'no requirement for a court to state the extent of the reduction for the plea of guilty'.[2] However, if a court does not reduce the sentence when a person has pleaded guilty, the court must state this is open court and give reasons for not reducing the sentence.[3]

Aside from stating a court may have regard to the timing of the plea,[4] section 13 of the PSA does not 'prescribe the factors which are relevant to a decision to reduce a sentence on the ground' of a guilty plea.[5] The considerations that are relevant come from the common law.[6]

At common law, there are 3 reasons why a guilty plea is generally accepted as justifying a lower sentence than would otherwise be imposed:[7]

1 *Penalties and Sentences Act 1992* (Qld) s 13 ('PSA').
2 *R v TBD* [2024] QCA 182 [36] ('*TBD*') citing *R v CCR* [2021] QCA 119, [15] ('*CCR*').
3 PSA (n 1) s 13(4). Although a sentence is not invalid because of this failure, it could be considered on appeal: s 13(5).
4 Ibid s 13(2).
5 *TBD* (n 2) [37].
6 *CCR* (n 2) [16]. Those considerations include the plea being evidence of remorse, it saves the community the cost of a contested trial and it may save the victim from giving evidence - see *Siganto v The Queen* (1998) 194 CLR 656 [22].
7 *Siganto* (n 6) [22], cited with approval in *TBD* (n 2) [37].

1. The plea can be a manifestation of remorse or contrition. The Court of Appeal has cautioned that 'on sentencing, an offender's remorse should not be left to inference. If it exists, it should be proved with clarity.'[8]
2. The plea has a utilitarian value to the criminal justice system. It saves the Queensland public time and money.
3. '[I]n particular cases — especially sexual assault cases, crimes involving children and, often, elderly victims — there is particular value in avoiding the need to call witnesses, especially victims, to give evidence.'[9]

In *Siganto v The Queen*,[10] the High Court found:

> a plea of guilty is ordinarily a matter to be taken into account in mitigation; first, because it is usually evidence of some remorse on the part of the offender, and second, on the pragmatic ground that the community is spared the expense of a contested trial. The extent of the mitigation may vary depending on the circumstances of the case. It is also sometimes relevant to the aspect of remorse that a victim has been spared the necessity of undergoing the painful procedure of giving evidence.[11]

In the absence of remorse for their actions, the focus turns to the willingness of the perpetrator to facilitate the course of justice.[12]

As to the utilitarian value of the plea, courts have recognised that the public interest is served by an accused person who accepts guilt and pleads guilty to an offence charged,[13] even if there would have been a high likelihood of conviction had the case proceeded to trial.[14] This is because, unless there is some incentive for a defendant to plead guilty, there is always a risk that they will proceed to trial.[15] While the weight given by the court will vary according to the degree of conviction certainty (as it appears to the sentencing judge), a guilty plea must always be considered a factor.[16]

The courts have indicated the more serious the offence, the less significance a plea will carry in terms of the ultimate sentence imposed and in some cases may warrant no discount at all.[17]

A person's motive for pleading guilty is not a reason not to take the plea into account.[18] A plea of guilty is also not a guarantee to a certain sentence that would bind a judge.[19]

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8 *R v Randall* [2019] QCA 25, 5 [27] ('*Randall*').
9 *R v Thomson; R v Houlton* (2000) 49 NSWLR 383, 386 [3]. This principle has been cited with approval by the Queensland Court of Appeal. See, for example, *R v Bates; R v Baker* [2002] QCA 174, [76] (Atkinson J) ('*Bates*').
10 (1998) 194 CLR 656.
11 *Siganto* (n 6) [22], cited with approval in *TBD* (n 2) [37].
12 *Cameron v The Queen* (2002) 209 CLR 339, 343 [11], [13]–[14] (Gaudron, Gummow and Callinan JJ); and *R v McQuire & Porter* (2000) 110 A Crim R 348, 358 (de Jersey CJ), 362 and 366 (Byrne J)
13 *R v Harman* [1989] 1 Qd R 414, 421; *Cameron v The Queen* (2002) 209 CLR 339, 360–1 [66]–[68] (Kirby J).
14 *R v Bulger* [1990] 2 Qd R 559, 564 (Byrne J).
15 Ibid.
16 *TBD* (n 2) [2024] QCA 182 [36] - [44]; *R v SEA* [2023] QCA 56 [8]; R *v Mahoney & Shenfield* [2012] QCA 366 [55]-[56]; *R v Ellis* (1986) 6 NSWLR 603, 604 (Street CJ).
17 See, for example *R v Crilley* [2020] QDCSR 291 where Judge Rafter declined to reduce the sentence due to the plea of guilty because 'the gravity of [his] offending is such that a reduction from the otherwise appropriate sentence of life imprisonment should not be made' [236]. See also *R v Mahoney & Shenfield* [2012] QCA 366 [53] (Gotterson JA, Muir JA and Applegarth J agreeing); *R v D* [2003] QCA 547 [40] (Chesterman J, McPherson JA and Mullins J agreeing).
18 *Bates* (n 9) [83] (Atkinson J) citing *R v Morton* [1986] VR 863, 867.
19 *R v Smith* [2022] QCA 55 [63] (Morrison J).

The 'one-third' – a rule of thumb

As discussed in **Chapter 11**, there is a statutory 50 per cent ratio between the minimum time to be served before an offender is eligible to be released on parole and the head sentence.[20] This usually means that if a court does not set a parole eligibility date, a person will become eligible for parole upon reaching the halfway mark of their sentence.[21]

Often, when a person pleads guilty, the non-parole period will be ordered around the one-third mark. For example, in *R v AAG*,[22] the Court of Appeal stated:

> Although there is no mathematical formula and every case will turn on its own circumstances, courts give very significant discounts to sex offenders who plead guilty and save the complainant from giving evidence at committal and trial, usually in the range of one-quarter to one-third of the head sentence applicable after a trial. Where apposite, a parole eligibility date may also be fixed somewhat earlier than the usual half-way point. Of course, the overall sentence must still be within the appropriate range to reflect the criminality of the offence.[23]

However, it is not a legislated rule,[24] as explained in *R v Craigie*:[25]

> The one-third non parole period often adopted by sentencing judges is not of course a legislative rule. It is a useful 'rule of thumb'. Unlike the legislatively fixed non parole period set out in a provision such as s 184(2) of the *Corrective Services Act 2006*, failure to comply with it does not require the sentencing judge to necessarily explain his reasons for doing so – the period chosen simply reflects the sentencing judge's view as to the minimum time that justice requires that the offender must serve having regard to all the circumstances of his offending conduct.[26]

Often other mitigating factors are also taken into account, not just the plea of guilty, such as a lack of relevant criminal history or a commitment by the person to their rehabilitation.[27] However, this is no 'hard and fast rule' and 'the authorities do not condone, in any respect of sentencing, some arithmetical approach under which a reduction is made from a pre-determined range of sentences'.[28]

Timing of the guilty plea

Any reduction to the head sentence or where parole eligibility or a partially suspended sentence is set depends on the timing of the plea and individual facts of the case.[29]

Section 13(2) requires the court to consider how early or late the plea was entered, as this is 'relevant to the extent of any reduction to be received' on a sentence.[30] Generally, a plea made at the 'last moment

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20 *Corrective Services Act 2006* (Qld) s 184(2).
21 There are a number of exceptions to this including if a person is declared convicted of a serious violent offence, in which case the person must serve 80 per cent of their sentence prior to being eligible for parole, or is serving a life sentence: see ibid s 182.
22 [2009] QCA 158.
23 Ibid [20] (McMurdo P).
24 See *Randall*(n 8) [38], [43].
25 [2014] QCA 1.
26 Ibid [26] (McMeekin J).
27 *R v Crouch* [2016] QCA 81 (McMurdo P, Gotterson JA agreeing at [34] and Burns J agreeing at [35].
28 *R v Torrens* [2011] QCA 38, [25] (Lyons J, Wilson AJA and Martin J agreeing).
29 See, for example, *TBD* (n 2) [37]–[38]; *R v Crouch* [2016] QCA 81 [29] in which the McMurdo P said that judges should continue to 'exercise the sentencing discretion judicially' and that 'whether a sentence warrants mitigation reflected in a parole eligibility, a parole release date or a suspension set after one third of the sentence, or at some other time, will always turn on the particular circumstances of the individual case'. The serious circumstances in a case and overwhelming evidence may mean that no reduction for a plea of guilty is warranted: see *R v Mahony* [2012] QCA 366 [50]–[56].
30 *TBD* (n 2) [39].

(as on the day set down for the trial) will ordinarily attract a smaller discount than one that is entered at the first reasonable opportunity'.[31]

To determine whether a plea was entered at the first reasonable opportunity, it is necessary to consider the relevant circumstances leading to the plea 'and not mere regard to the form of the charges'.[32] For example, a person may be only willing to plead guilty to an offence after other charges are withdrawn, so a court cannot automatically assume the person has not pleaded guilty at the earliest opportunity.[33] Where plea timing is disputed, the person must provide:

> evidence of the progress of negotiations in relation to charges that were withdrawn, the particular forensic prejudice or disadvantage in pleading guilty to some charges whilst another charge or other charges remained on an indictment or a late development in the case, such as the emergence of new evidence.[34]

Guilty plea reduction in offences of a sexual nature against a child

In *R v Crothers (a pseudonym)*,[35] the Court of Appeal determined that when sentencing a person for sexual offences against a child, the weight to be given to a guilty plea is affected by the sentencing factors in section 9(6) of the PSA. Sofronoff P stated:

> while s 13 of the Act requires a guilty plea to be taken into account, the weight to be given to such a plea when sentencing an offender who has committed sexual offences against children is affected by the terms of s 9(6) of the Act which requires a sentencing judge to "have regard primarily to" the factors there listed. The first four of these factors relate to the situation of the victim of the sexual offence and three relate to the situation of potential future victims. These were the matters to which [the sentencing judge] rightly gave the greatest attention and weight. The remaining factors of real consequence mentioned in s 9(6) which relate to the applicant are his prospects of rehabilitation, his remorse or lack of remorse and any psychiatric reports relating to him. For reasons that should be obvious, none of these factors are worth much in this case.[36]

Guilty plea reduction in setting the head sentence

As discussed in **Chapters 8** and **11**, the SVO scheme requires a person to serve 80 per cent of the sentence in custody before they are eligible for parole. In our SVO review, we found that the scheme constrains judges' ability to take all circumstances of the case into account and balance them appropriately, leaving the length of the head sentence as the only adjustable component of the sentence.[37]

There is no fixed practice around the amount to reduce the head sentence to recognise a guilty plea, and it will depend on the circumstances of the case. For example, in *R v CCR*,[38] the Court dismissed an appeal that the 14-year sentence for serious child sexual abuse offences was manifestly excessive because the reduction from 16 years for the plea of guilty was inadequate. The Court noted the reduction of 'one-eighth' was 'not unprecedented' and a review of similar cases showed that while it 'was a heavy sentence' it was not so excessive that it demonstrated there was an error of principle nor that the sentence was

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31 *R v Pike* [2021] QCA 285 referring to remarks by Kirby J in *Cameron v The Queen* (2002) 209 CLR 339, 359 [65] citing *R v Holder* [1983] 3 NSWLR 245; *R v Bulger* [1990] 2 Qd R 559; cf *R v Dodge* (1988) 34 A Crim R 325 at 331; *R v Heferen* (1999) 106 A Crim R 89, 92 [12]; *R v Thomson* (2000) 49 NSWLR 383 414–15 [132].
32 *TBD* (n 2) [39].
33 *Atholwood v The Queen* (1999) 109 A Crim R 465, 468 (Ipp J) cited in *Bates* (n 9) [80].
34 *TBD* (n 2) [40].
35 *R v Crothers (a pseudonym)* [2020] QCA 268.
36 Ibid [18].
37 Queensland Sentencing Advisory Council, *The '80 per cent Rule': The Serious Violent Offences Scheme in the Penalties and Sentences Act 1992* (Qld) (Final Report, 2022) 28 ('*The '80 Per cent Rule*').
38 *CCR* (n 2).

'unreasonable or plainly unjust'.[39] In *R v BEA*,[40] the Court cited without comment the decision of *R v Martin*,[41] in which the sentencing judge reduced a sentence of 12 years' imprisonment to 10 years, 'to ameliorate the effect of the serious violent offence declaration that was made'.[42]

In cases involving a plea to an ex officio indictment (the earliest point at which a person may plead guilty), the Court of Appeal has said that 'a significant discount' is warranted.[43] In *R v Wark*,[44] the Court reduced a sentence from 13 years to 12 years on this basis (and associated remorse) that had the case gone to trial, a sentence of 15–16 years imprisonment was merited and '13 years [imprisonment] did not make adequate allowance for the plea of guilty'.[45]

In cases where a mandatory SVO may apply to a sentence, generally courts are not to give a 'double benefit' to a guilty plea by reducing both the head sentence (to below 10 years) and the parole eligibility date.[46] However, there may be some circumstances where a double benefit is warranted.[47]

Prosecutorial approach to guilty pleas

When a person has been charged with a sexual offence, whether the offence can be dealt with summarily or on indictment will determine whether it is heard in the Magistrates Court or a higher court. Rape is an indictable offence and will almost always be dealt with by the District and Supreme Courts,[48] whereas sexual assault may be dealt summarily or on indictment, depending on the seriousness of the matter and their willingness to plead guilty.

For sexual assault cases dealt with summarily, police will be responsible for prosecuting the matter.[49] Where a sexual assault offence is charged on indictment or it is a rape offence, the Office of the Director of Public Prosecution ('ODPP') will prosecute. The Queensland Police's Operational Procedures Manual and the ODPP's *Director's Guidelines* set out how sexual violence offences are to be prosecuted and how to engage with victim survivors.[50]

Office of the Director of Public Prosecution procedures

The ODPP must determine whether there are reasonable prospects of a conviction and whether a prosecution is in the public interest.[51] The public interest test has 2 components: (1) Is there sufficient evidence to proceed with the prosecution? and (2) Does the public interest require a prosecution?[52]

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39 Ibid [19], [28].
40 [2023] QCA 78 ('*BEA*').
41 Unreported, District Court of Queensland, Cairns, Morzone QC DCJ, 28 May 2019.
42 *BEA* (n 40) [67].
43 *R v Wark* [2008] QCA 172 [55] (Cullinane J).
44 Ibid.
45 Ibid [20] (Mackenzie AJA).
46 *R v Cumner* [2020] QCA 54 [68].
47 *R v Tran; Ex parte A-G (Qld)* [2018] QCA 22. See also *R v King* [2020] QCA 9.
48 See Chapter 7, which explains the limited circumstances in which rape may be dealt with in the Magistrates Court.
49 Summary offences can be dealt with in higher courts when the offender is also charged with indictable offences.
50 Queensland Police Services, *Operational Procedures Manual* (Issue 102, 1 October 2024) Ch 3 – Prosecution Process; Office of the Director of Public Prosecution, *Director's Guidelines* (30 June 2023) ('*ODPP Director's Guidelines*'). Guideline 25 sets out how prosecutors are to protect and consult with victims. This includes ensuring a closed court for victim testimony during sexual offence cases (*Criminal Law (Sexual Offences) Act 1978* (Qld), s 5 and *Evidence Act 1977* (Qld) s 21A and protections from improper questions during sexual offence trials (*Evidence Act 1977* (Qld) s 21).
51 *ODPP Director's Guidelines* (n 50) Guideline 4, 2–8.
52 The *Directors Guidelines* set out a range of discretionary factors which may be used to assess whether a case meets the public interest criteria, such as '(a) the level of seriousness or triviality of the alleged offence, or whether or not it is of a 'technical' nature only'. Factors which pertain to the victim survivor include: '(k) any entitlement or liability of a victim or other person to criminal compensation, reparation or forfeiture if prosecution action is taken' and '(l) the attitude of the victim of the alleged offence to a prosecution': ibid 3–4.

Securing a guilty conviction is in the public interest and 'the most efficient conviction is a plea of guilty'.[53] The *Director's Guidelines* encourage early negotiations because early notice of guilty plea 'will maximise the benefits for the victim and the community'.[54]The purpose of negotiations is 'to secure a justice result'.[55]

However, a guilty plea will only be accepted if 'it is in the general public interest'. Under the *Director's Guidelines*, the public interest can be satisfied in one or more of the following ways:

(a) the fresh charge adequately reflects the essential criminality of the conduct and provides sufficient scope for sentencing;

(b) the prosecution evidence is deficient in some material way;

(c) the saving of a trial compares favourably to the likely outcome of a trial; or

(d) sparing the victim the ordeal of a trial compares favourably with the likely outcome of a trial.[56]

The Guidelines also provide for when a plea will not be accepted: it doesn't 'adequately reflect the gravity of the provable conduct of the accused'; the ODPP would be required to distort evidence or the defendant maintains their innocence.[57] Victim survivor views must be sought before any decision is made; however, these are not determinative, as 'it is the public, rather than an individual interest, which must be served'.[58]

When engaging in the plea negotiation process, the ODPP must also, if requested by the victim, provide victims with information regarding notice of a decision to substantially change a charge, or not to continue with a charge, or accept a plea of guilty to a lesser charge[59] – consistent with rights recognised under the Charter of Victims' Rights for a victim to be kept informed about these matters.[60] However, while victim survivors' views 'must be recorded and properly considered prior to any final decision, those views alone are not determinative'; the PDPP has the ultimate discretion to decide whether or not to proceed with the prosecution, having regard to the above mentioned factors.

Guilty plea and outcomes

Guilty plea rates for rape and sexual assault in Queensland

The Council's data analysis over the 18-year data period found that the guilty plea rate for all Queensland offences is 99.1 per cent (the not-guilty plea rate is 0.9%), and for sexual offences generally, 88.6 per cent (the not guilty plea rate is 11.4%).[61]

Compared with sexual offences generally, we found rape had an even higher proportion of not guilty pleas, with close to one-third of people sentenced having entered a not guilty plea (31.3%), but sexual assault had a lower proportion of not guilty pleas (8.1%).

Plea type and parole eligibility date – for rape

Our analysis found that people who pleaded guilty and were sentenced for rape (MSO) had short non-parole periods. The median time before parole eligibility was 2.3 years (average 3.1 years) for a person

53 Ibid 23.
54 Ibid.
55 Ibid.
56 Ibid.
57 Ibid 24.
58 Ibid.
59 Ibid 33.
60 *Victims' Commissioner and Sexual Violence Review Board Act 2024* (Qld) sch 1, div 2.
61 See Appendix 4.

who pleaded guilty to rape (MSO), compared with 3.0 years (average 3.5 years) for a person who pleaded not guilty.

Of the 535 people who pleaded guilty to rape (MSO) between July 2011 and June 2023 and received an imprisonment order, three-quarters had parole eligibility set below the halfway mark (74.4%), and over half had their parole eligibility date set at or below the one-third mark (55.8%). For these cases, the average proportion of the head sentence to serve before parole eligibility was 39.8 per cent (median 33.4%).

In contrast, of the 319 people who did not plead guilty, two-thirds were only eligible for parole after serving half of their head sentence (66.8%) and a much smaller proportion than for those who pleaded guilty (17.6%) had their parole eligibility date set below 50 per cent of the head sentence. Most commonly, people were required to serve 50 per cent of their sentence before becoming eligible for release on parole. Unlike the guilty pleas, there was no concentration at the one-third mark, suggesting that other sentencing considerations, such as specific factors in personal mitigation, were being applied to those set below the halfway mark.

Plea type and parole eligibility date – for sexual assault

If a person does not plead guilty to a charge of non-aggravated sexual assault, they must have the matter dealt with in a higher court, regardless of how serious the alleged conduct is.

The median imprisonment length to serve before being eligible for release on parole (after pleading guilty) for non-aggravated sexual assault sentenced in the Magistrates Courts was 0.2 years (approximately 2.5 months; average 0.2 years). There were some cases that only had to serve a short amount of time (under one month) or were able to apply for parole immediately, usually due to time served in pre-sentence custody. Due to a lack of jurisdiction, there were no not guilty pleas in the Magistrates Courts.

In the higher courts, those who pleaded guilty and received imprisonment were eligible for release on parole after serving a median of 0.8 years (approximately 10 months) with an average time to serve of 0.8 years.[62] Those who did not plead guilty had to serve a median of 0.5 years (approximately 6 months) prior to parole eligibility with an average time to serve of 0.6 years (approximately 7 months). However, the sample size for those who pleaded not guilty was small (n=14) in comparison to that for people who pleaded guilty (n=50).

Plea type and time to progress through the courts

The Council's analysis showed there was a substantial difference in the time it took a case to progress through the courts, depending on the person's plea.

For rape offences, just over two-thirds of cases involved a guilty plea (68.7%, n=1,246/1,813). The median time between committal hearing to sentence for a plea was 280 days (approximately 9.2 months). For cases that went to trial, the median time between committal hearing to sentence was 413 days (approximately 13.6 months).

For sexual assault offences sentenced in the higher courts, cases that involved a guilty plea had a median time of 250 days from committal hearing to sentence (approximately 8.2 months). For cases that went to trial, the median time between committal hearing to sentence was 331 days (approximately

62 Three cases were excluded from this analysis because plea type was not available.

10.9 months). All sexual assault cases sentenced in the Magistrates Courts pleaded guilty, with the median time from lodgement to sentence being 118 days (approximately 3.9 months).

15.2.2 Sentencing remarks analysis

The Council's thematic analysis of sentencing remarks of sexual assault and rape found a plea of guilty was the most referenced factor in mitigation.

Sentencing courts explained the value of the plea in different ways, but most commonly referred to acceptance of responsibility for the offending, evidence of cooperation with the administration of justice, and sparing the victim survivor from having to give evidence.

Where pleas of guilty were assessed as early courts set the parole eligibility date or release on a partially suspended sentence at one-third or less:

> The significance of the early plea, and it has been categorised as an early plea by the Prosecution, in my view quite properly, given that the matter was indicated as a sentence on the day that the indictment was presented, it means that the complainant has obviously been spared the obvious ordeal of having to relive the traumatic event of 32 years ago.[63]

> You pleaded guilty to all of these charges when you were arraigned before me this morning. In the circumstances that have been outlined by the Crown, I accept that these are early guilty pleas and I have taken that into account in determining the penalty that I am going to impose upon you today.[64]

> Your plea of guilty demonstrates, from very early, a willingness to accept responsibility and a degree of remorse for your actions … There is something of a practice to reflect the plea of guilty and other matters in mitigation of fixing a person's parole eligibility date at about a third. I have already given you the benefit of the matters in your favour by fixing the head sentence at that point, but I still am prepared to order your eligibility for release even and before three years because of the matters I have just referred to.[65]

Similarly, when pleas were accepted as timely, the courts generally set parole eligibility at one-third:

> As I say, your plea of guilty, though, is of significance, and in my view deserving of considerable reduction in penalty. There must surely be some encouragement to people accepting responsibility for this style of offending … I am satisfied that it would be appropriate in the exercise of discretion to reduce both the head sentence, and the time at which you become eligible for parole release. In the circumstances, in my view, balancing the competing considerations, I consider the following sentence to be just.[66]

> I accept your guilty plea, its timely. By this you have saved the State time, resources and the expense of preparing for trial and you have also saved the complainant from having to give evidence. I take it in to account in determining the sentence to be imposed upon you today.[67]

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63 Rape, major city, imprisonment < 5 years, #8: Pleaded guilty to 1 count of rape, one count of indecent treatment (as it was then), 1 count of entering a dwelling with intent to commit an indictable offence at night and one count of deprivation of liberty. Sentenced to 5 years imprisonment with parole eligibility date set after 18 months.

64 Rape, major city, imprisonment > 5 years, #9: Pleaded guilty to 6 counts of indecent treatment of a child under 16, under 12, who is a lineal descendent, under care and 3 counts of rape. Sentenced to 6 years imprisonment with parole eligibility date set after 18 months' imprisonment.

65 Rape, major city, imprisonment > 5 years, #18: Pleaded guilty to 10 sexual offences, including 5 counts of penile-vaginal rape of his daughter (aged 8–18 over period of offending) was sentenced to 9 years with parole eligibility at 2 years and 9 months. Plea was made early in Magistrates Court.

66 Rape, regional/remote, imprisonment > 5 years, #2: Pleaded guilty to one count of (penile-vaginal) rape of his intoxicated and semi-conscious friend for 'an extended and protracted period of time' was sentenced to 6 years with parole eligibility at 22 months.

67 Sexual assault, major city, higher courts, custodial, #11: Pleaded guilty to one count of sexual assault (rubbing erect penis on victim survivor's genitals) and was sentenced to 12 months' imprisonment, wholly suspended (operational period of 2 years).

Our analysis showed that even when a plea was late, judges thought the benefit for victim survivors to not be retraumatised by cross-examination warranted setting it at the one-third mark (or below):

> The most significant effect of your plea of guilty is that the complainant did not have to come to court and did not have to give evidence and did not have to relive the trauma of what you did to him, and I take that into account in your favour … I am prepared to accept that your plea of guilty is a product of your genuine remorse, even though it is in the face of an inability to remember what you did, I am told.[68]

> Your plea is a late plea. Your plea was entered on the morning that a pre ordering of the complainant's evidence was listed to proceed in this court. Your matter had been indicated to the court on a number of occasions as being a trial. So therefore, I treat your plea as a late plea. However, I also accept that by your plea of guilty you have spared the complainant the added trauma or distress of not only having to give evidence in court, but also from being cross-examined and having the allegations challenged, which of itself no doubt could have been a traumatic experience.[69]

> I take into account the timing of your plea of guilty, but albeit relatively late. Your cooperation in bringing this matter to a conclusion has saved the complainant from having to come to Court and speak to strangers about what you did to her.[70]

> I intend to set your parole eligibility date at the one-third point of the sentence I impose. I do so again, acknowledging that your plea is a late plea but that needs to be carefully weighed up with all the other relevant considerations.[71]

> The trial of these proceedings were listed to commence before me this morning, but you pleaded guilty when you were arraigned before me. In the circumstances, I accept that your guilty plea has assisted with the administration of justice, and I have taken that into account in structuring the penalty that I am going to impose upon you today. Particularly in a case such as this, in my view there is a great benefit to a guilty plea because it meant – despite the lateness of the plea – ultimately the complainant did not have to give evidence before a jury in the witness box … So in relation to the overall head sentence for each of the rape counts, I am going to impose a sentence of three and a half years' imprisonment. The Crown submits that because of your late plea I would make you eligible for parole at a date past the one-third, but there is a great benefit to your guilty plea today and I want to recognise that in making you eligible for parole at the date that I have determined that is appropriate in all the circumstances and that is 20 April 2024. So that is slightly below the one-third, but it will be a matter for the Parole Board for you to show that you have taken steps towards your rehabilitation before they release you back into the community.[72]

These cases suggest that, irrespective of the timing of the plea, parole eligibility is set at one-third of a head sentence or below.

There were examples where discretion was highlighted. In a case involving two counts of rape (penile–vaginal and penile–anal) by a man on his sleeping partner (who was pregnant at the time), the judge suggested the late plea did not warrant the same discount as an early one; however, when combined with other mitigating factors (no use of violence, mental impairment, not regarded as ongoing risk of sexual offending), the judge reduced both the length of the sentence and when the suspension date was set:

> The fact you pleaded guilty is important. It did come late in the day, it was in the week in which the matter was listed for trial; nonetheless, there is important benefit in your plea of guilty. It has saved the complainant from having to

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68 Sexual assault, major city, higher courts, custodial, #8: Pleaded guilty to one count of aggravated sexual assault (non-consensual oral sex performed on male victim with a known cognitive impairment) was sentenced to 18 months' imprisonment, suspended after 4 months. A delayed plea made 1 month prior to trial.

69 Rape, regional/remote, imprisonment < 5 years, #4: Pleaded guilty to 2 counts of indecent treatment of a child under 16, under care, 4 counts of rape (penile-oral and digital-vaginal), 2 counts of sexual assault and 1 count of aggravated sexual assault of stepdaughter (aged 13 to 18 years over period of offending). Sentenced to 4.5 years with parole eligibility at one-third.

70 Rape, regional/remote, imprisonment > 5 years, #15: Pleaded guilty to 2 counts of rape (digital-vaginal and penile-vaginal) of family friend. Sentenced to 5 years and 9 months with parole eligibility set at one-third.

71 Rape, regional/remote, imprisonment > 5 years, #10: Pleaded guilty to 17 counts of indecent treatment of a child under 16 under 12, lineal descendent and 4 counts of penile-anal rape and one count of common assault against his son. Sentenced to 7 years with parole eligibility set at one-third.

72 Rape, major city, imprisonment < 5 years, #23: Pleaded guilty to 3 counts of rape (digital-vaginal and tongue-vaginal) and 3 counts of indecent treatment of a child under 16 as a guardian of step-daughter (11 or 12 years old).

> testify and from the ignominy of telling everyone in her own words what happened. The lateness of it means that you cannot be given the same benefit as if it was truly an early plea in all of the circumstances, but you have saved the cost of the conduct of a trial and thereby contributed to the efficient administration of justice in addition to the factors I have just spoke of concerning the complainant … A pervasive feature that I must have regard to, amongst other things, is this developmental delay. In my view, it is quite relevant to the nature and structure of the sentence to be imposed … Your case I consider to be very unique. I expressly indicate that I am tailoring this sentence in an effort to deal with the many competing factors, and it should not be regarded as broadly comparable unless, somewhat surprisingly, the same issues would arise again. I intend to reduce the head sentence as well as the bottom of the sentence; that is the point at which you should be released – to reflect the matters in your favour.[73]

Sentencing different offences against multiple victim survivors can be complicated, particularly if the person pleads guilty to some charges but not others. In one case involving 3 separate victim survivors, the perpetrator pleaded guilty to offences against all 3 women but not guilty to the (digital–vaginal) rape of one of them. In balancing these considerations (and others), the judge stated:

> [O]rdinarily, by virtue of your pleas of guilty, any head sentence I imposed upon you might have required for you to have served one-third of that sentence. What I am ultimately going to do is make no order for parole, which means that the effect of the Corrective Services Act will require you to serve 50 per cent of that sentence before you become eligible for parole…But I am structuring the sentence in that way, by reducing the sentence, I, otherwise would have imposed upon count 1 [unlawful stalking], to take into account the fact that I am not making any recommendation for parole. That, again, in view, carefully balances your pleas of guilty in respect of count 4 [recording in breach of privacy] with the fact that you were found guilty after trial in relation to count 5 [rape] and, therefore, are not entitled to any discount for your plea of guilty on that count, and carefully balances those considerations by reducing the head sentence I might otherwise have imposed on count 1 to give you the benefit of your pleas of guilty for counts 1 to 4.[74]

Where the SVO scheme was raised, judges commented on the challenge in the mandatory aspect of the scheme and recognising the person's guilty plea:

> I agree that the appropriate range for the overall gravity of the offending is eight to 10 years' imprisonment. Having regard to all the factors 10 years is too high and that would also involve an order made a declaration of a serious violent offence, particularly for the rapes which would mean you would have to serve eight years in jail and as [defence counsel] said that would not give you any real recognition of your early plea of guilty and your – some cooperation with police.[75]

15.2.3 What do other jurisdictions do?

All Australian jurisdictions recognise a plea of guilty as a mitigating factor in sentencing, either in statute or through the common law. This is also the position in England and Wales, Scotland and New Zealand. However, there are a range of approaches to the discount allowed for a guilty plea.

New South Wales ('NSW'), South Australia and England and Wales use a sliding scale model of discounts based on fixed points within a pre-trial process.[76] The discount is usually applied to the length of the sentence. For example, in England and Wales the maximum sentence reduction is one-third of the head sentence (for an early plea),[77] while NSW legislation has a mandatory scheme for indictable offences that

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73 Rape, major city, imprisonment < 5 years, #5: He was sentenced to a head sentence of 5 years' imprisonment, suspended after 15 months.
74 Rape, regional/remote, imprisonment < 5 years, #3.
75 Rape, major city, imprisonment > 5 years, #15.
76 New South Wales: *Crimes (Sentencing Procedure) Act 1999* (NSW) Division 1A; South Australia: *Sentencing Act 2017* (SA) s 40(3) — in 2020 following a review the maximum discount for a guilty plea in the case of a serious indictable offence is now 25% — a reduction from the previous maximum discount of 40% — with reductions also made to discounts that can be applied to pleas entered at a later stage; Sentencing Council of England and Wales, *Reduction in Sentence for a Guilty Plea - First Hearing On or After 1 June 2017 Guideline* ('*UK Guilty Plea Guideline*').
77 *UK Guilty Plea Guideline* (n 76).

involves a sliding scale of discounts based on fixed points (see Table 15.1).[78] Despite the mandatory terms in section 25(1) of the *Crimes (Sentencing Procedure) Act 1999* (NSW), a court may refuse the discount or a reduced discount if:

- the perpetrator's culpability is so extreme the community interest in retribution, punishment, community protection and deterrence warrants no, or a reduced, discount;[79] or
- the utilitarian value of the plea was eroded by a factual dispute which was not determined in the perpetrator's favour.[80]

Table 15.1: New South Wales plea of guilty discount scale for indictable offences

Timing of plea	Discount
Before committal in the Local Court	25%
Up to 14 days before the first day of trial in the District or Supreme Court (for plea or notice of plea)	10%
In any other circumstances	5%

Source: *Crimes (Sentencing Procedure) Act 1999* (NSW) Division 1A

In Western Australia, when a term of imprisonment is imposed, a court cannot reduce the fixed term by 25 per cent or more[81] unless the offender pleads guilty or indicated that they will do so at the 'first reasonable opportunity'.[82] Legislation provides that the sentence discount must be stated in open court.[83]

Comparatively, the Australian Capital Territory ('ACT'), the Northern Territory ('NT'), Victoria, Scotland and New Zealand ('NZ') do not have a legislative prescribed discount.[84]Like Queensland, these jurisdictions have a statutory requirement to take into account a guilty plea (and its timing), but discretion is left to the court in relation to the extent of the discount given. This approach places 'the emphasis on the utilitarian value of the plea … [meaning the] timing of the plea [is] the key factor relevant to the reduction received'.[85] Generally, case law provides guidance as to the appropriate discount for a plea, however there is some statutory guidance in the NT in relation to the Local Court.[86]

In contrast to Queensland, there is a legislative requirement for the court to state the discount provided in the ACT, Scotland and Victoria.[87] For example, in Victoria the court must state the sentence it would

78 *Crimes (Sentencing Procedure) Act 1999* (NSW) pt 3, div 1A. The scheme does not apply to Commonwealth offences; where offences committed by a persons under 18 years and were under 21 years when proceedings commenced; sentences of life imprisonment; and summary offences or an offence dealt with on indictment to which this division does not apply (s 22(5)).
79 *Crimes (Sentencing Procedure) Act 1999* (NSW) s 25F(2).
80 Ibid s 25F(4).
81 *Sentencing Act 1995* (WA) ss 9AA(4)(a).
82 Ibid ss 9AA(4)(b).
83 Ibid ss 9AA(5).
84 *Crimes (Sentencing) Act 2005* (ACT) ss 35(3) and 37(2); *Sentencing Act 1995* (NT) s 2(j); *Sentencing Act 1991* (Vic) s 5(2)(e); *Criminal Procedure (Scotland) Act 1995* (Scot) s 196; *Sentencing Act 2002* (NZ) s 9(2)(b).
85 Tasmanian Sentencing Advisory Council, *Statutory Sentencing Reductions for Pleas of Guilty* (Final Report No. 10, October 2018) 10 ('*Sentencing Reductions for Pleas of Guilty*').
86 *Sentencing Act 1995* (NT) ss 108A (state and recording requirement for sentence after guilty plea) and 123A (Late guilty plea not relevant for sentencing for offence).
87 *Crimes (Sentencing) Act 2005* (ACT) s 37; *Criminal Procedure (Scotland) Act 1995* (Scot) s 196(1A); *Sentencing Act 1991* (Vic) s 6AAA.

have imposed 'but for the plea of guilty'.[88] In the ACT, when considering a 'lesser penalty (including a shorter non-parole period)' for a guilty plea, courts are required to consider a range of statutory factors including the timing of the plea, negotiations between the prosecution and defence about the charge the offender pleaded to, the seriousness of the offence, the effect of the offence on the victim survivor, and where the prosecution's case was 'overwhelmingly strong' not to 'make any significant reduction'.[89] Any 'lesser penalty imposed ..... must not be unreasonably disproportionate to the nature and circumstances of the offence'.[90]

Tasmania is the only state that does not have a statutory basis for a sentencing reduction for a guilty plea. Tasmanian common law does recognise that the utilitarian benefit of a plea may be taken into account 'as a mitigatory factor separate from any subjective consideration of remorse'.[91] Tasmanian courts regard the timing of the plea and the strength of the Crown case as relevant factors to the sentencing reduction. In *DPP v Broad*,[92] the Tasmanian Court of Criminal Appeal set out principles in stating the reduction, with Justice Wood stating that in some cases there was 'real benefit in quantifying the discount' as 'the gain to be derived from promoting the administration of justice is plain' but that it is 'best left to the discretion of the judge'.[93] The Tasmanian Sentencing Council in 2018 recommended a statutory scheme be implemented; however, this has not been adopted.

Guilty plea reduction or ratio in setting the non-parole period

Generally, other states and territories have a ratio between 50 and 75 per cent of the head sentence.[94] In South Australia,[95] Victoria[96] and the ACT,[97] this is via the common law (although SA and Victoria do have statutory schemes that set minimum non-parole periods).[98] The Victorian Court of Appeal has observed that the fixing of the non-parole period is not only in the interests of the offender, but also 'the community, in ensuring that, after a period of incarceration, the offender is safely rehabilitated into society'.[99] However, while rehabilitation is an important consideration,

> the non-parole period must be sufficient to reflect the gravity of the offence and the offender's subjective culpability. In particular, the non-parole period must be adequate to properly fulfil the sentencing purposes of general deterrence, denunciation, specific deterrence and protection of the community.[100]

In other states and territories, sentencing and parole legislation provides guidance on the required minimum or recommended proportion between the non-parole period and the head sentence. This ranges

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88 *Sentencing Act 1991* (Vic) ss 6AAA(2) and 6AAA(3).
89 *Crimes (Sentencing) Act 2005* (ACT) ss 35(2)–(5).
90 Ibid s 35(6).
91 *Sentencing Reductions for Pleas of Guilty* (n 85) viii.
92 [2018] TASSAC 5.
93 Ibid [9]-[10].
94 *The '80 Per cent Rule'* (n 37) 16.
95 he South Australian Court of Criminal Appeal has noted that non-parole periods have tended to range between '50% and 75% of the head sentence': *R v Devries* [2018] SASCFC 101, [19] (Hinton J) citing *R v Palmer* [2016] SASCFC 34, [4] (Kourakis CJ).
96 Generally Victorian sentencing courts impose non-parole periods that are between 60% and 75% of the head sentence: Judicial College of Victoria, *Victorian Sentencing Manual* (4th ed, July 2021) 162 [8.3.2] (*'Victorian Sentencing Manual*').
97 The 'usual [percentage] range of 50-75%' has been noted in a number of Court of Appeal decisions: *see Zdravkovic v The Queen* [2016] ACTCA 53, [74] citing *Barrett v The Queen* [2016] ACTCA 38, [52]: *Taylor v The Queen* [2014] ACTCA 9 at [20] (Murrell CJ, Refshauge and Penfold JJ agreeing generally as to reasons).
98 In South Australia, these are the serious repeat offenders scheme and the mandatory minimum non-parole period for serious offences against the person. In Victoria, the standard sentences scheme has mandatory non-parole periods and the statutory minimum sentences scheme applies a statutory defined term minimum non-parole period to certain offences
99 *Mush v The Queen* [2019] VSCA 307 [100]
100 Ibid [101].

from 50 per cent in the Northern Territory,[101] Tasmania[102] and Western Australia[103] to 75 per cent in NSW.[104] In Western Australia, for sentences of more than 4 years, a person is eligible for parole after serving all but 2 years of the term of imprisonment imposed in custody.[105]

What we know from previous reviews into sentencing reductions for guilty pleas

There have been reviews of the sentencing reduction for guilty pleas in several Australia and international jurisdictions, including England and Wales,[106] NSW,[107] South Australia,[108] Tasmania,[109] Victoria[110] and Western Australia.[111]

Some reviews have been government initiated to measure the operation and effectiveness of that jurisdiction's guilty plea scheme and/or to seek advice on ways to reform the guilty plea scheme. It is apparent that transparency of sentencing decisions and consistency (particularly in relation to the timing and circumstances of a plea) were important considerations in those reviews.

This section will briefly consider government-initiated reviews of guilty pleas in NSW, South Australia and Tasmania.

New South Wales

The NSW Sentencing Council ('NSWSC') and the NSW Law Reform Commission ('NSWLRC') have both examined guilty pleas and reductions in sentencing in reviews in 2009, 2013 and 2014.

The NSWSC's 2009 review examined the principles and practices governing sentence reductions and focused on a number of specific discounting factors, including the guilty plea and assistance to authorities. The report made several recommendations, which were implemented by the NSW Government. The new laws included:

- no discounts for sex offenders solely on the basis that they will be designated prohibited persons under Child Protection laws and prevented from working with children;
- any discounts received do not result in a penalty that is 'unreasonably disproportionate' to the serious nature and circumstances of the offence; and
- to require the court to take into account the circumstances in which the offender pleads guilty.[112]

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101 Applies to sentences of 12 months or longer: *Sentencing Act 1995* (NT) ss 53 and 54. The non-parole period increases to 70% for certain sexual and violent offences: ibid ss 55 and 55A.
102 *Sentencing Act 1997* (Tas) s 17(3).
103 In this case limited to sentences of 4 years or less: *Sentencing Act 1995* (WA) s 93.
104 *Crimes (Sentencing Procedure) Act 1999* (NSW) s 44, unless there are special circumstances for the balance of the sentence to be more. A court can also decline to set a non-parole period: s 45.
105 *Sentencing Act 1995* (WA) s 93.
106 Sentencing Academy, *Sentence Reductions for Guilty Pleas: A Review of Policy, Practice and Research* (December 2020).
107 NSW Sentencing Council, *Reduction of Penalties at Sentence: Final Report* (2009); NSW Law Reform Commission, *Sentencing: Final Report* (Report 139, 2013) ('*Sentencing Final Report*'); NSW Law Reform Commission, *Encouraging Appropriate Early Guilty Pleas: Final Report* (Report 141, 2014) ('*Encouraging Early Guilty Pleas*').
108 Brian Ross Martin, *Review of the Sentence Reduction Scheme – Part 2 Division 2 Subdivision 4 of the Sentencing Act 2017 (SA)* (Interim Report, 5 June 2019).
109 *Sentencing Reductions for Pleas of Guilty* (n 85).
110 Victorian Sentencing Advisory Council, *Sentence Indication and Specified Sentence Discounts* (Final Report, 2007).
111 Western Australia Department of Justice, *Review of Section 9AA of the Sentencing Act 1995: Review Report* (October 2019).
112 Honourable John Hatzistergos MLC, Attorney-General and Minister for Industrial Relations, 'Moves to Restrict Sentence Discounts for Police Informants and Sex Offenders' (Media Release, 27 November2009).

In 2013, the NSWLRC recommended introducing a legislative requirement to quantify the discount of a guilty plea and that courts must specify the discount given because this 'could improve both the transparency and consistency of sentencing for the benefit of all stakeholders'.[113]

In explaining its rationale for these amendments, the NSWLRC referred to the Australia Law Reform Commission's recommendations to federal sentencing legislation[114]and commentary of Justice McClellan:

> Having an identifiable and easily understood parameter for guilty plea discounts has had enormous benefit for the administration of criminal justice. One only has to compare the state of the criminal lists in countries where a plea brings no discount to understand the benefits of a structured sentencing approach … Quantified discounts make the reasoning of sentencing judges more comprehensible to offenders, victims, the public, and the appellate courts.[115]

The NSWLRC's 2014 review into encouraging appropriate early pleas made a recommendation to introduce the three-tiered statutory scheme referred to above.

Legal stakeholders, including the NSW Office of the Director of Public Prosecutions, NSW Bar Association, Legal Aid NSW and the Chief Magistrate of the Local Court of NSW, supported the introduction of a statutory system of plea discounts because it 'could facilitate certainty and consistency'.[116]

Some stakeholders did not support the use of discounts in return for the utilitarian benefit the plea gives to the criminal justice system. From the victims' perspective 'sentence discounts for this purpose can appear to be unjust' and 'somehow "discounting" what has occurred to them'.[117] The NSW Public Defenders argued that sentence discounts of this type may 'present an inappropriate inducement to plead guilty' and that the greater the disparity between sentence quantum received at trial compared with a plea, the more likely it is that a person will enter a false or inappropriate guilty plea.[118]

The NSWLRC noted that the latter argument was supported by the academic literature, but ultimately concluded that inappropriate pleas should be mitigated under its blueprint. It considered the possible disproportionate impact on marginalised groups, but noted that Bureau of Crime Statistics and Research ('BOCSAR') research had found little difference between Aboriginal and Torres Strait Islander people and non-Indigenous people when it came to the likelihood of a guilty plea.[119]

BOCSAR evaluated the early appropriate guilty plea reforms, finding that while they 'were not associated with a significant increase in guilty pleas overall', they did 'significantly affect the timing of guilty pleas'.[120] The analysis found early guilty pleas in District Court matters had increased by 6.5 per cent (from 70% to 76.5%) and at least 7 additional matters were finalised each week. However, overall court proceedings had not reduced, as improvements in the District Court were offset by an increase in time matters spend in the Local Court.[121] BOCSAR also interviewed stakeholders, with some concerned the scheme did not

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113 *Sentencing Final Report* (n 107) 125-26.
114 See, Australian Law Reform Commission, *Same Crime, Same Time: Sentencing of Federal Offenders* (Report 103, 2006) [11.42], rec 11-1.
115 Peter McClellan, 'Sentencing in the 21st Century' (Paper presented at the Crown Prosecutors' Conference, 10 April 2012) 17–18 cited in *Sentencing Final Report* (n 107) 125.
116 *Encouraging Early Guilty Pleas* (n 107) 224.
117 Ibid.
118 Ibid 225.
119 Clare Ringland and Lucy Snowball, 'Predictors of Guilty Pleas in the NSW District Court' (Crime and Justice Statistics Bureau Brief No 96, NSW Bureau of Crime Statistics and Research, 2014) 4.
120 Ilya Klauzner and Steve Young, 'The Impact of the Early Appropriate Guilty Plea Reforms on Guilty Pleas, Time in Justice and District Court Finalisations' Crime and Justice Bulletin, No. 24, NSW Bureau of Crime Statistics and Research, August 2021) 16.
121 Ibid 1.

sufficiently recognise the utilitarian benefit of guilty pleas, in particular for sexual assault and child sexual assault matters, with one stakeholder commenting:

> The lack of recognition that the decision to plead guilty is difficult to make at the preliminary stage, particularly for some offences, such as sexual assault, where one of the biggest factors in terms of the utilitarian value relates to whether a complainant has to give evidence and re-live the trauma of the sexual abuse.[122]

South Australia

In South Australia, the guilty plea discount scheme was introduced in 2013.[123] Initially, the scheme allowed for a discount of up to 40 per cent if entered not more than 4 weeks after the person first appeared in court. The purpose of the discount scheme was to make the guilty plea discount transparent and to apply an upper limit that is 'not overly generous'.[124] It also aimed to reduce delays and result in timely justice.[125]

In 2019, the Honourable Brian Ross Martin AO QC reviewed the scheme.[126] He found that although the scheme had increased the early resolution of matters,[127] many victim survivors were dissatisfied with the discount levels, particularly in relation to serious offences. Victim survivors thought the discount of 40 per cent was too high and should only be 10 per cent, and that a reduction should not be given if:

- the evidence was very strong as a conviction was inevitable;
- a plea was entered at the last minute;
- the person was a repeat offender.[128]

The review made 12 recommendations. The discount was subsequently reduced for indictable offences,[129] and for serious indicatable offences capped at 25 per cent (only for pleas submitted not more than 4 weeks after the defendant's first court appearance in relation to the relevant offence).[130] A late plea for a serious indictable offence can only receive a discount of up to 5 per cent.[131]

Tasmania

The Tasmanian Sentencing Advisory Council ('TSAC') was asked to examine and report on a statutory sentencing discount for pleas of guilty in Tasmania. The review was instigated in response to concerns about the delay to criminal proceedings and late-resolving guilty pleas, the impact to the administration of the justice system and the 'unnecessary stress and trauma' for victims, their families and other vulnerable people in the trial process.[132]

As noted above, Tasmania is the only Australian jurisdiction without a legislative provision which recognises a reduction of sentence for a guilty plea. TSAC considered four models of reform and

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122 Lily Trimboli, 'Early Appropriate Guilty Plea Reform Program - Process Evaluation' (Crime and Justice Bulletin, No 238, NSW Bureau of Crime Statistics and Research, August 2021) 22.
123 *Criminal Law (Sentencing) (Guilty Pleas) Amendment Act 2012* (SA), *Criminal Law Sentencing (Supergrass) Amendment Act 2012* (SA) came into operation on 11 March 2013.
124 Ibid 6–7, citing Second Reading Speech (Deputy Premier, 11 July 2012).
125 Ibid 37–8 [61].
126 Martin (n 108).
127 Ibid 43 [72] citing the Director of Public Prosecutions.
128 Ibid 21–2 [30]–[31].
129 *Sentencing Act 2017* (SA), s 40. This section applies to offences not described in s 39(1).
130 Ibid s 40(3)(a).
131 Ibid s 40(3)(d).
132 Tasmanian Sentencing Advisory Council (n 109) v.

recommended amending the *Sentencing Act 1997* (Tas) to recognise the guilty plea as a mitigating factor and to set out three factors relevant to the reduction:

- the fact of the guilty plea;
- the timing of the plea or the indication of the intention to plea assessed in the circumstances of the case; and
- the lesser penalty imposed must not be unreasonably disproportionate to the nature and circumstances of the offence.[133]

Other recommendations included that a judicial officer must state the effect of the guilty plea on the sentence when dealing with orders of imprisonment, and in the case of other penalty orders, they may state the effect.[134] These reforms were a package and TASC expressly stated it did 'not support any legislative reform that would adopt only some aspects of the recommendations'.[135]

15.2.4 Public opinion and guilty pleas

Discussed in **Chapter 5**, research on public opinion and sentencing shows the public is often at odds with judicial officers over the weight to be given to mitigating factors, such as the guilty plea.

Research commissioned by the Sentencing Council for England and Wales into public attitudes of the discount for a guilty plea found 'the public (and some victims and witnesses) do not like the idea of a universal approach to reductions'.[136] Rather, the reduction 'should depend on certain factors/circumstances relating to the offender or offence type'.[137] The same research revealed that the public found the idea of 'rewarding' offenders for pleading early 'unpalatable'.[138]

The national Jury Project led by Kate Warner examined juror and non-juror views on guilty plea discounts, in sexual violence cases. Only a minority supported a guilty plea discount, with most participants finding it 'inappropriate to reduce a sentence on the basis of facts unrelated to offence seriousness or the offender's level of culpability'.[139]

15.2.5 Stakeholder views

Submissions from victim survivor support and advocacy stakeholders

In its preliminary submission, Fighters Against Child Abuse Australia ('FACAA') recommended that 'plea deals' should be limited with respect to 'how far from the original charge they can be pleaded down'[140] for charges of rape. FACAA argues that plea deals to downgrade charges of rape do not align with principles of justice and reinforce the community's lack of faith in the justice system.[141]

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133 Ibid (n 109) xvi. These were Recommendations 2 and 5.
134 Ibid. These were Recommendations 6 and 7.
135 Ibid xi. This was Recommendation 3.
136 William Dawes et al. *Attitudes to Guilty Plea Sentence Reductions* (Sentencing Council Research Series, February 2011) 2.
137 Ibid.
138 Ibid 24.
139 Kate Warner et al. 'Juror and Community Views of the Guilty Plea Sentencing Discount: Findings from a National Australian Study' (2020) 22(1) *Criminology and Criminal Justice* 78.
140 Preliminary submission 17 (Fighters Against Child Abuse Australia) 10.
141 Ibid 6.

FACAA also noted that it has been told that the 'vast majority of [victim survivors] had their abuser's charges pleaded down against their wishes',[142] and that many were not consulted by the prosecution service before the decision was made to accept a plea.[143] For example, FACAA highlighted that in one circumstance, 'the DPP told our client that they had "great news" after the charges resolved',[144] which was not considered to be appropriate, as '[t]o hear that their abuser or rapist had pleaded guilty to a charge of assault is not "great news" for a victim-survivor'.[145] Particular concerns were also raised where a sexual violence offence resolves without there being a sexual component, as victim survivors are concerned that their perpetrator will not appear on the Sex Offenders Register and can continue working with children.[146] FACAA also stated that victim survivors are robbed of any sense of justice where a resolution without a sexual element prevents them from 'speak[ing] publicly about the truth of what happened to them as the conviction is only assault and does not feature a sexual component'.[147] FACAA stated that:

> To allow a rapist to plead down all the way to assault or even simply sexual touching without consent has left FACAA clients feeling like the people who were supposed to speak for them in the courts, the public defenders 'literally slapped them in the face'.[148]

In its submission in response to the Council's consultation paper, FACAA stated that:

> QLD [has] some of the best laws in Australia when it comes to rape [and] sentencing multiple time rapists. Currently there are mandatory minimum sentences of life for repeat federal level rapists, however there are too many ways around these mandatory minimum sentences. Public defenders or police prosecutors can make deals with the perpetrators to get charges downgraded, judges can downgrade charges to help get guilty pleas or because they feel the charge was too 'harsh' there are several ways perpetrators can get around the mandatory life sentences. These loopholes need to be closed immediately to prevent these good and just laws going to waste.[149]

FACAA also expressed the view that '[l]egislation needs to be put in place to stop plea deals from circumventing the legislation written to act as a deterrent for future crimes and to bring a sense of justice to victim-survivors.'[150]

The Queensland Sexual Assault Network ('QSAN') and the Brisbane Rape and Incest Survivors Support Centre ('BRISSC') also raised concerns about the downgrading of offences, offence severity and offence counts because of guilty pleas.[151]

In its submission, Respect Inc and Scarlet Alliance said that 'survivors should be consulted about plea deals'.[152]

Submissions from justice reform and advocacy bodies

The Justice Reform Initiative ('JRI') raised concerns that contested criminal proceedings can be retraumatising for victim survivors[153] and that enhancing the severity of sentences for these offences

142 Ibid 8.
143 Ibid 10–11.
144 Ibid 11.
145 Ibid.
146 Ibid.
147 Ibid.
148 Ibid.
149 Submission 15 (Fighters Against Child Abuse Australia) 8.
150 Ibid 11.
151 Preliminary submission 5 (Queensland Sexual Assault Network) 1; Preliminary submission 6 (Brisbane Rape & Incest Survivors Support Centre) 3.
152 Submission 25 (Respect Inc and Scarlet Alliance) 4.
153 Submission 13 (Justice Reform Initiative) 1.

could result in higher rates of not-guilty pleas – potentially subjecting more victim survivors to the risk of further traumatisation.[154] The JRI concluded that a more punitive sentencing framework would be detrimental to the interests of victims of crime.[155]

The Uniting Church emphasised in its submission that securing convictions was essential to victim survivors having confidence in the criminal justice system and reporting offences to police:

> Tougher penalties, longer sentences and stringent release practices, do little to address the majority of sexual offending, instead making offenders reluctant to take responsibility for their offending and choosing to contest the allegations. This in turn makes victims reluctant to pursue a prosecution, not wanting to be drawn into the protracted adversarial process. In other words, most victims of sexual assault do not report to the police, do not pursue a prosecution, or if they do, do not secure a conviction.[156]

Submissions from legal stakeholders

Legal Aid Queensland ('LAQ') echoed the JRI's concern that a 'sentencing system' that 'disincentivises pleas of guilty is likely to lead to more cases being taken to trial and more of such matters resulting in no convictions'.[157] LAQ acknowledged 'there are many reasons why defendants plead guilty. An offender may plead guilty for reasons beyond acceptance of their own guilty, but for forensic reasons and/or based on legal advice'.[158]

In relation to plea negotiations, the Youth Advocacy Centre recommended:

> Transparency in the proceedings involving regular consultation with the victim would alleviate some of the perceived injustices through the 'plea bargaining' process undertaken by the Queensland Police Service and Director of Public Prosecutions.[159]

Victim survivor views

Consultation with victim survivors

The Council consulted with victim survivors. In respect of guilty pleas, victim survivors told the Council about their views of pleas of guilty and discounts.

One mother told the Council:

> I was happy that we didn't have to put [my daughter] through that, because we'd been through so much already. But at the end of the day, I still believe that he just said he was guilty because his lawyer told him it would be better off for him. Not because it was going to help us in any way. Not because he cared if we put our daughters through a trial. (Victim Survivor Parent Interview 1)

There were concerns about plea bargaining and the person being sentenced on the basis of facts which did not reflect what really happened to the victim survivor:

> I don't think they should get that. They've done their thing. If they haven't done it, still, go to trial. Prove that you haven't done it.

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154 Preliminary submission 4 (Justice Reform Initiative) 2.
155 Ibid.
156 Submission 16 (Uniting Church in Australia, Queensland Synod) 7 citing Centre for Innovative Justice, *Innovative Justice Responses to Sexual Offending–Pathways to Better Outcomes for Victims, Offenders and the Community* (Report, 2014).
157 Submission 23 (Legal Aid Queensland) 18.
158 Ibid 26.
159 Submission 30 (Youth Advocacy Centre) 10.

> I don't think they should get [plea bargaining]. If they haven't done it, still, go to trial. Prove you haven't done it. (Victim Survivor Parent Interview 5)

One victim survivor was frustrated that prosecutors had accepted a plea to a lesser charge:

> I was so angry when I found out because I was like, I would have rather gone to trial because there was so much evidence against him … I mean obviously [my daughter] would have had to have gone to him. We would have had to like, you know, sit there, whatever, but it would have been more of an outcome for her than this. (Victim Survivor Parent Interview 5)

While the benefit of a plea of guilty in not requiring the victim survivor to give evidence was recognised, victim survivors had mixed views:

> I guess it was a good thing because me and my sister didn't have to go to trial, didn't have to face all that. But it sort of sucks too, because it would have been better if he pleaded not guilty and then ended up being guilty and got way longer. (Victim Survivor Interview 4)

> If he had pleaded guilty, obviously it would have made the process a lot easier, but he would have also got a lighter sentence. So it's a lose, lose situation really. (Victim Survivor Interview 6)

For one victim survivor the process of going through a trial was lengthy:

> From the time I reported it to the time we got to court, it was 6 and a half years. (Victim Survivor Interview 2)

Victim survivor support advocate views

Victim survivor support advocates discussed with the Council how guilty pleas impact the victim survivors with whom they work. Advocates recognised that, for some victim survivors, a plea is 'a relief … because it will mean that they don't have to go through that legal process [a trial]'.[160]

However, they also spoke of how difficult it was for victim survivors when a plea is accepted for less serious offences, because it can:

- impact the outcome, particularly if it was a penetrative offence downgraded to a non-penetrative offence;[161]
- mean victim survivors cannot reflect 'all of those matters that have been bargained away and the impact of those', which makes the criminal justice process less worthwhile.[162]

One advocate spoke of a client she supported whose perpetrator pleaded guilty on the day of the trial. The victim survivor had been preparing for the trial and being a witness where she wouldn't see the perpetrator, 'and now we were suddenly, without warning, thrust into the [sentence hearing] and he was there'.[163] While the victim survivor didn't have to go through the trial process, the feeling was mixed 'because the reason why he took a plea of guilty is because they decided to take rape off the table' and instead he was sentenced on less-serious offences. So, while he was convicted of child sex offences, 'the most traumatic part of her experience … didn't really get acknowledged'.

Another advocate gave an example of from a mother and young daughter she was supporting.[164] On the morning the child victim survivor was waiting to pre-record her evidence, a plea was accepted by the DPP.

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160 Victim support advocate interview 3.
161 Ibid.
162 Victim support advocate interview 1.
163 Ibid.
164 Ibid.

For the family there was 'relief that they didn't have to go through the trial, and I guess that validation that he is guilty of all these awful things, and that would be the outcome heard in court'. However, it was confronting to hear the judge to talk about 'how an early plea was submitted' and while the legal technicality was understood, 'the impact for that young person, that was her date of trial, like that was for her and she was maybe 13 or 14 at the time, so that was huge'.

Subject matter expert views

The importance of defendants pleading guilty was recognised by many of the participants we interviewed.

One practitioner spoke of the value of plea in ensuring a person is convicted for their offending, because in their experience, there is a '50–50 chance' of the person being successful and acquitted at trial, even where there is a strong prosecution case.[165] They observed that having clarity around the benefit given for a guilty plea is beneficial when talking to a client.[166]

Another practitioner observed that 'because your biggest currency from a defence counsel's point of view is the timing of that plea' and that with late pleas of guilty, 'sometimes that the client deep down might want a plea, but he's got a wife and a kid and all his parents are there and he's embarrassed'.[167]

Another practitioner emphasised, 'You don't just get to plead guilty and say, 'I'm remorseful'. There is a difference between remorse as a result of a plea of guilty and actual remorse.'[168]

In relation to the reduction given for a plea, practitioners referred to the usual practice, 'generally getting a third or less'[169] and that 'it's quite challenging to explain that' to community members.[170]

Two practitioners raised NSW's scheme that the reduction corresponds to when you enter a plea of guilty, with one stating that was 'a really good idea'.[171] The other practitioner thought the NSW model was resulting in a much higher early plea rate, 'more than 50%, something like that' compared to '10% of cases in Queensland committed to sentence'.[172] The same practitioner thought this was 'so much better for victims, they've got early results' and that 'it can be good for offenders as well, they're not in limbo for so long' and that the reduction was statutorily reduced when a plea was made a week out from trial.[173]

Some practitioners raised concerns about Queensland's approach, stating that people can get the same benefit for a late plea as 'if they plead guilty months earlier'.[174] It was recommended that a scheme which incentivised people to plead guilty earlier 'is probably the key'.[175]

Some participants referred to the impact of the SVO scheme and how it can incentivise pleas of guilty because the plea can be a factor to reduce the head sentence.[176] The same participant went on to refer to the Council's previous review on the scheme and the distorting effect of SVOs on sentencing, stating, 'How do you recognise a plea unless you take it off the top? And as soon as you take it off the top you're

165 SME Interview 7.
166 Ibid.
167 SME Interview 7.
168 SME Interview 11.
169 SME Interview 19; SME Interview 17.
170 SME Interview 19.
171 SME Interview 17.
172 SME interview 19.
173 Ibid.
174 SME Interview 17. Also SME Interview 19.
175 SME Interview 17.
176 SME Interviews 1, 15 16.

not an SVO and we have all these arguments around whether there needs to be something special to get an SVO for an offence'.[177]

Consultation events

At our Cairns consultation event, some participants thought more should be done to incentivise pleading guilty, as this is of benefit to the community and addresses the delay issues. However, other participants thought victim survivors would only appreciate this if the process were transparent.[178]

In contrast, at our Brisbane consultation event, some participants thought incentivising guilty pleas being giving a discount (e.g. setting the non-parole period at a third of the head sentence) was not conducive to a victim survivor's healing process.[179] Participants suggested some offenders may just be 'playing ball' because it is in their interest to do so, rather than meaningfully taking responsibility for their offending.

Some participants were also critical of the court treating a guilty plea as evidence of remorse, given that it may have been made to reduce the sentence.

At our Brisbane consultation event, concerns were raised that plea negotiations should not be done on the morning of a trial, when the victim is highly charged and about to give evidence. However, it was noted that there isn't really much incentive to plead guilty prior to trial, as the offender is often still given the benefit of a timely/early plea.

The issue surrounding plea bargains is that often it is left to the very end (just before trial) and victims are highly charged, thinking that they are about to be cross-examined. One participant thought that there should be more consideration taken by the court for when a plea is entered. This was echoed by participants in our online consultations, with concerns raised that the discount is the same for an early or late plea.[180]

At our online events, participants spoke of how challenging it is for the DPP to explain to victim survivors the notional one-third rule. While it is an eligibility date for release, not a release date, it was still difficult for victim survivors to accept. The thing that really matters to many victim survivors is the time actually spent in custody.

15.2.6 The Council's view

Key Finding

17. **Sentencing reductions for a guilty plea are important and should continue, but there may be benefits in reviewing current practice.**

There is value in courts continuing to have the ability to recognise the benefit of a plea of guilty in sentencing for offences of rape and sexual assault, such as through a reduction in the sentence that might otherwise have been imposed, or the fixing of an earlier parole eligibility date. The extent of any such discount, however, will always depend on the individual facts and circumstances of the case, including the context and circumstances in which the person's plea was entered and its timing.

The current approach in Queensland and other jurisdictions is not consistent. It is critical that the way a guilty plea is reflected in a sentence for rape and sexual assault achieves a proper

177 SME Interview 1.
178 Cairns Consultation Event, 21 March 2024.
179 Brisbane Consultation Event, 11 March 2024.
180 Online Consultation Event, 16 April 2024.

balance between the benefits to the criminal justice system, ensuring just and appropriate punishment and promoting public confidence.

See **Recommendation 24**.

It is a long-standing practice in all Australian courts to reduce a sentence where there has been a plea of guilty. Queensland courts are required to recognise a guilty plea under section 13 of the PSA and may choose to reduce the sentence. The court must consider how early or late the plea was made, and the circumstances surrounding the plea.

The Council agrees with the value of this practice and supports it continuing in Queensland. We recognise that a plea of guilty can be a manifestation of remorse; it saves the Queensland community time and significant expense; and, in cases of sexual assault and rape offences, it saves victim survivors from being retraumatised by giving evidence.

However, it became apparent in this review that there is tension between the need to recognise the guilty plea in assisting with the administration of justice and concerns that the reduction given does not adequately reflect the very serious nature of the offending. There were mixed views from victim survivors with whom we spoke about guilty pleas, and while a plea may have meant they did not have to go to trial and give evidence, they thought the sentence imposed was inadequate because of the discount given.

We heard during this review (and indeed in earlier ones)[181] from many victim survivors, victim support and advocacy services and members of the community that they had concerns about the sentencing reduction for a plea of guilty, particularly for serious harm offences such as sexual assault and rape. Those concerns include:

- There is a lack of consistency about when a plea is made (and in what circumstances) and the reduction which is given.
- Setting the non-parole period at one-third of the head sentencing is too generous for serious offences such as sexual assault and rape, particularly when the plea is late.
- There is considerable concern about whether reductions in sentence should be allowed at all for such serious offences.

Our analysis of sentencing remarks for rape and sexual assault revealed examples where the plea was late but the judge still set parole eligibility at one-third of the head sentence. While instinctive synthesis requires judicial officers to take a range of factors into account to determine a just sentence, and the weight given to a plea among other mitigating factors is not known, it appears that in some cases courts are giving the same reduction to a late plea as an early one, even ex officio pleas, despite the very serious nature of the offending.

We recognise that there are concerns about the way the Queensland guilty plea scheme currently operates and believe a review is timely. We are of the view that a lack of clarity about how the discount is applied (i.e. to the head or bottom of the sentence), how much of a discount is given and at what stage a plea was entered or offered may undermine public confidence in the court system. To address this concern, we recommend that consideration be given to initiating a review of the current sentencing

181 Queensland Sentencing Advisory Council, *Sentencing for Criminal Offences Arising from the Death of a Child* (Final report, 2018) 179.

practice with respect to guilty plea discounts in Queensland and whether it is meeting its objectives (**Recommendation 24**).

Recommendation

24. Review of guilty plea discounts

The Attorney-General and Minister for Justice consider initiating a review of the current sentencing practice with respect to guilty plea discounts as this applies in Queensland and whether it is meeting its objectives. Such a review should consider the approaches in other Australian and international jurisdictions and any evidence about the impacts of these models (for example, regarding impacts on plea rates, victim survivor satisfaction and/or rates of reoffending) while noting the importance of retaining a Queensland-based approach, given differences as to relevant legislative frameworks and legal contexts.

Applying the Council's fundamental principles

Applying the Council's fundamental principles guiding the review[182] to the issues raised in considering guilty plea discounts and to address **Key Finding 17** guided us in making a recommendation for a review to be considered:

- **Principle 1: Reforms to sentencing laws should be evidence-based with a view to promoting public confidence**: The Council has drawn on data analysis, research on community views, observations sentencing submissions and remarks, appeal decisions, past reviews and research, as well as extensive consultation. We know current sentencing levels for rape and sexual assault appear to be out of step with community views of offence seriousness as these relate to offences against children.[183] While we have made recommendations to seek to address this, we also note from research on public opinion that only a minority supported a guilty plea discount, with most participants finding it 'inappropriate to reduce a sentence on the basis of facts unrelated to offence seriousness or the offender's level of culpability'.[184] The Council's analysis in the SVO review found 'Queensland generally sets lower parole eligibility dates, relative to the head sentence, than other Australian jurisdictions (in the absence of special parole provisions)'.[185] We consider a review of the practice of guilty plea discounts in Queensland is important for promoting public confidence.
- **Principle 3: Sentencing outcomes for sexual assault and rape offences should reflect the seriousness of these offences, including their impact on victims, while not resulting in unjust outcomes**: We know sexual offences generally, and rape in particular, have high rates of not guilty pleas. We recognise a plea of guilty can be a manifestation of remorse, it saves the Queensland community time and significant expense, and in cases of sexual assault and rape offences, it saves victim survivors from being retraumatised by giving evidence. However, we found that tension exists between the need to recognise the guilty plea in assisting with the administration

182 For a full list of the fundamental principles, see Chapter 3.
183 For a discussion on UniSC findings see Chapter 5.
184 Warner et al (n 139).
185 *The '80 Per cent Rule'* (n 37) 15.

of justice, particularly when there is a lower rate of plea for these types of offences when compared to other non-sexual offences, with concerns that the reduction given does not adequately reflect the very serious nature of the offending. There were mixed views from victim survivors with whom we spoke about guilty pleas, and while a plea may have meant they did not have to go to trial and give evidence, they thought the sentence imposed was inadequate because of the discount given. There was also concern about the discount given when the plea is late; and whether reductions in sentence should be allowed at all for such serious offences.

- **Principle 5: Sentencing inconsistencies, anomalies and complexities should be minimised**: While we note the broad discretion in section 13 of the PSA, victim survivors have told us there is a lack of consistency about when a plea is made (and in what circumstances) and the reduction given. From a review of other jurisdictions, it appears the discount is given to the length of the sentence rather than the setting of the non-parole period.
- **Principle 6: Reforms should take into account the likely impacts on the disproportionate representation of Aboriginal and Torres Strait Islander people in the criminal justice system**: The potential impacts on Aboriginal and Torres Strait Islander persons are discussed in detail below. A review should consider the impact of plea rates on Aboriginal and Torres Strait Islander people, as well as the accessibility of legal advice to regional and rural Queensland so people are adequately represented and fully informed of their legal rights.
- **Principle 7: The circumstances of each person being sentenced, the victim survivor and the offence are varied. Judicial discretion in the sentencing process is fundamentally important**: We note the broad judicial discretion in section 13 of the PSA and that there can be flexibility in sentencing under the PSA where a court can choose to structure a sentence in different ways to take into account the guilty plea and other mitigating factors to structure a sentence that is appropriate and just in all the circumstances.[186] A review should ensure judicial discretion is maintained.
- **Principle 10: Any reforms should aim to be compatible with the rights protected and promoted under the *Human Rights Act 2019* (Qld) ('HRA') or be reasonably and demonstrably justifiable as to limitations**: A review of the Queensland's guilty plea practice does not affect rights under the HRA, which is discussed in more detail below. In summary, it can promote human rights by ensuring that if any changes are made, this does not impact rights under the HRA and could also consider whether any reforms raise issues of unfairness, or potentially impact the voluntariness of a plea and the ability of a person charged with an offence to make an informed decision.

The approaches in other Australian and international jurisdictions

We examined other Australian and international jurisdictions and found a range of approaches to recognising pleas of guilty in sentencing. Generally, it appears the discount is given to the length of the sentence, rather than the setting of the non-parole period.

Although Queensland has a similar model to the ACT, the NT, Victoria, Scotland and NZ, in that there is a statutory requirement to take a guilty plea into account and its timing with discretion left to the courts,

186 See, for example, *R v Ponsonby* [2024] QCA 229 [3] (Mullins P).

there are differences. For example, the ACT, Scotland and Victoria require courts to clearly articulate the discount for a plea in sentencing remarks.[187]

Some jurisdictions have a legislated sliding scale of discounts based on fixed points within the pre-trial process. For example, in England and Wales, if a guilty plea is entered at the first available opportunity (usually at a person's first court appearance) then a reduction of one-third will be applied to the sentence.[188] NSW has a similar approach, although the reduction is capped at 25 per cent if accepted at committal proceedings. We heard from some subject matter experts that the NSW model would be beneficial to increase early plea rates, which would be 'so much better for victims' and 'for offenders as well'.[189]

We note a finding from our SVO review that Queensland generally sets lower parole eligibility dates relative to the head sentence than other Australian jurisdictions, and that the setting of non-parole periods is an ongoing concern for many victim survivors and community members. We refer to **Recommendations 8** and **10** of this report concerning parole and the impact of the SVO scheme on head sentences by restricting the court's ability to take personal factors of mitigation into account.

We also acknowledge the work being undertaken by the Australian Law Reform Commission in its national inquiry into justice responses to sexual violence, which invited submissions on guilty pleas.[190] Findings from this review should inform consideration of **Recommendation 24**.

Systemic disadvantage considerations

Any review Queensland's guilty plea scheme should consider the potential impact of any changes on Aboriginal and Torres Strait Islander peoples and other culturally and racially marginalised groups.

In **Appendix 4**, section 4.3, we report on the demographics of people sentenced for sexual assault (MSO) and rape (MSO) as well as plea type by Aboriginal and Torres Strait Islander status.

Aboriginal and Torres Strait Islander people were disproportionately represented in both rape and sexual assault offences. Although Aboriginal and Torres Strait Islander peoples represent approximately 4 per cent of Queensland's population (aged 18 years and over),[191] they accounted for almost one-quarter of people sentenced for sexual assault (20.5%) and rape (23.3%) during the 18-year period.

The majority of people sentenced for rape (MSO) enter a guilty plea (68.7%). A slightly higher proportion of Aboriginal and Torres people sentenced for rape (MSO) pleaded guilty compared to their non-Indigenous counterparts (71.5% compared with 68.1%); however, this was not a significant difference.[192]

Most people sentenced for sexual assault (MSO) enter a guilty plea (91.9%). This varies slightly by court level and offence type, with sexual assault (aggravated) sentenced in the higher courts having the lowest proportion of guilty pleas at 80.3 per cent, and sexual assault (aggravated life) having the highest (100.0%). In the Magistrates Courts, 99.1 per cent of sexual assault (non-aggravated) cases had a guilty plea, compared with 84.4 per cent of sexual assault (non-aggravated) cases in the higher courts.

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187 *Crimes (Sentencing) Act 2005* (ACT) s 37; *Criminal Procedure (Scotland) Act 1995* (Scot) s 196(1A) and *Sentencing Act 1991* (Vic) s 6AAA.
188 *UK Guilty Plea Guideline* (n 76). This is one-third from the head sentence.
189 SME interview 19.
190 Australian Law Reform Commission, *Justice Responses to Sexual Violence: Issues Paper* (April 2024) 20.
191 As at 30 June 2021. See Australian Bureau of Statistics, *Estimates of Aboriginal and Torres Strait Islander Australians*, Table 7.3, available at accessed 8 October 2024.
192 Pearson's Chi-Square Test: $\chi 2(1) = 1.78$, $p = .1823$, V=-0.03.

Overall, when plea type is considered by Aboriginal and Torres Strait Islander status, few differences are seen. However, for sexual assault (non-aggravated) offences (MSO) sentenced in the higher courts, Aboriginal and Torres Strait Islander people were significantly more likely to plead guilty (91.9%) compared with non-Indigenous people (82.9%).[193]

While not specific to sexual offences, in a 2016 study of Aboriginal and Torres Strait Islander peoples living in discrete communities in Queensland who had spent time in custody, participants expressed concerns that 'they were not adequately supported in court to defend the charges and were advised to plead guilty as a means of expediency'.[194] It was found that the technical language used within the justice system is difficult to understand, leading to several offenders 'pleading guilty without fully understanding the nature of the charges'.[195]

A review should consider the impact of plea rates on Aboriginal and Torres Strait Islander people, as well as the accessibility of legal advice to regional and rural Queensland so people are adequately represented and fully informed of their legal rights.

Human rights considerations

A review of the Queensland's guilty plea scheme does not affect rights under the HRA. It can promote human rights by ensuring that if any changes are made to the scheme, this does not impact a right to equity before the law[196] or the right to a fair hearing.[197] It also needs to ensure and that 'a person charged with a criminal offence has the right to be presumed innocent until proved guilty according to law'.[198]

A review of the guilty plea scheme would need to consider whether any reforms raise issues of unfairness, or potentially impact the voluntariness of a plea and the ability of a person charged with an offence to make an informed decision.

The current approach to reducing a sentence to recognise a guilty plea may not be supporting the rights of victim survivors and may undermine victim survivor and community confidence in the justice system's ability to respond to serious offending. We consider that these concerns are best achieved through a review to assess whether the scheme is meeting its objectives.

15.3 Cumulative vs concurrent sentences

15.3.1 The current approach

If a court is sentencing a person to imprisonment for more than one offence, the court does not have the power to impose a single sentence of imprisonment for all offences.[199] The court will say, for each term of imprisonment, whether some or all of it is to be served concurrently (at the same time) or cumulatively (one after the other).

The principle of totality applies where there is more than one offence (discussed below). If sentences of imprisonment are concurrent without cumulation, the total sentence may be too lenient. If there is

193 Pearson's Chi-Square Test: $\chi 2(1) = 8.55$, $p = .0035$, V=-0.10.
194 Glen Dawes, *Keeping on Country: Doomadgee and Mornington Island Recidivism Research Report* (2016) 39.
195 Ibid.
196 *Human Rights Act 2019* (Qld) s 15. See also *Thilimmenos v Greece* [2000] (Judgment) (European Court of Human Rights, App No 34369/97, 6 April 2000) [44].
197 *Human Rights Act 2019* (Qld) s 31.
198 Ibid s 32.
199 *R v Crofts* [1999] 1 Qd R 386, 389 (Fitzgerald P, Davies JA, Moynihan J).

cumulation of sentences of imprisonment without any moderation, the total sentence may be disproportionately severe.

In Queensland, two approaches are taken to sentencing a person convicted of multiple offences.

Under the PSA, there is a presumption that sentences of imprisonment will be served concurrently with another offence, unless otherwise ordered.[200]

Concurrent sentences for multiple offences are generally structured by fix a sentence to the most serious offence, which is higher than it would be alone, but takes into account the overall criminality involved in the other offences. This is often referred to as a 'global sentence', 'the *Nagy* approach' or the '*Nagy* principle' after the case in which this approach was articulated:[201]

> Where a court is sentencing an offender for a number of distinct, unrelated offences, it may fix a sentence for the most serious (or the last in point of time) offence which is higher than that which would have been fixed had it stood alone, the higher sentence taking into account the overall criminality. However, that approach should not be adopted where it would effectively mean that the offender was being doubly punished for the one act, or where there would be collateral consequences such as being required to serve a longer period in custody before being eligible for parole, or where the imposition of such a sentence would give rise to an artificial claim of disparity between co-offenders. Such considerations may mean that the option of utilising cumulative sentences should be adopted.[202]

The PSA also provides a court with a discretion (choice) to order cumulative orders of imprisonment, meaning the imprisonment 'may be directed to start from the end of the period of imprisonment the offender is serving'.[203] A cumulative sentence cannot be imposed on a life sentence.[204]

The general practice is to order that the sentences are cumulative at the end of each order (moderating sentence length by taking into account totality considerations).[205]

In some circumstances, a cumulative sentence is mandatory. Most commonly, if the person commits a certain type of offence (including rape and sexual assault) and was serving a term of imprisonment in prison or on parole at the time, the PSA provides a court has no discretion (choice) and must impose a cumulative order of imprisonment for the new offending.[206] For some offences, the offence itself requires imprisonment to be cumulative.[207]

The principle of totality

The principle of totality means the court must consider the totality of all criminal behaviour when dealing with multiple offences at once (for instance, multiple assaults on different people in one incident) or when sentencing for an offence and the person is already serving another sentence.[208] Where there is a cumulative sentence, a court may ameliorate the cumulative sentence (for example, by ordering a term

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200 PSA (n 1) s 155.
201 *R v Nagy* [2004] 1 Qd R 63, 72 [39] (Williams JA).
202 Ibid.
203 PSA (n 1) s 156 (emphasis added).
204 *R v Pryor; Ex parte A-G (Qld)* [2001] QCA 241.
205 See *R v Bowditch* (2014) 67 MVR 339; [2014] QCA 157 where McMurdo P noted at [2]: Judges have a discretion as to whether to impose cumulative or concurrent sentences or part cumulative and part concurrent sentences: *Griffiths v R* (1989) 167 CLR 372; 87 ALR 392; 63 ALJR 585; 41 A Crim R 163.
206 Ibid s 156A. This applies to Schedule 1 offences under the PSA (n 1), including rape and sexual assault.
207 See, for example, *Bail Act 1980* (Qld) s 33(5).
208 *Mill v The Queen* (1998) 166 CLR 59, 62-3 (Wilson, Deane, Dawson, Toohey and Gaudron JJ) quoting Thomas, *Principles of Sentencing* (Heinemann, 2nd ed, 1979) 56–7; *R v LAE* (2013) 232 A Crim R 96, 104- 5, [32]–[37] (Martin J, Muir and Fraser JJA agreeing); *R v Beattie; Ex parte A-G (Qld)* (2014) 244 A Crim R 177, 181 [19] (McMurdo J) cited in *R v DBQ* (2018) 274 A Crim R 19, 25 [27] (Philippides JA, Boddice J agreeing at [43] and Bond J agreeing at [44])

of imprisonment that is lower than it would be if it were not cumulative), to ensure the sentence properly reflects the criminality.[209]

Under the PSA, a court must take into account the sentences a person is liable to serve.[210]

The Court of Appeal has emphasised that 'what is essential' to a sentencing judge when deciding whether to order concurrent or cumulative sentences is 'that [the] sentences imposed properly reflect the overall criminality of the offending conduct'.[211] The Court has also provided guidance that 'either method is apposite provided the judges made clear the method adopted and the reasons for it; that the overall effect of the sentence is not manifestly excessive; and that the sentences to do not result in double punishment for the same acts'.[212]

Courts must ensure that their total combined effort is not crushing. This can be due to 'the need to vindicate the rights of different victims while giving effect to the totality principle results in making sentences cumulative in whole or in part'.[213] In such cases, harshness in the overall sentence (it in fact arises in the particular case) is alleviated by the notion that a sentence should never be a 'crushing sentence'.[214] Such a sentence has been described as so harsh as to 'provoke a feeling of helplessness in the [offender] if and when he is released or as connoting the destruction of any reasonable expectation of useful life after release'.[215]

In *R v Brown; Ex parte Attorney-General (Qld)*,[216] which involved 29 offences (including 11 counts of rape and 2 counts of sodomy) against 5 victim survivors aged 14 to 16 years, the Court of Appeal said:

> A court of appeal considering a head sentence imposed for multiple offences committed over a number of discrete episodes of offending must confront considerable analytical difficulties in assessing the head sentence that is required to reflect the overall criminality of the offending conduct against the conclusionary standard of manifest inadequacy. A sentencing judge in this State is not required to construct the sentence in a way that reflects the individual sentences and the degree of cumulation, as is required, for example, under the applicable legislation in Victoria … Of course, the learned sentencing judge was required to review the aggregate sentences and consider whether they were just and appropriate having regard to the totality principle. And, as is often recognised, 'the severity of a sentence increases at a greater rate than any increase in the [linear] length of the sentence'. Against that, the learned sentencing judge was also required to have regard to the overall criminality and whether the sentences reflected the totality of the respondent's criminality. [217]

Sentencing outcomes and multiple offences

The Council's analysis of sentencing outcomes for sexual assault and rape offences over 18-years included whether the perpetrator was sentenced for more than one offence in the same sentence hearing.

However, there are some limitations to this analysis. A co-sentenced offence does not tell us whether there was more than one victim. It does not tell us whether the offences were committed as part of the same incident or even that the offences were committed on the same day. It does not tell us whether a

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209 See *Mill v The Queen* (1998) 166 CLR 59, 59 (Wilson, Deane, Dawson, Toohey and Gaudron JJ).
210 PSA (n 1) ss 9(2)(k)–(m).
211 *R v Van Der Zyden* [2012] 2 Qd R 568, [107] (Muir JA).
212 *R v Bowditch* [2014] QCA 157 [2] (McMurdo P) ('*Bowditch*').
213 *R v Symss* (2020) 3 QR 336, [25] ('*Symss*') citing *Richards v The Queen* [2006] 46 MVR 165.
214 Ibid [32].
215 Ibid [27] citing *R v Beck* [2005] VSCA 11, [19] (Nettle JA).
216 [2016] QCA 156.
217 *R v Brown; Ex parte A-G (Qld)* [2016] QCA 156 [90] (Jackson J) referring to *Director of Public Prosecutions v Felton* (2007) 16 VR 214.

sentence of imprisonment was cumulative on a sentence the person was already serving. Analysis of offences that are sentenced together can provide context about the type of offending that is commonly associated with rape and sexual assault.

Rape offences

The Council's analysis of the 1,817 cases of rape (MSO) over the 18-year data period found four in five (79.8%) were also sentenced for other offences at the same court event. This most common additional offences were rape (44.2%) and indecent treatment of a child (35.9%).

Co-sentenced offences were common for rape offences across all penalty types; however, they were most frequent where an imprisonment sentence was ordered. We found that, across all penalty types, there was an apparent increase in sentence length where there were co-sentenced offences.

The majority of people who received a prison sentence for the rape (MSO) were also sentenced for other offences within the same court event (82.5%). The median imprisonment sentence for rape (MSO) with co-sentenced offences was 7.0 years (average 6.8 years),[218] compared with 5.5 years (average 5.2 years) when there no co-sentenced offences, with this difference being statistically significant.[219]

Sexual assault offences

There were 1,904 cases sentenced for sexual assault (MSO) over the 18-year period, 1,230 of which received a custodial penalty. Of those cases, just over half (n=679, 55.2%) of sexual assaults (MSO) had a co-sentenced offence.

Of the 163 people who received an imprisonment sentence for non-aggravated sexual assault in the Magistrates Courts,[220] 79.1 per cent (n=129) were also sentenced for other offences within the same court event. The median imprisonment sentence with co-sentenced offences was 2.0 years (average 0.2 years) compared with 0.8 years (average 0.9 years) when there was no co-sentenced offence.

However, of the 174 people who received an imprisonment sentence for sexual assault[221] in the higher courts, 71.3 per cent (n=124) were also sentenced for other offences within the same court event; there was no difference for multiple offences. The median imprisonment sentence where other offences were also sentenced was 0.8 years (average 0.8 years), compared with 0.5 years (average 0.5 years) when no other offences were sentenced.

Nearly three-quarters of people who received a partially suspended sentence in the Magistrates Courts were also sentenced for other offences within the same court event (n=37, 74.0%). The median partially suspended sentenced where other offences were also sentenced was 1.0 years (average 0.9 years), compared with 0.8 years (average 0.7 years) when no other offences were sentenced.

By comparison, nearly two-thirds of people who received a partially suspended sentence in the higher court were also sentenced for other offences within the same court event (n=134,64.7%). The median partially suspended sentenced where other offences were also sentenced was 1.5 years (average 1.7 years), compared with 1.0 years (average 1.1 years) when no other offences were sentenced.

Nearly half of all cases with a wholly suspended sentence for sexual assault in the Magistrates Courts had co-sentenced offences (n=109, 44.9%). The median wholly suspended sentence with co-sentenced

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218 This calculation excludes life sentences (n=7).
219 Independent groups T-test: $t(433.64) = 9.36$, $p < .001$, two-tailed (equal variance not assumed).
220 This includes 148 imprisonment orders and 15 prison/probation orders.
221 This includes 150 imprisonment orders and 24 prison/probation orders.

offences was 0.5 years (average 0.5 years). There was no difference in the average or median sentence length when there were no co-sentenced offences.

In contrast, a smaller proportion of cases with a wholly suspended sentence for sexual assault sentenced in the higher courts had co-sentenced offences (n=128, 38.0%). The median wholly suspended sentence with co-sentenced offences was 1.0 years (average 0.9 years). When there were no co-sentenced offences, the median wholly suspended sentence was 0.8 years (average 0.7 years).

15.3.2 Sentencing remarks analysis

The Council's analysis of sentencing remarks for rape (MSO) and sexual assault (MSO) offences sentenced between 1 July 2020 and 30 June 2023 showed that, overwhelmingly, judicial officers imposed sentences of imprisonment for multiple offences to be served concurrently. Only 7 rape cases and 5 sexual assault causes discussed cumulating the penalty.

Of those 7 rape cases, all but one involved a cumulative sentence. In one of those cases, it was mandatory because of section 156A under the PSA.[222]

The remaining cases primarily involved multiple victim survivors;[223] however, in one case the perpetrator had committed sexual offences when he was a child and a young adult against the same child victim survivor.[224]

In one of the cases involving 2 victim survivors, the perpetrator was found guilty after 2 trials for offending against each victim survivor, and the judge decided to cumulate.[225] For reasons of totality, the judge moderated the sentences for offences committed against each victim survivor.

In another case there were 5 child victim survivors. The judge considered cumulating, but ultimately declined to cumulate, the sentences because 'the discrete penalty or penalties imposed in that situation [a cumulative sentence] would prove quite illusionary when considering issues of totality'. The judge concluded that a global penalty would better 'acknowledge [the offender's] repeated similar offending against multiple complainants'.[226] The judge sentenced all the rape counts to 9 years' imprisonment, stating:

> I think it is just and does not achieve a disproportionate penalty, to impose the same elevated penalty for the greatest offending, which I consider to be each of the rape charges. I do not consider it fair or just to choose one of them. They are heinous and made worse by the other. There is not one that stands alone, and imposing the same penalty for each would not, in the circumstances, make it necessarily disproportionate any more than choosing one would do. All sentences would be concurrent. I appreciate that, ordinarily, it would be appropriate to inflate the penalty on only one count so that the penalty for discrete offences not be liable to criticism as being disproportionate but for the

222 In one case the person committed the offence in prison while serving another sentence (Rape, regional/remote, imprisonment > 5 years, #3).
223 Rape, major city, imprisonment > 5 years, #1, Rape, regional/remote, imprisonment < 5 years, #3 and Rape, regional/remote, imprisonment > 5 years, #12. In Rape, regional/remote, imprisonment > 5 years, #13 cumulation was discussed but not applied. In Rape, major city, imprisonment < 5 years, #2 the person committed the rape offence while on bail for other fraud offences and had been sentenced to imprisonment before being sentenced for the rape offence. The judge exercised his discretion to order a cumulative sentence for the rape to begin at the end of the fraud offence.
224 Rape, regional/remote, imprisonment > 5 years, #11. The judge moderated the sentences for individual counts and made the rape and indecent treatment offences committed as a child concurrent to each other, but cumulated to the counts of rape committed as an adult. This meant a head sentence of 7.5 years, comprising 15 months plus 6 years.
225 Rape, major city, imprisonment > 5 years, #1.
226 Rape, regional/remote, imprisonment > 5 years, #13.

> reasons that I hope I have explained, I think it is just to do what I have decided to do and I hope I have made that reasoning quite plain.[227]

Of the 5 sexual assault cases examined where the sentence was cumulated, all involved the mandatory provision under section 156A of the PSA.[228]

15.3.3 What happens in other jurisdictions

Several other Australian and international jurisdictions have cumulation schemes for serious offending (e.g. Victoria's Serious Offender Scheme makes cumulation presumptive)[229] or sentence on an aggregate basis, particularly where offences were committed in separate events.[230] Many jurisdictions allow for sentences to be served partly concurrently and partly cumulatively.[231]

However, no matter what approach is taken, all Australian courts must apply the principle of totality.

New South Wales

In NSW, sexual assault cases with more than one victim will generally require an increase in the sentence for one victim[232] and it is open to a court to make each victim's sentence wholly cumulative upon the non-parole period of another victim where the offences are committed on separate victims over an extended period.[233] Courts must consider the number of victim survivors and whether the sexual offences were committed on separate occasions.[234]

The NSW Criminal Court of Appeal has found error in imposing wholly concurrent sentences for discrete sexual violence offending against both the same victim survivor over time[235] or against multiple victims.[236]

Victoria

In Victoria, when sentencing a person to a term of imprisonment for more than one offence, courts must generally fix a total effective sentence. This is 'usually achieved by imposing individual sentences for each offence and then making orders for concurrency or cumulation of all or part of those sentences'.[237] The judge will select a 'base sentence', usually the most severe individual sentence, and then cumulate sentences for other offences on top of that offence. There are two approaches to cumulation.[238] Judges must explain in their remarks 'the components of the sentence, that is, the individual terms and the extent

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227 Rape, regional/remote, imprisonment > 5 years, #13.
228 Sexual assault, regional/remote, lower courts, custodial, #1; Sexual assault, regional/remote, higher courts, custodial, #2; Sexual assault, major city, lower courts, custodial, #6; Sexual assault, regional/remote, lower courts, custodial, #3; Sexual assault, regional/remote, lower courts, custodial, #7.
229 *Sentencing Act 1991* (Vic) s 6E.
230 For example, Western Australian courts can order sentences aggregate sentences which are wholly or partly accumulated for sexual offences - *Sentence Act 1995* (WA) s 88, whereas in the NT, courts may not impose an aggregate term of imprisonment if one of the offences is a sexual offence - *Sentencing Act 1995* (NT) s 52(2).
231 For example, *Crimes (Sentencing Procedure) Act 1999* (NSW) s 55(2); *Sentencing Act 1995* (WA) s 88; *Crimes Act 1914* (Cth) s 19.
232 *Vaovasa v The Queen* [2007] NSWCCA 253 [16].
233 *Magnuson v The Queen* [2013] NSWCCA 50 [142].
234 *Van der Baan v The King* [2023] NSQCCA 5 [117].
235 *R v Smith* [2006] NSWCCA 353, [23].
236 *R v TWP* [2006] NSWCCA 141, [25]-[27], [34].
237 *Victorian Sentencing Manual* (n 96) 162.
238 Ibid 164.

of concurrency and cumulation' so that 'the public and appellate courts can discern how the sentencing judge has viewed the gravity of the offences'.[239]

The Victorian Court of Appeal has said that ordering a total effective sentence on one charge and total concurrency on all the other charges 'is problematic because the punishment for the entire offending [is attributed to one charge], with no punishment for the separate offending constituted by the other charges', and this may lead to disproportionate sentencing.[240]

Victorian courts may also order aggregate sentences when sentencing a person for 'two or more offences which are founded on the same facts, or form, or are part of, a series of offences of the same or a similar character'.[241] This allows to the court to address multiple offences in one sentence instead of separate offences for each offence. However, an aggregate sentence of imprisonment cannot be ordered on a 'serious offender' where any of the convicted offences are a 'relevant offence'[242] or if one or more of the offences is a standard sentence offence such as rape.[243] An aggregate sentence could be ordered for sexual assault offences.

Canada

In Canada, section 718.2(c) of the *Criminal Code* requires that where cumulative sentences are imposed, the combined sentence not be 'unduly long or harsh'.

In 2015, amendments were made to the *Criminal Code* outlining specific rules regarding when a sentence should or must be served cumulatively. For example, where a person was already serving imprisonment at the time of sentencing, the court 'shall consider directing' that the new term of imprisonment be served consecutively to that sentence.[244] Cumulative sentences may be ordered for terms of imprisonment at the same sentencing event where the 'offences do not arise out of the same event or series of events'.[245]

Courts are also required to order cumulative sentences for sexual offences against children when sentencing a person at the same time for more than one sexual offence committed against a child.[246]

15.3.4 Reviews and research

Royal Commission into Institutional Responses to Child Sexual Abuse

The Royal Commission into Institutional Responses to Child Sexual Abuse ('Commission') considered cumulative and concurrent sentencing, which often arise in child abuse matters. The Commission noted the dissatisfaction concurrent sentences can cause for victims and survivors. For example, the Commission was told:

> I do not understand the logic behind concurrent sentencing. I work in business; if someone buys a hundred of something from me, they get a discount. It appears that the same logic applies in criminal law, so if I'm going to rape someone, I may as well rape ten women because I'm still going to get the same sentence. Concurrent sentencing is illogical and is not a deterrent. Around the same time of Doyle's sentence, a man was sentenced to more time for

239 *Director of Public Prosecutions v Felton* (2007) 16 VR 214, [2] (Buchanan JA).
240 *Frost v The Queen* [2020] VSCA 53 [48].
241 The test is the same as applied to the joinder of charges on an indictment. See *DPP (Vic) v Rivette* [2017] VSCA 150, [80]–[81] quoting *R v Grossi* (2008) 23 VR 500, 510 [39] (Redlich JA).
242 *Sentencing Act 1991* (Vic) s 9(1A)(a).
243 Ibid (Vic) s 9(1A)(b).
244 *Criminal Code* (RSC 1985 c C-46) s 718.3(4)(a).
245 Ibid s 718.3(4)(b)(i).
246 Ibid s 718(7).

> fraud charges. This just doesn't make sense. It appeared to me from this example that the law values money and property more highly than children.[247]

The Commission considered that a poor understanding of sentencing principles contributes to this dissatisfaction, noting concerns raised by knowmore that:

> Concurrent and cumulative sentences are not well understood and it's often a very difficult and traumatising process for survivors to engage with prosecutors around their decisions of what matters will proceed on an indictment and what matters the accused will ultimately plead to … ultimately, our position on sentencing is that the sentencing judge should have the discretion around cumulative or concurrent sentencing, because I think if you operate with binding presumptions in either way, there can be particular difficulties which might cause injustice in particular cases. We've referred in our submission that if the presumption was to change, as it has in Victoria, to cumulative rather than concurrent, that may lead to some change in prosecution practice, which may have unforeseen consequences, such as limiting the number of charges in recognition of the cumulative impact, and if there are multiple charges, I would think the sentencing exercise becomes more difficult for the court.[248]

The Commission noted that Victoria has a presumption in favour of cumulative sentencing for serious child sex offences. They noted the submission from the Victorian DPP about its impact:

> the Victorian DPP submitted that, in practice, the presumption in Victoria in favour of cumulative sentencing for serious child sexual abuse offenders has minimal impact on the sentences imposed, as a consequence of the ongoing obligation to apply the principle of totality. He submitted that a clear legislative displacement of the principle of totality would be required to make a cumulative presumption effective.[249]

In line with this, the Commission did not consider that a presumption of cumulative sentences would address the issue for victim survivors, as sentences would need to be reduced for totality, meaning 'in order to comply with the principle, head sentences for child sex offences would need to be reduced in order to avoid a crushing sentence, which might be just as distressing to victims and survivors'.[250]

Instead, the Commission considered that when sentencing multiple offences, judicial officers should 'to the greatest degree possible, provide separate recognition for separate episodes of child sexual abuse offending, and certainly for multiple victims'.[251] The Commission concluded that there was scope for legislation 'to ensure that the separate harm done to victims by separate offences is recognised where there are multiple discrete episodes of offending and/or there are multiple victims' and recommended that:

> State and territory governments should introduce legislation to require sentencing courts, when setting a sentence in relation to child sexual abuse offences involving multiple discrete episodes of offending and/or where there are multiple victims, to indicate the sentence that would have been imposed for each offence had separate sentences been imposed.[252]

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247 Royal Commission into Institutional Responses to Child Sexual Abuse, *Criminal Justice Report - Parts VII to X and Appendices* (2017) 303 ('*Criminal Justice Report – Parts VII, X, Appendices*'),, quoting exhibit 38-0007, 'Statement of KJ Whitley', Case Study 38, STAT.0914.001.0001_R at [43].

248 Transcript of Mr Warren Strange, Case Study 46, 2 December 2016 cited in *Criminal Justice Report – Parts VII, X, Appendices* (n 247)) 305.

249 *Criminal Justice Report – Parts VII, X, Appendices* (n 247) 305–6.

250 Ibid 306.

251 Ibid.

252 Ibid 307, rec 75.

In the Queensland Government response, initially this was 'for further consideration';[253] later, the government reported that this recommendation was accepted and completed:

> The Queensland Government considers the existing Queensland sentencing framework appropriately ensures that sentences for child sexual offences recognise distinct behaviour and are transparent, in line with the intent of the recommendation.[254]

Victim survivor views

Recent research by the Scottish Sentencing Council on victim survivor views and experiences of sentencing for rape found that communication about the sentence by prosecutors and the judge was a critical issue for victim survivors. One victim survivor was involved in a complex case involving multiple offences and victim survivors, and she was 'unable to fully understand what the judge was saying … which contributed to a lack of clarity about how the sentence reflected individual experiences'.[255]

These findings align with research by RMIT's Centre for Innovative Justice into victim services. What emerged as more important than sentencing outcomes for victim survivors was 'the extent to which they felt that their experience had been recognised … and whether they had been supported to understand why a particular outcome had occurred'.[256]

15.3.5 Stakeholder views

Submissions

The Council discussed this issue in its Consultation Paper and invited submissions on whether it was impacting sentencing for sexual assault and rape. No submissions received commented on cumulative or concurrent sentencing.

Victim survivor views

Consultation with victim survivors

The Council consulted with victim survivors about their views on concurrent and cumulative sentencing. One victim survivor and her sister were both offended against as children by the same perpetrator. She told the Council that the sentence given to their perpetrator:

> It was like a cumulative … my child [offence] was only 3 years. And my sister's was 2. (Victim Survivor Interview 4)

253 Queensland Government, *Queensland Government response to the Royal Commission into Institutional Responses to Child Sexual Abuse* (Report, June 2018) 119 <https://www.dcssds.qld.gov.au/resources/dcsyw/about-us/reviews-inquiries/qld-gov-response/rc-child-sexual-abuse-response.pdf>.

254 Queensland Government, *Queensland Government fifth annual progress report Royal Commission into Institutional Responses to Child Sexual Abuse* (Report, 2022) 161 <https://www.dcssds.qld.gov.au/resources/dcsyw/about-us/reviews-inquiries/qld-gov-response/gov-annual-progress-report-child-abuse-2022-recommendation-implementation.pdf>.

255 Scottish Sentencing Council, *Victim-Survivor Views and Experiences of Sentencing for Rape and Other Sexual Offences* (2024) 21.

256 Centre for Innovative Justice, Build It or Burn It Down, Submission to the Australian Law Reform Commission (2024), 30 (emphasis in original).

Victim survivor support advocate views

When asked about concurrent sentencing in cases with more than one victim, one victim survivor advocate commented, 'Well, I don't think their experience is concurrent. They're just individual experiences of people. They should be sentenced that way.'[257] There was a strong view that, in cases involving multiple offences where a global sentence was ordered, this suggested the other offences 'don't count', 'he gets to do those other things for free' and 'if you're going to rape someone, make sure you do everything in one'.[258]

There were concerns that allowing offenders to serve sentences concurrently was not an appropriate 'consequence of your actions because it isn't a deterrent. Because it's not treated seriously. This violence is not taken seriously.'[259]

Subject matter expert interviews

One participant noted there is 'real resistance to cumulative sentencing in Queensland' and questioned whether 'that meets community expectations' and 'whether [global sentencing] is necessarily an appropriate way to sentence' sexual violence matters, particularly involving children.[260] That participant wondered whether 'the *Nagy* approach does invite a degree of generality in a way' and whether 'it may not be appropriate for cases where you've got a large number of offences or multiple victims'.

Consultation events

This issue was discussed by participants in our Cairns event, with some suggesting that greater consideration should be given to cumulative sentencing where there are multiple victims. When sentences are made concurrently, participants thought this made victim survivors feel they didn't matter.

While non-cumulative and concurrent sentences were not raised in our online events, participants spoke about the importance of preparing victim survivors for a sentence and how this contributes greatly to how adequate the person finds the sentence.[261] It was important to manage expectations such as knowing what the penalties might be to avoid surprise.

15.3.6 The Council's view

Key Finding

18. **No legislative changes are required to the current approach to concurrent and cumulative sentencing for multiple victim survivors of sexual violence.**

No additional guidance is needed regarding the ordering of cumulative sentences when sentencing for sexual assault and rape offences involving multiple victim survivors.

We find that there is a need to maintain judicial discretion to impose a just and appropriate sentence in individual cases, including the decision about whether to make consecutive or cumulative sentences. The Council concluded that no legislative changes are needed to current sentencing practices in cases

257 Victim support advocate interview 1.
258 Ibid.
259 Ibid.
260 SME interview 10.
261 Online Consultation Event, 16 April 2024.

involving multiple victim survivors of sexual violence. However, we note that, in contrast to Queensland, it is common sentencing practice in many other jurisdictions to partly cumulate sentences of imprisonment when dealing with multiple offences.

The Council recognises that the circumstances of each offender, victim survivor and offence are infinitely varied. For this reason, sentencing approaches that promote individualised justice applied within a framework of broad judicial discretion are generally more likely to support positive outcomes than a 'one size fits all' or 'one size fits most' approach.[262]

The Council is also mindful of the sentencing principle of totality and the need to ensure sentencing outcomes are proportionate to an offender's 'actual overall culpability'.[263]

We also recognise the common law practice that a sentence should never be a 'crushing sentence' because 'even justly severe punishment ought not remove the last vestige of a prisoner's hope for some kind of chance of life at the end of the punishment'.[264]

The Council agrees with comments made by the Queensland Court of Appeal that the decision about whether or not to cumulate should be made on the basis of which method will 'properly reflect the overall criminality of the offending conduct'.[265] We note the Court's guidance by President McMurdo (as she was then) that, regardless of which method is selected, judges 'must make clear the method adopted and the reasons for it'.[266] We also agree with comments by the Court that 'sometimes the need to vindicate the rights of different victims while giving effect to the totality principle results in making sentences cumulative in whole or in part'.[267]

One of the Council's fundamental principles for this review is that sentencing inconsistencies, anomalies and complexities should be minimised. On this basis, we do not recommend introducing a mandatory or presumptive cumulation scheme for sentencing sexual violence matters with multiple victim survivors as it may result in unnecessary complication to sentencing practices and could increase the risk of sentencing error. This is unlikely to improve victim survivor satisfaction and may further retraumatise victim survivors with matters going to the Court of Appeal for review. Further, as we have stated elsewhere in this report, mandatory sentencing practices have unintended consequences and we do not support their introduction.

However, we recognise that, for some victim survivors, concurrent sentences do not adequately reflect their experience and can appreciate that concurrent sentences may be seen as a benefit to a person sentenced for more than one offence.

During this review, we heard that victim survivors are not being provided with sufficient information to understand the sentence imposed. Understanding why a global sentencing approach has been used and the explanation by the decision-making is critical to this issue. From a victim's perspective (and the general public, for that matter), concurrent sentences are often seen as benefiting offenders who commit multiple offences, particularly against multiple victims.

As noted throughout this report, an essential part of victim survivor satisfaction with sentencing is to be heard and recognised during proceedings. Victims of crime are participants in the court, and it is

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262 See Fundamental Principle 7 in Chapter 3 of this report.
263 *Symss* (n 213) [22].
264 Ibid [40].
265 *R v Van Der Zyden* [2012] 2 Qd R 568, [107].
266 *Bowditch* (n 212) [2].
267 *Symss* (n 213) [25].

incumbent on all parties to treat them with dignity. Improving communication with sexual violence victim survivors about sentencing will have corresponding positive impacts on their sentencing experience, including enhanced understanding of the approach a judicial officer has taken to sentence the perpetrator (**Key Finding 12**).

We noted the findings of the Royal Commission into Institutional Responses to Child Sexual Abuse that victim survivor dissatisfaction may be due to a poor understanding of the principles behind concurrent sentencing. While we agree with the Queensland Government response that the current sentencing framework provides judicial officers with sufficient flexibility to recognise distinct offending, we think there is always opportunity for enhancing communication. The Commission emphasised that, 'to the greatest degree possible', judicial officers should 'provide separate recognition for separate episodes of child sexual abuse offending and certainly for multiple victims'.[268]We echo this advice and suggest that when sentencing a person for sexual offences committed against more than one person, judicial officers should direct remarks towards each victim survivor and, if they are present in the courtroom, maintain appropriate eye contact and acknowledge their experience directly. These considerations could form part of the guidance developed for legal practitioners and judicial officers in **Recommendations 6** and **17** of this report.

Applying the Council's fundamental principles

Applying the Council's fundamental principles guiding the review[269] to the issues raised in considering cumulative and concurrent sentencing and to address **Key Finding 18** guided us in making a recommendation for a review to be considered:

- **Principle 1: Reforms to sentencing laws should be evidence-based with a view to promoting public confidence**: The Council has drawn on data analysis, research on community views, observations sentencing submissions and remarks, appeal decisions, past reviews and research, as well as extensive consultation. We note the position of the Royal Commission into Institutional Responses for Child Sexual Abuse that, while many victim survivors were dissatisfied with concurrent sentencing, this was partly due to poor communication by the court and legal practitioners of the reasons for structuring sentences this way and that, 'to the greatest degree possible', judicial officers should 'provide separate recognition for separate episodes of child sexual abuse offending and certainly for multiple victims'.
- **Principle 2: Sentencing decisions should accord with the purpose of sentencing as outlined in section 9(1) of the PSA**: Ensuring judicial officers have discretion to structure a sentence that is just in all the circumstances according to the sentencing purposes in the PSA is paramount.
- **Principle 3: Sentencing outcomes for sexual assault and rape offences should reflect the seriousness of these offences, including their impact on victims, while not resulting in unjust outcomes**: We know sexual offences generally often involve more than one offence being sentenced at same sentencing event. We note concerns expressed to the Council and the Royal Commission that people who commit multiple offences appear to get a discount when sentences are ordered concurrently and that this can be distressing. We note that the Queensland Court of Appeal has said that when judicial officers are deciding which approach is most appropriate, the

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268 *Criminal Justice Report – Parts VII, X, Appendices* (n 247) 306.
269 For a full list of the fundamental principles, see Chapter 3.

chosen method should 'properly reflect the overall criminality of the offending conduct'. The current sentencing practice for concurrent or cumulative sentencing is flexible and allows judicial officers to make decisions that reflect the harm experienced balanced with the totality principle.

- **Principle 5: Sentencing inconsistencies, anomalies and complexities should be minimised**: Should a presumption or mandatory scheme of cumulative sentences for sexual offences be introduced, our concern is that this will lead to complexities, inconsistencies and anomalies in sentencing. We note our earlier findings that the mandatory aspects of the SVO scheme are distorting sentences and that scheme is applying downward pressure on sentences. We are concerned that changes leading to increased complexity, and therefore more appeals, are unlikely to improve victim survivors' satisfaction.
- **Principle 7: The circumstances of each person being sentenced, the victim survivor and the offence are varied. Judicial discretion in the sentencing process is fundamentally important**: We note the broad judicial discretion in Part 9, Division 2 of the PSA and that there can be flexibility in sentencing under the PSA where a court can choose to structure a sentence in different ways.

15.4 Language used in sentencing

This section discusses the language used in sentencing, primarily through sentencing remark delivery.

The Terms of Reference required the Council to consider:

- The need to protect victims from domestic and family violence and sexual violence;
- The need to hold domestic and family violence and sexual violence offenders to account; and
- The need to promote public confidence in the criminal justice system.

All these considerations are highly relevant and can be promoted by sentencing remarks that appropriately express the offence and the reason for a certain sentence imposed. However, these considerations can be undermined when sentencing remarks are poorly delivered and the court does not adequately explain the reasons for sentencing decisions.

15.4.1 Purpose of sentencing remarks

Under the PSA, 'if a court imposes a sentence of imprisonment … it must state its reasons in open court'.[270]

The purpose of delivering judicial sentencing remarks is to ensure the reasons for imposing a particular sentence on a person are transparent and accessible to the public: 'accessible reasoning is necessary in the interests of victims, of the parties, appeal courts and the public'.[271] It is therefore important for sentencing remarks to serve as an official record of the factors that influenced the sentencing decision, including sufficient details of the offence, the culpability of the person being sentenced and the harm caused to the victim survivor. [272]

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270 PSA (n 1) s 10. However, 'A sentence is not invalid merely because of the failure of the court to state its reasons as required by subsection (1)(a), but its failure to do so may be considered by an appeal court if an appeal against sentence is made.': PSA s 10(2).
271 *Markarian v The Queen* (2005) 228 CLR 357 [39] (Gleeson CJ, Gummow, Hayne and Callinan J agreeing) ('*Markarian*').
272 *R v Koumis* (2008) 18 VR 434 [62] (citations omitted) ('*Koumis*').

Sentencing remarks serve a powerful communicative function to all members of the public by ensuring:

- the offending person understands their sentence and is held accountable for the harm they have caused;
- the victim survivor understands the reasons for the sentence imposed, and sees their experience has been acknowledged by the courts;
- there is consistency between sentences imposed within a particular common law jurisdiction; and
- the community sees that the offender has been denounced for their conduct.[273]

It is important for a judicial officer to provide sufficient reasons for their decision, '[t]o ensure that the instinctive synthesis in the sentencing process is not unfathomable and does not conceal error, the 'law strongly favours transparency'.[274] It has been recognised in Queensland that:

> It is desirable that sentencing remarks be succinct, sharply focussed and expressed in a way likely to resonate with the offender, the victim and the public at large. They also have to be able to withstand the scrutiny of appellate courts. The reasons for structuring a sentence in a particular way should ordinarily appear in the sentencing remarks, and a sentencing court may more readily infer error when reasons are not expressed.[275]

This is particularly important when deciding a contested issue at sentence. The courts have recognised it is 'desirable that conclusions reached by the sentencing judge as to the primary arguments advanced by the parties, particularly if they are in controversy, should be apparent from the reasons'.[276] For example, the Victorian Court of Appeal concluded that due to the seriousness of the offending and the 'evidence showing a significant risk of [the offender] committing further offences of violence, whether sexual or not',[277]a 'substantially higher sentence was called for'.[278] The Court noted that 'since [the sentencing judge] did not explain how the various factors were brought to bear on the sentencing decision, we are constrained to infer that the matters urged in mitigation were allowed to overwhelm other considerations, leading to error of principle'.[279]

Ex tempore sentencing in Queensland

Queensland courts are unique in that the most common sentencing approach is to make ex tempore remarks. This means the judge delivers the sentencing remarks verbally, immediately following oral submissions by the prosecution service and defence representatives.

It is accepted that public understanding of sentencing is enhanced by clear and well-crafted remarks; however, in considering ex tempore reasons delivered in busy courtrooms, the courts have also acknowledged that '[i]t is not appropriate to parse and analyse judgments'[280] and '[i]mpreciseness of language … can have less significance that it might otherwise have'.[281]

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273 Andrew von Hirsch et al. *Principled Sentencing: Readings on Theory and Policy* (Bloomsbury Publishing, 2009) 129.
274 *Koumis* (n 272) [62] (citations omitted).
275 *R v Hyatt* [2011] QCA 55 [11].
276 *Koumis* (n 272) [63].
277 *DPP v Patterson* [2009] VSCA 222 [51].
278 Ibid [52].
279 Ibid.
280 *Andersen v Commissioner of Police* [2020] QDC 23 [18], citing *Commissioner of Taxation v Baffsky* (2001) 192 ALR 92, 102.
281 *Andersen v Commissioner of Police* [2020] QDC 23 [18], citing *R v Hooper; ex parte Cth DPP* [2008] QCA 308, [23].

There are positive and negative aspects to delivering remarks on an ex tempore basis. Legal stakeholders generally regard Queensland's practice of ex tempore remarks as 'very efficient'.[282] In a 2016 review into live broadcasting of remarks, although legal stakeholders acknowledged that public understanding of sentencing was enhanced by clear and well-crafted remarks, a 'delay in the prompt imposition of sentences' may not be 'in the interests of justice, the interests of the person being sentenced or the interests of victims'.[283] That review noted the demands and pressures of busy court lists means that judicial officers may not always have the time required to craft sentencing remarks.

One negative aspect of ex tempore remarks is that they can lack detail, particularly about the offending, and be less structured, particularly when compared to written remarks in other jurisdictions. As ex tempore sentencing remarks are delivered following submissions, some judicial officers do not re-state the facts of the offending, which limits transparency for members of the community who do not have access to transcripts of sentencing submissions, only sentencing remarks. It is also likely that when judicial officers deliver their remarks due to the immediate proximity of the submissions, they may rely upon language and terminology used by legal practitioners. It is therefore important for legal practitioners to use appropriate, trauma-informed language in their written and oral sentencing submissions.

Sentencing remarks are relied on by other parts of the justice system as an independent record of what happened. For example, sentencing remarks are an important evidence base for the Queensland Corrective Service ('QCS') when making decisions about programs and treatment, and without sufficient detail of the offending there may only be the offender's account of what happened to rely on.

What happens in other jurisdictions

While ex tempore sentencing occurs in other Australian jurisdictions, it is not the common approach for higher court decisions in some jurisdictions, such as NSW and Victoria. In those jurisdictions, it is more common for judicial officers to hear the submissions at the plea hearing and then adjourn the sentence hearing to later date, enabling time to draft and revise their remarks.

The NSW Criminal Court of Appeal in *Gal v R*[284] held that the sentencing judge had erred in making no reference to the facts of the offence and not assessing the objective seriousness of the offence, despite referring to the serious in argument. The Court said 'there was an insufficient statement of the basis upon which the applicant was sentenced'.[285] The Court further stated:

> Ultimately any practice of having recourse to the transcript of sentence hearings as an adjunct to the reasons for sentence has significant limitations. Sentencing judges are not bound by the observations made during the course of sentencing hearings. Sentencing judgments speak to a wider audience than simply the parties and even this Court, none of whom can be expected to consult the transcript. Nothing in this judgment is meant to suggest that a sentencing judgment must dwell upon either the facts of an offence or their objective seriousness at any length. Instead, at a minimum such reasons should state or refer to the essential facts upon which an offender is sentenced and provide at least some assessment of, or reflection upon, the seriousness of the offending conduct.[286]

The Victorian Court of Appeal has said sentencing remarks are a 'reaffirmation of society's values' and these may be properly expressed in sentencing reasons.[287]The Court also said:

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282 The Bar Association Queensland submission to the Supreme Court review, *Electronic Publication of Court Proceedings – Report* (April 2016) 37.
283 Supreme Court of Queensland, *Electronic Publication of Court Proceedings – Report* (April 2016) 37.
284 [2015] NSWCCA 242.
285 Ibid [37].
286 Ibid [39].
287 *WCB v The Queen* [2010] VSCA 230; 20 VR 483, [12] ('*WCB*').

> A sentencing judge need not be reticent to express him or herself in terms of community values. The circumstances in which a sentencing court may refer to or draw upon the concerns or expectations of the community is not to be circumscribed as the appellant suggests. The courts do not exist independently of the society which they serve. As the sole legitimate administrator of criminal justice, they may be viewed as the trustees of the power of the community to judge and, where appropriate, punish its members. This requires that courts vindicate the properly informed values of the community and, equally significantly, that they are seen to do so.
>
> The expectations and values of the community are, in fact, often invoked in sentencing remarks and in the broader context of sentencing laws. Central to the purposes of sentencing is public denunciation of the offending conduct and reinforcement of society's expectations. The sentence communicates society's condemnation of the offender's conduct. It signifies the recognition by society of the nature and significance of the wrong that has been done to affected members, the assertion of its values and the public attribution of responsibility for that wrongdoing to the perpetrator. The sentence serves to reinforce the standards which society expects its members to observe.[288]

The Court has also said more comprehensive reporting of details in sentencing is even more critical in cases of sexual offences, to both maintain 'public confidence in the operation of the criminal justice system' and to increase public awareness of the 'type of sentences imposed for that kind of criminal conduct':[289]

> Regrettably, sexual offences against children, including incest, are amongst the range of commonly occurring crimes which are not generally reported or which receive little attention. Thus to return to our earlier proposition, if sentencing outcomes in these and other commonly committed crimes are not adequately made known to the public at large, general deterrence will lose its authority as a prime principle justifying the imposition of custodial and other punitive measures. When the community labours under the belief that sentences that are imposed are inadequate, a sense of injustice exists that damages the respect in which our criminal justice system is held. The public needs to be made more aware of the full extent of custodial sentences that are handed down on a regular basis in all levels of the legal system. For example, the community must be better informed as to the consistent imposition of custodial penalties that are imposed by all of the courts for offences such as home invasions, violence resulting in injury, trafficking in or cultivating drugs of addiction, sexual offences and more serious driving offences. The courts and the media must be able to utilise all technologies that are available so as to achieve a more comprehensive reporting of sentencing for all types of criminal conduct.[290]

15.4.2 Why language matters in sentencing sexual assault and rape offences

Language is even more important for sexual violence offences due to long-standing systemic issues relating to our understanding of sexual violence and the harm caused by these offences.[291] As discussed in **Chapter 2** of this report, although sexual violence is prevalent, it is one of the most under-reported crimes, and even when it is reported to police, there are high attrition rates. Some of the barriers to reporting include a fear of not being believed,[292] a lack of trust in and/or concerns with the justice system[293] and unsupportive community attitudes about women, racism and rape myth acceptance.[294]

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288 Ibid [34]-[35].
289 Ibid [42].
290 Ibid [43].
291 For example, the Women's Safety and Justice Taskforce recommended the Criminal Code be reviewed to modernise language used for sexual offences because some terms in offences were 'problematic' and were 'apt to retraumatise victim[survivors': Women's Safety and Justice Taskforce, *Hear Her Voice – Report Two: Women and Girls' Experiences Across the Criminal Justice System* (2022) ('*Hear Her Voice, Report Two*') 273. This work has commenced and is ongoing, but changes have included changing the term 'carnal knowledge' used in rape to 'engage in penile intercourse'.
292 Australian Institute of Family Studies and Victorian Police, *Challenging Misconceptions About Sexual Offending: Creating an Evidence-based Resource for Police and Legal Practitioners* (Reference Booklet, 2017) 3.
293 Victorian Law Reform Commission, *Improving the Justice System Response to Sexual Offences* (Report, September 2021) 23,27; Ibid 3.
294 *Hear Her Voice*, *Report Two* (n 291) 103.

Judicial officers can help to break down 'systemic barriers to reporting sexual violence by establishing a court environment where victim survivors are confident their wellbeing safety will be prioritised'.[295] Importantly, the language used and/or accepted without comment by the Court of Appeal set precedents for how sexual violence is understood and framed by legal practitioners and judicial officers.

As discussed in **Chapter 6,** the way legal practitioners and judicial officers describe the seriousness of an offence is important to ensure the gravity of offending is appropriately recognised and sentenced. When language is used to describe offending that may not reflect the offending gravamen, it minimises both the harm caused and the culpability of the perpetrator, as well as not properly denouncing the offender's conduct.

Problematic language in sentencing sexual offences potentially impacts the adequacy of sentencing practices because it may:

- influence or be perceived to influence the way judicial officers determine seriousness for the purposes of sentencing;[296]
- retraumatise the victim survivor by appearing to minimise the seriousness of the offending and/or the offender's culpability;
- provide inadequate information about the offence and offending for both parties, as well as other essential parts of the justice system including for QCS to risk manage and provide treatment to the sentenced person and the Parole Board to make informed decisions about the person's parole suitability.

We also heard from victim survivor and advocacy groups that the way the offender's prior 'good character' is discussed in a hearing, and in particular the language used by judicial officers in their remarks, can be deeply distressing for victim survivors and undermine the sentencing purpose of denunciation. In **Chapter 9**, we considered research into the use of language and 'good character' in sentencing sexual assault and rape. A South Australian study of sentencing transcripts suggested the language used when discussing 'good character' assists the sentenced person 'to feel as though he was, is and will be a good person within the sentencing context'.[297] The researchers pointed to several negative consequences arising from its use and the broader implications:

> the language of good character avoids the naming of the defendant and, alarmingly, the child sexual abuse. The defendant's 'goodness' can be used to shift blame to the victim and minimises the seriousness of the child sexual abuse offences. This represents a wider societal practice of silencing discussion about child sexual abuse, which has serious potential implications for victims. The dominance of good character at the sentencing stage can create additional negative experiences within the criminal justice system for victims of child sexual abuse, especially for those who engage with the legal system to assist in their recovery.[298]

Language changes regarding how evidence of 'good character' is communicated in court may assist a victim survivor and the community to understand how it is being taken into account, promoting transparency and public confidence.

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295 Vicki Lowik et al, 'The Trauma-informed Court: Specialist Approaches to Managing Sexual Offence Proceedings – Part 1' (2024) 33(1) *Journal of Judicial Administration* 1-2.
296 See comments in *WA v Wynne* [2024] WASCA 20 [73] 21 (Buss P, Mazza JA and Hall JA agreeing).
297 Ibid 106.
298 Ibid.

Impartial and unprejudiced sentencing of child sexual offenders

Judicial officers are required to sentence in an impartial and unprejudiced manner, with the High Court stating that the test 'is whether a fair-minded lay observer might reasonably apprehend that the judge might not bring an impartial and unprejudiced mind to the resolution of the question the judge is required to decide'.[299]

In relation to sentencing child sex offenders, the High Court has said it is important for sentencing courts to avoid emotion, including disgust or revulsion towards when sentencing this cohort. Sentencing remarks should be confined to 'relevant legal and factual analysis'.[300] This is to ensure 'disgust and revulsion for the offender and sympathy for the victims cannot be allowed to cloud the sentencer's vision'.[301] In *Ryan v The Queen*,[302] ('*Ryan*') Kirby J observed that:

> As far as possible, emotions must be put aside. Otherwise, the offender, and society, may be left with a belief that judicial emotion and prejudice against the offender, rather than proper factual and legal analysis of the offences, lies behind the sentence that is imposed … Putting emotion to one side is the best way that the justice system has devised for avoiding both the appearance and actuality that extraneous considerations have entered the sentencing process. This may be well be particularly relevant to sentencing offenders convicted of multiple offences against minors because of the specially heavy demand which that task places upon judicial dispassion and professionalism.[303]

Hayne J further commented:

> As I said at the start of these reasons, sentencing an offender requires consideration and balancing of many different and often conflicting matters. What the offender did and why, and who the offender is, will be central to that task. If those matters provoke a particular reaction towards the offender by society at large, or a section of it, they are matters which the sentencer has already considered. Society's reaction to them neither adds to nor detracts from their significance in the sentencing process. If, by contrast, the reaction of society to the offender is not based in such considerations but is, for example, based in emotional responses to the offender or the offender's actions, they are matters which a sentencer should not take into account in mitigation of sentence. There is an irreducible tension between the proposition that offending behaviour is worthy of punishment and condemnation according to its gravity, and the proposition that the offender is entitled to leniency on account of that condemnation.[304]

The High Court's commentary in *Ryan* was particularly focused on denunciatory remarks by the sentencing judge, which had included 'debasing', 'degrading', 'wicked', 'abhorrent', 'almost beyond belief' and 'enormity',[305] rather than the language used to describe the offending conduct.

Trauma informed remarks

Trauma-informed practices are increasingly being used in Australian courts. We discussed the importance of this approach and our recommendations to improve trauma-informed practice in Queensland courts in **Chapter 13**.

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299 *Johnson v Johnson* [2000] HCA 48.
300 *Ryan v The Queen* (2001) 206 CLR 267 [121] (McHugh J). (*'Ryan'*)
301 Ibid [134] (Hayne J).
302 (2001) 206 CLR 267.
303 Ibid [119] and [122].
304 Ibid [157].
305 Examples cited from the original sentencing remarks in the decision of Kirby J [82].

15.4.3 Sentencing remarks analysis

This section presents some of the problematic language examples we identified in the thematic analysis of rape and sexual assault sentencing remarks, which could be seen to minimise the offender's culpability and/or the harm experienced by the victim survivor.

Characterisation of sexual offending

Not fitting words to deeds

Research on language in sentencing of sexual violence offences has found 'language which mutualizes violent behaviour implies the victim is at least partly to blame and inevitably conceals the fact that violent behaviour is unilateral and solely the responsibility of the offender'.[306]

We found examples in textual remarks where the language used to describe the offending was more suitable to consensual acts than to rape or sexual assault. Using this type of language does not properly denounce the conduct, nor does it hold the person to account for their actions.

In sexual assault sentencing remarks, we found examples where forced mouth-to-mouth contact was described as kissing without reference to the victim's lack of consent.

> you kissed her and gently pushed her on to a bed.[307]
>
> you hugged her from behind and kissed her on the neck.[308]
>
> kissed her on her mouth and put your tongue inside her mouth.[309]
>
> you grabbed her with his hands on either side of her head and kissed her on the lips.[310]

We also found examples where vaginal or anal rape was described as sex or sexual intercourse, which may characterise the offender's conduct as sexual rather than violent.[311]

> you inserted your penis into her vagina and had sex with her until you ejaculated.[312]
>
> Each involve you having sexual intercourse with her while she was asleep.[313]
>
> You removed her pants, held her down by the throat so that she could not breathe and had sexual intercourse with her without her consent until you ejaculated.[314]

Although, 'ostensibly the same physical act, they suggest very different characterisations of the act (e.g. affectionate versus violent) and call for radically different actions (e.g. not intervention versus legal intervention)'.[315] Further, describing the conduct in this way minimises the perpetrator's culpability, as well as the violence (and fear) involved with non-consenting sexual contact.

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306 Linda Coates and Allan Wade, 'Telling it Like it Isn't: Obscuring Perpetrator Responsibility for Violent Crime' (2004) 15(5) *Discourse and Society* 501.
307 Sexual assault, regional/remote, higher courts, custodial, #9.
308 Sexual assault, major city, lower courts, custodial, #1.
309 Sexual assault, regional/remote, higher courts, custodial, #4.
310 Sexual assault, major city, lower courts, non-custodial, #12.
311 Coates and Wade (n 306) 503.
312 Rape, major city, imprisonment < 5 years, #12. This is the only way the rape offending was described in the remarks and no details were given of each count, only this description.
313 Rape, major city, imprisonment < 5 years, #5. The judge did describe this conduct later in the remarks as 'two separate acts of rape on a sleeping woman, one of them involved anal penetration which I accept should be approached as a more serious act than the vaginal penetration, at least in the circumstances before me'.
314 Rape, regional/remote, imprisonment > 5 years, #14.
315 Coates and Wade (n 306) 503.

Further, language used by the court that mutualises the conduct may result in the person seeking to justify their behaviour to themselves and others as being purely sexual rather than violent (and therefore criminal).

Describing the offending in passive language

Similarly, research has found that remarks written (or spoken) in the passive voice reduce attributions of responsibility – that is, passive constructions were 'more likely to attribute less harm to the victim and significantly less responsibility to the offender'.[316] For examples identified by the Council in sentencing remarks for rape and sexual assault sentenced recently, see **Chapter 6**, section 6.5.1.

We found examples where the court used language that omitted or minimised the culpability of the perpetrator in cases involving rape. For example, judicial officers would describe the offending conduct with passive or neutral terms, such as 'insert' or 'put', rather than language more reflective of the non-consenting nature of these offences, such as 'forced' or 'penetrate'. This may diminish the offender's agency and the degree of force used to commit the offence.

> you pulled her pants down and then you proceeded to climb on top of the complainant and insert your penis into her vagina.[317]
>
> Count 20, rape, inserting your penis into [the victim survivor's] vagina, which was very painful…covering her mouth, inserting your penis into her vagina.[318]
>
> You then took your pants down and put your penis inside her vagina.[319]
>
> Count 2, the insertion of your finger or fingers into her vagina without her consent.[320]

It is likely that this language was used in the Statement of Fact and may reflect language used in police records or in victim survivor statements. However, the effect of this choice of language is to minimise the offender's culpability as well as the harm caused, including the fear, violence and pain inherent in the offending.

Not calling rape conduct rape

As discussed in **Chapter 6**, we observed differences in the ways types of rape conduct were discussed, with some types of conduct not being called 'rape'.

Generally, we found that the term 'rape' was primarily used for penile–vaginal penetration and not for digital penetration of a person's vulva, vagina or anus, or rape involving penile penetration of the mouth. Often, those forms of offending were described as digital penetration or oral sex. This may reflect the broader social constructs of sexual activities that 'real' sex is heterosexual penile/vaginal sex and oral and digital sex are foreplay activities, and therefore less important in the hierarchy of sexual activity.

Describing penile–mouth rape as oral sex is also an example of not fitting deeds to words. Using this language minimises the violence inherent in the act, as well as the offender's culpability in forcing their penis into another person's mouth.

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316 Ibid, 502.
317 Rape, major city, imprisonment < 5 years, #15.
318 Rape, major city, imprisonment > 5 years, #19.
319 Rape, major city, imprisonment > 5 years, #17.
320 Rape, major city, imprisonment < 5 years, #7. For contrast in Rape, regional/remote, imprisonment > 5 years, #15 the judge stated, 'Then you forced your fingers into her vagina despite her resistance and repeatedly telling you to stop.'

The Western Australian Court of Appeal, in *The State of Western Australia v Wynne*,[321] commented on the importance of using language that 'accurately capture the gravamen of the offence'.[322] In that case, the sentencing judge had repeatedly referred to rape conduct as 'touching', which the Court said was 'more apt to describe an offence of indecent assault'; this offence has a much lower maximum penalty and the offence in this case was 'one of sexual penetration without consent, and the sentence imposed was required to reflect that fact and the maximum penalty for the offence'.[323]The Court said the judge's words 'failed' to 'accurately capture the gravamen of the offence' and there was speculation that her 'repeated use of the word touching may indicate' how the judge 'arrived at the conclusion that an Intensive Supervision Order was an available disposition'.[324]

Rape involved 'no violence at all'

We found a tendency for judicial officers to describe rape as involving 'no violence', which may minimise the inherently violent nature of rape cases.

This phrasing was often used in cases where the victim survivor had been asleep or unconscious:[325]

> I also have regard to the fact that you did not use any weapons and that there was no overt violence or, indeed, there was no application any force more than what was required to achieve penetration.[326]

> You violated a woman, your friend, sleeping in her own bed. I accept that it is not suggested that you were violent, and that no threats were made.[327]

> [defence counsel] confirms the absence of aggravating features, such as there was no violence, no threats, no intimidation, and no force used to overcome resistance. Indeed, it seems given the state that the complainant was in [semi-conscious due to heavy intoxicated], she did not offer any resistance, but nonetheless, the point should be made that there is the absence of those aggravating features which occurs in some cases.[328]

There was an example where the court clearly articulated that violence was inherent in the rape offences but that the aggravating factors of additional physical violence were absent:

> Balanced against those aggravating features, I note the complainant suffered no physical injuries, that there was no additional violence over and above that required to secure her submission and that inherent in the acts of penetration and conduct themselves, and that there was no weapon used.[329]

15.4.4 Stakeholder views

Submissions from victim survivor and advocacy stakeholders

While submissions did not focus on language, many stakeholders thought the criminal justice system did not adequately consider harm to victim survivors.[330]

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321 [2024] WASCA 20
322 *WA v Wynne* [2024] WASCA 20 [73] 21 (Buss P, Mazza JA and Hall JA agreeing).
323 Ibid 21 [74].
324 Ibid 21 [73].
325 *R v Hutchinson* [2010] QCA 22 [22] (Keane JA, de Jersey CL and Douglas J agreeing). See also *R v Enright* [2023] QCA 89 (Mullins P, Bond JA and Boddice AJA), where it was stated at [86] that '[t]he sentencing judge found that the offending conduct did not involve other aggravating features such as violence, although that was not unusual in offences involving the sexual assault of a sleeping person'.
326 Rape, major city, imprisonment < 5 years, #5.
327 Rape, regional/remote, imprisonment < 5 years, #14.
328 Rape, regional/remote, imprisonment > 5 years, #2.
329 Rape, regional/remote, imprisonment > 5 years, #8.
330 See, for example, Submission 24 (QSAN) 3.

QSAN thought sentences for sexual violence 'should better reflect community expectations about the seriousness of these crimes and be more reflective of the actual impact of the crime and the trauma caused to the victim survivor'.[331]

It was suggested that for courts to 'adequately denounce sexual offences'[332] and ensure sentences are appropriate, language should reflect 'the objective gravity and the moral culpability of the offending'.[333]

Submissions from legal stakeholders

Legal stakeholders did not raise concerns about the language used in current sentencing practices for rape and sexual assault.

Submissions from individuals

One submission in response to our Consultation Paper focused on the importance of transparency in sentencing decisions and on increasing public understanding of reasons through published remarks that are 'in simple, jargon-free' language.[334]

Rita Lok referred to research showing that when people were given more information about a case, their punitiveness decreased. She was concerned about the lack of accessible remarks in Queensland courts, particularly in the Magistrates Courts, suggesting there could be 'more consistent publishing of sentencing remarks in lower courts' and noting the 'publishing mechanisms adopted by superior courts, namely the Supreme Courts and Court of Appeal, which consistently produce and publish written decisions'.[335]

Victim survivor views

Structure of remarks

Consultation with victim survivors

The Council consulted with victim survivors about their experience of sentencing, including attending a sentence hearing and listening to the judge deliver their remarks.

As commented on elsewhere in this report (for example, see **Chapter 14**) most victim survivors did not think the impact of the offending was properly understood by the courts, which diminished their satisfaction with the sentencing outcome.

One victim survivor told us that while 'everyone was very respectful' in the sentencing process, and the sentencing judge had been 'fantastic', she still thought the court didn't understand the harm she had experienced:

> He is a fantastic judge. I don't have any bad words about him. But I just don't think the whole court system understands the impact of what happens. (Victim Survivor (rape) Interview 2).

331 Ibid 8.
332 Submission 20 (DVConnect) 5.
333 Submission 24 (QSAN) 12.
334 Submission 4 (Rita Lok) 2.
335 Ibid.

Another victim survivor had similar experiences with prosecutors and the judge being respectful and fair, although she felt the judge had understood the harm she experienced. However, regarding the defence counsel, she told us:

> I felt the defendant's lawyer like didn't give a care at all. Didn't give a f**k basically. Basically, about the trauma, I had, they just wanted to win. (Victim Survivor (rape) Interview 6).

The mother of one victim survivor said although they submitted a victim impact statement, the judge focused more on the offender:

> The judge barely read [the victim impact statement]. And he didn't care. But then [the judge] read the evidence that his lawyer put in about how this happened, and he just basically, you know, it just felt like we weren't important. He quickly mentioned that it did harm to our family and it wasn't okay. But, yeah, about how [the offender's] changing his life and how [the offender's] got good references, and it just made us feel like … (Victim Survivor Parent Interview 1)

Problematic language

Consultation with victim survivors

In relation to problematic language, one victim survivor told us that the way the judge talked about her offender's actions minimised his culpability and any denunciatory or deterring effect and resulted in her feeling dissatisfied with the sentence:

> The words that the judge said that he can't … be sure of the motivation [for offending] but the perpetrator must have felt so strongly he couldn't help himself. That has created an after effect of feeling less safe in the world, because if a judge says 'oh you must just have been overcome with temptation', okay you can walk out and you can go back to your life. Then when I'm walking down the street and there's a man, or I'm in a situation where I feel uncomfortable, the thought is, what if he's just overcome by temptation. (Adult victim survivor (sexual assault) Interview 7)

Victim survivor support advocate views

One victim survivor advocate briefly commented on how language used in sentencing can impact victim survivors; however, this topic was not the focus of these discussions.[336]

Subject matter expert interview participants

Purpose of sentencing remarks

Generally, SME participants thought sentencing was hard and most judges got the balance right on details about the offender and the victim survivor. It was recognised that sentencing remarks serve many functions and audiences, although the primary purpose is to communicate to the offender. Some participants were aware that remarks were considered by QCS[337] and the Parole Board,[338] with one practitioner expressing concern that the Board is not automatically provided with the exhibits on file.[339]

336 Victim support advocate interview 1.
337 SME Interview 1.
338 SME Interviews 10, 16
339 SME Interview 16.

However, some participants thought remarks were often 'talking to the Court of Appeal, rather than the offender or to the victim',[340] and there was not enough focus on the victim survivor and their experience.[341] It was recognised that victim survivors might be frustrated if they attend a sentence and hear 'ad nauseam about the offender's background and antecedents'.[342]

One participant suggested courts could

> have a little bit more focus towards explaining to the victim, particularly if they are in the back of the court, why a particular concept plays out the way that it does. Because just calling it rehabilitation or general deterrence doesn't do much to the victim. It's just a name, but it's really about explaining it in very basic English as to why I've come to the view that I have so that he and or she understands in the back of the court. And I'm not sure that the sentencing court does that very well.[343]

The *ex tempore* nature of sentencing in Queensland was raised, with some practitioners commenting that it expedites decisions.[344] One practitioner observed it is challenging to deliver remarks in a busy court schedule that 'makes everybody feel heard and reflects all the relevant sentencing considerations'.[345] Another participant noted how Queensland differed from other Australian jurisdictions in its approach to sentencing, and commented:

> I find it interesting, like obviously Queensland, there's such a diversity in the way in which sentencing remarks are presented. Whereas in some other jurisdictions, it's a lot more formulaic. It's a totally different process. But they don't ex tempore either, in other jurisdictions. So you don't get to hear the result there and then, which is what we're trying to do.[346]

Some participants commented on the value of detailed remarks for legal practitioners to use as a comparison in future. Pointing out that some judicial officers' remarks 'would be quite brief all the time', just capturing 'every single appeal point' and nothing further,[347] legal practitioners noted that the quality of remarks really depends on the judicial officer.[348] One practitioner stated:

> A lot of times you have some magistrates who'll just go, I've had regard to all the things in section 9" and then they'll just move along and go, 'here's your penalty'. Where you have others that will go into significant detail about the defendant's circumstances but also the victim's circumstances. So, you know, I couldn't give you a definitive answer, just to say this, it depends on the magistrate but you certainly do have ones that will take everything into account on the victim's side and others that will just gloss over it.[349]

Another commented on the brevity of remarks and that relying on judges' sentencing remarks alone will likely mean that 'there would be things that are missing in terms of context telling'.[350] The participant used the example of investigating a case for merit for an appeal and that they 'would get the whole court file and I would get all of the documents that were tendered … [and] then I actually understand what went on'.[351]

340 SME Interview 1.
341 SME Interviews 15 and 17.
342 SME Interview 17.
343 SME Interview 11.
344 SME Interview 14.
345 SME Interview 23.
346 SME Interview 14.
347 SME Interviews 7. Similar comments were also made in SME Interviews 15 and 22.
348 SME Interviews 4, 7, 17.
349 SME Interviews 4, 22, 23.
350 SME Interview 16.
351 Ibid.

There were mixed views about whether remarks should be detailed or brief. One practitioner thought it could be re-traumatising for victim survivors when the offence facts are repeated during sentencing remarks – especially when the victim survivor is present in the court room.[352]

Structure of sentencing remarks

Some participants who were judicial officers shared their own approach to sentencing with the Council. There was a general consistency to the approach taken by judges to delivering remarks.

> I try to keep them as brief as possible, but I kind of always think they're going to be used for those reasons and for other judges when they're resentencing someone. And they need to see the facts of what happened on an earlier occasion, or it's a breach of an order … I do at least, which some judges don't do, I do try and put a summary of the facts and basically a summary of what I've done. Yeah, so I make them as comprehensive as possible without quoting the law or quoting cases, passages out of cases and things like that. So, they probably normally might be about three pages.[353]

> The way I approach it is fairly standard and consistent with, I think, most of the judges. I state the most critical facts and the relevant antecedents and the principles and cases to the extent necessary, and then impose the sentence. We have a reasonably efficient system in Queensland, so most sentences are passed immediately after the close of the submissions. We appreciate, of course, that corrective services and perhaps others, including the Parole Board, might need to look at the remarks down the track. So we try and ensure that the content is going to be adequate for those purposes. But primarily we are speaking to the person being sentenced, and sometimes we have the victim in court, and they need to hear things. And getting that balance between the victim and the offender as part of that statement is important.[354]

> I do it a little bit differently to others. So, I say, what has happened to you is this. I'm told this is where you were born. I'm told that this is what your background is and that you come to offend against this woman in this way. And I know you say you have an issue with alcohol and I now can see that, for example, you're addressing that through these things. But let me just get to what this proceeding is really about, which is what you actually did. And then I go into the facts. And I think it's very impactful because although it's different to the way other people do it, I think it sort of gives me a background of the person and what this is about. And then we get to the main thrust. This is this concept of general deterrence I was telling you about. For me, it has to be the meat of the sentencing remarks. And so, I then very, very finally go through the factual features. And although they are often contained in the schedule of facts, it's important to actually outline them all. By that stage, I've said all the good things about him. Now it's up to the bad things. Why the offending is so serious. [355]

> What I try to do in the sentencing remarks is identify the basis of, without going into, depends, every case is different, I suppose, but I give a summary of the allegations, which are the basis of each of the charges, so that there is at least in the record some identification that this is what the offence was made up of, without going through all of the details of it. And I'll identify the serious aspects of the offending, if it's, for example multiple instances of sex offending, if it's a position of responsibility in respect of the child, the child is in the care of the offender, those sort of things…work out what the aggravating features are or the mitigating features out of the offending.[356]

> Well, I have a structure that I pretty much follow every single time, which is here's what the facts are, here's what the antecedents are, here's what the evidence is. And then I'll go through and I'll say, here's what the facts are, here's what the antecedents are of the defendant. And here is where he pleaded guilty or not guilty. Here's what I have to take it, here's what I have to turn my mind to in determining the appropriate sentence. The seriousness of the charge, the maximum penalty, protection of the community, impact upon the victim. And then I talk about, if I know something about it, the impact upon the victim. I know the particularly serious aspects of this offence. It was protracted over a long period of time and involved breach and egregious breach of trust, etc, etc, etc, whatever it might be. And then

352 SME Interview 5.
353 SME Interview 9.
354 SME Interview 10.
355 SME Interview 12.
356 SME Interview 13.

> balancing all this up together, this is the end result. So, I approach them all that way because I find that that helps me to think through what the sentence should be.[357]

Problematic language

Some participants in expert interviews referred to opportunities to enhance understanding of legal practitioners about the harm caused by sexual violence offending.[358]

One practitioner highlighted the importance of language used in the courtroom and in sentencing remarks, and that practitioners need to be mindful of not using words which minimise or trivialise a victim survivor's experience and/or the offender's conduct.[359] The interviewee referred to comments made by Cardinal George Pell's defence barrister to describe the alleged crimes as 'no more than a plain vanilla sexual penetration case' and suggested that remarks such as those were unhelpful:

> I've always said it's a real challenge … there is relativity of offending and that's fine. But this is what happened to this child. This is what happened to this particular woman. And so, you don't need to characterise it anything other than this is what you did to her. That is the conduct. So, I think, of course, everything is relative and comparable. But I think once you start labelling it, it undermines it to that person. And it objectively undermines it overall. So, I think language is a huge thing for judicial officers. We really could learn a thing or two about particularly with sexual offenses, I think.[360]

15.4.5 The Council's view

In **Chapter 13** we examined the experiences of victim survivors and their justice needs. Improving communication emerged as a central issue, and part of this is the way judicial officers and legal practitioners engage with victim survivors in sentencing hearings and in remarks. Despite the rights of victim survivors enshrined in the Charter of Victims' Rights, we found many victim survivors of rape and sexual assault are dissatisfied with their experiences engaging with the criminal sentencing process (**Key Finding 12**). The Council is concerned that current sentencing practices and processes may retraumatise victim survivors (**Key Finding 13**); not be culturally safe for some victim survivors (**Key Finding 14**); and should use trauma-informed language (**Key Finding 15**). To address these findings, we recommended incorporating trauma-informed practices to sentencing in Queensland through enhanced resources and professional development for judicial officers and legal practitioners (**Recommendations 17, 18, 19 and 20**).

The approach of ex tempore sentencing remarks should continue

The Council supports the continued use of ex tempore sentencing in Queensland. We share the legal sector's view that this approach enables matters to be dealt with expeditiously which is in the interests of victim survivors and perpetrators.

Comprehensive sentencing decisions ensure sentencing outcomes are better understood and may increase community awareness of sentences for sexual assault and rape

We note the High Court's commentary that 'accessible reasoning is necessary in the interests of victims, of the parties, appeal courts and the public' and that judicial officers must give reasons for their

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357 SME Interview 14.
358 SME Interview 9.
359 SME Interview 11.
360 Ibid.

decision.[361] This is particularly pertinent when sentencing a person to imprisonment and, where possible, courts should use accessible language in their remarks.

Sentencing remarks have many functions, but first and foremost their purpose reflects the courts' role as the 'sole legitimate administrator of criminal justice' and 'as the trustees of the power of the community to judge and, where appropriate, punish its members'.[362] As Kirby J stated in *Ryan*, the sentence represents 'a symbolic, collective statement that the offender's conduct should be punished for encroaching on our society's basic code of values as enshrined within our substantive criminal law'.[363]

Sentencing remarks not only communicate to the perpetrator that what they did was wrong and against the law; they serve a broader function of making the community aware of the type of sentences imposed for that kind of criminal conduct. Greater community awareness of sentences imposed for sexual assault and rape offences may act as a deterrent to others in the community who are inclined to commit similar offences and may help strengthen confidence in the operation of the criminal justice system.

The Council heard repeatedly during this review that victim survivors are very keen that perpetrators do not reoffend, so effective programs are critical. Fulsome sentencing remarks are vital for QCS to better enforce the order made by the court, and for the Parole Board to determine whether the person is ready for parole. While we noted concerns that restating details of the offending may be retraumatising for a victim survivor in the courtroom, we think there is greater risk that an incomplete record for QCS and the Parole Board to inform their assessments will be more upsetting for victim survivors.

Characterising rape and sexual assault in language suggesting mutual conduct or passive terms may undermine perpetrator accountability and be distressing to victim survivors

The way offences are described in sentencing remarks matters, but it is particularly important for sexual offences because '[p]erpetrators often misrepresent their own actions garnish support, avoid responsibility, blame the victim and conceal their activities'.[364] If legal practitioners and judicial officers use language that does these things, it may be easier for the offender to excuse their actions and not take responsibility.

The Council is concerned about problematic language used in sexual assault and rape cases, which does not clearly reflect the actions of an offender and/or minimises their culpability by using consenting, pleasurable sexual terms rather than language that reflects the inherently violent and non-consensual nature of these offences. For example, using passive language to describe the offender's actions, such as 'insert' or 'put' rather than 'forced' risks minimising that person's agency and culpability in committing a serious, non-consensual offence. As discussed in **Chapter 6**, the language used by judicial officers and legal practitioners has the potential to minimise offence seriousness, which could impact sentencing outcomes.

The Council is mindful of High Court jurisprudence on the 'importance of avoiding "emotion", including disgust or revulsion towards child sex offenders, when sentencing'.[365] However, like the Victorian Sentencing Advisory Council ('VSAC') we suggest for non-consensual sexual offences, substitutions like

361 *Markarian* (n 271) [39].
362 *WCB* (n 287) [34].
363 *Ryan* (n 300) [118].
364 Coates and Wade (n 306) 503.
365 Victorian Sentencing Advisory Council, *Sentencing of Offenders: Sexual Penetration with a Child Under 12* (Report, 2016) 25.

'put' or 'insert' instead of 'forced' or 'penetrate' go beyond neutrality and that such language 'instead fails to both accurately describe the act itself and convey the inherent violence of that act'.[366] VSAC's comparison of sentencing remarks for rape and sexual penetration with a child under 12 offences identified several issues with language and found the type of language used in sexual penetration cases 'did not given adequate weight to the degree of violence', with judicial officers explicitly saying 'no violence was involved'.[367] VSAC found that, '[i]n making such a finding, judges seem ostensibly concerned with physical violence over and above that inherent in the basic physical element of the offending'.[368] They suggested that given understanding that the trauma of these offences was 'only very recently accepted as fact', it meant current sentencing practices 'reflect an understanding of "violence" … that conforms to historical norms of overt, inter-adult stranger assaults involving visible injuries, the use of weapons, and/or disguises'.

Regarding the tendency of courts to say 'no violence was used' in cases of a person raping an asleep or unconscious victim, we suggest this type of language risks undermining the court's denunciation of the offences. We suggest legal practitioners and judicial officers should instead emphasise that these offences may have involved 'no additional violence'. Legal practitioners should not lose sight of the fact that a sleeping or unconscious victim survivor cannot resist, and the perpetrator may be more likely not to be caught.[369]

366 Ibid 25.
367 Ibid 24.
368 Ibid 23.
369 The Western Australia Court of Appeal's recent decision of *Brown v The State of Western Australia* [2024] WASCA 106, was an appeal of manifest excess for a sentence of 3 years and 6 months involving the digital rape of an adult woman who had been asleep. It was an aggravating factor at sentence that 'the complainant was asleep, minimizing any chance that the appellant would get caught or meet resistance' [72]. The Court said this allowed the appellant to take 'advantage' of the victim survivor in order to commit the offence [84].

Chapter 16 – Alternative and complementary justice models

16.1 Introduction

The Terms of Reference ask us to advise on options for reform to the current penalty and sentencing framework to ensure it provides an appropriate response to sexual violence offending.[1]

In this chapter, we explore the use of complementary and alternative justice models in Queensland's adversarial system of justice, including restorative and transformative justice, and look at the potential implications for sentencing rape and sexual assault matters should a legislative restorative justice model be introduced in Queensland.

We consider current alternative justice models available in Queensland, as well as models used in other jurisdictions. We also present our key finding and recommendations for reform to enable the use of restorative justice pathways for sexual assault and rape matters in Queensland.

16.2 Alternatives to the adversarial system of criminal justice

As discussed in **Chapter 2**, only a small proportion of sexual violence offences are reported to police and, of these, an even smaller proportion result in a conviction and sentence. Based on data published in 2024 by the NSW Bureau of Crime Statistics and Research, only 7 per cent of sexual assaults result in an offence being proven and sentenced.[2]

There are myriad complex reasons for current low rates of reporting by victim survivors of sexual violence and the high levels of attrition of these cases, of which sentencing practices and processes form just one part.

Various alternatives to traditional court processes have been introduced in Queensland, as well as in other jurisdictions, as alternatives or complementary to traditional forms of justice in recognition that restorative and transformative pathways may provide a more trauma-informed and beneficial approach to respond to the harm caused by this form of offending.

In this chapter, we explore restorative justice and transformative justice approaches to sexual violence matters as examples of these models.

16.3 Restorative justice for sexual violence offences

16.3.1 Overview of restorative justice

Restorative justice is a philosophical and practical approach to addressing crime that focuses on repairing the harm that has been caused to people, relationships and communities, rather than serving a purely

1 Appendix 1, Terms of Reference.
2 Brigitte Gilbert, 'Attrition of Sexual Assaults from the New South Wales Criminal Justice System' (Crime and Justice Statistics Bureau Brief No 170, NSW Bureau of Crime Statistic and Research, May 2024).

punitive purpose.[3] The process involves all parties with a 'stake' in the offending coming together and working collectively to find a solution.[4]

The idea of restorative justice is to bring together of victims of crime, offenders and communities to restore the rights, sense of dignity, empowerment and harmony that have been lost or damaged. Restorative justice is:

> A way to do justice that actually includes the people impacted by crime - victims, offenders, their families and communities. Its goal is to respect and restore each as individuals, repair broken relationships and contribute to the common good.[5]

Restorative justice processes can take various forms, including through victim–offender conferences, mediation, forum sentencing and circle sentencing. The process can occur at any point before conviction as a diversionary option away from a criminal prosecution, at the sentence or post-sentencing as an alternative to imprisonment. [6] Programs often have different eligibility criteria, models of delivery and rules surrounding mandatory attendance (prescribing the attendance of a victim survivor or their surrogate, or not).[7]

Irrespective of the form, the core feature of restorative justice is to provide an 'opportunity for parties directly affected by a crime to come together to acknowledge the impacts and discuss the way forward'.[8] Generally, this process requires the offending person to admit 'they have caused the harm and then engag[e] in a process of dialogue with those directly affected and discussing appropriate courses of action which meet the needs of victims and others affected by the offending behaviour'.[9]

Restorative justice processes were initially introduced as an alternative to traditional criminal justice options for young people – mostly in relation to minor, non-violent offences.[10] Every jurisdiction in Australia has implemented restorative justice processes within its juvenile justice system. [11]

However, there has been broad recognition that the restorative justice framework can theoretically apply across all offences, independent on the age of the offender or the nature of the offence, provided that appropriate safety concerns are addressed, and there are no cultural barriers to implementation.[12] As a consequence, an increasing range of restorative justice approaches have been utilised for adult offenders and victims of more serious types of crimes.[13]

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3 Francis T Cullen and Cheryl Lero Jonson, *Correctional Theory: Context and Consequences* (Sage, 2nd ed, 2012) as cited in Lacey Schaefer et al, *Sentencing Practices for Sexual Assault and Rape Offences: Literature Review* (Final Report prepared for the Queensland Sentencing Advisory Council, 2024) 66.

4 Jacqueline Joudo Larsen, 'Restorative justice in the Australian criminal justice system' (Research and Public Policy Series No 127, Australian Institute of Criminology, 2014) vi, citing T F Marshall, 'The evolution of restorative justice in Britain' (1996) 4(4) *European Journal on Criminal Policy and Research* 21, 37.

5 Jane Bolitho et al (eds), *Restorative Justice: Adults and Emerging Practice* (Sydney Institute of Criminology Monograph Series, 2012) 19.

6 Ibid 21.

7 Ibid.

8 Victorian Law Reform Commission, *The Role of Victims of Crime in the Criminal Trial Process* (Report, 2015) [7.238]. A similar position is reflected in Bolitho et al (n 5) 2012) 20.

9 Commonwealth, Royal Commission into Institutional Responses to Child Sexual Abuse, *Criminal Justice Report Parts VII–X and Appendices* (2017) 299, 183.

10 Bolitho et al (n 5).

11 *Youth Justice Act 1992* (Qld) Pt 3; Children, *Youth and Families Act 2005* (Vic) s 415; *Young Offenders Act 1997* (NSW); *Young Offenders Act 1993* (SA) Div 3; *Young Offenders Act 1994* (WA) Part 5; *Crimes (Restorative Justice) Act 2004* (ACT); *Youth Justice Act 2005* (NT) Pt 39, 64, 84; *Youth Justice Act 1997* (Tas) Part 2, Div 2-3, Part 4 Div 4.

12 Bolitho et al (n 5) 20—21.

13 Ibid 13.

Within this context, it has been acknowledged that restorative justice approaches may provide an opportunity for victim survivors of rape and sexual assault to communicate the impacts of the crime to their offender, which may assist with their recovery process, as well as enabling their offender to better understand the consequences of their own offending. [14] However, it is important for victim survivors to have a choice to engage in this process, rather than having it imposed upon them, as this may lead to further harm.

16.3.2 Restorative justice processes for sexual violence offences

In 2021, the Australian Productivity Commission reported that the ARJC was a cost-effective and suitable alternative to traditional criminal justice responses.[15]

It has been widely recognised that restorative justice conferencing models can benefit both the people who have experienced harm and those responsible for causing it.

Studies have revealed enhanced satisfaction for victim survivors of serious crimes committed by adults where they participated in restorative justice, rather than the traditional justice system.[16] For example, a review of post-sentence restorative justice programs for serious crimes (including sexual offences) found greater victim satisfaction through restorative justice pathways than the traditional criminal justice system, which they said had not 'allay[ed] their fears, their bewilderment, or their struggles with memories after the crime'.[17]

For victim survivors of sexual violence, the benefits of these processes can include:

- being more involved, contributing to the outcome and holding their offender to account without proceeding through the criminal prosecution process;[18]
- obtaining a sense of voice, power, agency and resolution – empowering the victim through the ability to decide whether to engage in this process based on their own individual circumstances, as well as the trauma they experienced as a consequence of the offence; [19]
- having the opportunity to tell their story without restriction and to have their voice heard, including by directly telling the person who committed these offences about the impact it has had on them;[20]
- asking unresolved questions and receiving answers directly from their offender;[21]
- obtaining validation and seeking reassurance that they are not to blame;[22]
- seeing their offender accept responsibility, and endeavour to make amends;[23]

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14 Ibid 18.
15 Nous Group, *An Updated and Contemporary Adult Restorative Justice Conferencing model for Queensland Department of Justice and Attorney General* (Report, 2020) 1; Taskforce meeting with Dispute Resolution Branch staff, 11 February 2022, Brisbane.
16 Bolitho et al (n 5) 12.
17 Ibid 23.
18 Paul Gavin et al., 'Restorative justice in cases of sexual violence: current and future directions in the UK' (2023) 24(4) *Contemporary Justice Review* 393, 395.
19 Ibid 395; RMIT University, Centre for Innovative Justice, *Restorative Justice Conferencing Pilot Program, Background Paper* (2016) 2–3 ('*CIJ RJC Pilot Program Background Paper*').
20 Ibid
21 Ibid.
22 Ibid.
23 Ibid.

- gaining a deeper understanding of the impact of the offending on them;[24]
- repairing the relationship (where appropriate);[25] and
- opportunities for an earlier resolution of the matter.[26]

However, to support these outcomes, appropriate safeguards are needed. In particular, research has found:

- The risks of re-victimisation or re-traumatisation may be enhanced where the victim survivor is not provided with sufficient information to understand the restorative justice process and to decide whether they would like to participate, or where they hold unrealistic expectations with respect to its potential outcome which then does not eventuate.[27]
- While genuine apologies can benefit victim survivors, an insincere apology or an offender who shows no remorse can result in a victim survivor feeling worse after the process.[28]
- Where a victim enters these processes with fear or anger, their suffering may be exacerbated, impacting their recovery.[29]
- It is important for victim survivors to actively participate in those processes if the full benefits of their participation are to be realised.[30]

For those responsible for causing harm, studies have revealed potential benefits, including opportunities to:

- take responsibility for their actions and understand the impact of their crime on the victim survivor, including enhancing the person's sense of empathy for the victim survivor;[31]
- gain a sense of motivation to account for the harm;
- repair relationships with the victim survivor, where safe and appropriate;
- access appropriate treatment, rehabilitation programs and other support services to better understand the consequences of the offending and their reasons for doing so, and to discourage future recidivism;
- apologise and make amends by agreeing to the outcomes sought by the victim survivor.[32]

For more information, see section 10.8 of the **Consultation Paper: Background**.

It is challenging to assess the 'effectiveness' of restorative justice schemes for adults who have committed sexual offences as a means of reducing re-offending.[33] However, the evidence suggests these

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24 Bolitho et al (n 5) 23.
25 *CIJ RJC Pilot Program Background Paper* (n 19) 2–3.
26 Gavin et al (n 18) 396.
27 Ibid 397.
28 Ibid.
29 Ibid 396–7.
30 Bolitho et al (n 5) 20–4.
31 Gavin et al (n 18) 396.
32 *CIJ RJC Pilot Program Background Paper* (n 19) 2–3.
33 There have been limited studies into the experiences of those who engaged with these processes, and the existing literature relates to a broad range of programs, which operate at varying stages of the criminal process, for different types of offences, and involving different degrees of participation and consequences for non-compliance with any agreements.

processes can have a small positive impact on recidivism rates for violent crimes and are a better process for both parties than traditional justice mechanisms.[34]

Despite these findings, there remain mixed views on whether restorative justice processes should be made available for sexual violence matters, primarily due to concerns that it may be a retraumatising experience and may subject the victim survivor to further harm.[35] For this reason, it is critical that victim survivors retain the ability to choose to participate.

Those opposed to its use express concerns that diverting sexual violence offences away from the criminal justice system minimises the seriousness of sexual violence offending, fails to hold the offender to account and 'hides' these offences from the public eye.[36] Concerns have also been raised regarding the risks of re-traumatisation for victim survivors and that these processes are not psychologically or physically safe for the victim survivor to engage with, particularly when there are power imbalances between the parties, or where there is a risk of them being pressured into participating.[37] This is of particular concern where the sexual violence was perpetrated by a member of the victim survivor's family (intrafamilial sexual abuse). [38]

Advocates recognise that restorative justice processes may more appropriately meet the needs of victim survivors who do not want to proceed through the court system, restore relationships (where appropriate) as well as educating the offender about the consequences of their behaviour, with a view that this will encourage positive behaviours in the future.[39] Research also suggests the use of these approaches may be supported by the community.[40]

It is further recognised that restorative justice processes can be used as in addition to traditional criminal justice processes rather than just as alternatives to them, which may impact the extent to which they are viewed as appropriate. For example, if used as a post-sentence option, some of the concerns about the person failing to be held properly to account or of minimising the seriousness of the offending might not be as pronounced.

Universally, those who support restorative justice being made available have identified a need for proper safeguards and appropriate support for victim survivors to be built into the program model. Ensuring these processes do not infringe upon the human rights of either party, particularly where they are vulnerable or from culturally or linguistically diverse populations, is part of this.

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34 Heather Strang et al, 'Restorative Justice Conferencing (RJC) Using Face-to-Face Meetings of Offenders and Victims: Effects on Offender Recidivism and Victim Satisfaction. A Systematic Review' (2013) 9(1) *Campbell Systematic Reviews* 1, 2, 47.

35 Meredith Rossner and Helen Taylor, 'The Transformative Potential of Restorative Justice: What the Mainstream Can Learn from the Margins' (2024) *Annual Review of Criminology* 357, 368.

36 Bolitho et al (n 5) 23.

37 Gavin et al (n 18) 396; Bolitho et al (n 5) 23.

38 Gavin et al (n 18) 396.

39 Bolitho et al (n 5) 23.

40 See, for example, Jennifer Duff, *Perceptions of and Confidence in Canada's Criminal and Civil Justice Systems: Key Findings from the 2023 National Justice Survey* (Research in Brief, 2024). A majority of respondents (58%) supported the use of restorative justice processes for these offences provided both the victim and offender wished to participate. This was, however, the lowest of all offences supported as being eligible for restorative justice, with property offences and robbery being viewed as the most suitable (by 82% of respondents).

16.3.3 The current position in Queensland

Queensland has two separate restorative justice pathways, depending on whether the offence was committed by a young person (a person under 18 years) or an adult. The Council's analysis within this review predominantly focuses on restorative justice pathways as they apply to adults.

Adult restorative justice pathways

Queensland offers Adult Restorative Justice Conferencing ('ARJC') (formerly known as 'justice mediation') through the Dispute Resolution Branch ('DRB') of the Department of Justice ('DOJ').

Unlike its use in the juvenile justice system - which has been formally legislated[41] - there is no legislative framework that expressly allows a court in Queensland to order an adult, with their consent, to participate in ARJC either as part of the conditions of their sentence or prior to/after the sentence. ARJC processes have developed through an application of the *Dispute Resolution Centres Act 1990* (Qld) ('DRC Act') in combination with the power of the courts to adjourn proceedings.

Through the DRB, accredited mediators (convenors) support victims of crime to meet with those who have perpetrated harm against them in a conference format outside the court system, to encourage perpetrators to take responsibility for their actions and take steps towards repairing that harm. As distinct from traditional criminal justice models, ARJC provides an opportunity for the victim to tell their story in their own words and to hold the perpetrator accountable for their actions outside of the courtroom. Families, friends and other support persons can attend the conference with the victim survivor.

The DRB operates ARJC services from the Brisbane, Ipswich, Townsville, Cairns and Gold Coast regions. Additionally, the local community justice groups from Mornington Island (Junkuri Laka) and Aurukun provide restorative justice services.[42]

At the time of the Women's Safety and Justice Taskforce ('WSJ Taskforce') review, the DRB facilitated approximately 200 mediation sessions (conferences) in response to the 350 referrals it received annually.[43] DRB reported a small but increasing number of domestic violence and sexual offences cases being referred to ARJC, with an even smaller number proceeding to conference (due to an intensive suitability assessment process).[44] DRB reports there is a high satisfaction rate of 93 per cent for both victims and offenders.[45]

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41 *Youth Justice Act 1992* (Qld) Part 3.

42 Queensland Police Service, *Operational Procedures Manual* (Issue 102, Public Edition, 1 October 2024) Chs 3 'Prosecution process', 3.3 'Adult Restorative Justice Conferencing' 9 ('QPS OPM').

43 Women's Safety and Justice Taskforce, *Hear Her Voice, Report Two: Women and Girls' Experiences Across the Criminal Justice System* (2022) 386 ('*Hear Her Voice, Report Two*').

44 Ibid.

45 Dispute Resolution Branch submission to the Queensland Sentencing Advisory Council's review of sentencing for child homicide offences, 14 August 2018, <https://www.sentencingcouncil.qld.gov.au/__data/assets/pdf_file/0011/580871/Submission-37-DisputeResolution-Branch.pdf>.

Participation in ARJC is entirely voluntary[46] and discussions within the conference setting are both confidential[47] and subject to privilege. [48] Any agreement reached through a mediation session is not enforceable.[49]

Referrals to ARJC can be made by the court, police, prosecutors, corrective services and victims of crime or suggested by defence practitioners.[50]

The service is currently used primarily as a diversionary option for criminal matters at the pre-conviction stage, although an ARJC can also be requested at other stages of the criminal justice process – including as a pre-sentence and post-sentence option, as follows:[51]

- Pre-sentencing options: A referral can be made before a person is charged with an offence (via a police referral), or before a court hearing (by either the prosecution or a judicial officer).
- Post-sentencing options: A referral can be made after sentence (Queensland Corrective Services).

The DRB may refuse a referral or return the matter to the prosecution service where it is deemed unsuitable for ARJC processes, such as where either party withdraws, there is a disagreement about the facts of the offence, the parties cannot come to a resolution or there is a risk of further harm in continuing.[52]

Where the ARJC process is used as a pre-sentence option and is 'successful' (i.e. results in an agreement that is completed or complied with), the criminal investigation or proceeding will usually cease (either by way of paper nolle or offering no evidence to the charges), unless there are exceptional circumstances.[53]

While conferencing is most commonly used for offences sentenced in the Magistrates Court (such as wilful damage or common assaults), it can also be used for more serious offences – including domestic violence offences (with the approval of the officer in charge of police prosecutions).[54] Similarly, the Office of the Department of Public Prosecutions ('ODPP') can refer any matter to ARJC where it is deemed to be in the public interest.[55] However, its use for sexual violence offences has traditionally been limited;[56] the Director's Guidelines outline that it is usually in the public interest to proceed with the criminal prosecution of these offences.[57]

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46 *Dispute Resolution Centres Act 1990* (Qld) s 31.
47 Under the *Dispute Resolutions Centres Act 1990* (Qld), a 'relevant person' (including a mediator or member of the DRB staff) must not disclose information obtained in connection with the administration of the Act unless authorised under s 37 of the DRCA. This includes where the person from whom the information was obtained consents to this, or in accordance with a requirement imposed by or under a law of the State (other than imposed by a subpoena or other compulsory process) or the Commonwealth.
48 *Dispute Resolution Centres Act 1990* (Qld) s 36.
49 Ibid s 31(3).
50 QPS OPM (n 42) Part 3.3 and the Office of the Director of Public Prosecutions' *Directors' Guidelines* (as at 30 June 2023) ('*ODPP Director's Guidelines*') sets out the operational procedures of ARJC in Queensland.
51 *Hear Her Voice, Report Two* (n 43) vol 1, 386-7.
52 QPS OPM (n 42) 3.3.5. Reflected in Submission 21 (Dispute Resolution Branch) 4.
53 QPS OPM (n 42) 3.3.6.
54 Ibid 3.3.1.
55 *ODPP Director's Guidelines* (n 50) 3, 3.
56 Submission 19 (Basic Rights Queensland) 4.
57 *ODPP Director's Guidelines* (n 50) 3(iv), 3.

Restorative youth justice conferencing

Queensland has a separate Youth Restorative Justice Conferencing ('YRJC') model, which applies when an offender was under 18 years of age at the time they committed the offence. As discussed above, this model has been formally legislated in the *Youth Justice Act 1992* (Qld).[58]

The sentencing court is required to consider engagement with pre-sentencing restorative justice processes at sentence, including any participation, obligations or actions taken by the child as part of YRJC, and any information provided by the chief executive in relation to the sentencing of the child.[59]

Referrals can be made for sexual violence matters committed by children, including rape and sexual assault offences.

There are various ways in which a YRJC referral can be made, as outlined in Table 16.1 [60]

58 *Youth Justice Act 1992* (Qld) pt 3.
59 Ibid s 167(6).
60 Ibid pt 3.

Table 16.1: Youth Restorative Justice Conferencing Referral Types

Type of referral	The referral is made when the young person:	Consequence of non-compliance or non-completion
Police referral to restorative justice conference	Admits the offence to police and is referred to RYJC rather than court. Charges are dismissed.	**Returned to police**, who will either: return the charges to court; provide another chance to attend a conference; issue a caution; or take no action.
Court referral to a police diversion referral	Enters a plea of guilty to the court, but the court decides that it is a matter where police could have referred them to RYJC, and subsequently does so. Charges are dismissed.	**Returned to police**, who will either: return the charges to court; provide another chance to attend a conference; issue a caution; or take no action.
Court diversion referral to a restorative justice conference	Enters a plea of guilty to the court and is offered the chance to proceed to RYJC instead of being sentenced for the offence.	**Returned to court**, who will either: re-sentence them; provide another chance to attend a conference; or take no action.
Court referral to a police diversion referral	Enters a plea of guilty to the court, but the court decides that is a matter where police could have referred them to RYJC, and subsequently does so. Charges are dismissed.	**Returned to police**, who will either: return the charges to court; provide another chance to attend a conference; issue a caution; or take no action.
Police referral to restorative justice conference	Admits the offence to police and is referred to RYJC rather than court. Charges are dismissed.	**Returned to police**, who will either: return the charges to court; provide another chance to attend a conference; issue a caution; or take no action.
Pre-sentence referral to restorative justice conference	Enters a plea of guilty to the court and is referred to RYJC prior to sentencing. Their participation in this conference can be considered by the court when determining the appropriate sentence.	**The sentencing court will be told** and will have regard to this in sentencing the young person for the offence.
Restorative justice order (with supervision)	The young person is ordered to participate in RYJC as part of their sentence. The young person must agree to participate in the conference for this order to be made.	**Returned to court**, and the young person will be resentenced for the original offences.

Source: 'Restorative justice for young people and their families (Department of Youth Justice, accessed 6 November 2024: https://desbt.qld.gov.au/youth-justice/parents-guardians/programs-initiatives/initiatives/restorative-justice-conferences/for-young-people>).

YRJC processes are intended to divert children away from the criminal justice system, and involve the participation of the young person, a convenor and a victim participant - either the attendance of the victim survivor, their representative or a representative from an organisation that advocates for victims of crime.[61] The young person must be informed about the process and be willing to participate and comply with the referral or restorative justice order and to otherwise be found suitable to participate.[62]

61 Queensland Family & Child Commission, 'Restorative Justice Conferencing in Queensland' (Report, June 2023) 7.
62 See *Youth Justice Act 1992* (Qld) ss 22(3), 163(1)(b)–(c), 192A(1)(b)–(c).

WSJ Taskforce recommendations

The WSJ Taskforce recognised the value of restorative justice conferencing as an alternative pathway to the criminal justice system for women and girls who experience crime in *Hear Her Voice – Report Two: Women and Girls' Experiences Across the Criminal Justice System* ('*Hear Her Voice – Report Two*').[63] They also found that these processes should be made available for sexual violence offences.

The WSJ Taskforce subsequently made three recommendations in support of the expansion of adult restorative justice in Queensland:

- identifying options for the expansion of a sustainable and accessible ARJC;[64]
- co-designing a victim-centric legislative framework with people with lived experience, Aboriginal and Torres Strait Islander peoples and service and legal system stakeholders. This framework will include the consideration of a set of overarching principles, operational processes, eligibility criteria, expertise of convenors and inbuilt safeguards for its use.[65]
- undertaking a pilot restorative justice program for adult sexual and domestic and family violence offences.[66]

In developing a legislative framework to support this model, the WSJ Taskforce considered the Queensland Government's previous commitment to developing an updated ARJC model, as well as considering its expansion, as a response to a recommendation by the Queensland Productivity Commission.[67]

Within this context, the WSJ Taskforce recommended that the risks specific to sexual offending and domestic and family violence be considered and tested through a dedicated pilot program 'to enable the safe use of restorative justice in sexual offence cases'.[68] The Taskforce also recommended that legislative amendments be made to encourage the use of diversionary options including ARJC processes.[69] Consultation with women with lived experience as accused persons and offenders, service systems and legal stakeholders who support them and First Nations peoples was also recommended within the context of the consideration of recommendations regarding the expanded use of restorative justice in Queensland and development of a victim-centric legislative framework in support of this.[70]

In response, the former Queensland Government committed to 'explore options for a sustainable long-term plan for the expansion of adult restorative justice services in Queensland', and for the 'content and design of the legislative framework' to be informed by this work.[71] It further committed to 'fund and undertake' a pilot program and for this to be evaluated after the required legislative framework is in place.[72]

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63 *Hear Her Voice, Report Two* (n 43) recs 90–92, 97, 125.
64 Ibid rec 90.
65 Ibid rec 91.
66 Ibid rec 92.
67 Queensland Productivity Commission, *Inquiry into Imprisonment and Recidivism* (Report, August 2019) rec 8.
68 *Hear Her Voice, Report Two* (n 43) 395.
69 Ibid rec 97.
70 Ibid rec 125 with references to recs 90 and 91.
71 Queensland Government, *Queensland Government Response to Hear Her Voice - Report Two - Women and Girls' Experiences Across the Criminal Justice System* (2022) ('*Response to Hear Her Voice, Report Two*') 8.
72 Ibid.

In May 2023, the Legal Affairs and Safety Committee also supported the Taskforce's recommendation regarding the expansion of adult restorative justice services in its report on its inquiry into support provided to victims of crime.[73]

DRB in DOJ is leading the response to these recommendations, with funding allocated to undertake the first stage of this project, including considering options that are sustainable, victim-centric, culturally safe, trauma-informed and accessible to all Queenslanders.[74]

DRB reports it temporarily expanded ARJC services in 2023–24 to increase its accessibility for all Queenslanders, which was reflected in an increased number of conferences held.[75]

The 2023–24 annual report on progress of implementation of the WSJ Taskforce recommendations reports that work is continuing to develop restorative justice services for adult sexual and domestic and family violence offences and to explore options for a staged expansion.[76] It reports that '[r]esearch-based analysis of the key elements of restorative justice conferencing services' has been completed, and '[s]takeholder consultation on options for a sustainable long-term plan to expand adult restorative justice conferencing' has commenced.[77] It also notes that a Restorative Justice Sexual and Gender-based Violence practice guide is also being developed and is expected to be delivered in 2024.[78]

As the model is still in development, the planned pilot program has not been established or evaluated.

16.3.4 Restorative justice processes in other jurisdictions

There is currently no national framework for the application of adult restorative justice in Australia. Restorative justice schemes for adult offending exist in the Australian Capital Territory ('ACT'),[79] and to a limited degree, in New South Wales ('NSW') (after the person has been convicted while serving their sentence)[80] and Victoria.[81]

Restorative justice schemes for adult sexual violence offending are only available in the ACT and NSW (albeit limited), but they are used to a greater extent overseas, including in several European countries,[82] England and Wales, Ireland, Canada and New Zealand ('NZ').[83]

Unlike Queensland's approach, the ACT and NZ have statutory schemes that both consider the relevance of restorative justice processes when sentencing. These models have been recognised as best practice.[84]

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73 Queensland Parliament, Legal Affairs and Safety Committee, *Inquiry into Support Provided to Victims of Crime* (Report No 48, 57th Parliament, May 2023) Recommendation 9.
74 Submission 21 (Dispute Resolution Branch) 1–4.
75 Department of Justice and Attorney-General, *Annual Report 2023–24* (2024) 126.
76 Queensland Government, *Women's Safety and Justice Reform: Second Annual Report 2023–24* (May 2024) 14.
77 Ibid 79 (rec 90 - status).
78 Ibid.
79 See *Crimes (Restorative Justice) Act 2004* (ACT).
80 Victorian Law Reform Commission, *Improving the Justice System Response to Sexual Offences* (Report, September 2021) [9.12] ('*Improving the Justice System Response to Sexual Offences*').
81 For more information, see Queensland Sentencing Advisory Council, *Sentencing of Sexual Assault and Rape: The Ripple Effect – Consultation Paper – Background* (March 2024) and Women's Safety and Justice Taskforce, *Hear Her Voice Report Two* (n 43) 388.
82 Including Belgium, Denmark and Norway.
83 *Improving the Justice System Response to Sexual Offences* (n 80) [9.15].
84 Ibid.

- In the ACT, a matter can be referred to restorative justice processes either pre-sentence[85] or as a part of the sentence as a 'sentence-related order'.[86] Where the offending person participates in a restorative justice conference prior to sentence, their participation must be considered by the judge as an acceptance of responsibility for the offence when deciding how they should be sentenced (if at all).[87] However, while the court can consider a person's participation in restorative justice processes, the court may not increase the severity of the sentence because the person chose not to take part, or to continue to take part, in restorative justice.[88]
- In NZ, the sentencing court must take into account the outcomes of any completed restorative justice processes, or that the court is satisfied are likely to occur, in relation to the particular case.[89] A facilitator's report is provided to the sentencing judge, who decides whether to include any agreements made at the restorative justice conference as part of the sentence.[90] When considering the extent to which any offer, agreement, response or measure to make amends should be taken into account in sentencing, the court must consider whether or not it was genuine and capable of fulfilment, and whether or not it has been accepted by the victim as expiating or mitigating the wrong.[91]
- In England and Wales, participation in restorative justice processes can form part of a 'rehabilitation activity requirement' that can be attached as a condition to community sentence or suspended sentence.[92] This condition requires the person to comply with any instructions they are given by a responsible officer to participate in activities, which can include those whose purpose is reparative, such as restorative justice activities.

The legislative models and reviews in other jurisdictions are discussed in more detail in Chapter 10 of the **Consultation Paper: Background**.

16.3.5 What we know from earlier reviews of restorative justice processes as they apply to sexual offences

Evaluations of restorative justice processes that apply to sexual offending offer some evidence of the efficacy of these processes in meeting the needs of victim survivors, in repairing the harm caused by the offending and in reducing reoffending.

The Justice Reform Initiative in its submission to our review, particularly highlighted that more recent examples of restorative justice processes in Australia and New Zealand had 'indicated positive results in

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85 The ACT prescribes a legislative framework for restorative justice processes, which outlines an intention to 'enhance the rights of victims of offences by providing restorative justice as a way of empowering victims to make decisions about how to repair the harm done by offences': *Crimes (Restorative Justice) Act 2004* (ACT) s 6. This framework outlines who is eligible to participate in restorative justice conferencing, including the victim survivor, an immediate family member if the victim is younger than 10 years old and a parent of a child victim and the offending person who must accept responsibility for the offence (or in the case of a young offender, not deny responsibility) and agree to take part in restorative justice: *Crimes (Restorative Justice) Act 2004* (ACT) ss 17–19.

86 Ibid s 13.

87 *Crimes (Sentencing) Act 2005* (ACT) s 33(1)(y).

88 Ibid s 34(1)(h).

89 *Sentencing Act 2002* (NZ) ss 8(j), 10(3).

90 New Zealand, Department of Justice, 'How Restorative Justice Works' (19 December 2022). <https://www.justice.govt.nz/courts/criminal/charged-with-a-crime/how-restorative-justice-works>.

91 *Sentencing Act 2002* (NZ) s 10.

92 *Sentencing Act 2020* (UK) ss 200, 286 and sch 9, pt 2. Parts 2–13 of this Act constitute the 'Sentencing Code': s 1.

terms of victim satisfaction, reduced offending, and a reduction in re-victimisation through the justice process'.[93]

Australian Capital Territory

A recent evaluation conducted by the Australian Institute of Criminology ('AIC') found that its expansion of restorative justice conferencing to include sexual violence offences and domestic and family violence ('DFV') offences (Phase Three)[94] had 'provided an important mechanism for persons harmed to seek redress in the aftermath of sexual violence and DFV victimisation, and for persons responsible to address the factors associated with their offending' through access to treatment options.[95]

The evaluation identified that victim survivors of sexual violence offences or DFV who participated in the program were motivated to pursue restorative justice processes as an alternative to formal criminal proceedings, particularly where they wanted to confront their offender within a 'safe' conference setting and to 'have their experiences heard, to encourage the person responsible to get help or give back to the community, and to try and make sure that the person responsible would not reoffend'.[96]

However, the AIC evaluation found that referrals for sexual violence offences were lower than expected, which was attributed to factors including referring agencies perceptions that restorative justice 'privatised' responses to sexual violence.[97] Restrictive eligibility criteria that require a finding of guilt prior to a referral being made were also seen to have contributed to low rates of referral.[98] Those interviewed noted that these cases were unlikely to be referred during later stages of the criminal justice process, due to high levels of attrition associated with these cases[99] and low levels of guilty pleas.[100]

The AIC evaluation also identified a need for more methodologically rigorous evaluations of restorative justice processes, recognising the limited numbers of peer-reviewed evaluations.[101]

Victoria

A review conducted by the Victorian Law Reform Commission ('VLRC') in 2021, which considered improvements to justice system responses to sexual offences in Victoria, found strong support for the development and implementation of a restorative justice program as a mechanism to enable all parties

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93 Submission 13 (Justice Reform Initiative) 2.

94 The Restorative Justice Scheme in the ACT is administered by the Restorative Justice Unit (RJU) within the Justice and Community Safety Directorate of the ACT Government. There have been three stages of delivery to date: Phase One commenced in the early 2000's and enabled police diversions through restorative justice conferencing for young people who had committed minor offences; Phase Two commenced in 2016 and involved an expansion of the program to adult offences, as well as serious offences; Phase Three commenced in 2018 and involved the expansion of the program to include DFV and sexual violence offences.

95 Siobhan Lawler, Hayley Boxall and Christopher Dowling, *Restorative Justice Conferencing for Domestic and Family Violence and Sexual Violence: Evaluation of Phase Three of the ACT Restorative Justice Scheme* (Final Report prepared for the Australian Institute of Criminology, 2023) 9–12.

96 Ibid 10.

97 Ibid.

98 Ibid 14.

99 Ibid.

100 Ibid 47.

101 Ibid 15 citing Daye Gang, Bebe Loff, Bronwyn Naylor and Maggie Kirkman, 'A Call for Evaluation of Restorative Justice Programs' (2021) 22(1) *Trauma, Violence, & Abuse* 186. The only evaluation which met the criteria was of the Arizona RESTORE program, based on 22 cases (Koss, 2014). The program was found to decrease the rates of diagnosed post-traumatic stress disorder in survivor victims, most participants agreed or strongly agreed that their preparation for the conference achieved its intended goals, and all survivor victims who attended their conference were satisfied with the conference.

who have been affected by a sexual offence to better understand the harm, and to work together to repair it.[102]

The VLRC outlined risks associated with employing restorative justice processes for sexual offences, including concerns that it minimises the seriousness of this type of offending and 'hides' sexual offending from the public eye, and that it could retraumatise victim survivors by transplanting them back into the 'dynamics of the original violence' or having their offender deny responsibility.[103]

The VLRC subsequently proposed a set of guiding principles to ensure that restorative justice processes are appropriate for sexual offences by:

- managing the risks associated with using these processes for sexual violence offences;
- governing the interaction between the proposed model and the existing criminal justice system; and
- assigning responsibility for oversight of the restorative justice scheme, including training requirements for convenors/facilitators. [104]

Guiding principles recommended were:

> Voluntary participation: Consent is informed and participants are free to withdraw at any time.
>
> Accountability: The person responsible accepts responsibility. Outcome agreements are fair and reasonable.
>
> The needs of the person harmed take priority: The process centres on the needs and interests of the person harmed.
>
> Safety and respect: Safety measures are provided. The process is flexible and responsive to diverse needs, including the needs of children and young people, and of Aboriginal communities. Power imbalances are redressed, and the dignity and equality of participants is respected. The process is supported by skilled personnel with specialist expertise in sexual violence, and it is well resourced.
>
> Confidentiality: What is said and done during restorative justice is confidential, with some exceptions.
>
> Transparency: De-identified results are publicised to contribute to continuous program improvement. Programs are regularly evaluated.
>
> An integrated justice response: The process is part of 'an integrated justice response'. Other criminal and civil justice options are available, as well as therapeutic treatment programs.
>
> Clear governance: Legislation sets out the guiding principles, provides for implementation and oversight, and explains how restorative justice interacts with the criminal justice system.[105]

New South Wales

Qualitative research undertaken by KPMG, in partnership with RMIT University's Centre for Innovative Justice, found that many victim survivors who reported sexual violence offending to police did so to ensure their offender understood their behaviour to be criminally wrong. However, the study also found that many

102 *Improving the Response of the Justice System to Sexual Offences* (n 80) Chapter 9.
103 Ibid [9.49]–[9.58].
104 Ibid Chapter 9.
105 Ibid [9.64].

victim survivors regretted making a report to police as they would have preferred an alternative approach to the criminal justice system, which exposed them to further trauma ('new trauma'). [106]

It recommended that the NSW government explore the development of a victim survivor-led sexual violence restorative justice service to operate alongside traditional legal processes to 'enable victim-survivors to pursue a justice response that suits their experience and recovery', including providing them with a voice, recognition, information, receiving an apology and having reparations made.[107]

United Kingdom

A 2022 United Kingdom ('UK') study into the utility of restorative justice conferencing found support for restorative justice conferencing in sexual violence matters. [108] However, the study concluded that additional empirical evidence was required to better understand best practice and to ensure its safe optimisation for victim survivors of sexual violence.[109]

One aspect of the study involved a panel discussion with eminent restorative justice researchers and scholars, which revealed five key themes:

- There is broad dissatisfaction with using the term 'justice' to describe these processes as, while they have a restorative focus, they may not always result in a justice outcome.
- There is a belief these processes will be too hard for a victim survivor to engage with, without recognising that qualified convenors can manage any risks.
- It is important for there to be sufficient flexibility to allow the parties to participate in a conference model that best suits their needs.
- Trauma-informed processes are required to ensure the safety of both parties.
- It is critical that victim survivors understand the process and the potential outcomes before entering the process.[110]

The post-conference survey revealed broad support for the use of restorative justice processes in sexual violence matters that are victim survivor-led (only available where they choose to participate) and where there is enhanced training of facilitators to appropriately address risks of revictimization, re-traumatisation, and power imbalances.[111] It was suggested that facilitators and convenors must have: '(1) a deep appreciation of sexual trauma and its impact, (2) an understanding of the psychology of the offender and (3) a working knowledge of the dynamics of sexual violence'.[112] Inter-agency collaboration (particularly where the offender is incarcerated) was recognised as being important to assist the facilitator to gain a deeper understanding of the offending person.[113]

The survey also revealed that enhanced public awareness of restorative justice processes is required.[114]

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106 KPMG and Centre for Innovative Justice, ' This is my story. It's your case, but it's my story'. Interview study: Exploring justice system experiences of complainants in sexual offence matters' (Research report, NSW Department of Communities and Justice, NSW Bureau of Crime Statistics and Research, 31 July 2023) 114.
107 Ibid xii, 114 (Recommendation 13).
108 Gavin et al (n 18) 393.
109 Ibid 404.
110 Ibid 398.
111 Ibid 401–3.
112 Ibid 403.
113 Ibid 404.
114 Ibid 399–400.

Australian Law Reform Commission review

The ALRC has been asked by the Commonwealth Attorney-General to consider 'alternatives to, or transformative approaches to, criminal prosecutions, including restorative justice, civil claims, compensations schemes and specialist court approaches' as part of its current inquiry into justice responses to sexual violence.

The ALRC has invited feedback from victim survivors and members of the community regarding whether restorative justice pathways should be available in sexual violence matters and, if so, how.[115] The ALRC has also sought feedback on current restorative justice reforms and their effectiveness, as well as broader views surrounding how to implement restorative justice pathways as a way of responding to sexual violence.[116]

The ALRC is due to deliver its final report to the Attorney-General by 22 January 2025.

16.3.6 Stakeholder views

In our Consultation paper, we invited feedback on the Queensland Government's existing commitment to 'explore options for a sustainable long-term plan for the expansion of adult restorative justice services in Queensland'. We specifically invited feedback on:

- how pre-sentencing restorative justice processes for adults convicted of rape and sexual assault might be considered at sentence (Q.20); and
- whether there are any relevant sentencing considerations that might arise should a new legislative restorative model be introduced in Queensland (Q.21).

Submissions from legal stakeholders

Intersection between ARJC pathways and the Queensland sentencing regime

In its submission, DRB acknowledged that there has been a shift in Queensland from the question of whether ARJC processes should be available for sexual violence offences to how they can be safely and effectively used for offences involving sexual violence.

In considering the work currently underway to establish a formalised process for adult restorative justice, as well as progressing a pilot program for adult sexual and DVO offences,[117] the DRB raised various factors for consideration, including:

- 'Any proposed use of ARJC outcomes in sentencing should be trauma-informed and not cause further harm to the victim'. The importance of assessing a participant's suitability to engage with ARJC processes was raised.[118]
- 'The protection of the victim's rights and needs, including confidentiality, must be considered'. This includes consideration of how information should be shared by the court in a way that is confidential. Suggestions included the provision of either a general or detailed statement by the ARJC outlining the general or specific outcome of the conference, or enabling a victim to comment

115 See Australian Law Reform Commission, 'Justice Responses to Sexual Violence' (web page, 23 January 2024) <https://www.alrc.gov.au/inquiry/justice-responses-to-sexual-violence>.
116 Ibid.
117 Submission 21 (Dispute Resolution Branch) 1.
118 Ibid 2.

on the outcomes within their Victim Impact Statement to provide the court with increased insight into the outcome of ARJC, while maintaining a victim-centric approach.[119] Whether this process requires victim survivor permission is also a relevant factor for consideration, particularly where the victim survivor is not happy with the outcome.[120]

- 'The time to complete ARJC outcomes may not meet the court's needs'. For example, it may take longer for the victim survivor to 'ready' themselves to participate in ARJC conferencing. Current ARJC processes also allow 6 months after conferencing for any agreed outcomes to be carried out. [121]
- 'With proper protection of victims' rights, justice could be promoted through the consideration of ARJC outcomes in sentencing'. It was suggested that a statement could be prepared by ARJC outlining the general outcome of the conference and any steps taken by the offender for the consideration of the court at sentence.[122] Alternatively, this information could be reflected within a VIS, as a victim-centric mechanism for the victim survivor to inform the court about the rehabilitative steps that have been taken.[123]
- 'Sentences or community-based orders that include participation in a future ARJC are problematic'. This is particularly so where a person or the circumstances may subsequently be deemed unsuitable for ARJC processes.[124]
- 'A sentence should not be increased if an offender did not choose to take part in ARJC'. This is because it is important for participants to engage on a voluntary basis for ARJC to be a safe and successful process.[125]
- 'A sentence should not be increased because a referral does not progress to conference'. This recognises that a variety of reasons exist for why it may not occur, and the person being sentenced should not be penalised for this.[126]

Legal Aid Queensland ('LAQ') supported restorative justice outcomes being considered at sentence to enable a sentencing court to take into account a person's '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',[127] as this 'would incentivise meaningful engagement in the process.'[128]

LAQ recommended that the new Queensland ARJC model should combine elements of the ACT and NZ legislative approaches to require a court to take into account any engagement with, or agreement reached through, restorative justice processes in sentencing the person, noting:

119 Ibid.
120 Ibid.
121 Ibid 2–3.
122 Ibid 3.
123 Ibid.
124 Ibid.
125 Ibid 4.
126 Ibid.
127 Submission 23 (Legal Aid Queensland) 32.
128 Ibid.

> 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.[129]

To ensure compliance with any outcome agreement, it suggested:

> 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.[130]

Critically, both the DRB and LAQ submitted that, as this should be a voluntary process, 'a sentencing court should not increase a sentence because an offender chose not to take part in the process or stopped taking part'.[131]

LAQ made further recommendations, including that:

- Any legislative reform should be 'accompanied with significant resources to the Restorative Justice branch … to ensure the option is available through the state and that delays are minimised' – recognising the limited options to access ARJC outside of Brisbane. It was suggested that technology could be leveraged to enhance access.[132]
- Any sentences or restorative justice processes should be 'both culturally informed and sensitive' to support the rehabilitation of sexual offenders.[133] Recommendations for achieving this included: prescribing that a convenor must consider inviting a respected member of the person's community or a community justice expert to attend;[134] ensuring that parties are notified of their right to legal representation within this process; [135] and ensuring that convenors have 'adequate training to support understanding of First Nations defendants and defendants suffering from disadvantage and complex needs'.[136]
- Opportunities should be explored for remote attendance (such as through pre-recorded communication or through a representative).[137]
- Where a victim survivor refuses to participate, there should be an obligation on the prosecution to provide evidence that they have informed the victim survivor about ARJC and the court process.[138]
- Alternative mediation models should be considered to accommodate for circumstances where the victim survivor does not want to participate, but the perpetrator does.[139]

It was recognised by the Youth Advocacy Centre that pre-sentence youth restorative justice processes 'have been effective in assisting the [Childrens] Court in determining the appropriate sentence', particularly as 'willingness to participate in the restorative justice process prior to sentencing' has been

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129 Ibid 33.
130 Ibid 32.
131 Ibid; Submission 21 (Dispute Resolution Branch, DJAG) 4.
132 Submission 23 (Legal Aid Queensland) 34.
133 Ibid 11.
134 As is required for the YRJC model.
135 As is required for the YRJC model.
136 Submission 23 (Legal Aid Queensland) 34.
137 Ibid.
138 Ibid.
139 Ibid.

considered to be a factor in the offender's favour.[140] They viewed this as beneficial as it 'demonstrates to the victim the offender's willingness to see the harm caused to the victim and helps [identify] the offender's remorse and willingness to repair harm'.[141]

In considering when in the proceeding these processes should occur, Basic Rights Queensland ('BRQ') emphasised the importance of ensuring that restorative justice pathways can be accessed at any stage throughout a proceeding, similar to the New Zealand Project Restore model.[142]

Subject matter expert interview participants

Potential use of RJ processes for sexual violence matters

The majority of subject matter expert ('SME') participants were generally supportive of exploration of restorative justice processes to better meet the needs of victim survivors of sexual violence.[143] Some participants raised concerns,[144] and two were opposed to its use in sexual violence matters.[145]

Participants were broadly in support of exploring restorative justice processes for lower-level sexual offending where an adult was the victim.[146] In particular, this was seen as 'a huge missed opportunity particularly for some lower level assaults' against an adult woman where a desired outcome might be an apology and acknowledgement that they had been wronged.[147]

If a perpetrator was willing to engage in the process, one participant considered the process to hold educational value,[148] and to be meaningful to their rehabilitation.[149] Another participant acknowledged that restorative justice processes may be less traumatic for victim survivors than an adversarial trial process (which may result in an acquittal),[150] and that this may also represent a faster way to finalise the matter, which can be beneficial for victim survivors.[151]

The Council also heard that private mediation was being used in cases of low-level sexual violence.[152] One legal practitioner advised that some private mediators in the Brisbane region already work with families to help them work through the offending and its impact on the family; where appropriate, this may be a relevant sentencing factor.[153] Another practitioner referred to it being used successfully in cases of sexual assault in the context of a friendship where excess alcohol was consumed.[154]

Other participants recognised a need for restorative justice processes for sexual violence matters,[155] and highlighted the importance of avoiding blanket rules that prevent these processes from being engaged in circumstances where it is appropriate.[156] For example, one legal practitioner reflected that restorative

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140 Submission 30 (Youth Advocacy Centre) 9.
141 Ibid.
142 Submission 19 (Basic Rights Queensland) 4.
143 SME Interviews 3, 6, 7, 8, 9, 13, 14, 16, 17, 20, 21, 22, 23, 25, 26.
144 SME Interviews 7, 13.
145 SME Interviews 4, 10.
146 SME Interviews 7, 8, 14. SME Interview 10 had doubts about the process for child sexual abused matters.
147 SME Interview 14.
148 SME Interview 14.
149 SME Interview 16.
150 SME Interview 8.
151 SME Interview 8.
152 SME Interview 2.
153 SME Interview 2.
154 SME Interview 14.
155 SME Interview 14.
156 SME Interviews 6, 22.

justice 'shouldn't necessarily be put to one side merely because of the [seriousness of the] offences themselves'.[157]

However, nearly all participants who supported the extension of restorative justice processes recognised that it should only be done in appropriate circumstances where the victim survivor consented to engage with this process,[158] which some participants thought may be unlikely or unusual.[159]

Not all participants supported restorative justice processes for sexual violence matters. For example, participants expressed concerns that restorative justice processes:

- may involve power imbalances between the victim survivor and the offending person which puts them at risk, with this participant also concerned about the use of these processes where the victim survivor and perpetrator were unknown to one another;[160]
- are not 'suitable' pathways, and that allowing them to be used in these cases may not meet community expectations;[161]
- may be exploited by 'more well-off' individuals who use them to 'buy their way out of a conviction';[162]
- would not be meaningful in circumstances where their perpetrator had pleaded guilty for convenience, not out of a sense of remorse;[163]
- may not be useful where the victim survivor is a child, and their parent is heavily involved in directing the restorative justice conference.[164]

Another participant said that, in their experience, most victim survivors do not wish to participate or be involved in conferences with their offender, and a restorative justice process is diminished where the victim survivor does not wish to be involved and a victim survivor representative is arranged.[165] However, another participant thought this process should still be available in circumstances where the victim survivor does not wish to be involved, because of the meaningful benefits for the perpetrator's rehabilitation.[166]

Challenges with current restorative justice pathways and processes

When discussing the current restorative justice process more broadly, practitioners raised challenges with the existing model. For example, one participant noted that while the Office of the Director of Public Prosecutions' *Director's Guidelines* have been changed to enhance consideration of restorative justice pathways, submissions to refer a matter are still being rejected by the DPP without reasons being provided.[167]

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157 SME Interview 26.
158 For example, SME Interviews 24, 25.
159 SME Interviews 15, 22.
160 SME Interview 4.
161 SME Interview 10.
162 SME Interview 4.
163 SME Interview 7.
164 SME Interview 21.
165 SME Interview 15.
166 SME Interview 16.
167 Ibid.

Other participants noted there is currently a significant delay in engaging with adult justice mediation processes (for all offences). Matters must be adjourned for a lengthy period for the process to occur, which impacts when a matter is finalised.[168]

Some SME participants also raised funding and access challenges – particularly for matters heard in rural, regional and remote areas where these restorative justice processes may not be available.[169] For example, one participant reflected that they were unable to refer a sexual assault matter in a regional centre for restorative justice because of a lack of funding in the area, even though the victim was very motivated to do so and 'everyone would have been more satisfied out of that process than the sentencing process'.[170] Another participant shared that they had had to transfer a matter to Brisbane to access restorative justice.[171]

There were also differing views on when restorative justice processes should take place and how or whether it should impact sentencing. For example, one participant thought restorative justice processes should take place prior to sentence to inform the sentencing decision and not be a penalty option.[172] Another participant agreed that participation should occur prior to sentence, but not pre-conviction.[173] Another participant thought that if there was agreement for a matter to be referred to restorative justice, criminal charges should not proceed, otherwise there is no reason for an offender to want to engage in this process.[174]

Consultation with victim survivors of rape and sexual assault offences

Potential use of restorative justice processes for sexual violence matters committed by adults

The victim survivors we interviewed who participated in the sentencing process were either of the view that ARJC processes should not be made available at all for sexual violence matters committed by adult offenders, or they did not personally consider this to be an option they would consider:

Consultation with victim survivors

When asked whether she would be interested in participating in a RJ conference with her offender, a victim survivor said that she was not interested, and that she would 'not [have] very much to say to him'.[175]

Another victim survivor was adamant that restorative justice processes should not be made available for sexual violence matters, reflecting that it would have caused her so much trauma to go through that process.[176] The victim survivor reflected that she had to have a screen erected during the sentence hearing so that she did not have to see her offender. [177] Her partner told us they could not understand how the Queensland Government could be thinking of providing a space for a victim to have to listen

168 SME Interview 13.
169 SME Interview 12, 19, 22.
170 SME Interview 21.
171 SME Interview 19.
172 SME Interview 12, 22.
173 SME Interview 9.
174 SME Interview 23.
175 Victim Survivor Interview 4.
176 Victim Survivor Interview 6.
177 Ibid.

to their offender say sorry, as 'no amount of sorry could ever take away what I've witnessed her go through'.[178]

Similarly, another victim survivor told the Council that, even if it was available, she would not have wanted to participate in a RJ conference with her perpetrator, as she was scared of both him and his family, and she did not believe that the process would have helped her.[179] She further reflected that she believed that it would have been more traumatic for her to have to face her offender again in a conference setting – noting that having to see him in the courtroom was already 'pretty scary'.[180] However, the parent of that victim survivor thought it would have helped her (not necessarily the victim survivor) to heal, by requiring the offender to 'sit there and listen to what he did to us – what he's done to our whole family'.[181]

Another victim survivor reflected that her perpetrator had offered to participate in a justice mediation (diverted away), and that it was described as: 'you and him will sit in a room. You'll have a conversation. He'll ask you to sign a non-disclosure statement, maybe give you some money to keep you quiet and it'll go away.'[182] However, she reflected that she didn't 'want his money. I wanted the community to be safe.'[183]

However, one victim survivor expressed the view that restorative justice processes should be made available after conviction, as it would be difficult to sit across from the person if they had not yet accepted responsibility.[184]

Victim survivor experience of the current juvenile restorative justice processes for sexual violence offending[185]

A mother of three daughters, each of whom had been raped by a juvenile offender,[186] discussed with the Council her experience of engaging with the YRJC process with her daughters, as the juvenile offender was 17 years old at the time of the conferencing process.

Broadly, the victim survivor expressed her view that the YRJC scheme was too offender-focused and did not adequately reflect the serious nature of this type of offending. She further indicated that, in her experience, she was not given sufficient information prior to the matter being referred to YRJC, and that the convenors were not equipped to facilitate a conference involving serious sexual offences and did not appropriately address her daughter's experiences. However, she recognised that there could be value in this process for victim survivors who wanted to receive an apology from their offender. Her views are presented below.

Consultation with victim survivors

The victim survivor stated they proceeded through restorative justice conferencing process because they were told that a criminal prosecution would likely not result in any period of detention. However,

178 Ibid.
179 Victim Survivor Interview 1.
180 Ibid.
181 Ibid.
182 Victim Survivor Interview 7.
183 Ibid.
184 Ibid.
185 Victim Survivor Interview 3.
186 Ibid.

she expressed her view that she did not entirely understand what the process would involve prior to engaging with it:

> I think the information we had, we kind of still felt like we didn't quite understand, understand it all, and there was a lot of questions around it, but we sort of, you know, for them to try to provide us guidance, something they couldn't really do directly, and kind of with a very generalised guidance around certain areas of what this process looks like. (Victim Survivor Interview 3)

She also noted that the conference was held over a Microsoft TEAMS call, as she was living in a regional centre, which 'made it all the more uncomfortable and awkward at times'.

While she acknowledged that she and her daughters could not have expected the young offender to have been punished more than he would have been had they progressed through the criminal justice process, she did not believe the process adequately reflected the seriousness of the offending, or 'like there was any punishment' at the end of the conference:

> It didn't feel like it was a real outcome in any sense of justice for the girls, or him feeling any real consequence or having any real effect on his life, or... to take any seriousness out of what had happened ... the outcome didn't reflect the seriousness of what he had done to those girls...
>
> I understand that spending time in jail doesn't really rehabilitate at the end of the day. So, I don't know. It just didn't seem enough. I would like to think that there's something in between, and I would have liked to have seen mandatory counselling [for the offender] as an enforced process for a lengthy period of time. (Victim Survivor Interview 3)

When asked whether she thought that her daughters had any choice or control over the conference outcome, or the process, she responded:

> I think it was a perceived choice. I think they were given, you know, 'you get to decide what happens', but you don't really. (Victim Survivor Interview 3)

The victim survivor noted that her daughters were required to come up with ways for the offender to rectify the harm within a limited scope of available actions:

> the girls had to go to a lot of effort, [put] a lot of thought into this, and do all the work for everyone else, come up with their own expected outcome from this, and they had to choose what would happen, but they were only given a few options of what they could ask at the end of this process. And so, I guess, I think it was kind of defeating, really. It just didn't seem like it was worth the effort. (Victim Survivor Interview 3)

In doing so, the conference convenors tried to compare ways for the young offender to repair the harm using an analogy of a stolen bike, which the victim survivor felt was not appropriate:

> when we were dealing with the youth justice team, they all, they seemed like they didn't really understand ... they kept referring to examples of stolen bike. So, the purpose would be to then have, 'you could get that victim to pay the price of that bike', or 'you could replace the bike or work it off' or different, you know ... there was no more serious example for us ... to be guided by, through this. (Victim Survivor Interview 3)

It was acknowledged that, as part of that process, the young offender was required to engage in counselling sessions, but that:

> It was, you know, government implemented, so I think there was only five or something, it was only limited time. And he was, you know, as soon as they decided he was alright and wasn't deemed to be a paedophile or anything like that, they went, you know, "all good, we're done here." So, it wasn't a huge amount of counselling or anything like that ... (Victim Survivor Interview 3)

The victim survivor noted that the young offender had a significant degree of control over the restorative justice process, including whether he was 'ready' to participate and the number of people supporting

him. She noted that he was supported by his mother, his sister and a support person. The victim survivor raised that the offender's mother asked for her own support person to be present, which she vetoed:

> we're going to sit in this room and expect that he gets ... five random people in a room that we don't know, and they don't know, hearing about what he's done to them, and what they've been through ... I couldn't put ... the girls through just one more stranger in that room ... when they ... weren't even comfortable talking to someone familiar about, you know, about this. (Victim Survivor Interview 3)

The victim survivor believed that, even after the conference, the juvenile had little insight into the actual harm caused to her daughters or the family:

> I think he understood. I think he knew what he'd done... but I don't know how, if he could understand or empathise with what he had actually, you know, put them through, or what they went through. And I don't know that he empathised or could understand what he had actually done to them, emotionally or mentally. (Victim Survivor Interview 3)

The victim survivor expressed her broader view that, while she can accept that 'some of them [women], they may just want that acknowledgement' from their offender, she does not believe restorative justice conferencing should be available for adult sexual violence matters:

> I think to me this sort of offence [sexual violence] is a bit too serious ... [and] it felt like it was taken, not as seriously as it should have been ... it feels like ... if there's no result that ... makes someone think twice about maybe doing it next time, [and then] what's the purpose of having gone through this process? ... So, you know, in the long run I don't know that it would be much of a deterrent, and certainly as far as community standards go, I mean, what does that tell everybody? (Victim Survivor Interview 3)

In doing so, she raised concerns that people who commit sexual violence offences face no consequences for their actions, and are not supervised in the community:

> I think I would have liked to have seen something ... I think on the criminal record there should be a flag for sexual offences. That should come up, you know, in times when, you know, maybe when they do have children or at certain moments where checks and balances can be put in place to make sure that other people are safe ... I just think that should follow somebody for, you know, maybe not stop employment and things like that, maybe in certain areas. But definitely, you know, how do we know he's not at risk? Nobody knows he's not at risk. Really, what do they do to prove that he wasn't at risk to the community anymore? (Victim Survivor Interview 3)

Interviews with victim survivor support advocates

Victim support advocates reflected on their experiences supporting victim survivors and their families through restorative justice processes, and expressed their views about whether they believe it should be made available for sexual violence offences committed by adults.

Potential use of restorative justice processes for sexual violence matters committed by adults

Some victim support advocates reflected that while they were initially opposed to domestic or sexual violence matters proceeding through RJ processes, they have since recognised that RJ processes may prove beneficial for some victim survivors, 'depending on the victim and what they want to do'.[187] In doing so, the support advocate reflected that they had observed some women have their needs met through this process, but that this was usually where the offending was – towards the less-serious end of the continuum.[188] Others have found the process beneficial where the purpose was to educate an offender

187 Victim Support Advocate - Group Interview 3.
188 Ibid.

who was from another culture and/or where the victim survivor did not want to proceed with a court proceeding:

> The offender was a taxi driver from another culture and she wanted him to know that … what he did was not okay. And it was not only not okay, that it was a crime. She wanted him to understand that and the impact on her and her safety. She wanted him to go to some kind of counselling – and he agreed to go to counselling - and she got some small monetary gain out of it. And she was happy with that because she didn't want to go to court, [she was] an older woman. (Support Advocate - Group Interview 2)

Advocates also recognised that there can be benefits where the offender is part of a community that holds that person accountable:

> I mean, some cultures, yeah, there's some unspoken, you know, there's more of a detrimental impact of a community punishment. For example, being shunned from the community, you know, there's more of a punishment than an actual prison sentence. (Support Advocate - Group Interview 2)

> And I mean, in terms of restorative justice models, I think New Zealand probably works quite well in that way because in the cultural context, you have got a community holding that person accountable, which is different from urban. You know, here, you come in, two individuals, thank you, goodbye and out you go. Where's the accountability? There is in Indigenous communities. If you're going back to that community, there's lots of eyes on. And I think that's it, the eyes on for future offending in different cultures and in different situations, you know, where you've not just, you know, raped this person, you've not offended against this person, you've offended against the whole community. And that's not acceptable. So that more holding, there's the accountability in that cultural context, which is some in Canada as well, but New Zealand, I think, is probably one of the working well in terms of models in the world. (Support Advocate - Group Interview 2)

Support advocates also noted challenges with the current model of ARJC, including:

- Despite saying that RJ is 'victim-focused', current processes are 'mostly offender driven', and initiated by defence counsel.[189] Although a victim survivor may want to proceed via RJ processes, this can only occur where the offender is willing to participate in that process, and to admit their offending behaviour.[190]
- The criminal charges are adjourned for a lengthy period for the RJ processes to occur, and are then 'dropped' or discontinued. [191]

One victim survivor support advocate reflected that while she acknowledged the merits of restorative justice processes, she did not believe it was appropriate for serious crimes, including sexual violence offences:

> I think the damage is too significant. And, like, restorative justice is for, well, I'll go, and I'll fix it … in recognition of what you've done and to make it right. This is a serious offence, and you can't make that right again. There's no making this right. So that's my personal opinion on the restorative justice space, is that a sexual assault is not the space for that … The damage is too significant. (Victim Survivor Interview 1 – Support advocate)

Another support advocate expressed a strong view that restorative justice processes can be appropriate for young people where the offence involves property theft, but that their use in sexual violence matters is inappropriate:

> One, she's not a bicycle, she's not a car. She was raped over a series of years by this [person] who was 17 at the time of the [youth justice] conference. (Support Advocate - Group Interview 1)

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189 Ibid.
190 Ibid.
191 Ibid.

The support advocate was sceptical that the young perpetrator could have gained a full understanding of the consequences of his offending within the short conference period such that he did not require further assistance, or was 'ready' to be unsupervised:

> The other thing was his 'ready' report came through within a couple of weeks … I'm sure he's at that age, and that nature, and that amount of time, I'm sure this young man has completely understood the whole thing - the nuanced nature of gendered violence of a sexual nature. I'm sure that in 4 weeks or 6 weeks or whatever it was, he was ready to go. That was ridiculous. (Support Advocate - Group Interview 1)

The support advocate indicated that, in that particular circumstance, the victim survivor had no real interest in participating in this process, and that it predominantly benefited her offender.[192] She also raised concerns that the victim survivors were required to think of what the 'consequences' should be for the juvenile as part of the restorative justice process, which was referred to as an 'abomination as far as I'm concerned, especially under the nature, the length of time, the amount of harm that was done'.[193] The advocate reflected that 'there was no outcome that would have been at all satisfactory'.[194]

Another victim support advocate reflected on their own experience supporting a 16–17-year-old girl through restorative justice who had been raped by her older brother. It was noted that the parents made the decision to refer the matter to restorative justice because they did not want their son to have a criminal record.[195] However, she reflected that she was not sure whether this had been the best outcome for the victim survivor – who, she noted, had not returned to counselling after going through this process.[196]

A need for alternative restorative justice pathways and what these should include

Victim support advocates recognised that the current adversarial justice system is 'not working for victim survivors of sexual violence', and that alternative pathways need to be considered:

> And I mean, in terms of like what we heard at the [Women's Safety and Justice] Taskforce as well, like, okay, the criminal justice system is not working. It's not working for victim survivors of sexual violence. So it's like we've still got to try and do what we can with that system. We don't want to go, right, we're giving up on this and let's funnel everything through here, because that's not the answer either. We need a number of options … we need options that focus on accountability and the human rights of the victim survivor for them to be able to tell their reality, for them to be seen, to be heard and asked what is it that you want to happen, and is it realistic.[197]

In considering the important features of a restorative justice model for sexual violence offending, victim advocates reflected that safety for the victim survivor should be paramount:

> I mean, I think it's safety, safety, safety, emotional and physical safety throughout and constant checking on that as well. Not just agreeing at the outset that this is what I want to do. And then they get there, and they don't feel safe. It's that checking. Have you got a support person with you? Are you briefed before you've got the support person with you checking into your levels of safety and some debriefing and support beyond? And that's why, that's why if women are connected with a sexual assault service, that criminal justice process is an intersection point in their life that talks about what happened to them. But if they're connected, if sexual assault services were appropriately funded, then you would look at the support leading up to and preparation for court support through court and support at sentencing and beyond sentencing because their life continues beyond sentencing. It's good for them to have that support. It's

192 Victim Support Advocate - Group Interview 1.
193 Ibid.
194 Ibid.
195 Ibid.
196 Ibid.
197 Ibid.

> looking at, we want, it's the balancing, the balancing of accountability versus victim safety and them being able to tell their truth, to tell the reality, which they've been sidelined from in the criminal justice system.[198]

Consultation events

Participants in consultation events expressed broad general support for enabling improved restorative justice processes to be available for sexual violence matters, provided these are genuinely driven by the victim survivor (not by the offender).

It was recognised that restorative justice pathways can provide greater agency to victim survivors to decide whether they would like to pursue restorative justice processes as an alternative to traditional criminal justice processes, which may not always be appropriate. These processes can also provide both sides with a greater understanding of the consequences of the offending.[199] As most sexual violence offences are committed by a family member or a friend, it was recognised that restorative justice could help navigate these complexities.[200]

Participants were of the view there should be enhanced education and capacity-building in the community to build knowledge and understanding of restorative justice processes, and the positive impacts restorative justice can have.[201] For example, educating the community that the ARJ system is not merely a way to avoid a criminal conviction, but rather can also be a more meaningful process where the victim survivor gets to explain the harm done to them, and for the perpetrator comes to understand the consequences of the offending and has the opportunity to articulate an apology.

However, participants expressed similar concerns with the current ARJC model to those expressed by subject matter expert interview participants and victim survivor advocacy and support organisations, including that:

- there are currently significant delays with ARCJ processes, which can cause dissatisfaction in the system;
- victim survivors do not have access to protection or support if criminal processes are not engaged; and
- police have no power to refer a criminal prosecution matter to restorative justice pathways themselves.

Although outside the scope of the current review, there were also concerns that the current YRJC mode is too focused on the perpetrator being rehabilitated, rather than also focusing on the experience of the victim survivor - which can be ignored through this process. Participants who had experiences with these processes reflected that many young people do not appreciate the opportunity to participate in YRJC, and do not engage meaningfully with it. Comparatively, adult offenders who participate in the ARJC often understand that without this process, they may be subject to incarceration.

Contrary to this view, some participants expressed the view that restorative justice is more appropriate for offences committed by young people than adults, as they are young, their brains have not yet been fully formed, there may be a variety of reasons why they committed the offence (such as trauma-

198 Ibid.
199 Brisbane Consultation Event, 11 March 2024.
200 Cairns Consultation Event, 21 March 2024.
201 Brisbane Consultation Event, 11 March 2024.

responses, disability, etc) and restorative justice can assist them to change their behaviour. [202] Less tolerance was granted for adult offenders, with some participants stating that adults should be more aware of the outcomes of criminal offending.[203]

Despite some support, a small number of participants thought restorative justice processes were not appropriate at all for sexual violence matters, highlighting that it is too offender-focused, and can result in outcomes that are unexpected or unwanted by the victim survivor.

Participants in online consultation sessions thought more options needed to be considered regarding the model of delivery – for example, for some being in the same room as the person who has offended against them would be too overwhelming, and other options may need to be considered - such as an exchange of letters.[204] This option was viewed as being 'very powerful' for young perpetrators and it was viewed as a useful 'complement' to sentencing.[205]

It was acknowledged that many victim survivors 'would like find this a very, very difficult thing to engage with', particularly taking into account power dynamics where the offending is within the family.[206] Where the charges are discontinued, one participant reflected that many victim survivors may not be happy with this outcome as there is no recording of a conviction and no punishment.[207]

When RJ processes should be available within the context of the criminal proceeding

There were mixed views on when RJ processes should occur and how they should be conducted. For example, participants expressed a view that there should be greater opportunities to engage in improved restorative justice pathways, including:

- before police charge the person; [208]
- as part of the sentencing order (such as including a restorative justice component as a condition of what might otherwise be viewed as a less severe form of penalty); [209] and
- as an alternative or complementary form of sentencing outcomes, with further regard to be had to how this would operate to avoid future harm being caused to victim survivors.[210]

However, other participants expressed strong views that restorative justice processes should not be used in lieu of a criminal justice process – recommending that, if it is to occur, this should occur after sentence, or at the end of the custodial component of the sentence order, so that the offending person can demonstrate to the victim (and the community) that they have changed their behaviour in a positive way.[211]

It was also suggested that victim survivors should be provided with an opportunity to meet with the offending person after a sentence hearing, or after they have engaged in sexual offender programs, to understand whether those processes have impacted the person's likelihood of reoffending. [212]

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202 Cairns Consultation Event, 21 March 2024.
203 Ibid.
204 Online Consultation Event, 3 April 2024.
205 Ibid.
206 Online Consultation Event, 16 April 2024.
207 Ibid.
208 Brisbane Consultation Event, 11 March 2024.
209 Ibid.
210 Ibid.
211 Cairns Consultation Event, 21 March 2024.
212 Brisbane Consultation Event, 11 March 2024.

How RJ processes should function for sexual violence matters

As noted above, most participants in support of restorative justice processes recognised that the process must be driven by the victim survivor, not the offender.[213] Ensuring the safety of the victim survivor was viewed as being critical, which would require significant resourcing. [214]

Some participants thought these processes could still prove beneficial for the perpetrator if a counsellor attended on behalf of the victim.[215]

It was recommended that both parties have access to counselling prior to a decision being made to proceed through RJ pathways, to ensure that both parties are deemed suitable, prior to engaging.[216]

There was a suggestion from some participants that victims should have full autonomy to decide whether RJ orders are made public, or whether they remain confidential. For example, it was suggested that there could be a record of the agreement between the victim survivor and the offender held by the court, with an option for the victim to decide whether to release it. However, some participants expressed concerns that the rights of young offenders need to be protected and the outcomes of these processes should not be made public. Other participants commented that they 'do not support a systemic NDA' for restorative justice processes. While there was no broad agreement about the treatment of these agreements, participants generally agreed that the age of the offender was relevant to this decision.

Submissions from victim survivor support and advocacy stakeholders

Support for restorative justice processes

Victim survivor support advocates endorsed the development of an appropriate, victim-centred restorative justice pathway for sexual offences matters in Queensland in response to concerns that the victim survivors of rape and sexual assault lack confidence in the current criminal justice system, which can be re-traumatising for them.[217]

BRQ provided strong support for community restorative justice programs more broadly, as well as in relation to rape and sexual assault offences, to 'support victims and their wellbeing'.[218]

BRQ highlighted the importance of ensuring that Queensland's new model of restorative justice is victim driven (similar to New Zealand's program, Project Restore) to 're-balance power between the parties and assist victim healing'. [219]

BRQ also supported restorative justice pathways being accessible for victims throughout the legal process (similar to the position in New Zealand).[220]

However, BRQ also raised concerns with restorative justice models that rely on community volunteers, who are not paid for services rendered (as per the pilot underway in South Australia). [221]

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213 Ibid.
214 Ibid.
215 Ibid.
216 Ibid.
217 Submission 13 (Justice Reform Initiative) 2; Preliminary submission 4 (Justice Reform Initiative) 2–3; Submission 19 (Basic Rights Queensland) 4; Preliminary submission 11 (DVConnect) 5; Preliminary submission 6 (Brisbane Rape & Incest Survivors Support Centre) 2.
218 Submission 19 (Basic Rights Queensland) 4.
219 Ibid.
220 Ibid.
221 Ibid.

Submissions outlined the potential benefits associated with restorative justice processes, including reduced recidivism, improved community outcomes and enhanced victim survivor experiences.[222]

However, submitters pointed out that these processes may not be suitable for all victim survivors, and that individualised processes must be enabled. For example, the Brisbane Rape & Incest Survivors Support Centre ('BRISSC') recognised that the emotional and physical harm and justice needs of victim survivors needs to be considered and supported though these processes, as they may not always be suitable and will not always meet the justice needs of every victim survivor.[223]

Within this context, submitters recommended that regard be had to the form of these processes to ensure that they are victim-driven, safe and trauma-informed.[224]

The Justice Reform Initiative ('JRI') recognised the importance of mitigating any power imbalances between the offender and victim survivor,[225] and proposed that the Council consider research conducted by the Centre for Innovative Justice ('CIJ') at RMIT University in 2014, which recommended the development and implementation of restorative justice conferencing for sexual offending:[226]

> The model the CIJ presents aims to achieve greater justice for more victims and hold more people who commit sexual offences to account. The CIJ argues the damaging and widespread nature of sexual assault requires an appropriately tailored and flexible response from the justice system – one that seeks to tackle and unpack the complicated nature of sexual crimes; to operate as part of the solution, not only to individual offences, but also to the systemic nature of sexual violence.[227]

Victim-centred restorative justice and therapeutic justice approaches were also supported by the Uniting Church in Australia Queensland Synod (Queensland Synod).[228] In its submission, the Queensland Synod raised concerns that the adversarial court process is limited, in that it does not enable the courts to respond to the unique needs of people experiencing marginalisation and disadvantage, or to divert them away from the criminal process and into alternative options to incarceration.[229]

The Queensland Synod recognised that there are increased numbers of Queenslanders being held in custody and on remand (including a disproportionate representation of First Nations people),[230] which is expensive,[231] ineffective and fails to promote rehabilitation and reintegration. The Queensland Synod concluded that crime in the community is therefore not being reduced, communities are not being made safer and social drivers of criminogenic behaviours or antisocial tendencies are not being addressed.[232]

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222 Preliminary submission 6 (Brisbane Rape & Incest Survivors Support Centre) 2.
223 Ibid.
224 Submission 19 (Basic Rights Queensland) 4.
225 Submission 13 (Justice Reform Initiative) 2; Preliminary submission 4 (Justice Reform Initiative) 2–3. The JRI referred to the 2010 findings of the Australian Law Reform Commission and the New South Wales Law Reform Commission that these processes may not be appropriate, due to a power imbalance between the victim survivor and offender which makes it difficult to achieve the aims of the RJ process.
226 Preliminary submission 4 (Justice Reform Initiative) 3.
227 Ibid [6]-[10], citing the Centre for Innovative Justice, Innovative Justice responses to sexual offending – pathways to better outcomes for victims, offenders and the community (2014).
228 Submission 16 (Uniting Church in Australia Queensland Synod) 2.
229 Ibid 4.
230 Ibid 2: an average of 'over two-thirds (66.6%) of children and over one-third (36.4%) of adults in Queensland prisons identify[ing] as Aboriginal or Torres Strait Islander, despite making up only 4.6% of the general population.' Justice Reform Initiative report, *Alternatives to incarceration in Queensland* (Report, 2023) ('*Alternatives to incarceration in Queensland*').
231 The Uniting Church in Australia Queensland Synod noted that it costs the Queensland Government $240.81/day or $2,068.32/day to house an adult or juvenile in a correctional centre respectively ($87,896/year or $761,507/year): *Alternatives to incarceration in Queensland* (n 230).
232 Submission 16 (Uniting Church in Australia Queensland Synod) 3.

The Queensland Synod concluded that there is a need to make innovative, evidence-based, community-led programs and services available in conjunction with the traditional justice model to provide 'more opportunities for victims to experience a sense of justice, for offenders to take accountability for their offending, and for broader public policy objectives to be met'.[233]

The Queensland Synod also recommended that significant investment be made into the community sector to divert people away from the system and towards approaches that seek to address causes of their contact with the criminal justice system, such as 'responses to housing needs, mental health issues, cognitive impairment, employment needs, access to education, the misuse of drugs and alcohol, and problematic gambling'. [234] It was also suggested that additional funding be invested in early intervention and prevention strategies to address drivers of criminogenic tendencies.

The Queensland Family & Child Commission ('QFCC') also expressed the view that sentencing in the youth justice system is more beneficial to young offenders and victims if it operates on principles of restorative justice and rehabilitation, rather than adopting a purely punitive approach.[235]

However, Fighters Against Child Abuse Australia ('FACAA') were strongly opposed to making restorative justice conferencing available for rape or sexual abuse offences, stating that they were 'universally not welcomed by our members'.[236] FACAA stated that '[r]estorative justice might be applicable for car theft or even robbery but there is no reasonable excuse for rape or sexual assault so why should there be a way for the perpetrators to feel better about the crime?'[237]

Recognition of societal contributions to offending behaviours

Some victim survivor advocates recognised that people who perpetrate harm have often experienced socio-economic disadvantage and cultural barriers that can be contributory factors to their offending behaviour. For example, DVConnect noted that

> we are not ignorant to the challenges that people who use violence experience in their lives, the systemic barriers, and the contributors to their ultimate choice to use violence. We are aware of how the complexity of trauma, poverty, and the patriarchal and colonist society that we live in can impact how people who use violence end up at that choice. We recognise the human rights of people, including those that choose to use violence.[238]

Notwithstanding this, DVConnect acknowledged that this does not excuse offending behaviour, as it is always the perpetrator's choice to use violence; however, it is a relevant factor for consideration of their experiences.[239]

16.4 Transformative justice and other alternative justice models

16.4.1 Overview of transformative justice

Transformative justice is an alternative approach to the traditional criminal justice system, which calls for a re-evaluation of conceptions of justice, retribution, rehabilitation and punishment. [240]

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233 Ibid 5.
234 Ibid 4.
235 Preliminary submission 12 (Queensland Family & Child Commission) 2.
236 Submission 15 (Fighters Against Child Abuse Australia) 13.
237 Ibid.
238 Submission 20 (DV Connect) 4.
239 Ibid.
240 Alana Abramson and Melissa Roberts, 'Restorative, Transformative Justice' in Shereen Hassan and Dan Lett, *Introduction to Criminology* (A Canadian Open Education Resource, 2023).

Transformative justice has been described as 'a political framework and approach for responding to violence, harm and abuse', which 'seeks to respond to violence without creating more violence and/or engaging in harm reduction to lessen the violence'.[241] Transformative justice approaches and interventions:

> 1) do not rely on the state (e.g. police, prisons, the criminal legal system, ICE, foster care system (though some transformative justice responses do rely on or incorporate social services like [counselling]);
>
> 2) do not reinforce or perpetuate violence such as oppressive norms or vigilantism; and, most importantly
>
> 3) actively cultivate the things we know prevent violence such as healing, accountability, resilience, and safety for all involved.[242]

Transformative justice is part of the critical tradition in criminology arguing for 'a paradigm shift in criminal justice and changes to the social structures and perpetuate injustice and inequality'.[243] This includes shifting the focus towards 'healing, accountability, resilience, and safety',[244] and seeking to empower local communities to develop their own strategies to respond to and prevent future instances of violence within their own communities without relying on state-led systems.[245]

Transformative justice is founded on a strong belief that the community delegates

> responsibility for producing safety to police, prosecutors, and prisons, and accepting the violence they perpetrate as the inevitable price of safety … [but] the state stokes our fear of one another, discouraging and interfering with our ability to care for each other.[246]

While representing a range of values, attitudes and approaches, transformative justice seeks to repair the harm done to a person by enhancing connections within communities and focusing on systemic change, healing and growth. Often, these processes can involve facilitated conversations, community-based interventions and long-term engagement to address and resolve conflicts:

> [Transformative justice] interventions can take different forms, but more often than not, they include (1) supporting survivors around their healing and/or safety and working with the person who has harmed to take accountability for the harm they've caused, (2) building community members' capacities so that they can support the intervention, as well as heal and/or take accountability for any harm they were complicit in, and (3) building skills to prevent violence from occurring, and supporting community members' skills to interrupt violence while it is happening.[247]

Critically, while transformative justice relies on elements of restorative justice and has strong overlap with these processes, it is a separate and distinct process to formal, state-led restorative justice pathways, that seek to repair a specific harm or wrong caused to a particular victim survivor.[248] Transformative justice takes a broader approach – seeking to address the social or structural issues that contributed to the harm and 'treat the root causes of violence',[249] including racism, gender inequality, poverty and colonialism, through societal change and dismantling harmful systems (including the prison system).[250]

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241 Mia Mingus, 'Transformative Justice: A Brief Description', TransformHarm.com, <https://transformharm.org/tj_resource/transformative-justice-a-brief-description>.
242 Ibid.
243 Alana Abramson and Melissa Roberts, 'Restorative, Transformative Justice' in Shereen Hassan and Dan Lett, *Introduction to Criminology* (2023).
244 Rossner and Taylor (n 35) 362.
245 Ibid 358.
246 Submission 32 (Sisters Inside) 3, citing Mariame Kaba and Andrea J Ritchie, *No More Police: A Case for Abolition* (The New Press, 2022).
247 Mingus (n 241).
248 Rossner and Taylor (n 35) 363.
249 Submission 32 (Sisters Inside) 4.
250 Rossner and Taylor (n 35) 362.

These systems also remain 'completely separate from the criminal punishment system to ensure [they are] not co-opted by the state as another coercive too'.[251]

16.4.2 Transformative justice in practice

While there has been an increased focus on alternative options within the criminal justice system, transformative justice frameworks have not yet been implemented in any country.[252] However, some countries have begun to explore options for integrated transformative justice principles through community-led programs that focus on healing, accountability and community-led responses to harm.[253]

In some cases, these processes are complementary, rather than used as alternatives, to criminal justice system responses, although there are also many examples of community-led initiatives that operate outside of and entirely independently of the criminal justice system.

However, it is important to recognise that these processes are not true transformative justice processes, as they operate within the existing legal framework.

The use of transformative justice in Australia

In New South Wales, Transforming Justice Australia provides voluntary, confidential and free community-based restorative justice responses with a focus on people who have experienced sexual abuse and related harm. Those who are responsible for the harm can participate, but only if the survivor wishes them to be involved.

Transforming Justice also provides advocacy, research and community information about restorative justice, with a focus on developing

> a service that responded to the needs, wishes and hopes of survivors; to provide survivors choice and opportunities for meaningful justice; to encourage active accountability from those responsible and to recognise the importance of family members and community in responding to sexual abuse. Transforming Justice Australia honours these motivations, incorporates their experience and builds upon the existing evidence-base of good restorative practice.[254]

Transforming Justice delivers services in the community and alongside the criminal justice system. The process is run in a flexible way to prioritise the needs of the person harmed and address issues arising from the harm.

It uses a co-facilitated model involving two facilitators who work together with participants throughout the restorative process. The organisation has a team with 'deep experience working with people who have experienced complex trauma, as well as families, First Nations communities, young people, adults, LGBTIQ community and culturally and linguistically diverse communities'.[255]

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251 Submission 32 (Sisters Inside) 4.
252 Rossner and Taylor (n 35) 357.
253 Ibid.
254 Transforming Justice Australia, 'Our story and origins' (web page) <https://www.transformingjustice.org.au>.
255 Transforming Justice Australia, 'Questions about restorative justice – How is restorative justice different to criminal justice?' (web page) <https://www.transformingjustice.org.au>.

16.4.3 Potential risks and benefits of transformative justice in responding to sexual violence

Advocates see the benefits of transformative justice, including over restorative justice alone, that it 'attends to both the interpersonal aspects of harm as well as the systemic and structural issues. In this way, the justice lens is widened to offer innovative, collaborative, and healing approaches to harm.'[256]

The risks identified in relation to restorative and transformative justice and factors impacting its widespread adoption include:

- a lack of support by the general public of alternative approaches to justice, which may also be viewed as being 'soft on crime';
- resistance by criminal justice stakeholders who are 'trained in and conditioned to the punitive system' to the adoption of new practices;
- concerns about 'the practicality of shifting an entire criminal justice system to a new paradigm. Just as the criminal justice system is not the most appropriate response for every case, the same is true of restorative justice';
- the costs of moving to and maintaining a restorative justice system (although the existing costs of maintaining the current criminal justice system needs to be factored in);
- potential net-widening effects, meaning more people being dealt with through restorative justice approaches;
- inconsistent processes adopted in different locations and facilitators having 'varying levels of expertise, which may cause harm or lessen faith in the fairness and efficacy of the system';
- risks of reproducing inequalities and involving elements of coercion or pressure on participants to participate.[257]

16.4.4 Other alternative justice approaches

There are several different models of justice approaches proposed to better meet the needs of victim survivors.

One example, proposed by Lacey and Pickard, is the adoption of a 'dual-track' justice model that would separate out the objective of meeting needs of victim survivors from the current criminal justice system 'track' designed to determine criminal responsibility and convict and sentence perpetrators delivering punishment and seeking to promote reform and rehabilitation.[258] Under this model, victims would be required to participate in the 'offender-oriented track' only insofar as necessary to establish the facts of the case, but otherwise their involvement would be minimised. Instead, the focus of the 'victim-oriented track' would be on a response that:

- is victim-centred, focusing on what victims want by way of support and service provision;

256 Ibid.
257 Abraham and Roberts (n 243).
258 Nicola M Lacey and Hanna Pickard, 'A Dual-Process Approach to Criminal Law: Victims and the Clinical Model of Responsibility without Blame' (2019) 27(2) *The Journal of Political Philosophy* 229.

- is supported by adequate funding provided by the state which has a legislative basis and has specialised staff with therapeutic, social work and legal skills;
- includes financial support for victims in support of recognition of harm, healing and restoration; and
- has the resources to facilitate apologies or direct recompense by perpetrators where victim survivors express a desire for this.

While not explicitly framed as a 'victim-centred track', there are several elements of this model that have already been adopted in Queensland, or proposed for introduction in response to the WSJ Taskforce recommendations including the development and piloting of a professional victim advocate service in Queensland[259] and the implementation of a victim-centric trauma-informed service model for responding to sexual violence drawing on the Sexual Assault Response Team model that operates in Townsville.[260]

Queensland has also established victim support agencies, including Victim Assist Queensland and the more recently established Office of the Victims' Commissioner, which together have a range of responsibilities and functions with respect to victim survivors, including the provision of financial support, providing assistance about where to seek help, publishing information and responding to complaints. There are also a range of community-led services non-government organisations, including the services that form part of the Queensland Sexual Assault Network.[261]

The concept of a victim 'advocate' In Queensland is similar to that advocated in Victoria by Sexual Assault Services Victoria of 'Justice Navigators' embedded within specialist sexual assault services, which has now been funded by the Victorian Government.[262] The functions these navigators are intended to perform include:

- acting as an entry point to the justice system;
- supporting victim survivors to understand and exercise their rights;
- helping victim survivors navigate support services, compensation, recovery and justice options, including by through accompanying them to court proceedings; and
- being experts in their jurisdiction's victims' rights charter and acting to advocate to ensure a victim survivor's charter rights are upheld.[263]

The model is based on the Independent Sexual Violence Advocates (ISVA) scheme operating in England and Wales since 2007, which has been reported as being successful in halving the number of survivors withdrawing from legal procedures.[264]

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259 *Hear Her Voice Report Two* (n 43) rec 11.
260 Ibid rec 11. For more information, see Chapter 13.
261 For more information, see 'About us', Queensland Sexual Assault Network (web page) <https://qsan.org.au/about>.
262 Victorian Government' 'Changing Laws and Culture to Save Women's Lives (Media Statement 30 May 2024) <https://www.premier.vic.gov.au/changing-laws-and-culture-save-womens-lives>.
263 Respect Victoria, Submission to the Australian Law Reform Commission, *Inquiry into Justice Responses to Sexual Violence* (June 2024) 18, citing Sexual Assault Services Victoria, *Justice Navigator Stakeholder Brief* (2024).
264 'SASVic welcomes the introduction of Justice Navigators as part of the government's new funding package', *Sexual Assault Services Victoria* (web page) <https://www.sasvic.org.au/news/justice-navigators>.

Other complementary and alternative approaches include community-led and driven initiatives, such as the establishment of victim survivor hubs,[265] First Nations healing circles[266] and healing centres.[267]

16.4.5 Submissions from legal stakeholders

While not a focus of consultation, several submissions from participants in consultation sessions held by the Council were concerned that current justice responses are failing victim survivors and that the current response to sexual violence is in need of reform.

Comment was consistently made regarding the small number of cases that are reported, successfully prosecuted and make it to sentence. The adequacy of sentencing responses was viewed as an issue not just of ensuring the sentence imposed in an individual case reflected the harm caused and met the broader purposes of sentencing, but what it signalled to victim survivors about whether it was 'worth' reporting these offences at all.

TASC Social Advocacy ('TASC') and LAQ both reinforced the importance of recognising factors that contribute to the commission of sexual violence offences. For example, TASC reflected:

> While a small proportion of individuals come into the world with the makings of psychopathy, it is much more likely that sexual violence stems at least to a significant degree to adverse experiences during development – experiences which include insecure attachment to maternal caregivers (frequently due to domestic and family violence or their own histories of trauma); direct and indirect exposure to violence; consistently harsh punishment; financial strains; and ongoing exposure to social networks where criminal [behaviour] is often the norm.
>
> Over time, these experiences contribute to a rising up of emotions such as anger, shame, impulsivity, lack of frustration tolerance, self-disregard, and antisocial [behaviours] – [behaviours] strongly associated with interpersonal violence, sexual violence, and the loss or shutting down of empathy and compassion towards others.[268]

In concluding that people 'carry society within them',[269] they reflected that:

> There is a strong likelihood that the criminal justice system cannot punish or deter its way out of the challenge presented by rape and other forms of sexual assault. While it may be effective for select individuals, it stands to increase criminogenic tendencies in many others. For individuals who were raised in violent and harsh environments, prison only confirms what these individuals already believe to be true. Deviant [behaviour] reflects both a deviant developmental environment and the overlay of social norms and belief systems which make it easier for these disordered inclinations to be rationalised and acted upon.[270]

TASC concluded that, within the context of current formal criminal justice responses, restorative justice processes have the greatest chance of 'proactively reducing the rate of rape and other forms of violent sexual assault. While important, it is also possible that society – through acts of sentencing if possible – look to ways of rehabilitating itself'.[271]

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265 See, for example, 'The Survivor Hub' (web page) <https://www.thesurvivorhub.org.au/>, although there are many examples of these forms of support services and networks established through not-for-profit and non-government organisations.
266 Many Young, 'Aboriginal Healing Circle Models' (National Indigenous Justice CEO Forum, 2007). This is based on the Canadian model of circle healing.
267 See Healing Foundation, 'Healing Centres' (web page) <https://healingfoundation.org.au/community-healing/healing-centres>.
268 Submission 22 (TASC Legal and Social Justice Services) 11.
269 Ibid 15.
270 Ibid 14.
271 Ibid 15.

To effectively reform the behaviours of people who commit these offences and to effect proactive change within the broader Queensland community society, TASC recommended that regard be had to:[272]

- assessing lengths of incarceration based on understanding that less punishment and not more may aid in efforts towards rehabilitation;
- increased use of community orders where programs are invested in ideas of therapeutic justice and offender related [pre-rehabilitation] (programs aimed at potential offenders and communities and [neighbourhoods] at risk before crime happens);
- when safe to do so, [educating] offenders not only so that they can better control themselves, but so they can pass this information on to younger generations at risk;
- [the use] of rehabilitation programs that stress accountability while also acknowledging the ways in which criminal [behaviour] develops in people;
- as part of [pre-rehabilitation] sentencing, [suggesting] the use of parenting support programs targeting families at risk due to parental stressors and structural inequity;
- in cases of offenders with wealth, [providing] fines where the funds go to supporting [pre-rehabilitative] programs;
- [the use] of specialised Sexual Violence Courts;
- sentencing offenders to accountability programs which also acknowledge the role of trauma and environmental factors in offending; and
- forming a collaboration between criminal law and public health law by finding creative ways to sentence offenders to participation in public health approaches to resolving the challenge of rape and sexual assault. Public health campaigns are able to confront society's rape culture and misogynistic myths.

LAQ also recognised that a 'history of systemic disadvantage and trauma is relevant to an understanding of at least some sexual offending and should therefore frame appropriate criminal justice responses'.[273] For example,

> the systemic 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.[274]

However, LAQ reflected that:

> 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.[275]

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272 Ibid 15–16 (references omitted).
273 Submission 23 (Legal Aid Queensland) 6.
274 Ibid 5.
275 Ibid 9.

It was further recognised that, absent of these 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'.[276]

In its preliminary submission, Sisters Inside recommended that the Council consider alternative models to the adversarial system of criminal justice, such as transformative justice models that seek 'real justice without reliance on the court systems'.[277] Their formal submission built on this initial position.

In its submission, Sisters Inside expressed its view that 'the criminal punishment system in Australia is not "broken" or "failing"', but rather working as it is intended to in order to 'contain, control and criminalise those in marginalised communities, particularly First Nations people'.[278] A call was made for Queensland to 'boldly reimagine how responses to sexual violence could look'.[279]

Three issues were highlighted within the current justice system for sexual violence offences, including that it is: [280]

- failing to meet the needs of most victim survivors;
- not supporting those who cause harm to take responsibility and account for their behaviour to reduce the likelihood of recidivist behaviour; and
- doing nothing to respond to or address 'cultural norms of patriarchal white supremacy that encourage sexual violence'.

Sisters Inside told us that many victim survivors of sexual violence want 'their story to be validated, their voice and agency respected, for the person who harmed them to take accountability for their behaviour, and for what occurred to not happen again', rather than seeking imprisonment or punishment. As current processes are focused on punishment, it was suggested they may not meet their needs.[281] Responding to people who caused harm through the traditional criminal justice system, it was suggested, results in them denying their behaviour, which makes it harder for victim survivors to receive help.[282]

It was also acknowledged that sexual violence offences affect everyone in the community, and that the community has a responsibility to help support the victim survivor, and to hold the perpetrator to account.[283] Suggestions for how the community can help can 'range from challenging cultural norms that enable and excuse sexual violence, such as racism and misogyny, to providing people with stable, housing, employment, food and education as pathways to strengthening individuals and their communities'.[284]

Sisters Inside advocated for consideration of transformative justice options that are flexible and responsive to the needs of all parties, as well as within the circumstances. [285] Options include providing avenues for victim survivors and their perpetrator to each be supported (potentially by members of their

276 Ibid 10.
277 Preliminary submission 28 (Sisters Inside) 3.
278 Submission 32 (Sisters Inside) 2.
279 Ibid 3.
280 Ibid.
281 Ibid 1.
282 Ibid 3.
283 Ibid 6.
284 Ibid.
285 Ibid 7.

family or friends), and to meet with each other at an earlier stage to attempt to resolve the harm through agreed outcomes or actions.[286]It was acknowledged that this process could take years to resolve.

While restorative justice pathways require perpetrators of harm to participate on a voluntary basis, transformative justice outcomes may deliver a response that does not necessarily require their participation, but still meets the needs of victim survivors. An example was given of where the perpetrator is 'made aware of their victims perspectives and face[s] community consequences, with the victim feeling heard, acknowledged and respected', which they suggested as a more successful outcome than by making use of the 'criminal punishment system'.[287]

In their subsequent submission, Sisters Inside reiterated the view that a model of transformative justice could include strategies focused on healing (such as mediation or healing circles) which are undertaken in appropriate circumstances (where both parties are agreeable) and with adequate support to resolve matters which would otherwise be dealt with by the courts.[288] Sisters Inside noted that this could be particularly beneficial for domestic and family violence matters.[289]

Basic Rights Queensland also reflected that it supports the facilitation of community restorative justice programs for rape and sexual assault matters to support victim survivors.[290]

Aboriginal and Torres Strait Islander Advisory Panel members' views

Members of the Council's Aboriginal and Torres Strait Islander Advisory Panel made several observations about current system responses, including that the reality is that no matter how long the sentence is, people will not view this as long enough.[291]

The Panel expressed a similar view that people are not sent to prison for rehabilitation, but rather for containment and to ensure community safety. It was recognised that prison is not a deterrent, and that there are other factors also that come into play, such as mental health considerations, a person's wellbeing and life circumstances that must be addressed to respond to sexual violence.[292]

The Panel recommended that the overarching question should be 'How can we ensure public safety and what will be effective in achieving rehabilitation to stop people from reoffending?' Within this context, the Panel advocated for responses to sexual violence that enhance perpetrator accountability as well as healing and harmony for the community. In doing so, they advocated for a model that holds the person responsible for their actions to account, then enables all parties to move on, heal and understand the trauma caused by these offences, while bringing a better awareness to sexual violence offending. [293]

The Panel recommended taking a cohesive approach in responding to sexual violence and avoiding siloed responses that fail to take into account the ripple effects. It was also considered critical that Human Rights Act considerations are taken into account, recognising that we need to do this right, and to start bringing in earlier and better responses to address sexual violence offending.[294]

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286 Ibid.
287 Ibid 8.
288 Preliminary submission 28 (Sisters Inside) 3.
289 Ibid.
290 Submission 19 (Basic Rights Queensland) 4.
291 Meeting of the Aboriginal and Torres Strait Islander Advisory Panel, 18 April 2024.
292 Ibid.
293 Ibid.
294 Ibid.

16.5 The Council's view

Key Finding

19. **Complementary and alternative approaches to traditional criminal justice processes may offer opportunities to better respond to victim survivors' justice needs and should be explored**

Complementary and alternative approaches to traditional criminal justice system responses, such as restorative or transformative justice, may offer an opportunity to better respond to the various justice needs of victim survivors. Provided victim survivors wish to participate, and these processes are appropriately managed, they may encourage healing and recovery within a safe environment that encourages perpetrators to take responsibility for their actions and enables victim survivors to have their voice heard and their experiences acknowledged and validated.

See **Recommendations 25 and 26**.

In considering whether the current penalty and sentencing framework provides an appropriate response to sexual violence offending in Queensland, or whether complementary and alternative approaches should be considered, the Council reflected on the findings in **Chapter 13** that traditional criminal justice system responses can operate in a way that is anti-therapeutic for victim survivors of rape and sexual assault, and can result in their re-traumatisation (**Key Finding 12**). In finding this sentencing 'problem', it was important for the Council to consider and 'advise on options for reform to the current penalty and sentencing framework to ensure it provides an appropriate response to this type of offending'.

We recognise that the criminal justice system, and the sentencing process more specifically, play an important role in maintaining order, reinforcing important collective societal values and providing a sense of justice within the Queensland community by responding to wrongdoing. In responding appropriately to criminal offending, the criminal justice system has an important and pivotal role to play in maintaining the rule of law.

There are few other rights more important to protect than preserving people's right to privacy and sexual and bodily integrity and autonomy. As discussed in **Chapters 6 and 7,** offences of sexual assault and rape constitute a serious violation of these rights. For this reason, the most appropriate resolution of a complaint made to police of sexual offending in most cases will be the prosecution of the person alleged to have committed the offence and, where a conviction follows, a penalty being imposed through the sentencing process.

At the same time, we recognise there are many occasions where criminal justice processes and outcomes fail to meet the needs of victim survivors. By limiting victims' involvement, the criminal justice system fails to allow victims to 'speak to their experience and emotions surrounding the crime, in an environment that feels safe and supportive' or to express their anger and desire for retribution 'in a way which may be raw or unconstrained', which may be an important part of their recovery and healing process.[295] Critics of current responses suggest that responding to the first need may not be possible with direct perpetrator

[295] Lacey and Pickard (n 258) 234. Similar comments were made during Victim survivor support advocate interview 3.

participation, while the second may be 'counter-productive to the therapeutic task of enabling offenders to take responsibility and begin to change'.[296]

We further acknowledge that most sexual violence offending goes undetected and unreported, and even when a complaint is made, a very small proportion of cases result in a criminal conviction being secured and the person being sentenced. On the basis of research undertaken by BOCSAR based on NSW data, the rate of conviction and sentence of sexual assault offences may be as low as 7 per cent, and possibly even lower.[297] As discussed in **Chapter 2**, some victim survivors also may be reluctant to report a sexual violence incident due to their concerns about going through the justice system process, fears about the potential consequences of reporting, including loss of familial relationships, and loss of housing and community, or even the implications for the person who may have perpetrated the harm against them.

In this context, we consider that alternative and complementary approaches to responding to sexual violence offending may offer an opportunity to better respond to the various justice needs of victim survivors while also promoting perpetrator accountability and placing a focus on addressing the underlying factors associated with that person's offending (see **Recommendations 25 and 26**).

Bringing together victims of crime, perpetrators of sexual violence and communities through these approaches serves to promote purposes of sentencing outlined in section 9(1) of the PSA, including with respect to the rehabilitation of the person being sentenced, and to recognise the harm done to victim survivors, as well as seeking to restore their dignity and repair relationships (where possible and appropriate).

Various models might be considered, of which restorative and transformative justice, which are discussed in this chapter, are just two.

In supporting the consideration of these complementary or alternative pathways, we recognise the significant work underway in Queensland to give effect to the WSJ Taskforce recommendations, including to expand the availability of ARJC, supported by a new legislative framework, and the commitment to progress a pilot restorative justice program for adult sexual and domestic and family violence offences.[298]

We also acknowledge the work undertaken by the ALRC in its current national inquiry into justice responses to sexual violence, which requires consideration of 'alternatives to, or transformative approaches to, criminal prosecutions, including restorative justice, civil claims, compensations schemes and specialist court approaches'.

Findings from these reviews should inform consideration of our recommendations (**Recommendations 25 and 26**).

296 Ibid.
297 Gilbert (n 2). Differences were found between attrition rates for offences against adults and children and contemporary and historic child sexual assaults.
298 *Hear Her Voice, Report Two* (n 43) recs 90-92.

16.5.1 Enhancement of the current ARJC model

Recommendations

25. Adult restorative justice program

The new legislative framework and pilot adult restorative justice program, once established, should incorporate the following features as it applies to sexual assault and rape offences:

a) Restorative justice processes should be available at any stage of the criminal justice process, but should be victim-centred and prioritise the needs and interests of victim survivors while also responding to the needs of defendants.

b) Assuming a new legislative framework is established, a legislative model, such as exists under the *Crimes (Restorative Justice) Act 2004* (ACT), should be considered to allow for any outcomes of pre-sentence restorative justice processes to be taken into account at sentence.

c) At sentence, a court should not be permitted to take into account the fact that the person chose not to take part, or not to continue to take part, in a restorative justice process for the offence [see s 34(1)(h) of *Crimes (Sentencing) Act 2005* (ACT)].

d) Flexibility should be provided regarding the mode of delivery – for example, personal attendance at a conference, the exchange of letters, mediated communications between the complainant and the perpetrator or other suitable process.

e) Principles such as those that apply in New Zealand to restorative justice for sexual offences, and recommended by the Victorian Law Reform Commission in its report on improving the justice system response to sexual offences, should be developed to guide practice.

f) As recommended by the Women's Safety and Justice Taskforce in its report *Hear Her Voice - Report Two: Women and Girls' Experiences Across the Criminal Justice System* (2022) (recommendation 91), the legislative framework for adult restorative justice in Queensland should be co-designed with people with lived experience, Aboriginal and Torres Strait Islander people, and service and legal system stakeholders, adopting a victim-centric approach. Such framework should:

   i) articulate overarching principles for the use of restorative justice in adult criminal cases, with particular principles and safeguards for its use in relation to sexual offences and domestic and family violence-related offences;

   ii) set out operational processes, including a clear framework for referrals and suitability assessment processes set out how restorative justice interacts with the criminal justice system;

   iii) establish criteria and processes to assess the qualifications, expertise and suitability of convenors and provide for their functions and powers;

   iv) consider the diverse needs of victim survivors, including First Nations victim survivors, and how best to structure the framework to meet individual needs;

   v) provide adequate protections and safeguards for participants, underpinned by a gender-sensitive and trauma-informed approach.

We acknowledge and support the work currently underway to legislate a formal adult restorative justice model in Queensland and that such a model should be available for sexual violence matters as recommended by the WSJ Taskforce.

However, it is critical that safeguards are established to enable these processes to be made readily accessible and safe at any stage of the criminal justice process for victim survivors of sexual violence. In particular, such framework should, as recommended by the WSJ Taskforce:

- articulate overarching principles for the use of restorative justice in adult criminal cases, with particular principles and safeguards for its use in relation to sexual offences and domestic and family violence-related offences;
- set out operational processes, including a clear framework for referrals and suitability assessment processes set out how restorative justice interacts with the criminal justice system;
- establish criteria and processes to assess the qualifications, expertise and suitability of convenors and provide for their functions and powers;
- consider the diverse needs of victim-survivors, including First Nations victim survivors, and how best to structure the framework to meet individual needs;
- provide adequate protections and safeguards for participants, underpinned by a gender sensitive and trauma-informed approach.

Restorative justice should be victim-centric, trauma-informed and prioritise the needs of victim survivors

A key finding of our review has been that current justice processes are not victim-centric, resulting in feelings of exclusion, despite being directly impacted by the offence. However, if restorative justice conferencing processes are to offer a complementary or alternative model, victim survivors must be given control and agency over the process. This includes ensuring any processes only proceed where the victim survivor is fully informed of what to expect and on being informed of this, expresses an individual desire to participate in the process without undue pressure placed on them by external parties to do so. They must have an opportunity to have their voice heard without restrictions, and to have the harm caused to them appropriately understood and acknowledged.

Importantly, sexual violence offences are not like other forms of offending, such as property offences. Restoring the harm caused by sexual offending is to some degree an unattainable and unrealistic objective. The fact that we heard that some YRJC conference organisers are drawing analogies between these very different forms of offending and placing the burden on victim survivors to suggest ways the wrong against them can be remedied is deeply concerning.

We also acknowledge views that in the context of YRJC processes (when utilised for sexual violence matters), these processes can place too much focus on the rehabilitation of the offender without appropriate acknowledgement of the harm caused. This led one victim survivor to share her views that there had been no 'justice' at the conclusion of the process.

Many current processes involve direct contact and communication between victim survivors and their offenders, giving rise to significant risks of re-traumatisation associated with direct participation in these processes. A victim survivor may experience strong and overwhelming feelings when confronted by the person who has committed an act of sexual violence against them and may not be able to face them

within a conference setting. Where they do meet, there is also a risk of physical or verbal confrontations, manipulation of processes or power imbalances between the parties.

We acknowledge that the Queensland ARJC model seeks to minimise these risks by requiring a person to admit the offence and agree to the facts as proposed by the prosecution before a referral is made to ARJC processes and through the processes around the management of the conference. However, there remains a risk that the person will either completely deny the offending, or an aspect of it, within the conference setting, even if this was not the case prior to the conference, which may cause further trauma for a victim survivor, leaving them without the closure they might have been seeking.

The above issues are illustrative of the need to place a strong focus on ensuring that convenors and facilitators are appropriately trained and that they have the necessary skills to understand sexual violence offending and the impacts it has on both parties. This may also enable them to identify any risks that may arise, particularly with respect to potential power imbalances or concerns that the victim survivor has been pressured into participating in these processes. Ensuring the availability of specialist facilitators who are equipped to manage any risks of re-traumatisation is critical, as is identifying when a conference should be ended early to protect the psychological safety of either party, but particularly the victim survivor.

Whatever model is ultimately adopted, it is important that restorative justice models elevate the needs of victim survivors to ensure their safety is prioritised and their needs are met. Conferences should be structured in a way that prioritises their need to speak to their experience and emotions, to have the harm understood and acknowledged by their offender, and to contribute to the outcome agreement (where appropriate to do so). Victim survivors should have control over the process, including control to decide whether they wish to withdraw from proceedings or the terms under which they would like to engage. Conferences involving Aboriginal and Torres Strait Islander victim survivors and/or perpetrators should be managed, convened and run by First Nations-funded organisations and individuals operating under agreed guidelines.

Consideration should also be given to whether it is appropriate to allow restorative justice conferencing to occur in the absence of a victim survivor where they do not wish to participate (either through a victim survivor advocate or the person's representative), but the offender does - as was suggested by Legal Aid Queensland. [299] If permitted, further regard must be had to how this should influence the sentence outcome.

Participation must be voluntary for both parties

Participation in restorative justice must be voluntary, and not coerced or influenced, to ensure that both parties have a sense of control over their participation, as well as any outcome from this process.[300]

It is therefore important for victim survivors and defendants to be provided with sufficient information to make an informed decision regarding whether restorative justice is an appropriate mechanism for them to engage with:

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299 Submission 23 (Legal Aid Queensland) 34.

300 Marie Keenan, 'Training for Restorative Justice Work in Sexual Violence Cases' (2018) 1(2) *The International Journal of Restorative Justice* 291, 292

- For victim survivors, this includes an understanding that restorative justice may not necessarily yield a particular justice outcome, and that their offender's participation may benefit them at sentence.
- For defendants, restorative justice requires an acceptance of responsibility and a willingness to be accountable for their offending and the impact it has had on the victim survivor, as well as the reality of the victim survivor's experience, which may be different from their own.

Legislated consideration at sentence, with no negative consequences for the perpetrator

Provided that participation is voluntary, information regarding a person's participation in a restorative justice conference ought to be provided to the judicial officer for consideration at sentence to incentivise the offender's 'meaningful engagement in the process'.[301] Such information could include whether the person engaged with the process and whether the terms of any outcome agreement have been met or any progress made.[302]

We also recognise the pre-sentence restorative justice processes involved in the YRJC model, which have assisted the court in determining the most appropriate sentence by considering participation to be an element in their favour, provides information for consideration in developing a legislative model.[303]

However, in recognition of the fundamental right of an accused person to be presumed innocent until found guilty within the Queensland adversarial criminal justice system, an accused person must be permitted to withdraw from participating in this process at any point without there being any negative consequences within the criminal prosecution process.

In developing a model for Queensland, regard should be had to the approach in taken in the ACT, which permits the court to consider any agreements reached in sentencing the person, but which prevents any negative inference being drawn where they do not participate, or withdraw from, restorative justice processes.[304]

Greater flexibility and resourcing is required

Information proved throughout this review on the application of current ARJC processes in Queensland highlights some of the challenges that are likely to arise in the development of the new restorative justice model, including issues surrounding current delays for ARCJ referrals, limited access to existing programs outside of specific delivery locations and issues with the availability of suitable community-based treatment options.

The Council recognises that these challenges will likely continue without a commitment by the government of significant additional funding and resourcing and consideration being given to alternative modes of delivery.

The framework adopted must also be sufficiently flexible to respond to the unique needs of victim survivors, rather than limiting the form, mode of delivery and outcomes available. For example, options should be made available to enable personal attendance at a conference, the exchange of letters,

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301 Submission 23 (Legal Aid Queensland) 32–3; Submission 21 (Dispute Resolution Branch) 3.
302 Submission 23 (Legal Aid Queensland) 33.
303 Submission 30 (Youth Advocacy Centre) 9.
304 *Crimes (Sentencing) Act 2005* (ACT) s 34(1)(h).

mediated communications between the complainant and the perpetrator or any other suitable process determined.

We endorse comments made by the WSJ Taskforce that these processes also must be appropriately funded to enable equal access across the state.

Principles should be developed to guide the implementation of ARJC processes

While we are mindful of the considerable risks inherent in these processes, not least due to the power imbalances involved and potential for these processes to cause secondary trauma, we are of the view that these risks can be managed through the implementation of an appropriately designed principle-based scheme - similar to the position taken by the Victorian Law Reform Commission in New Zealand.

We support the current development of a Restorative Justice Sexual and Gender-based Violence practice guide and this being supported with appropriate professional development and training for all stakeholders involved, including referring agencies and individuals. We acknowledge the important inclusion in the New Zealand Restorative Justice Standards for Sexual Violence cases of new principles underpinning their practice standards that emphasise the needs of sexual offence and family violence participants:

- The process is victim/survivor driven. It respects the right of the victim/survivor to hold the offender accountable. It recognises re-balancing of power between the victim/survivor and the offender as a key to victim healing.
- Processes are designed to maximise both the opportunity to experience a sense of justice and the chances for healing, and to minimise chances for harm.[305]

We recommend that a Queensland-based practice guide also given consideration to the inclusion of additional guidance and principles, where appropriate, for processes that are to involve Aboriginal and Torres Strait Islander participants, including family members, and for people from other cultural backgrounds or disadvantaged and marginalised communities, such as people with cognitive disability and LGBTQIA+ people.

The legislative framework should be co-designed with members of the community

As recommended by the Women's Safety and Justice Taskforce in *Hear Her Voice – Report Two* (Recommendation 91), the legislative framework for adult restorative justice in Queensland should be co-designed with people with lived experience, Aboriginal and Torres Strait Islander people, and service and legal system stakeholders, adopting a victim-centric approach.

This aspect of this work is critical and should be continued.

We also acknowledge the work being undertaken by the ALRC in its current national inquiry into justice responses to sexual violence, which requires consideration of 'alternatives to, or transformative approaches to, criminal prosecutions, including restorative justice, civil claims, compensations schemes and specialist court approach'.

Findings from these reviews should inform consideration of the Council's recommendations.

The Terms of Reference required the Council to 'advise on options for reform to the current penalty and sentencing framework to ensure it provides an appropriate response to this type of offending'. Within this

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[305] Ministry of Justice, *Restorative Justice Standards for Sexual Offending Cases* (Report, July 2013) 20.

context, the Council has recommended the consideration of transformative justice approaches as an alternative to the criminal justice system (**Recommendation 25**).

Feedback to the Council has reinforced the need to take care in the broader adoption of restorative justice processes for sexual violence matters and for appropriate safeguards to be put in place, particularly to ensure that the process prioritises the needs and interest of victim survivors and does not put them at risk of further harm. This feedback suggests a need for all stakeholders to be engaged throughout the process of developing the new legislative framework and pilot program to ensure there is clarity about the intended operation of the new program, including referral pathways and a supporting service-delivery model, and its potential benefits for victim survivors and defendants are understood to promote referrals being made in appropriate cases.

16.5.2 Alternative and complementary justice processes

Recommendations

26. **Alternative and complementary justice approaches**

Taking into account any outcomes of the Australian Law Reform Commission's current inquiry into justice responses to sexual violence, the Queensland Government consider exploring the merits and appropriate resourcing arrangements in support of alternative approaches to traditional criminal justice system responses to sexual violence offences to provide victim survivors with alternative avenues for healing and recovery, which also are effective in promoting perpetrator accountability.

Such approaches should be viewed as supplementary to existing criminal justice system responses and be victim survivor centred. They might include, for example, victim-centred approaches, including victim navigator schemes, victim survivor hubs, community-based restorative justice programs and transformative justice approaches.

As discussed above, many aspects of the criminal justice system do not operate in a way that meets the needs and interests of victims. It may be that the current system, which is designed to prosecute offences on behalf of the state, rather than the victim, and to hold perpetrators accountable for their behaviour, will never fully meet the needs of victim survivors, even if significant reforms are initiated.

In some cases, victim survivors may choose not to disclose the sexual offending at all if the choice is between going through the criminal justice process or not, and if there may be concerns about the consequences for the person who has harmed them in circumstances where they wish the relationship to continue – such as in the context of offending involving adult intimate partners or friends.

We are strongly supportive of reforms recommended by the WSJ Taskforce to improve current responses to sexual violence to improve the system's operation and promote better outcomes. At the same time, we accept that there will continue to be cases that will not result in a formal complaint being made, where the victim survivor may decide they do not wish to proceed or, for evidential reasons, the prosecution does not continue or a conviction is not secured.

In these cases, it is important that alternative and complementary pathways be offered to ensure victim survivors get the support and assistance they need to recover, and those who cause harm take responsibility for their actions and address the causes of their offending behaviour.

We do not consider one model superior to any others, and further investigation is required. It is likely that a range of options will work better in meeting the diverse needs and interests of victim survivors and perpetrators of sexual violence rather than just one.

Those models that may be considered include victim-centred approaches, including victim navigator schemes, victim survivor hubs, community-based restorative justice programs and transformative justice approaches.

Such approaches should be viewed as supplementary to existing criminal justice system responses rather than replacements.

16.5.3 Applying the Council's fundamental principles

The following principles relate to applying the Council's fundamental principles guiding the review[306] to the issues raised with respect to extending enhanced restorative justice pathways to apply to offences of rape and sexual assault to address **Key Finding 19**, and in making **Recommendations 24** and **25**.

- **Principle 1: Reforms to sentencing laws should be evidence-based with a view to promoting public confidence**: We have drawn on reports published by other research and law reform bodies regarding adult restorative justice processes in other jurisdictions, which have recognised the potential benefits of a well-developed, safe and victim-centric restorative justice process. We have also relied upon the evidence received through consultation with stakeholders, including victim survivors of sexual assault and rape to inform our key findings and recommendations. We note the conflicting views between victim survivors, victim support advocates, legal stakeholders and members of the broader community surrounding whether these processes are suitable for restorative justice conferencing, with some raising concerns that it does not reflect the seriousness of these offences, while others advocate its use – outlining benefits for both victim survivors and perpetrators of sexual assault and rape. The current evidence suggests that there is support for enabling complementary or alternative pathways, such as enhanced restorative justice processes and transformative justice approaches, to be made available for victim survivors to choose to engage with.
- **Principle 2: Sentencing decisions should accord with the purposes of sentencing as outlined in section 9(1) of the *Penalties and Sentences Act 1992* (Qld):** We have considered the purposes of sentencing in recommending that restorative or transformative justice pathways be further explored, recognising that they seek to provide a pathway to the rehabilitation of the person who committed the offence, as well as recognising the harm done to the victim survivor and attempting to restore their dignity and repair relationships (where possible and appropriate). These approaches align with the purposes of sentencing, while providing complementary or alternative pathways to traditional justice responses to crime.
- **Principle 3: Sentencing outcomes for sexual assault and rape offences should reflect the seriousness of these offences, including their impact on victims, while not resulting in unjust outcomes**: Stakeholders expressed concerns that ARJC pathways do not appropriately reflect the serious nature of sexual violence offending, and that they do not sufficiently punish or deter those who commit sexual violence from reoffending, as there are no real consequences for the offender,

306 For a full list of the fundamental principles, see Chapter 3.

and no sense of justice for victim survivors. However, reports published by research bodies reflect that restorative justice conferencing can have impacts through reduced recidivism, as well as providing the offender with a greater sense of understanding of the consequences of their actions.[307] The work being led to develop an appropriate practice guide for these forms of offending with appropriate supporting principles, together with supporting guidelines, training and professional development, may assist in addressing current identified risks of ARJC processes. Complementary justice approaches should also be developed with a focus on ensuring that the seriousness of sexual offending is not minimised and promotes appropriate outcomes that hold perpetrators accountable for their actions and recognise the harm caused by their offending.

- **Principle 4: People serving sentences in the community for a sexual offence should have appropriate supervision**: Some stakeholders raised concerns that current restorative justice processes do not enable sufficient monitoring of the offending person in the community for a sufficient period of time. Restorative justice processes, however, enable convenors to monitor the offender's interactions with a victim survivor within a safe environment and can assist them with behavioural changes through facilitated discussions. Participation in counselling services can also be required as part of conferencing agreement, ensuring that people who commit crimes have access to services to assist with their behavioural changes.
- **Principle 6: Reforms should take into account likely impacts on the disproportionate representation of Aboriginal and Torres Strait Islander people in the criminal justice system**: We are conscious that Aboriginal and Torres Strait Islander people are over-represented within the criminal justice system, and that any recommendations will likely have a significant impact on First Nations persons, both as perpetrators and as victim survivors of sexual violence. We have had regard to the views of the Panel that alternative processes that focus on healing and restoration should be explored. We have also considered the concerns they raised perceptions of sexual violence offences as being 'women's business', which limits the willingness of victim survivors to discuss their experience and may create a power imbalance within a conference setting. The Council has taken these concerns into account in recommending that the ARJC model in Queensland be co-designed with Aboriginal and Torres Strait Islander people to ensure that these concerns are considered and addressed. These same principles should be applied to any complementary programs, services and responses developed.
- **Principle 7: The circumstances of each person being sentenced, the victim survivor and the offence are varied. Judicial discretion in the sentencing process is fundamentally important**: We recognise that the justice needs of victim survivors and the circumstances of each offence, and each person who commits these offences, are varied. We believe that offering complementary and alternative processes to traditional justice outcomes provide more options with which victim survivors and perpetrators of sexual violence can engage, promoting individualised responses to crime and promoting more positive outcomes. Victim survivor choice within these processes should be retained.
- **Principle 8: Sentencing orders should be administered in a way that satisfies the intended purpose or purposes of the sentence. Services delivered under them, including programs and treatment, should be adequately funded and available across Queensland both in custody and**

307 See, for example, Lindsay Fulham et al, 'The effectiveness of restorative justice programs: A meta-analysis of recidivism and other relevant outcomes' (2023) *Criminology & Criminal Justice*.

in the community: In considering the availability and accessibility of restorative justice processes and complementary justice models, we have had regard to the information provided to us that current ARJC processes are not accessible to victim survivors and perpetrators of crime who live in regional, rural and remote areas of Queensland. This has informed the consideration of our recommendation that the new restorative justice model should be adequately resourced to ensure that Queenslanders have equitable access to these services, irrespective of where they live. This should also be an objective of any victim-centred services developed, while noting that what will work well in one location may not work so well in another.

- **Principle 9: Sentencing decisions for sexual assault and rape should be informed by the best available evidence of a person's risk of reoffending**: We have had regard to the views of some legal stakeholders that a person's participation in pre-sentence restorative justice processes, as well as any outcomes agreed upon, is a matter that is relevant to the court's assessment of a person's risks of reoffending and rehabilitative prospects. We support these outcomes being taken into account as appropriate at sentence.
- **Principle 10: Any reforms should aim to be compatible with the rights protected and promoted under the *Human Rights Act 2019* (Qld) ('HRA') or be reasonably and demonstrably justifiable as to limitations**: Restorative and transformative justice pathways promote a person's human rights, such as 'rights in criminal proceedings'.[308] This is discussed in more detail below.

16.5.4 Systemic disadvantage considerations

As discussed throughout this report, Aboriginal and Torres Strait Islander peoples are over-represented both as perpetrators of sexual assault and rape offences and as victims of this form of offending.

We consider opportunities to enhance the availability of restorative justice processes as an alternative or complementary approach to traditional criminal justice processes may have a significant, positive impact upon the criminal justice experiences of both Aboriginal and Torres Strait Islander victim survivors and perpetrators of sexual violence offences. In doing so, the Council acknowledges feedback received during this review that restorative justice processes are 'more culturally aligned and familiar' for some communities within Australia than traditional justice models[309] – including for Aboriginal and Torres Strait Islander peoples – and that these processes may also benefit people from culturally and linguistically diverse backgrounds.

It is important to recognise that the extent to which such processes may support better outcomes for Aboriginal and Torres Strait Islander defendants and victim survivors, including healing from the impacts of these offences, will likely depend on the design and delivery of such programs. Critically, we recognise the importance of ensuring that appropriate protections are built into their implementation to ensure the safety of victim survivors. The potential of such processes to perpetuate power imbalances, thereby further disempowering Aboriginal victim survivors, is particularly acute.[310] In this context, we acknowledge

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308 *Human Rights Act 2019* (Qld) s 32(2)(h) which provides a person is entitled 'to obtain the attendance and examination of witnesses on the person's behalf under the same conditions as witnesses for the prosecution'.

309 Submission 24 (QSAN).

310 Arielle Dylan, Cheryl Regehr and Ramona Alaggia, 'And justice for all? Aboriginal victims of sexual violence' (2008) 14(6) *Violence Against Women* 678, 680 citing Aileen Cheon and Cheryl Regehr, 'Restorative justice in cases of intimate partner violence: Reviewing the evidence' (2006) 1 *Victims and Offenders*; Kathleen Daly and Julie Stubbs, 'Feminist engagement with restorative justice' (2006) 10 *Theoretical Criminology*; Rashmi Goel, 'No women at the center: The use

the express recommendations of the WSJ Taskforce for the new Queensland model to be co-designed with people with lived experience and Aboriginal and Torres Strait Islander peoples, in addition to service and legal system stakeholders. Equitable access to ARJC processes across rural, regional and remote areas must be promoted to ensure that these processes are available for all Queenslanders.

Importantly, such processes should not be seen as a wholesale 'replacement' for the proper recognition of harm through traditional criminal justice system processes. The wishes of Aboriginal and Torres Strait Islander victim survivors, many of whom are women and children, must be paramount.

Members of the Council's Aboriginal and Torres Strait Islander Advisory Panel supported the consideration of restorative justice processes as a way of resolving or healing conflicts within the community while conveying a deeper understanding of the nature of the harm caused by sexual violence offending on the perpetrator. They further recognised the existence of cultural barriers that limit the reporting of sexual violence offences within community. Within this context, the Panel acknowledged the importance for women and children within these communities of having the offending person stop their behaviour, rather than necessarily seeking that they be incarcerated or otherwise punished.

In considering the development of an enhanced model, the Panel outlined various factors that should be considered, including the importance of ensuring ARJC processes are victim-led and driven, and that they respond to the unique justice needs of the victim survivor, including the need to receive a genuine (as opposed to tokenistic) apology from their offender, and to understand how this will be taken into account at any sentence hearing. Aboriginal and Torres Strait Islander victim survivors should be supported throughout the process by an Aboriginal and Torres Strait Islander person. Cultural concerns with respect to the 'shame' of sexual violence offending must be considered.

16.5.5 Human rights considerations

Restorative justice processes have been recognised as sharing 'common principles [with human rights] such as empowerment, inclusion, participation and individual responsibility'.[311]

The enhancement of restorative justice and transformative justice approaches seeks to promote human rights, including the rights of victims enshrined within the Charter of Victims' Rights, to be treated with 'courtesy, compassion, respect and dignity, taking into account the victim's needs'.[312] It also addresses the needs of perpetrators of criminal offences, by providing them with an opportunity to understand their offending and the impacts on the victim survivor.

Specifically, our recommendations seek to empower victim survivors by providing them with enhanced agency over the way the justice system responds to the harm they have suffered, as well as providing them with opportunities to have their voice heard within an environment where they are believed, and that encourages healing. The recommendations support alternative pathways for victim survivors based on their individual needs.

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of the Canadian sentencing circle in domestic violence cases (2000); 15 *Wisconsin Women's Law Journal*; Julie Stubbs, 'Domestic violence and women's safety: Feminist challenges to restorative justice' in Heather Strang and John Braithwaite (eds), *Restorative Justice and Family Violence* (Cambridge University Press, 2002).

311 Theo Gavrielides (ed), *Human Rights and Restorative Justice* (Restorative Justice for All Publications, 2018) 7.

312 *Victims' Commissioner and Sexual Violence Review Board Act 2024* (Qld), sch 1 ('Charter of Victims' Rights').

With respect to those who have caused harm, the recommendations of the Council would not result in any direct limitations being placed on a person's 'rights in criminal proceedings'.[313] However, the Council recognises that enhancements to ARJC has the potential to impinge upon the rights of perpetrators where appropriate safeguards are not built in.

In considering reforms to current restorative justice principles, the Council supports the consideration of the comprehensive set of standards and principles developed by Braithwaite.[314] The first of these categories, described as 'constraining standards', includes non-domination, empowerment, equal concern for all stakeholders, accountability, appealability and respect for human rights. These underpin the management of restorative justice encounters and may operate to promote rights protected under the HRA, such as:

- recognition and equality before the law (s 15);
- protection from torture and cruel, inhuman or degrading treatment (s 17);
- right to privacy and reputation (s 25);
- cultural rights (ss 27–28); and
- right to a fair hearing (s 31).

The second category of standards comprises 'maximizing standards', which include the restoration of relationships, emotional restoration and prevention of future harm/injustice (the achievement of which is conditional on the circumstances, wishes and capabilities of the parties).

The final category consists of 'emergent standards', such as remorse, apology, censure of the act, forgiveness and mercy (which it is suggested should 'only arise organically' and not be forced).

Maximising standards and emergent standards are described as representing the outcomes of restorative justice processes. While these are not guaranteed, advocates suggest they are more likely to be achieved through a restorative justice process than through traditional criminal justice processes.[315]

It is also important that such programs be continually evaluated to ensure that the rights of all participating parties are protected.

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313 *Human Rights Act 2019* (Qld) s 32(2)(h) which provides a person is entitled 'to obtain the attendance and examination of witnesses on the person's behalf under the same conditions as witnesses for the prosecution'. This right may be relevant to sentencing laws and policies, which affect the admissibility of evidence and restrict access to information and material to be used as evidence.

314 John Braithwaite, 'Setting Standards for Restorative Justice' (2002) 42(3), *British Journal of Criminology* 563.

315 Meredith Rossner, 'Restorative Justice in the Twenty-First Century: Making Emotions Mainstream' in Alison Liebling, Shadd Maruna and Lesley McAra (eds), *The Oxford Handbook of Criminology* (7th ed, Oxford University Press, 2023) 725, 732.

PART E: Other considerations and enhancing the evidence base

Contents

PART E: Other considerations and enhancing the evidence base

Chapter 17 – Issues impacting human rights and people who experience disadvantage and discrimination

17.1 Introduction

The Council has been asked to 'advise whether the legislative provisions that the Queensland Sentencing Advisory Council reviews in the *Penalties and Sentences Act 1992* (Qld) [('PSA')], and any recommendation are compatible with rights protected under the *Human Rights Act 2019* (Qld) [('HRA')]'.[1]

Where the Council has made a recommendation in this report, its compatibility with HRA and the impact of the recommendation on the disproportionate representation of Aboriginal and Torres Strait Islander people is discussed in the relevant 'Council views' section.

The purpose of this section is to discuss whether there are any issues with provisions under the PSA or other aspects of sentencing being compatible with the HRA or disproportionately impacting Aboriginal and Torres Strait Islander persons, which is not part of a Council recommendation.

17.1.1 The current position

The HRA protects and promotes 23 identified human rights.[2] One way it achieves this is by 'stating the human rights Parliament specifically seeks to protect and promote'[3] and 'requiring statements of compatibility with human rights to be tabled in the Legislative Assembly for all Bills introduced in the Assembly'.[4] The HRA also provides, in exceptional circumstances, for Parliament to override the application of the HRA to a statutory provision.[5]

A statutory provision is compatible with rights if it does not limit a right; or, if it does, the limitation 'is reasonable and demonstrably justifiable'.[6] The limitation must be reasonable and 'demonstrably justified in a free and democratic society based on human dignity, equality and freedom'.[7] This includes a consideration of:

> a)the nature of the human right;
>
> b) the nature of the purpose of the limitation, including whether it is consistent with a free and democratic society based on human dignity, equality and freedom;
>
> c) the relationship between the limitation and its purpose, including whether the limitation helps to achieve the purpose;
>
> d) whether there are any less restrictive and reasonably available ways to achieve the purpose;

1 Appendix 1, Terms of Reference, 3.
2 *Human Rights Act 2019* (Qld) s 3(a) ('HRA').
3 Ibid s 4(a).
4 Ibid s 4(c).
5 Ibid ss 4(e), 43, 45. See, for example, *Youth Justice Act 1992* (Qld) s 150A. This provision will automatically expire (meaning that it no longer applies) after 5 years unless Parliament chooses to re-enact the override declaration.
6 Ibid s 8.
7 Ibid s 13(1).

> e) the importance of the purpose of the limitation;
>
> f) the importance of preserving the human right, taking into account the nature and extent of the limitation on the human right;
>
> g) the balance between the matters mentioned in paragraphs (e) and (f).[8]

The HRA came into full effect on 1 January 2020.[9] Legislation and amending provisions introduced prior to the HRA would have had regard to the 'fundamental legislative principles' set out in the *Legislative Standards Act 1992* (Qld).

17.2 Rights of victim survivors

Rape and sexual assault offences involve a serious breach of human rights:

> Rape is a violation of a range of human rights, including the right to bodily integrity, the rights to autonomy and to sexual autonomy, the right to privacy, the right to the highest attainable standard of physical and mental health, women's right to equality before the law and the rights to be free from violence, discrimination, torture and other cruel or inhuman treatment.[10]

The High Court has recognised that an important role of sentencing is to denounce the person's wrongful conduct and to deliver punishment, thereby recognising the breach of a victim's human rights:

> A fundamental purpose of the criminal law, and of the sentencing of convicted offenders, is to denounce publicly the unlawful conduct of an offender. This objective requires that a sentence should also communicate society's condemnation of the particular offender's conduct. The sentence represents 'a symbolic, collective statement that the offender's conduct should be punished for encroaching on our society's basic code of values as enshrined within our substantive criminal law'. In the case of offences against children, which involve derogations from the fundamental human rights of immature, dependent and vulnerable persons, punishment also has an obvious purpose of reinforcing the standards which society expects of its members.[11]

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

- the right to enjoy human rights without discrimination;[12]
- the right to protection from torture and cruel, inhuman or degrading treatment;[13]
- the right to privacy and reputation;[14]
- the protection of families and children;[15]
- cultural rights, including cultural rights of Aboriginal peoples and Torres Strait Islander peoples;[16] and
- the right to liberty and security of person.[17]

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8 Ibid s 13(2).
9 *Proclamation No 2 – Human Rights Act 2019 (commencing remaining provisions) 2019* (Qld) (SL 2019 No 224). Some provisions commenced on assent (7 March 2019) others on proclamation (1 July 2019) and remaining provisions (1 January 2020).
10 Dubravka Simonovic, Special Rapporteur on Violence Against Women and Girls, its Causes and Consequences, *Rape as a Grave, Systematic and Widespread Human Rights Violation, a Crime and a Manifestation of Gender-Based Violence Against Women and Girls*, UN Doc A/HRC/47/26 (19 April 2021), 5 [20] ('UN Rape as Systematic Human Rights Violation').
11 *Ryan v The Queen* (2001) 206 CLR 267 [118] (Kirby J) (footnotes omitted).
12 HRA (n 2) s 15(2).
13 Ibid s 17.
14 Ibid s 25.
15 Ibid s 26.
16 Ibid ss 27–8.
17 Ibid s 29.

While the rights in the HRA do not apply specifically to victim survivors, the rights of victims in Queensland are recognised in the Charter of Victims' Rights.[18] These rights, while not legally enforceable,[19] have been considered in the assessment of the appropriateness and adequacy of sentencing practices as part of the Council's review.

The Legal Affairs and Safety Committee inquiry into support provided to victims of crime recommended that the Queensland Government consider whether the Charter of Victims' Rights should be incorporated into the HRA.[20] This change was supported by stakeholders, including the Women's Legal Service Queensland and knowmore, which submitted that victims' rights should be recognised in the HRA and should be legally enforceable.[21]

The Council received submissions advocating for the sentencing process to recognise the human rights of the victim survivor.[22]

Similar concerns were expressed at the time the Human Rights Bill was developed. The then Attorney-General, in her second reading speech introducing the Bill, stated:

> Some submissions were concerned that the bill focuses too much on the rights of defendants to criminal charges and that explicit rights for victims of crime should be articulated. This particular bill, however, is not just the best vehicle for that commitment. This bill does not privilege or elevate the rights of criminal defendants over the rights of victims in the criminal process. Rather, the government explicitly delivered on this commitment with the introduction in 2016 and passage of the Victims of Crime and Other Legislation Amendment Act 2017.
>
> Human rights in the bill are not absolute. The general limitations provision, clause 13, recognises that human rights may be subject to reasonable and demonstrably justifiable limits. Implied legitimate reasons for limiting human rights, as drawn from human rights jurisprudence, include community safety and the protection of the rights of others including, for example, children and victims of domestic violence.
>
> Clause 12 of the bill also clarifies that the human rights in the bill are in addition to other rights and freedoms included in other laws, meaning that victims' rights that are contained in other sources of law will continue to apply. In this regard, the committee noted the victims' rights charter in the Victims of Crime Assistance Act 2009 and the existing complaints mechanism that is available under the victims' rights charter, as I referred to earlier.[23]

The Council agrees that the same fundamental human rights protected under the HRA apply equally to victims and survivors, including children, and other members of the Queensland community.

An independent review of the HRA was initiated in February 2024 to assess the effectiveness of the current provisions in the Act, including any issues that have arisen regarding its operation. As recommended by the Women's Safety and Justice Taskforce and the Legal Affairs and Safety Committee, the review was asked to consider whether recognition of victims' rights under the Charter of Victims'

18 *Victims' Commissioner and Sexual Violence Review Board Act 2024* (Qld) sch 1.
19 Ibid s 43. If a person feels their rights under the Charter of Victims' Rights has not been upheld, they can make a complaint: ch 3, pt 3.
20 Legal Affairs and Safety Committee, Queensland Parliament, *Inquiry into Support provided to Victims of Crime* (Report No 48, 57th Parliament, May 2023) rec 3.
21 Ibid 4. In its submission to the inquiry, the Women's Legal Service Queensland ('WLSQ') supported victims charter principles being enforceable legal rights in addition to amendments being made to the HRA: WLSQ, Submission No 32 to Legal Affairs and Safety Committee, Queensland Parliament, Inquiry into Support provided to Victims of Crime (12 April 2023).
22 Submission 20 (DV Connect); Submission 24 (QSAN); Submission 22, Chapter 1 (TASC (Legal and Social Justice Services)).
23 Queensland, Parliamentary Debates, Legislative Assembly, 31 October 2018, 26 February 2019, 377–8 (Yvette D'Ath, Attorney-General and Minister for Justice).

Rights should be incorporated into the Act.[24] The review report has been finalised and will be tabled in Parliament.[25]

In **Chapter 13**, we noted that the Women's Safety and Justice Taskforce also recommended a review be undertaken of the Charter of Victims' Rights to 'consider whether additional rights should be recognised or if existing rights should be expanded' and that '[i]deally, this review would be undertaken by the victims' commissioner' once established.[26] We support this recommendation. The Office of the Victims' Commissioner has advised that the Victims' Commissioner has now commenced work to review the Charter.[27]

Important rights are also protected under the UN *Convention on the Rights of People with Disabilities* and the UN *Convention on the Rights of the Child*. We note that relevant principles recognised in those international instruments include accessibility and respect for difference and acceptance of persons with disabilities as part of human diversity and humanity,[28] and the protection of the child from physical and mental violence, sexual exploitation and sexual abuse.[29]

Relevant to our review, the rights of victim survivors of sexual violence may provide a justification for limiting the rights of people who commit sexual offences where there is evidence that supports the need for reforms in support of meeting the proposed reforms' intended objectives. However, as recognised under the HRA, such limitations on rights are must also be assessed with reference to whether there is a less restrictive and reasonably available way to achieve their purposes, while also taking into account the importance of the objectives sought to be achieved.[30]

There are few rights that are more important to protect than the rights of people not to be subjected to sexual violence. As discussed in **Chapter 11**, ensuring the current sentencing system is best structured to achieve long-term community protection, alongside the other purposes of sentencing, has been a key concern of our review.

17.3 Rights of people charged and convicted of criminal offences

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

- the right to recognition and equality before the law;[31]
- the right to protection from torture and cruel, inhuman or degrading treatment;[32]
- cultural rights;[33]

24 See Terms of Reference <https://www.humanrightsreview.qld.gov.au/>.
25 The report was delivered in September 2024. Pursuant to section 95(5) of the HRA (n 2), the report must be tabled within 14 sitting days following its receipt.
26 Women's Safety and Justice Taskforce, *Hear Her Voice – Report Two: Women and Girls' Experiences Across the Criminal Justice System* ('*Hear Her Voice*, *Report Two*'), vol 1, 139–40 rec 19.
27 Correspondence from Office of the Victims' Commissioner to Queensland Sentencing Advisory Council, 28 November 2024.
28 *Convention on the Rights of Persons with Disabilities*, opened for signature 30 March 2007, A/RES/61/106, (entered into force 3 May 2008).
29 *Convention on the Rights of the Child*, GA/RES/44/25 (20 November 1989) Art 19, 34.
30 HRA (n 2) 13(2)(d)–(f).
31 Ibid s 15.
32 Ibid s 17.
33 Ibid ss 27–8.

- the right to liberty and right not to be subjected to arbitrary detention;[34]
- the right to a fair hearing;[35]
- the right not to be tried and punished more than once;[36] and
- the right to protection against retrospective criminal laws.[37]

No provisions of the PSA are currently subject to an 'override declaration'.[38]

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

Every person has the right to liberty and security,[39] and must not be subjected to arbitrary arrest or detention.[40] Depriving a person of liberty should only be in accordance with the law's established procedures.[41]

The PSA states that '[s]ociety may limit the liberty of members of society only to prevent harm to itself or other members of society'.[42] Its purposes include 'promoting consistency of approach in sentencing of offenders' and 'providing fair procedures' when imposing a sentence.[43]

Sentencing principles under the PSA which may limit this right include provisions that displace the principle that imprisonment is a sentence of last resort,[44] and the presumptive provisions for actual imprisonment when sentencing a person for an offence of a sexual nature against a child under 16 years, unless there are exceptional circumstances.[45]

We have previously noted that the Serious Violent Offences scheme may limit this right, including the ability of courts to promote substantive equality as Aboriginal and Torres Strait Islander peoples are disproportionately represented in the criminal justice system and among those convicted of offences that are subject to the scheme.[46] The mandatory operation of the SVO scheme when an offender is convicted of rape and sentenced to 10 or more years' imprisonment and the inflexible minimum non-parole period that applies on a declaration being made arguably affect the courts' ability to acknowledge the circumstances of the offender. However, it is noted that these factors can be taken into account when setting the head sentence.

Another provision that has a mandatory element is the requirement for a judge to impose life imprisonment or an indefinite sentence for a 'repeat serious child sex offence', which infringes the right to liberty and the right to not be subjected to arbitrary detention.[47] At the time the mandatory penalty was introduced in 2012 (prior to the HRA), the Explanatory Notes acknowledged that this impacted 'traditional rights', but it was necessary given the importance of community protection:

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34 Ibid s 29.
35 Ibid s 31.
36 Ibid s 34.
37 Ibid s 35.
38 As to the nature and effect of an 'override declaration', see ibid ss 43–7.
39 Ibid s 29(1).
40 Ibid s 29(2).
41 Ibid s 29(3). The provisions in s 29 are based on the *International Covenant on Civil and Political Rights*, art 9.
42 *Penalties and Sentences Act 1992* (Qld) preamble ('PSA').
43 Ibid ss 3(d)–(e).
44 Ibid ss 9(2A), (4)(b) and (7A).
45 Ibid s 9(4)(c).
46 See Queensland Sentencing Advisory Council, *The '80 per cent Rule': The Serious Violent Offences Scheme in the Penalties and Sentences Act 1992 (Qld) (*Report, 2022) (*'The "80 per cent Rule"'*) Appendix 15.
47 HRA (n 2) s 29.

> A mandatory sentence that cannot be mitigated represents a significant abridgment of traditional rights. However, the effect on the individual must be balanced against the need for community protection. Child sex offenders victimise one of the most vulnerable groups in the community. It is incumbent on the community to provide adequate protection from harm to this group, as they are inherently unequipped to protect themselves from such predation.
>
> The new mandatory sentencing regime is necessary to: denounce repeat child sex offenders; provide adequate deterrence for this cohort of offenders; protect one of the most vulnerable groups of the community; and to enhance community confidence in the criminal justice system.[48]

Legal Aid Queensland told the Council:

> 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 offence', 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.[49]

The QHRC has made previous submissions to this Council that comment on mandatory penalties, drawing attention to the need for significant evidence 'to demonstrate that mandatory minimum sentences are the least restrictive manner of achieving the purposes' of sentencing.[50]

A review of the repeat serious child sex offence scheme was outside the scope of this review given that this scheme applies to offences other than rape and sexual assault. Only a small number of people sentenced for rape over our data period were sentenced under this scheme.[51]

As discussed in the Council's fundamental principles (see principle 7), the Council has previously raised concerns about the potential for mandatory sentences to constrain available sentencing options, lead to anomalies and unintended consequences in sentencing, and cause inconsistency in sentencing.[52] When developing its recommendations, the Council has sought to preserve judicial discretion to ensure sentences are just in all circumstances.[53] At the same time, the Council has been concerned to ensure a person convicted of rape and sexual assault is properly held accountable and the impact on victim survivors is given appropriate recognition, thereby promoting community confidence. We have also drawn on relevant research evidence about the effectiveness of different penalty types in meeting their objectives.

17.3.2 Right to protection against retrospective laws

The right to protection against retrospective laws[54] is reflected in the *Criminal Code* (Qld),[55] which protects a person from being punished for an offence unless it was an offence at the time it was committed or to be punished any more than the older law allowed (or the newer law allows).[56]

48 Explanatory Notes, Criminal Law (Two Strike Child Sex Offenders) Amendment Bill 2012 (Qld) 2–3.
49 Submission 23 (Legal Aid Queensland) 35.
50 Queensland Human Rights Commission, Preliminary submission 3 to Queensland Sentencing Advisory Council, *Penalties for Assaults on Public Officers review* (9 January 2020) 9 [31].
51 See further, Appendix 4, section 4.7.1. Four life sentences were imposed under this regime over the 18-year data period.
52 See, for example Queensland Sentencing Advisory Council, *The '80 per cent Rule'* (n 46).
53 The Court of Appeal has recognised that this purpose is 'the paramount objective of sentencing': *R v Randall* [2019] QCA 25 [37].
54 HRA (n 2) s 35.
55 *Criminal Code Act 1899* (Qld) sch 1 ('*Criminal Code* (Qld)').
56 Ibid s 11.

This right may be limited when new sentencing considerations and schemes are introduced if they apply retrospectively. For example, the mandatory life sentence for a 'repeat child sex offence' is partially retrospective.[57] Amendments to section 9 of the PSA are generally considered to be procedural, meaning they can apply to a person when sentenced and not when the offence was committed.[58] However, the amendment requiring a sentence of actual imprisonment be served for a sexual offence when the victim is a child under 16 [now s 9(4)(c)] is not procedural and not retrospective. This means it only applies to offences committed after its introduction on 26 November 2010.[59]

The Council's recommendations in respect of an aggravating factor (**Recommendation 1**) and good character (**Recommendation 5**) would most likely be considered procedural and apply when a person is sentenced, not when the offence was committed. This is because they retain judicial discretion to determine the appropriate sentence and do not require a specific sentencing outcome.[60]

17.3.3 Right not to be tried and punished more than once

If a person has been charged, had a trial and been acquitted, or been convicted and sentenced, they must not be tried for the offence again.[61] This is also known as rule against 'double jeopardy'. This human right protects a person from being repeatedly prosecuted and provides finality of criminal proceedings.[62] It does not apply if it is 'justified by exceptional circumstances', such as the discovery of new evidence.[63]

This right is reflected in the *Criminal Code* (Qld), which also protects a person from being punished twice for the same offence[64] unless there is fresh and compelling evidence and it is a 'prescribed offence'.[65] Relevant to this review, the offence of rape and sexual assault (in aggravated circumstances where the person is liable to life imprisonment) was recently included in the exception to double jeopardy.[66] In the Statement of Compatibility, it was stated that the limitation is 'tightly constrained, [being] restricted to circumstances in which fresh and compelling evidence later emerges and to serious offences punishable by life imprisonment and that directly interfere with another person's life or sexual bodily integrity'.[67]

This right might also be relevant to sentencing laws, policies, acts or decisions that allow a person to be detained after their sentence has finished.[68] In some instances, people who have committed offences such as rape or sexual assault may be subject to additional post-sentence detention supervision or monitoring schemes, including those under the *Dangerous Prisoners (Sexual Offenders) Act 2003* (Qld)

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57 The scheme allows for an offence which happened before commencement (19 July 2012) to be the 'first child sex offence'. The mandatory provision will apply if a subsequent 'serious child sex offence' happens after the scheme has commenced. This means the scheme has a partial retrospective operation: PSA (n 42) s 223.

58 See *R v Truong* [2000] 1 Qd R 663; *R v Hutchinson* [2018] QCA 29.

59 *R v Koster* [2012] QCA 302 [38] Holmes JA (McMurdo P and Applegarth J agreeing on this issue). Introduced by *Penalties and Sentences (Sentencing Advisory Council) Amendment Act 2010* (Qld).

60 See, for example, *R v Hutchinson* [2018] QCA 29, [39] (Mullins J, Fraser and Morrison JJA agreeing) in which the Court of Appeal concluded based on its analysis of relevant case authorities that section 9(10A) of the PSA is a procedural provision.

61 HRA (n 2) s 34.

62 This right is based on Article 14 of the *International Covenant on Civil and Political Rights*, opened for signature 16 December 1966 (entered into force 23 March 1976).

63 United National Human Rights Committee, *General Comment No 32: Article 14: Right to equality before courts and tribunals and to a fair trial*, 19th sess, UN Doc CCPR/C/GC/32 (23 August 2007) 16 [56].

64 *Criminal Code* (Qld), ss 16–7.

65 Ibid ch 68. Prescribed offences are defined in s 678. As to the meaning of 'fresh and compelling evidence', see s 678D.

66 *Criminal Code and Other Legislation (Double Jeopardy Exception and Subsequent Appeals) Amendment Act 2024* (Qld), commencing 1 September 2024 (SL 2024 No 177).

67 Statement of Compatibility, Criminal Code and Other Legislation (Double Jeopardy Exception and Subsequent Appeals) Amendment Bill 2023 (Qld) 8. There are also procedural safeguards.

68 For a full list see Queensland Human Rights Commission, 'Fact Sheet: Right Not To Be Tried Or Punished More Than Once' (July 2019) 1.

('DPSOA') and the *Child Protection (Offender Reporting and Offender Prohibition Order) Act 2004* (Qld) ('CPOROPO Act'). Under the DPSOA scheme, a person in custody serving a term of imprisonment for a 'serious sexual offence' (involving violence or against a child) may be subject to continued detention or supervision after their sentence has finished.[69] The Supreme Court must be satisfied the person is a 'serious danger to the community' without an order.[70] A detailed review of the operation of the DPSOA was excluded from this review, as it operates as a civil post-sentence scheme and is not a sentencing consideration.[71] When the DPSOA scheme was introduced, it was acknowledged that this breached fundamental legislative principles, but was 'justified in order to protect the community from released prisoners who pose an ongoing serious risk of reoffending and are in need of ongoing rehabilitation'.[72]

Several stakeholders referred to the intersections between the DPSOA scheme and sentencing for sexual violence offending during the review, as well as the need for adequate and high-quality post-release supervision.

The Council considered how often DPSOA orders were made for offenders also subject to an SVO declaration as part of its earlier review of the SVO scheme and found the frequency varied by offence. For offenders sentenced for rape who were also declared convicted of a serious violent offence, orders were made over the relevant data period in 35 cases (33.9 per cent).[73]

The WSJ Taskforce recommended consideration be given to reviewing the operation of the DPSOA scheme and that this review could examine the scheme's effectiveness and whether it should be expanded to dangerous violent offenders.[74] While outside the scope of our review, we support this recommendation.

17.4 Impact of recommendations on people who experience disadvantage and discrimination

Offences of sexual assault and rape can disproportionately impact people who experience disadvantage and discrimination. For victim survivors, this includes women, children, people who experience cultural and racial marginalisation, people with disability, Aboriginal and Torres Strait Islander people, people with a mental illness or cognitive impairment, elderly people and those who identify as part of the LGBTQIA+ community. The same issues of disadvantage may also be experienced by those who commit these offences.

In developing its recommendations, the Council has been mindful of the need to safeguard the rights of victim survivors while ensuring that the rights of those convicted of these offences are also considered.

Most people who commit sexual offences are 'similar to the general offender population in terms of demographic, psychosocial and criminal history variables':[75]

69 *Dangerous Prisoners (Sexual Offenders) Act 2003* (Qld) ss 5, 13(5), sch 1 (definition of 'serious sexual offence').
70 Ibid s 13(1).
71 PSA (n 42) s 9(9)(b).
72 Explanatory Notes, Dangerous Prisoners (Sexual Offenders) Bill 2003 (Qld) 3.
73 Queensland Sentencing Advisory Council, *The '80 per cent Rule'* (n 46) 93, Figure 11.
74 Women's Safety and Justice Taskforce, *Hear Her Voice - Report One: Addressing Coercive Control and Domestic Violence in Queensland* (2021) vol 3, 717–18, rec 72.
75 Denise Lievore, 'Thoughts on Recidivism and Rehabilitation of Rapists' (2005) 28(1) *UNSW Law Journal* 293, 294.

> Most are young, single, white males, although men from Indigenous and ethnic minority groups are over-represented among visible sex offenders. Rapists come from all socio-economic backgrounds but are often socially, economically, educationally and occupationally disadvantaged.[76]

Reforms to the sentencing process, which introduce an aggravating factor and limit some types of evidence of a person's personal circumstances unless it is relevant to rehabilitation or risk of reoffending, or the nature and seriousness of the offence, mean it is inappropriate for such circumstances to be given weight. This may result in a change in sentencing practices, including longer sentences that may disproportionately impact defendants who are marginalised or experiencing other forms of disadvantage and discrimination.

Following our previous review of the SVO scheme, we recommended that, as part of any implementation strategy developed by the Department of Justice, should the recommendations in our report be adopted, further consultation should be undertaken with legal stakeholders, including those providing direct representation for Aboriginal and Torres Strait Islander defendants and other defendants who are marginalised or experiencing disadvantage. This is to identify any additional legal funding or support required to minimise unintended impacts of the recommendations.[77] This consultation process, we recommended, should include consideration of the adequacy of existing funding, both in support of defendants' legal representation and to fund the preparation of any required specialist reports.

This review raises similar issues to our earlier review. We therefore suggest that a similar consultation process be initiated in support the implementation of our current recommendations.

17.4.1 Aboriginal and Torres Strait Islander peoples are disproportionately represented in sentences for rape and sexual assault

The Terms of Reference ask us to 'advise on the impact of any recommendation on the disproportionate representation of Aboriginal and Torres Strait Islander people in the criminal justice system'.[78] Where this is relevant to a recommendation, this is discussed throughout the report.

Sentencing outcomes are discussed in detail in **Appendix 4**. Any statistics on the disproportionate representation of Aboriginal and Torres Strait Islander peoples need to be interpreted in the context of the chronic social, economic and cultural disadvantage and marginalisation experienced by Aboriginal and Torres Strait Islander peoples.[79]

Violence, and particularly violence against women and children, is not part of traditional Aboriginal and Torres Strait Islander culture.[80] However, due to a range of complex current and historical intergenerational factors, including the ongoing impact of colonisation, and structural and institutional

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76 Ibid.
77 Queensland Sentencing Advisory Council, *The '80 per cent Rule'* (n 46) rec 25.
78 Appendix 1, Terms of Reference, 3.
79 For more information on the historical and ongoing target context see Productivity Commission, Closing the Gap - Information Repository, 'Socio-economic outcome area 10: Aboriginal and Torres Strait Islander adults are not overrepresented in the criminal justice system', <https://www.pc.gov.au/closing-the-gap-data/dashboard/se/outcome-area10>.
80 Productivity Commission, *Overcoming Indigenous Disadvantage Key Indicators 2020* (Report 2020), 4.130 citing Our Watch, 'Challenging Misconceptions About Violence Against Aboriginal and Torres Strait Islander Women' (2024) <https://action.ourwatch.org.au/resource/challenging-misconceptions-about-violence-against-aboriginal-and-torres-strait-islander-women>; Women's Safety and Justice Taskforce, *Hear Her Voice, Report Two* (n 26) vol 1, 151 citing Victoria Police, *Policing Harm, Upholding the Right: Victoria Police Strategy for Family Violence, Sexual Offences and Child Abuse 2018-2023*, 15.

discrimination,[81] Aboriginal and Torres Strait Islander peoples are disproportionately represented in all areas of the criminal justice system.[82] An Aboriginal and Torres Strait Islander person may have experienced trauma that is unique to their Indigeneity (for example, as a result of being a member of the Stolen Generations and displacement).[83] Aboriginal and Torres Strait Islander peoples may also experience intersecting forms of disadvantage, such as having a disability, living in poverty, having low socio-economic status, experiencing a lack of employment and having a limited education.[84] Other factors that may be relevant to the sentencing outcomes include the different nature and seriousness of these offences, the personal circumstances of those being sentenced (including any relevant prior criminal history) and whether the person committed the offence while under another sentence or order (e.g. while on parole). These factors, among others, contribute to disproportionate representation of Aboriginal and Torres Strait Islander peoples in the criminal justice system.

Access to legal representation and advice (communicated in a way the person can understand), can also have a significant impact on the outcome. For example, it may prevent an inappropriate guilty plea if there is an available defence or impact the sentence by offering pleas in mitigation.[85] While a court can take into account 'cultural considerations, including the effect of systemic disadvantage and intergenerational trauma'[86] to help understand the background of the person in the context of the offending, it does not excuse the offending. A sentencing court must balance the mitigating factors with all the circumstances of the offence:

> Aboriginal women and children who live in deprived communities or circumstances should not also be deprived of the law's protection … they are entitled to equality of treatment in the law's responses to offences against them, not to some lesser response because of their race and living conditions.[87]

Violence against Aboriginal and Torres Strait Islander peoples, including sexual violence, is perpetrated by people of all cultural backgrounds, in many different contexts and settings.[88]

Bearing this context in mind, the Council considered administrative data on how Aboriginal and Torres Strait Islander people are disproportionately represented.

Aboriginal and Torres Strait Islander peoples represent approximately 4 per cent of Queensland's population (aged 18 years and over).[89] Aboriginal and Torres Strait Islander adults were sentenced for 16.8 per cent of all offences (not just sexual offences) sentenced in Queensland between July 2005 and June 2023. For sexual assault and rape, their disproportionate representation is greater.[90]

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81 See Dr Harry Blagg, Dr Vickie Hovane and Dorinda Cox, Submission No 121 to *Australian Law Reform Commission Inquiry into the Incarceration Rate of Aboriginal and Torres Strait Islander Peoples*, 1; *Commission of Inquiry into Queensland Police Services Responses to Domestic and Family Violence, A Call for Change* (Final Report, 2022) 18.

82 Australian Law Reform Commission, *Pathways to Justice— An Inquiry into the Incarceration Rate of Aboriginal and Torres Strait Islander Peoples* (Report No 133, December 2017) ('*Pathways to Justice report*'). See especially: in prison, 93 [3.13]; charged with an offence, 100 [3.30]; and on remand, 102 [3.36]. including women 105 [3.41].

83 Ibid 185–6 [6.2].

84 See Dr Klaire Somoray, Samuel Jeffs and Anne Edwards, *Connecting the Dots: the Sentencing of Aboriginal and Torres Strait Islander Peoples in Queensland* (Queensland Sentencing Advisory Council, Sentencing Profile Series, 2021), 4–10.

85 Australian Law Reform Commission, *Pathways to Justice report* (n 82) 31, 320, [10.3].

86 PSA (n 42) ss 9(2)(oa)–(p).

87 *R v Daniel* [1998] 1 Qd R 499, 531 (Fitzgerald P).

88 Our Watch, 'Challenging Misconceptions About Violence Against Aboriginal and Torres Strait Islander Women' (2024) <https://action.ourwatch.org.au/resource/challenging-misconceptions-about-violence-against-aboriginal-and-torres-strait-islander-women>.

89 As at 30 June 2021. See Australian Bureau of Statistics, 'Estimates of Aboriginal and Torres Strait Islander Australians', Table 7.3, available at < https://www.abs.gov.au/statistics/people/aboriginal-and-torres-strait-islander-peoples/estimates-aboriginal-and-torres-strait-islander-australians/latest-release> accessed 8 October 2024.

90 See Appendix 4, section 4.3.

From a review of administrative courts data for sexual assault, the Council observed:

- One in 5 sentenced sexual assault cases involved an offence committed by an Aboriginal and Torres Strait Islander person (20.5 per cent) and the overwhelming majority were non-aggravated sexual assault offences (95.4 per cent).[91]
- Over the 18-year data period, the proportion of Aboriginal and Torres Strait Islander peoples sentenced for sexual assault (MSO) has increased slightly, from 11.9 per cent in 2005–06 to 19.1 per cent in 2022–23.[92]
- Aboriginal and Torres Strait Islander peoples were more likely to receive a custodial penalty than non-Indigenous people.
- The majority of Aboriginal and Torres Strait Islander peoples sentenced received a custodial penalty (81.8 per cent) compared with under two-thirds of non-Indigenous people sentenced (60.2 per cent).
- There was little difference in the average or median sentence for any custodial penalty type received in the Magistrates Court when Aboriginal and Torres Strait Islander status was considered.

From a review of administrative courts data for rape, the Council observed:

- Almost one-quarter of sentenced rape (MSO) cases involved an offence committed by an Aboriginal and Torres Strait Islander person (23.3 per cent).
- Over the 18-year data period, the proportion of Aboriginal and Torres Strait Islander people sentenced for rape (MSO) decreased, from 21.5 per cent in 2005–06 to 16.8 per cent in 2022–23.[93]
- Aboriginal and Torres Strait Islander people were no more or less likely than non-Indigenous people to receive a custodial penalty.
- Aboriginal and Torres Strait Islander people were more likely to receive a sentence of imprisonment (80.0 per cent vs 65.0 per cent), and less likely to receive a partially suspended prison sentence (16.2 per cent vs 31.1 per cent) than non-Indigenous people. These findings are statistically significant.
- There was no significant difference in the average sentence length by Aboriginal and Torres Strait Islander status across any custodial penalty type presented.
- All life sentences were imposed on non-Indigenous men (n=7).

The Aboriginal and Torres Strait Islander Legal Service ('ATSILS') referred us to target 10 of the National Agreement on Closing the Gap (NACTG): 'By 2031, reduce the rate of Aboriginal and Torres Strait Islander adults held in incarceration by at least 15%.'[94] They noted that Productivity Commission's report on the

91 See Appendix 4, section 4.8.
92 See Appendix 4, section 4.8.6, Figure A50.
93 See Appendix 4, section 4.7.4, Figure A25.
94 National Agreement on Closing the Gap (July 2020) cited in Submission 28 (ATSILS).

assessment of progress from 2019 to 2023 shows for Queensland, the progress towards this target is worsening (which is reported with 'high confidence' meaning it is considered reliable).[95]

ATSILS suggested that the Council consider whether any proposed amendments to the existing sentencing regime might 'inadvertently worsen progress towards targets to reduce incarceration rates and that, where possible and appropriate, opportunities are taken to improve the current regime to promote alternatives to incarceration'.[96]

They told us the cultural issues impacting Aboriginal and Torres Strait Islander people that are most relevant to sentencing rape and sexual assault are:

- the protective factors of the individual's connection to community, kin and culture including spiritual wellbeing;
- the protective factors of the individual participating in relevant programs run by local community-controlled organisations to address root causes for offending behaviour including, for example, programs that address underlying trauma via healing programs;
- the:
    - impacts of intergenerational trauma, child removal, dispossession from lands and systemic racism and the role of such in contributing marginalisation of at-risk individuals; and
    - social and economic disadvantage including in relation to housing, employment and education;
    - impacts of trauma that the individual has experienced in their life, for example, if they were the victim of sexual assault or rape prior to the offending including as a child;
    - impacts of physical health and mental health issues that might have been brought on or exacerbated by the aforementioned factors;
    - impacts of substance abuse/misuse that might have been brought on or exacerbated by the aforementioned factors, to identify underlying drivers of the individual's offending;
- the protective factors of diverting the individual into a community-led programs/initiatives as an alternative to incarceration; and
- the long-standing overincarceration of Aboriginal and Torres Strait Islander individual, including the high numbers of individuals on remand, and the commitments under the NACTG to drive down incarceration levels.[97]

They recommended we consider whether to legislate the principle in *Bugmy v The Queen*,[98] in which the High Court observed 'the effects of profound childhood deprivation do not diminish with the passage of time and repeated offending' and that background is to be given full weight – noting this may point in different directions (e.g. reducing an offender's moral culpability, while at the same time increasing the importance of community protection).[99]

As our Terms of Reference were limited to two offences of sexual assault and rape, we consider this would require further investigation. In **Chapter 8**, we recommended a review of section 9 of the PSA (**Recommendation 3**).

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95 Productivity Commission (Cth), Closing the Gap Information Repository (2023) available at <https://www.pc.gov.au/closing-the-gap-data/dashboard/se/outcome-area10>.
96 Submission 28 (ATSILS) 2.
97 Ibid 5.
98 *Bugmy v The Queen* (2013) 249 CLR 571.
99 Ibid 595 [44]–[45] (French CJ, Hayne, Crennan, Kiefel, Bell and Keane JJ). See Submission 28 (ATSILS) 5–6.

Other aspects of our recommendations also support information being put before the sentencing court about the person's individual circumstances, including cultural submissions and advice. This is explored in **Chapter 12**.

In **Chapter 11**, we also recommend reforms that would expand the penalty and parole options available to a court and provide a court with more sentencing options – including non-custodial orders that may provide courts with better alternatives to short terms of imprisonment when sentencing for sexual assault in support of long-term community safety.

Our earlier observations regarding the legal needs of defendants who are marginalised or experiencing disadvantage to identify any additional legal funding or support required to minimise impacts are of particular relevance in avoiding unintended impacts.

We also strongly support the continued implementation of the WSJ Taskforce recommendations to increase the cultural competency of all people working within the criminal justice system.[100] Supporting an improved understanding of the issues impacting Aboriginal and Torres Strait Islander defendants and victim survivors will only improve outcomes and result in the better tailoring of orders to individual circumstances should our reforms be introduced.

100 Women's Safety and Justice Taskforce, *Hear Her Voice*, *Report Two* (n 26) recs 5, 51, 66, 67, 68.

Chapter 18 – Improving the evidence base for sentencing reform in Queensland

18.1 Introduction

The Council was directed to examine the penalties currently imposed on sentences under the *Penalties and Sentences Act 1992* (Qld) for sexual assault and rape offences, to review sentencing practices for these offences and to identify any trends or anomalies that occur in the sentencing these offences, and to advise on any other matters relevant to this reference.[1]

As outlined in **Chapter 4**, in conducting this review the Council gathered information from a wide range of sources to understand current sentencing practices for these offences, and to build an evidence base from which to reach conclusions about the way sentencing for rape and sexual assault is operating in Queensland, and to inform the Council's consideration of any recommended areas for reform.

This chapter discusses some of the current gaps in the existing evidence base and the limitations that have impacted the Council's ability to fully understand current sentencing practices with respect to the offences of rape and sexual assault, and identifies a number of opportunities for reforms to improve the availability and quality of Queensland's criminal justice sentencing information to support ongoing monitoring, research and future reform efforts.

18.2 The position in Queensland

18.2.1 Limitations with the availability of sentencing information in Queensland

The ability to access high-quality data and information about sentencing enables legal practitioners and judicial officers to understand current practices in an applied context, and to ensure consistency in sentencing. Additionally, though, access to such information for government agencies and researchers, also enables the identification of trends and issues, supporting ongoing monitoring and evaluation of system responses and opportunities for reform.

While strict safeguards around the collection, storage and use of such data are essential from both a privacy and human rights perspective, as acknowledged by the Women's Safety Justice Taskforce: 'accurate and timely data and reliable analysis is essential for building capacity and capability across the system and to inform policy, practice and investment decisions',[2] and also supports transparency, accountability and community confidence.

1 See Appendix 1, Terms of Reference.
2 Women's Safety and Justice Taskforce, *Hear Her Voice – Report Two: Women and Girls' Experiences Across the Criminal Justice System* (2022) vol 2, 717 ('*Hear Her Voice, Report Two*').

In undertaking our review, there were two main sources of sentencing information of particular interest: administrative data and sentencing transcripts. In accessing and analysing these, we identified a number of challenges.

Limitations with administrative data

As discussed in **Chapter 4**, criminal justice administrative data with respect to offences, offenders and court outcomes is held by different departments and agencies. Each department and agency use different case management systems, and while there is some integration between systems in relation to the transfer of select details under the 'Integrated Criminal Justice' (ICJ) model, this is limited to specific information for specific administrative and operational purposes, and occurs at a particular point in time.

The nature of the information captured by administrative systems is necessarily for operational, rather than research, purposes, and the accuracy of the information available reflects how administrative information is structured, entered, maintained and extracted. It is therefore not surprising that not all information that might be considered relevant for research purposes is captured in the administrative data systems. As a result, this leads to difficulty for researchers and other stakeholders aiming to understand:

- case progression and attrition
- offender and offence characteristics
- victim survivor characteristics
- reasons for decisions.

Understanding case progression and attrition

Understanding and reporting on the 'attrition' of cases through the criminal justice system, particularly for those involving sexual violence matters, is challenging. As discussed in **Chapter 2**, matters that ultimately result in a sentenced outcome in the court system represent only a very small proportion of all sexual violence matters that are brought to the attention of Police.

For the Council, given our focus specifically on matters ultimately sentenced in relation to these offences, it was particularly important for us to understand how these sentenced matters had progressed through the various parts of the system, but even this task was challenging.

One factor that contributed to this challenge was that administrative case management systems like the Queensland Police Records Information Management (QPRIME) within Police, the Queensland Wide Inter-linked Courts (QWIC) system within courts, and the Integrated Offender Management System (IOMS) maintained by QCS, have been developed independently with different purposes, structures and data–capture requirements.

Importantly, based on the initial case management process within QPS, each matter that ultimately progresses through to the courts for sentencing in relation to a sexual violence offence initially commences within the QPRIME system, and each individual offender is assigned a unique 'Single Person Identifier' (SPI) by QPS. Other relevant administrative details are also captured (at a particular point in time), including information regarding the specific offence(s) charged, the associated QPS event reference number (QP number) and information regarding the offender and the victim.

Once a matter is progressed to the court system, an electronic lodgement is made by Police to Courts, and information is 'transferred' from QPRIME to the QWIC system maintained by Courts. Importantly, this electronic lodgement provides for the transfer of the relevant offence and case details, including the SPI, as captured by QPS at that point in time.

Within the QWIC system, as a matter progresses through the court system, it is important to note that any changes by police to the original information captured (i.e. updates to the SPI or additional victim information) are not then updated in the court system, and there is no mechanism for this detail to be updated.

Specifically in relation to the progression of cases within the court system, there may be many reasons why changes may be made to the original offences charged and proceeded against. For example, as discussed in **Chapter 15** regarding plea negotiations, matters that were initially charged as one offence category (e.g. rape) may ultimately be amended to reflect the provable conduct, or through a jury verdict of guilty to an alternative, lesser charge (e.g. sexual assault). This mismatch in the final sentenced charge and the originating charge as recorded by QPS can make linking records between agencies very difficult, if not impossible, to undertake. This is exacerbated in instances where a matter is committed to the higher courts, as much of the administrative data from the originating file is not 'carried over' to the higher court electronic administrative record, and if changes are made by way of 'replacement indictments', these administrative records are not necessarily 'linked' to each other as one matter ceases and another matter commences. While the court paper file records all the nuance, this is not necessarily recorded electronically to support data linking.

Understanding offender and offence characteristics

As the administrative data systems used in the criminal justice system are generally concerned with capturing information to fulfil operational objectives, information often sought for the purpose of research and evaluation, particularly regarding offender characteristics and the circumstances surrounding the offence, is generally not captured in an extensive way, or in a way that can easily be analysed.

For example, as we experienced in our undertaking our review and outlined in **Chapter 4**, there was no structured data available surrounding the specific type of conduct that constituted a sexual assault offence, such as where the victim survivor was sexually touched (or whether the victim survivor was forced to touch the offender), or how this occurred (including whether it was sexual touching over or over clothes and what type of body part was touched).

To gather this information, the Council undertook a content analysis of a sample of sentencing remark transcripts to extract this information where it was mentioned by a sentencing judge. However, this information could not always be extracted from the remarks - particularly where the Crown and the sentencing court relied on the Statement of Facts to describe the offending. Unfortunately, if the Statement of Facts was not verbally read into the record, this was not available to the Council via the sentencing transcript.

Importantly, as discussed in **Chapter 12**, the presence or absence of specific types of information available to the court for the purpose of sentencing (i.e. pre-sentence reports or cultural reports) was also difficult to identify; again, to gather this information the Council undertook a review of sentencing remark transcripts for reference to these documents, as this information is not captured in the administrative data systems in a structured way.

Other contextual information regarding the offender and the offence was also difficult to obtain, including information about mental health status, intellectual or cognitive impairment and whether the offender was from a culturally and racially marginalised background.

While a greater use of pre-sentence reports could help criminal justice agencies capture more of this information, as recommended in recommendation 129 by the Women's Safety and Justice Taskforce, *Hear Her Voice – Report Two*, it is also acknowledged that it is unlikely that the content within such reports would be captured in a structured way to support quantitative analysis; however, it would be useful for the presence of these reports to be captured in such a way to support research and evaluation efforts.

Understanding victim survivor characteristics

As noted previously, limited information about victim survivors is recorded in the court's administrative data system as this content is generally provided by the QPS with the original court lodgement. In undertaking our review, we noted that while some information about victim age and gender is recorded, this information was not populated for most rape and sexual assault cases.

In order to supplement this information, the Council initially undertook a data-matching exercise with QPS to link court records to crime records in an attempt to better identify the characteristics of victims, as well as to obtain information about the victim–offender relationship.

Unfortunately, this process was unable to yield robust results for various reasons, including:

- While offenders are generally able to be manually linked between QPS and Courts through the use of the SPI and the QP Number, it is more challenging to link specific charges, especially where an offender has been charged with multiple offences arising from the same occurrence (i.e. multiple rape or sexual assault offences) recorded under the same QP Number. This is further complicated, as a single offender may offend against multiple victims within such a circumstance and the identifiers at this level of granularity do not generally transfer from QPS to Courts.
- Similar to the Courts dataset, the QPS administrative system was missing demographic information for many victims of these offences.

As the data-matching exercise would not yield robust results, the Council undertook a content analysis of a sample of sentencing remarks to extract the relevant details regarding victim survivors. This process was labour intensive, as each sentencing remark was required to be reviewed individually to extract and record the relevant information. This was particularly challenging because sentencing remarks do not often contain comprehensive details about the demographics of the victim survivor – as they may more commonly be discussed during submissions (or not at all, if reports or statements are not read into the court record). The process of manually reviewing and coding these data elements therefore required significant effort and produced limited results in some circumstances.

Understanding reasons for decisions

As outlined in **Chapter 11** regarding the use of suspended sentences of imprisonment, in undertaking our review we experienced challenges in determining whether a breach of a suspended prison sentence by reoffending resulted in a formal breach action being initiated and, if formal action was taken, what action the court took upon finding the breach proven (for example, whether the sentence was activated in full or in part, the operational period of the order extended, or whether the offender was convicted and

not punished further). Where there was a breach noted due to reoffending, we were also unable to clearly determine the nature of that offence.

This is because the court event for the breach is created as a new proceeding and is not linked administratively with the original proceedings where the suspended sentence of imprisonment was initially ordered. This means it is very difficult to track whether offenders are breaching their suspended prison sentences in order to determine whether they are effective as a tool to divert offenders from prison in Queensland.

To address this issue, the Council obtained data on the operational period of suspended sentences of imprisonment and conducted a recidivism-type analysis to determine whether any subsequent offence punishable by imprisonment was sentenced during the operational period of the suspended prison sentence. This provided some insight into the effectiveness of suspended sentences of imprisonment, though had limitations.

This issue of the limitations of administrative data regarding suspended sentences of imprisonment and their associated breaches was previously recognised by the Council in an earlier review into community-based sentencing orders.[3]

Additionally, while the court administrative data system QWIC is designed to capture order outcomes, it does not capture details regarding the reasons for making such decisions. This information is only available via manual reviews of court files, or otherwise by sentencing remark transcripts.

Limitations with sentencing transcripts

Queensland sentencing remark transcripts provide a rich source of information regarding the details of a matter, particularly focusing on the sentencing outcome and the associated reasons provided for a given sentence. They are also a rich source of additional contextual information that is considered by the court when sentencing, although it does require the detail to be explicitly discussed as part of the sentencing process.

As with its previous work, the Council acknowledges the limitations associated with analysing sentencing remarks, most notably that sentencing remarks do not contain a comprehensive list of factors considered by a sentencing judge, as details are only recorded where the judicial officer specifically comments on them as part of the sentencing proceedings.

As discussed above, this presented challenges for the Council where documents such as the Statement of Facts were relied upon without articulating them for the court record, or where a Victim Impact Statement was tendered but not read out as part of the proceeding.

The depth of information in the remarks also varies by judge and often by court level, making them an inconsistent source of data. Nevertheless, as part of a mixed-methods research design, sentencing remarks supplement purely data-driven analyses, providing a rich source of additional information on the context of rape and sexual assault offences.

3 Queensland Sentencing Advisory Council, *Community-based Sentencing Orders, Imprisonment and Parole Options: Final Report* (Report, 2019), 256–7, rec 36 ('*Community-based Sentencing Orders report*').

Access to transcripts

As discussed in **Chapter 13**, we recommend that victim survivors of rape (and possibly sexual assault) be provided with a copy of the transcript of sentence proceedings as a matter of course, rather than on request, to enhance their understanding of the sentence outcome, as well as the reasons for this decision (**Recommendation 15**).

Criminal defence lawyers, prosecutors and judges also require access to sources of case comparators – that is, a way to find and locate previous cases that are similar with respect to a matter presently before a court. Their ability to locate previous comparable sentences helps to ensure consistency in sentencing.

As discussed in **Chapter 10**, there is an apparent lack of information-sharing across agencies and potential duplication of effort as individual agencies keep and maintain separate internal databases and registers of comparable cases. Further consideration should be given to whether agency-specific resources could be made more accessible (see **Recommendation 6.2**).

In March 2007, the Queensland Sentencing Information Service (QSIS) was developed as a comprehensive collection of higher court sentencing remark transcripts available to legal officers and practitioners, via subscription (free of charge). This service was intended to enable legal practitioners to search for transcripts of sentencing remarks based on the offence type, date of sentence or unique case identifiers (such as the offenders name) and display sentencing trends.

As a government entity concerned with the administration of the criminal justice system, the Council is also provided with access to QSIS, and this has been the primary source of sentencing transcript information we have used for our review.

In undertaking our review, however, the Council identified that there was a significant volume of higher court transcripts relevant to our review that did not appear in the QSIS database. Upon inquiring with the QSIS team, it was identified that this was due primarily to processing issues and delays within the system.

Furthermore, as a result of changes to the QSIS system that were implemented in February 2023, while the functionality of the service was enhanced in some respects, there was regression in others, and it is no longer as easy to navigate and find comparable cases.

As noted below in stakeholder feedback, these shortcomings of the current QSIS system have hindered the ability for practitioners and judicial officers to identify comparative cases and contributed to further reliance on in-house databases. The identified gaps in the QSIS collection and the changes to the overall functionality of QSIS also posed a significant barrier to the Council's review.

Furthermore, for the purpose of our review, given that many sexual assault cases are sentenced in the Magistrates Court, unfortunately these were not available in the QSIS system, as transcripts are only available via QSIS in relation to matters sentenced in the higher courts. Additionally, transcripts in the QSIS system only relate to sentencing decisions; however, the proceedings immediately prior to the sentencing decision, such as the sentencing submissions, are not available in QSIS. For our review, the Council therefore required transcripts of sentencing submissions, both in the lower and higher courts. For transcripts not available in QSIS, the Council was required to request and obtain these (at cost) via the QTranscripts system.

Despite these limitations, the Council's access to sentencing transcripts via QSIS has been essential to our ability to undertake the research that we have been able to complete, and the Council is mindful that

this sentencing information is not necessarily available to researchers more broadly who are concerned with understanding, researching or evaluating sentencing practices.

In particular, access to the higher court sentencing transcripts within QSIS is only granted to individuals and agencies eligible under section 19 of the *Supreme Court Library Act 1968* (Qld), which includes judicial officers and legal practitioners, as well as government entities concerned with the administration of the criminal justice system. While the Council is provided access under this provision, notably access is not provided to researchers more generally.

For researchers unable to satisfy the eligibility requirements of section 19, access to Queensland transcripts is limited to those made publicly available on the Supreme Court Library website as part of the CaseLaw collection. These remarks are based on a much smaller subset of sentencing remarks from both the Supreme and District Courts, which have been anonymised in a way that protects the privacy of victims and witnesses and facilitates rehabilitation.

18.3 What happens in other jurisdictions?

The availability of sentencing information, including both criminal justice administrative data and sentence hearing transcripts for sentencing related research and evaluation purposes varies across both Australian and international jurisdictions.

18.3.1 Availability of administrative data for research purposes

Universal limitations persist across all jurisdictions in attempting to understand attrition relating to sexual violence due to low rates of reporting, largely driven in the first instance by the concealed nature of sexual violence offending and some victim survivors not recognising or acknowledging conduct as a criminal offence. If offending is not reported, they may also not access and respond to surveys.[4]

Regardless of jurisdiction, due to the length of time between a victim survivor first making a complaint and the finalisation of the matter in court, it is also universally difficult to calculate true rates of attrition, particularly where changes to the initial police charges between this time occur, which can make it difficult to assess attrition and prevalence rates.[5]

All jurisdictions suffer from some limitations that arise as a result of the nature of criminal justice and administrative data in general, and the access to administrative data for the purpose of research and evaluation is necessarily bound by strict privacy and ethics considerations.

To support research and evaluation efforts, jurisdictions such as NSW and New Zealand have developed a number of detailed, standardised, quantitative administrative datasets that are made available for research purposes.

For NSW in particular, the Bureau of Crime Statistics and Research (BOCSAR) makes available the Reoffending Database (ROD), which contains information regarding finalised charges, finalised court appearances and proven court appearances. These variables include person and case identifiers,

4 Tasmanian Sentencing Advisory Council, *Sex Offence Sentencing* (Final Report, August 2015) 4.
5 Victorian Sentencing Advisory Council, *Sentencing Sex Offences in Victoria: An Analysis of Three Sentencing Reforms* (June 2021) 84, App 2, 'Methodology', 'Recorded Offence Data'.

demographic variables, court details, principal offence at contact and the most serious offence finalised at the contact. There are also detailed custody data variables.[6]

Similarly, New Zealand also provides access to a large array of justice agency administrative data, as well as data from victim surveys. Data is derived from the Ministry of Justice, National Intelligence Application, New Zealand Police, Department of Corrections and New Zealand Crime and Victim Surveys.[7]

In both jurisdictions, the availability of standardised administrative data for appropriate research and evaluation purposes has helped to build the evidence base and understanding of systems and processes in those jurisdictions. Regardless of access and standardisation within a jurisdiction, the nature of administrative data is such that all jurisdictions suffer to some extent from challenges in relation to the actual information available.

Similar to Queensland, Victoria has issues with linking data between its higher and lower courts due to how data is captured in each jurisdiction. Sentencing information available in Tasmania is recorded as a global sentence, and therefore adds complexity where there are multiple offences dealt with in a single case. Scotland shares this limitation of single and multi-conviction cases being unable to be distinguished but the data in that jurisdiction is further limited by an inability to separate charges, for example, of rape and attempted rape.

18.3.2 Availability of sentencing transcripts for research purposes

All jurisdictions in Australia publish selected sentencing decisions and judgments on their respective court websites and to some degree on AustLii. These decisions are primarily of the Court of Appeal, rather than decisions at the first instance. However, Victoria and NSW also regularly publish first-instance remarks of their higher court jurisdictions.

Victoria and NSW have established processes to make transcripts of sentence hearings more accessible to the broader public through regular releases on their online databases. For example, the Victorian Supreme Court publishes full judgments on AustLii, and members of the public can watch or listen to judgments and sentences via their 'Multimedia on demand' database. NSW also produces written judgements to its 'NSW Caselaw' database within 24 hours of delivery unless there is a delay because a decision has been read onto the record.

No jurisdiction appears to make sentencing transcripts of the lower courts, or transcripts of sentencing submissions, publicly available. Across all jurisdictions, processes are employed for the publicly available transcripts to ensure they are anonymised to protect the privacy of victim survivors and witnesses, which is particularly important for matters involving sexual offending. This anonymisation can sometimes limit the analysis that can be undertaken.

6 NSW Bureau of Crime Statistics and Research, 'Guidelines for access to and use of unit record file ROD data for researchers' 17–29 < https://bocsar.nsw.gov.au/content/dam/dcj/bocsar/documents/how-we-work/guidelines-and-form-to-access-unitrecord-reoffending-data.doc>.

7 Ministry of Justice (NZ), 'Data tables', *Research & Data* (web page, 19 March 2024) <http://www.justice.govt.nz/justice-sector-policy/research-data/justice-statistics/data-tables/#services.>.

18.4 Strategies and reforms

There has been a strong commitment at both the national and state levels to strengthen criminal justice data collection and capability across the system, particularly in understanding responses to sexual violence offending. The relevant strategies and reforms currently underway are outlined below.

18.4.1 National strategies and initiatives

The Meeting of Attorneys-General Work Plan to Strengthen Criminal Justice Responses to Sexual Assault (MAG Work Plan) 2022–27 outlines three priority areas to strengthen legal frameworks, build justice sector capability and support research and greater collaboration nationally:

- strengthening national datasets;
- sharing research and learnings; and
- commissioning academic research to build the evidence base.[8]

The First Action Plan of the National Plan to End Violence Against Women and Children 2022–2032 (National Plan) also includes action to improve the national evidence base by working towards consistent terminology, monitoring and evaluation frameworks, and by strengthening the collection and sharing of data and evidence.[9] The National Plan seeks to support jurisdictions, including Queensland, to develop and agree to the inclusion of more measurable targets, including those for children, young people, prevalence, women, Aboriginal and Torres Strait Islander peoples, people living with disability, people from culturally and linguistically diverse backgrounds and people identifying as part of the LGBTIQA+ community.[10]

The National Plan Outcomes Framework also recognises that there is no appropriate data source currently available to measure indicators relevant to Aboriginal and Torres Strait Islander people's experiences, including of sexual violence.[11] Data availability for other cohorts is also limited. The accompanying Performance Measurement Plan to the National Plan Outcomes Framework outlines desired measures and potential data sources, including ABS Criminal Justice Data and qualitative data sources that are relevant to our review but no baseline is developed – for example, quantitative data on the proportion of matters discontinued through different stages of the justice process, rates of recidivism and proportions found guilty, and qualitative data such as increased positive outcomes and experiences of the criminal justice system.[12]

18.4.2 Queensland strategies and initiatives

The Queensland Government Domestic, Family and Sexual Violence (DFSV) System Monitoring and Evaluation Framework aligns Queensland with the national approach towards enhanced data collection

8 Australian Government Attorney-General's Department, 'The Meeting of Attorneys-General Work Plan to Strengthen Criminal Justice Responses to Sexual Assault 2022-2027' (Work Plan, August 2022) <https://www.ag.gov.au/system/files/2022-08/MAG-work-plan-strengthen-criminal-justice-responses-to-sexual-assault-2022-2027.pdf>.

9 Department of Social Services, The *National Plan to End Violence against Women and Children 2022-2027 – First Action Plan Action 2* (2023) <https://www.dss.gov.au/ending-violence>.

10 Ibid.

11 Department of Social Services, *National Plan Outcomes Framework 2023–2032* (2023) 21 (see notes) <https://www.dss.gov.au/sites/default/files/documents/08_2023/np-outcomes-framework.pdf>.

12 Department of Social Services, *National Plan Outcomes Framework: Performance Measurement Plan* (2024) 1–44 <https://www.dss.gov.au/sites/default/files/documents/08_2023/np-outcomes-framework.pdf>.

and capability. The Framework seeks to ensure that Queensland can obtain data to understand the number and proportion of victim-survivors of sexual violence experiencing improved service or justice system outcomes, unique offenders and victims of sexual violence, and the number and proportion of unique offenders who commit further sexual violence following a previous offence, including those on community-based orders.[13]

The Women's Safety and Justice Taskforce's *Hear Her Voice – Report Two* notes limitations in data collected on the nature and extent of women with cognitive or intellectual disability experiencing victimisation, along with data on age, gender identity, race, socio-economic status and family dynamics, as well as information on Aboriginal and Torres Strait Islander peoples as victims and offenders. Additional limitations included QCS IOMS data on disability, type of program or intervention offered/recorded in an easily extractable format, and whether female prisoners have been victims of sexual abuse. The taskforce also noted that it was not possible to extract reliable data on the number of indictments for sexual offences lodged prior to 2019.

Key recommendations were made in relation to improving data quality and accessibility of criminal justice system information (see Recommendations 177–182).[14] These recommendations included recommending the replacement of the courts' QWIC database with a new, contemporary system; improved data integration across the criminal justice system to enable better recording, tracking and monitoring across the system. The taskforce also recommended that changes be made to support the provision of court transcripts for the purposes of research, either for free or at a reduced cost (see Recommendation 82). All these recommendations were supported by the government.[15]

The Queensland Government's sexual violence strategy is also into its second action plan: Prevent. Support. Believe. Second Action Plan 2023–24 to 2027–28. The plan aims to develop and implement a data quality strategy and embed agreed data collection standards across all agencies for domestic, family and sexual violence, including as it relates to target population groups.[16]

18.5 Stakeholder views

Stakeholder views on the availability or quality of sentencing information and data were limited, and focused primarily on the needs of the individual stakeholder and transparency of decision-making:

- One submission called for all Queensland Parole Board decisions to be released on the Parole Board website.[17] In contrast to Queensland, they noted the New Zealand Parole Board releases more of its decisions.[18]
- Another submission discussed the public benefit of clear, transparent and accessible sentencing remarks and judgments.[19]

13 Queensland Government, *Domestic, Family and Sexual Violence System Monitoring and Evaluation Framework* (2023) 1–27 <https://www.publications.qld.gov.au>.
14 *Hear Her Voice*, *Report Two* (n 2) vol 2, 717–31.
15 Queensland Government, *Queensland Government Response to the Report of the Queensland Women's Safety and Justice Taskforce, Hear Her Voice – Report Two*.
16 Queensland Government, *Prevent. Support. Believe. Queensland's Framework to Address Sexual Violence Second Action Plan 2023-24 to 2027-28* (2021) < https://www.publications.qld.gov.au/dataset/sexual-violence-prevention/resource/a22ad633-8529-4ab7-99d6-549fec75e709 >.
17 Submission 27 (Name Withheld) 1, 4.
18 Ibid 4..
19 Submission 4 (Rita Lok) 2..

- Some SME participants commented on the limited ability of courts to measure recidivism and complainant satisfaction with sentencing outcomes.[20]
- Other SME participants identified that limitations in administrative data collection reduce understanding of court user needs (e.g. interpreters).[21]

As discussed further in **Chapter 10**, legal stakeholders also commented on the importance of accessing sentencing transcripts for the purpose of supporting consistency in sentencing decision-making, and that recent changes to the QSIS platform have made it somewhat more challenging for a practitioner to find relevant cases to rely upon at sentence.[22]

18.6 The Council's view

Key Finding	
20.	**Sentencing data and information in Queensland is limited and can be enhanced.** Sentencing information in Queensland is limited by both the quality of data available and a lack of integration between relevant justice administrative data systems. It is critical that Queensland takes a cohesive, whole-of-government approach to improving the quality of information being captured and shared by all relevant agencies. It is important to build the evidence base upon which reform decisions are made, which includes designing and implementing evaluation and monitoring frameworks alongside any reforms to enable agencies to monitor the impact and evaluate the success of the reforms, and whether further adjustments are required. See **Recommendations 27 and 28.**

Based on the evidence gathered and research undertaken by the Council for this review, the availability and quality of data and information relevant to sentencing of sexual violence offences has limitations, and there are a number of opportunities to improve this to support ongoing research, monitoring and evaluation of sentencing related reforms.

In making this finding, we acknowledge that there are a number of current government commitments at both the national and state levels to strengthen criminal justice data collection and capability across the system, particularly in understanding responses to sexual violence offending. The recommendations proposed seek to reinforce these and provide further clarity in relation to specific and discrete opportunities to enhance data and information that are of specific relevance to sentencing reform.

20 SME Interview 1.
21 SME Interview 3 and 11.
22 SME Interview 7.

18.6.1 Applying the Council's fundamental principles

As discussed in **Chapter 3**, the Council adopted 11 fundamental principles to help guide the review, and it is the first principle of the review that is particularly relevant to the recommendations proposed.[23]

Principle 1: Reforms to sentencing laws should be evidence-based with a view to promoting public confidence. In order to ensure that our suggested reforms are evidence-based, the Council approached the task using a rigorous methodology, and sought to rely on many different information sources, taking a mixed-methods approach.

The Council strongly supports reviews that consider the appropriateness and adequacy of sentencing practices and outcomes in Queensland (not limited to sexual violence offences) as a means of evaluating whether current sentencing practices are fit for purpose; however, any review or reform must necessarily be based on the best evidence available.

In undertaking our review, the Council has identified that there are significant limitations associated with the quality and quantity of criminal justice sentencing information in Queensland. There is also a lack of integration between relevant justice administrative data systems, which limits the ability to undertake assessments without significant time and resources being invested. These challenges were particularly noted in relation to both administrative data and sentencing transcripts.

By recommending that enhancements be made to both the collection of and accessibility of sentencing information, we aim to ensure opportunities for the ongoing monitoring and evaluation of the proposed reforms.

Our position is not new. We previously recognised[24] the lack of reliable, comprehensive data in criminal justice databases.[25] In a review of the Civil and Criminal Justice System in Queensland, it was also noted that:

> Reliable, up to date, accurate and accessible data is the life blood of an effective criminal justice system. It allows decision makers at all levels to make evidence-based decisions; it challenges entrenched beliefs and perceptions, and it provides a foundation to secure funding. Such a system is dependent on effective information technology support.[26]

We have identified that there are opportunities for research to inform practice, and for practice to inform research. This requires an ongoing commitment by professionals, researchers, criminal justice agencies and other agencies tasked with the prosecution of rape and sexual assault offences to collect and report high-quality information at both the individual and system levels. This supports an informed and responsive policy of decision-making and system responses.

In its previous review into community-based sentencing orders, the Council recognised data limitations in Queensland surrounding the analysis of suspended sentences of imprisonment and court ordered parole.[27] Throughout that review, the Council found that it was not possible to evaluate whether the net-widening effects of suspended prison sentences identified in some other jurisdictions are also a problem for Queensland using the existing data set. The Council subsequently recommended that the

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23 For a full list of the fundamental principles, see Chapter 3.
24 Queensland Sentencing Advisory Council, *Community-based Sentencing Orders report* (n 3) 446.
25 Martin Moynihan, *Review of the Civil and Criminal Justice System in Queensland* (Queensland Government, 2009) 20, expanded on in section 10.6.
26 Ibid 20, 105.
27 *Community-based Sentencing Orders report* (n 3) recs 36 and 49.

administrative data captured by Court Services Queensland for orders made under Part 8 of the PSA should be reviewed to ensure:

- information about the number of suspended sentences breached through reoffending by commission of a new offence punishable by imprisonment is available;
- orders made on breach are accurately captured; and
- breach data can be extracted in a format that can be analysed without resort to extensive manual coding.[28]

Within that review, the Council concluded that without these datasets it will remain difficult for the Council to evaluate the effectiveness of suspended sentences of imprisonment, to understand the degree to which the use of these orders is diverting offenders from prison and to identify which offender groups are most likely to succeed on these orders. In addition to that recommendation, the Council identified that there was also a strong need for an evaluation to be conducted into the effectiveness of court ordered parole and Board-ordered parole in Queensland, including an assessment of statistics in relation to recidivism and completion rates.[29]

The Council retains its position regarding both these prior recommendations (**Recommendation 27**).

Recommendation

27 **Improved administrative data surrounding suspended imprisonment sentences, and the evaluation of the effectiveness of parole**

The Queensland Government consider and implement the following recommendations made by the Council with respect to data and research in the Council's 2019 *Community-based Sentencing Orders, Imprisonment and Parole Options: Final Report*:

- Recommendation 36: Improved administrative data capture relating to suspended imprisonment orders sentence to support reporting on breaches of orders and orders made on breach;
- Recommendation 49: An evaluation of the effectiveness of court ordered parole and Board ordered parole in Queensland, including an assessment of recidivism and completion rates.

Enhancements to support understanding of case progression and attrition

Of particular relevance to this review, due to the high volume of sexual violence matters where the specific offences charged may be changed or adjusted as a matter progresses through the court system, are the limitations of the administrative data systems that make tracing charges through the system challenging where changes are made, particularly for those ultimately finalised in the higher courts.

There are various reasons why a charge may change, and this process can occur at multiple stages. For example:

28 Ibid 256–7, rec 36.
29 Ibid 306–8, rec 49.

- A police prosecutor may determine that there is insufficient evidence to proceed with a charge prior to committal or sentence and may subsequently offer no evidence with respect to that charge. Where appropriate, the police prosecutor may present a new bench charge sheet in substitution or addition to the initial charges.
- The magistrate may determine that there is insufficient evidence to substantiate a charge such that a jury could reasonably convict the person of that offence, and dismiss the charge prior to, or during, a committal proceeding.
- The legal officer or Crown Prosecutor who drafts the indictment for the Department of Public Prosecutions (DPP) may decide to amend the initial police charges where appropriate, such as where they determine that there is insufficient evidence to proceed with a particular charge, or where there are other, more appropriate charges. This process is informed by their consideration of all of the evidence (which may include evidence that was not available earlier on in the proceeding).
- The DPP may further amend the charges prior to trial/sentence, where additional evidence becomes available that calls the Crown's prospects of success at trial into question, or where the charged person offers to plead to alternative charges.

As a consequence, there may be occasions where none of the initial police charges are reflected in the offences for which a person is ultimately sentenced.

To enable enhanced understanding of the progression of a charge from inception to completion, and to better understand sentencing practices and trends, we recommend that the administrative systems used by Queensland courts be updated to fully capture these changes and enhance the 'traceability' of charges (**Recommendation 28.1**). This should include consideration of a way to 'link' offences which are charged in the lower courts to the counts which proceed on indictment, and are then finalised at sentence. This may be achieved through the digitisation of the transmission sheets (which document the charges committed to a higher court, as well as any changes to the charges that then proceed on indictment).

While we are conscious that data are maintained by individual agencies to support their own functions and administrative requirements, system-level priorities are also important. To a certain extent, we believe that some problems encountered during this review (and through other, previous reviews) could be addressed by a stronger, system-wide commitment to the integrity of the Single Person Identifier (SPI) – a unique number allocated by the QPS to individuals, which in practice should flow through all interactions a person has with the criminal justice system.

Therefore, to further enhance our understanding of the progression of cases through the criminal justice system, as the primary source of data linking across criminal justice agencies, we recommend that any changes made to the QPS initiating record specifically regarding the SPI be made available to downstream agencies to allow for more accurate tracking of individuals through the criminal justice process (**Recommendation 28.2**).

Enhancements to support understanding of characteristics of cases and participants

In conducting this review, we identified that enhanced information is required to support better understanding of offences which are being committed, as well as the people who are impacted by them.

This information is critical to our assessment of the adequacy and appropriateness of sentencing outcomes for any offence.

We identified challenges with obtaining victim survivor demographic data from administrative datasets limits the ability of researchers to explore trends in sentencing according to victim demographics and to see whether these align with community expectations. This information is important, as the demographics of a victim survivor may be relevant to the sentence outcome, such as where the victim survivor is inherently vulnerable – for example, where they are a child.

Similarly, we became aware that sentence outcomes may be impacted by any reports that are tendered by the prosecution or defence at sentence, including cultural or psychological reports. The relevance of these reports is further discussed in **Chapter 12**. However, because the presence of these reports is not recorded within current administrative data systems in a way that supports analysis, we were unable to consider the impact of these reports from a qualitative perspective.

Furthermore, various administrative processes impact sentence outcomes, such as whether the person being sentenced has spent any time on remand (prior to sentence) in relation to the offences for which they are being sentenced, or in relation to prior convictions. Such a consideration has a bearing on a sentence outcome, as a judicial officer may be minded to consider time spent on remand, but not take it into account, thereby reducing the head sentence that would otherwise have been imposed. Without appropriate data to document these processes, it is challenging for us to consider whether sentence outcomes are adequate or appropriate.

To inform the consideration of future reviews (for any offence), we subsequently recommend that data collection processes of criminal justice agencies be improved to capture enhanced information with respect to (**Recommendation 28.3**):

- victim survivor information captured in police and court data sets, where possible and appropriate. This could include information about the victim survivor's date of birth, gender, sex, ethnicity, Aboriginal and Torres Strait Islander status, and the nature of the relationship between the victim survivor and their offender (noting that there may be none, which is relevant in and of itself). Consideration of a 'data not captured' (or similar) field could also be beneficial to help identify any data that has not been captured;
- the nature of specific reports tendered by prosecution or defence, including cultural or psychological reports; and
- administrative processes and outcomes, including conditions of orders, reasons for breaches and time spent in pre-sentence custody, to better understand effectiveness of sentencing and sentencing types.

Improving access to sentencing transcripts

The Council has found that sentencing remarks are currently the only available source of many important data variables. They also serve as an important tool in the education of the broader community of appropriate justice outcomes. However, we found that access to sentencing remarks for both legal practitioners and the broader public is currently limited by the inconsistent publication of sentencing remarks on publicly available sentencing databases. This is of concern as, for the general public and

researchers, sentencing remarks provide an important mechanism to understand the full context of decisions made about sentencing.

Sentencing remarks are also very difficult to obtain for those who do not meet the eligibility requirements to access the QSIS service,[30] which is limited to legal professionals, government employees and other prescribed entities.[31] Relevantly, academic researchers with an interest in sentencing often do not meet the criteria to access QSIS and the cost of obtaining transcripts is often prohibitive for researchers with limited funds to complete a project.

To promote public confidence and enhance the ability of researchers to understand sentencing practices and outcomes in Queensland, we recommend that:

- access to sentencing remarks for the general public and researchers continues to be enhanced, including through the publication of District Court remarks for rape and sexual assault (**Recommendation 28.4**); and
- access to the transcripts of lower court proceedings, as well as sentencing submissions, be increased for researchers specifically, to support enhanced research capabilities (**Recommendation 28.5**).

In making these recommendations, we acknowledge that these transcript requests may be required to be facilitated via the QTranscripts system, so consideration should be given to enable and support 'bulk' requests for the purposes of research. This acknowledges that the current QTranscript system has been developed to support individual requests for individual transcripts, and our experience in requesting multiple transcripts for the purposes of our review means this process of manually requesting individual transcripts is exceptionally time-consuming and could be improved to support bulk requests for the purposes of research.

As discussed in **Chapter 10**, we acknowledge that it is essential for legal professionals to be able to find comparable decisions, though it is equally important for centralised, government resources such as QSIS to be maintained to ensure their currency and functionality.

The current limitations of the QSIS platform have restricted the ability of the Council to conduct sentencing research for this review. We therefore recommend that the functionality of the QSIS be enhanced to ensure that it is regularly updated and has improved search functionality, including the ability to (**Recommendation 28.6)**:

- search for cases and case comparators, and to enable search results to be downloaded to CSV or Excel formats to support the review and collation of materials;
- search for specific offence provision combinations, as the current iteration of the QSIS platform has fragmented offences into multiple sub-categories, making it unfeasible to conduct basic searches and find relevant sentencing transcripts;
- see search result information with the details of all cases that are known to have been sentenced, even where a transcript may not yet be available, to support ongoing awareness of the currency of the collection; and

30 *Supreme Court Library Act 1968* (Qld) pt 3.
31 Ibid s 19.

- separate sentencing transcripts for child and adult offenders, particularly where this information is presented in statistical charts and graphs – noting the different sentencing principles required to be applied for youth compared with adults.

We are strongly of the view that improving the functionality of the QSIS will make it easier for legal professionals to search for cases and case comparators, thus improving their submissions, and for the judiciary to understand prevalence rates for various offences, average sentence lengths and other statistical information to inform the exercise of their sentencing discretion, thereby enhancing sentence outcomes.

Recommendation

28 **Improving the evidence base for sentencing reform**

In support of improving the evidence base for sentencing reform, the effective administration of justice and promoting community understanding of sentencing, the Queensland Government appropriately fund and prioritise work to ensure:

- **28.1**: The administrative systems used by Queensland Courts are updated to ensure each charge indicted in the higher courts is linked to the originating charge(s) (if any) that were committed in the lower courts. Consideration should be given to the digitisation of the transmission sheets that are attached to indictments as a mechanism for implementing this change.
- **28.2**: Work is led by the Queensland Police Service in conjunction with other criminal justice agencies, to ensure that any changes made to a Single Person Identifier (SPI) through merges, splits or other modifications is made available to downstream agencies – for example, via a concordance mapping – to allow for more accurate tracking of individuals through the criminal justice system.
- **28.3**: Data collection processes of criminal justice agencies are improved to capture enhanced information about the demographics of and nature of any relationship between the parties, the types of information being relied upon at sentence, and information to enable better understanding of the effectiveness of sentencing and sentence types.
- **28.4**: Access to sentencing remarks for the general public is enhanced, including through the publication of District Court remarks for rape and sexual assault, and access is facilitated for the purpose of research.
- **28.5**: Access to lower court transcripts and sentencing submission transcripts (for both the higher and lower courts), is improved for the purpose of research.
- **28.6**: The functionality of the current Queensland Sentencing Information System (QSIS) is updated and enhanced, including through enhanced search and display functions (with consideration of earlier versions).

PART F:
Reference List

Chapter 1 Reference list

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1.3 C Legislation

1.3.1 Australian

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Criminal Code (Consent and Mistake of Fact) and Other Legislation Amendment Act 2021 (Qld)

Criminal Code (Serious Vilification and Hate Crimes) and Other Legislation Amendment Act 2023 (Qld)

Criminal Code Act 1899 (Qld)

Criminal Code and Other Legislation (Double Jeopardy Exception and Subsequent Appeals) Amendment Act 2024 (Qld)

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Criminal Justice Legislation (Sexual Violence and Other Matters) Amendment Act 2024 (Qld)

Criminal Law (Domestic Violence) Amendment Act 2016 (Qld)

Criminal Law (Sexual Offences) Act 1978 (Qld)

Criminal Law (Two Strike Child Sex Offenders) Amendment Act 2012 (Qld)

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Criminal Offences Victims Act 1995 (Qld)

Dangerous Prisoner (Sexual Offenders) Act 2003 (Qld)

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Director of Public Prosecutions Act 1984 (Qld)

Dispute Resolution Centres Act 1990 (Qld)

Domestic and Family Violence Protection (Combating Coercive Control) and Other Legislation Amendment Act 2003 (Qld)

Evidence Act 1977 (Qld)

Health and Other Legislation Amendment Act 2024 (Qld)

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Other Legislation Amendment Act 2023 (Qld)

Peace and Good Behaviour Act 1982 (Qld)

Penalties and Sentences (Sentencing Advisory Council) Amendment Act 2010 (Qld)

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Penalties and Sentences (Serious Violent Offences) Amendment Act 1997 (Qld)

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Penalties and Sentences Regulation 2015 (Qld)

Police Powers and Responsibilities and Other Legislation Amendment Act (No 2) 2023 (Qld)

Recording of Evidence Act 1962 (Qld)

Respect at Work and Other Matters Amendment Act 2024 (Qld)

Sexual Offences (Protection of Children) Amendment Act 2003 (Qld)

Sexual Offences (Protection of Children) Amendment Bill 2002 (Qld)

Statutory Declaration under the Oaths Act 1867 (Qld)

Supreme Court Library Act 1968 (Qld)

Victims' Commissioner and Sexual Violence Review Board Act 2024 (Qld)

Victims of Crime Assistance Act 2009 (Qld)

Victims of Crime Assistance and Other Legislation Amendment Act 2017 (Qld)

Youth Justice Act 1992 (Qld)

Youth Justice and Other Legislation (Inclusion of 17-year-old Persons) Amendment Act 2016 (Qld)

Australian Capital Territory

Crimes (Consent) Amendment Act 2022 (ACT)

Crimes (Restorative Justice) Act 2004 (ACT)

Crimes (Sentence Administration) Act 2005 (ACT)

Crimes (Sentencing) Act 2005 (ACT)

Crimes Act 1900 (ACT)

Evidence (Miscellaneous Provisions) Act 1991 (ACT)

Commonwealth

Crimes Act 1914 (Cth)

Criminal Code Act 1995 (Cth)

New South Wales

Crimes (Administration of Sentences) Act 1999 (NSW)

Crimes (Domestic and Personal Violence) Act 2007 (NSW)

Crimes (Sentencing Procedure) Act 1999 (NSW)

Crimes (Sentencing Procedure) Amendment (Sentencing Options) Act 2017 (NSW)

Crimes (Sentencing Procedure) Amendment (Standard Minimum Sentencing) Act 2002 (NSW)

Crimes Act 1900 (NSW)

Crimes Amendment (Sexual Offences) Act 2008 (NSW)

Crimes Legislation Amendment (Sexual Consent Reforms) Act 2021 (NSW)

Crimes Legislation Amendment (Victims) Act 2018 (NSW)

Road Transport (Safety and Traffic Management) Act 1999 (NSW)

Young Offenders Act 1997 (NSW)

Northern Territory

Criminal Code Act 1983 (NT)

Criminal Justice Legislation Amendment (Sexual Offences) Act 2023 (NT)

Sentencing Act 1995 (NT)

Youth Justice Act 2005 (NT)

South Australia

Crimes Act 1900 (SA)

Criminal Law (Sentencing) (Guilty Pleas) Amendment Act 2012 (SA)

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Tasmania

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Victoria

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1.3.2 International

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