

Review of sentencing for sexual assault and rape offences

About the Terms of Reference - Part 1



Content warning:

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

This background paper has been produced by the Queensland Sentencing Advisory Council as part of its current review of sentencing for sexual assault and rape offences and the aggravating factor for domestic violence offences. The Council's review has been initiated in response to Terms of Reference issued by the former Attorney-General and Minister for Justice, Minister for Women and Minister for the Prevention of Domestic and Family Violence, the Honourable Shannon Fentiman MP, in May 2023.

This background paper has been prepared to provide those who may wish to contribute to the review with more detailed information on the Terms of Reference and the Council's approach.

The Council intends to release a public Consultation Paper on the first part of this reference on sentencing practices for sexual assault and rape offences in early 2024 and a second Consultation Paper on the second part of the reference on the aggravating factor for domestic and family violence offences in early 2025. On the release of these papers, we will invite formal submissions in response to the issues raised.

Should you wish to provide feedback in advance of the release of these papers, please contact the Council by email to info@sentencingcouncil.qld.gov.au

Cover 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' for those who have experienced a traumatic event.

Socks can be used in many different ways in sexual violence cases – to control or restrain a victim, to block access to door, and even 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 and stripped of their dignity.

For this design, we captured these everyday items in photographs with a distorted reflection to symbolise that sexual violence offending has ripple effects for the victim-survivor, their friends, family and the broader community. Ripples are also thought to play an essential role in supporting memory consolidation.

Background Paper 1, Review of sentencing for sexual assault and rape offences: About the Terms of Reference – Part 1

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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, detailed in section 199 of the Act, include to:

- inform the community about sentencing through research and education;
- engage with Queenslanders to understand their views on sentencing; and
- advise the Attorney-General on matters relating to sentencing, at the Attorney-General's request.

Further information

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Introduction

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

- 1.** sentencing practices for sexual assault and rape offences; and
- 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.

This paper discusses Part 1 of the Terms of Reference on the sentencing of sexual assault and rape offences, the background to these issues being referred and our approach to this review.

A second background paper exploring issues relevant to Part 2 of the reference and our approach to this aspect of the review is available on [our website](#).

For more information about the current sentencing framework that applies to the sentencing of sexual assault and rape offences, visit [our website](#).

What we have been asked to do

The Attorney-General has asked the Council to review sentencing practices for sexual assault and rape offences.

We have been asked to consider whether current sentencing laws are appropriate and meeting their objectives or if any changes are needed.

The [Terms of Reference](#) set out in detail what we have been asked to do.

During our review, we have been asked to keep in mind ‘the need to maintain judicial discretion to impose a just and appropriate sentence in individual cases’, as well as ‘the need to promote public confidence in the criminal justice system’.¹

Key issues the Council must consider

The Attorney-General has asked us to consider:

- the maximum penalties for sexual assault and rape offences;
- the need to protect victims of sexual assault and rape offences and to hold offenders to account;
- ‘commentary expressing that penalties currently imposed on sentences for sexual assault and rape offences may not always meet the Queensland community’s expectations’; and
- ‘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’.²

In particular, we have been asked to:

- examine the penalties currently imposed for sexual assault and rape offences under the PSA and review sentencing practices. This includes types of sentencing orders made, their duration and (any) time ordered to be served in custody prior to the person being released into the community or eligible for release on parole;
- 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 if any additional legislative guidance is required;

1. [Terms of Reference – Sentencing for sexual violence offences and aggravating factor for domestic and family violence offences](#) (issued 17 May 2023) 1.

2. Ibid.

- 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; and
- 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.³

The Council must report on this part of the reference by 16 September 2024.

Other issues the Council must consider

We have also been asked to:

- review national and international research, reports and publications relevant to sentencing practices for sexual assault and rape offences;
- examine relevant offence, penalty, and sentencing provisions in other Australian and international jurisdictions to address offending behaviour relating to sexual assault and rape and any evidence of the impact of any reforms on sentencing practices;
- consult with key stakeholders, including but not limited to the judiciary, victim-survivors of domestic and family violence and sexual violence, the legal profession, key First Nations community representatives and organisations, domestic and family violence services, sexual violence advocacy groups, community legal centres and relevant government departments and agencies (e.g., Queensland Police Service and Director of Public Prosecutions);
- advise on the impact of any recommendation on the disproportionate representation of Aboriginal and Torres Straits Islander people in the criminal justice system; and
- advise whether the legislative provisions being reviewed and any recommendations are compatible with rights protected under the *Human Rights Act 2019* (Qld).⁴

Issues the Council may consider

The Terms of Reference also allow us to ‘advise on other matters relevant to this reference’.⁵ This means we may consider some aspects of sentencing that are not expressly referred to in the Terms of Reference.

3. Ibid 2.

4. Ibid 2–3.

5. Ibid 3.

What is out of scope for our review

There are some aspects of the justice system's response to sexual violence offending we will not review, including:

- penalties imposed on sentence for children sentenced under the *Youth Justice Act 1992* (Qld);
- sentencing outcomes and practices for sexual violence offences generally, although we will consider these to this extent they apply or are relevant to the sentencing of sexual assault and rape offences;
- 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 2016* (Qld);
- detailed consideration of the operation of the *Dangerous Prisoners (Sexual Offenders) Act 2003* (Qld) which operates as a post-sentence scheme,⁶ and the *Child Protection (Offender Reporting and Offender Prohibition Order) Act 2004* (Qld)⁷ 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.

6. The Queensland Government has committed to inviting the Legal Affairs and Safety Committee to consider reviewing the operation of this Act. 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* (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>>.

7. 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/CPOROPPO-Act-review-2023>>.

Why this issue was referred to the Council

The Terms of Reference refer to several previous reports and changes to the law considered by the Attorney-General when asking the Council to undertake this review, including the reports of the Women’s Safety and Justice Taskforce:

- *Hear Her Voice, Report One: Addressing Coercive Control and Domestic and Family Violence in Queensland* (‘Report One’) of the Women’s Safety and Justice Taskforce;⁸ and
- *Hear Her Voice, Report Two: Women and Girls’ Experiences Across the Criminal Justice System* (‘Report Two’) of the Women’s Safety and Justice Taskforce.⁹

The Women’s Safety and Justice Taskforce

In March 2021, the Queensland Government established the Women’s Safety and Justice Taskforce (‘WSJ Taskforce’) to examine the experiences of women across the criminal justice system. The WSJ Taskforce was chaired by the Honourable Margaret McMurdo AC. Under its Terms of Reference, the WSJ Taskforce was asked to examine:

1. how best to legislate against coercive control as a form of domestic and family violence and the need for a specific offence of ‘commit domestic violence’; and
2. the experiences of women with the criminal justice system.¹⁰

The WSJ Taskforce undertook its work in two phases. It delivered its first report to the Attorney-General on the first aspect of its work in December 2021.¹¹ Report Two on the experiences of women with the criminal justice system was released in July 2022.¹²

WSJ Taskforce Report One recommendations

Report One contained 89 recommendations.

In addition to making several recommendations in support of the introduction of a new criminal offence of coercive control and improving system responses, the WSJ Taskforce recommended the PSA be amended to:

- require the respondent’s domestic violence history to be provided to the court where the perpetrator is being sentenced for the breach of a Domestic Violence Order or other domestic violence related offence (recommendation 59);

⁸ Women’s Safety and Justice Taskforce, [Hear Her Voice – Report One: Addressing Coercive Control and Domestic and Family Violence in Queensland](#) (2021).

⁹ Women’s Safety and Justice Taskforce, [Hear Her Voice – Report Two: Women and Girls’ Experiences Across the Criminal Justice System](#) (2022).

¹⁰ ‘About the Women’s Safety and Justice Taskforce’ <<https://www.womenstaskforce.qld.gov.au/about-us>>.

¹¹ Women’s Safety and Justice Taskforce (n 8).

¹² Women’s Safety and Justice Taskforce (n 9).

- require a court, when sentencing an offender to consider whether the impact of being a victim of domestic and family violence, including coercive control, on their offending behaviour is a mitigating factor (recommendation 66); and
- establish a new post-conviction civil supervision and rehabilitation order for serious domestic and family violence offenders (recommendation 80).

Queensland Government response to WSJ Taskforce Report One

The Queensland Government published its response to Report One and the WSJ Taskforce's recommendations in May 2022.¹³

Recommended amendments to the PSA regarding the provision of an offender's domestic violence history to a court when being sentenced and to consider whether the impact of domestic violence on a person's behaviour is a mitigating factor, have come into effect.¹⁴

The intent behind recommending the establishment of a post-conviction order was supported by the Queensland Government, with the Government to consider how best to implement this recommendation.¹⁵

WSJ Taskforce Report Two recommendations

The WSJ Taskforce's second report focused on the barriers faced by Queensland women and girls accessing the criminal justice system, both as victims and as offenders. This report had a strong focus on issues of sexual violence.

The adequacy of sentencing for sexual violence offences (specifically, for the offences of rape and sexual assault charged under ss 349 and 352 of the *Criminal Code* (Qld)) was raised in submissions to the WSJ Taskforce. Comments made by submitters included those critical of current sentencing responses:

Misconceptions about sexual violence are so common. Women are subtly accused of provoking the abuse or being responsible of their own victimisation. Most offenders get away with it. They walk away and do it again. They know the system will be lenient and give them suspended sentences or community services.¹⁶

This report made 188 recommendations, including several relevant to sentencing. These recommendations included:

- in reviewing and amending (if necessary) Chapter 22 (Offences against Morality) and Chapter 32 (Rape and sexual assaults) of the *Criminal Code* with respect to the capacity of children aged 12 to 15 years old to consent to sexual activity and to address the sexual exploitation of children aged 12 to 17 by adults who are in a position of authority over those children, to ensure there is 'an internal logic across

13. 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* (10 May 2022) <<https://www.publications.qld.gov.au/dataset/3212af28-07f4-47cf-a349-d59bb737f06e/resource/84bb739b-4922-4098-8d70-a5a483d2f019/download/qg-response-wsjtaskforce-report1.pdf>>.

14. *Penalties and Sentences Act 1992* (Qld) ss 9(2)(ga), 11 as amended by *Domestic and Family Violence (Combating Coercive Control) and Other Legislation Amendment Act 2023* (Qld) ss 26, 81. These changes commenced on 1 August 2023.

15. Queensland Government (n 13) 26 (response to rec 80).

16. Taskforce submission 702349 cited in *Women's Safety and Justice Taskforce* (n 9) vol 1, 50.

the two chapters so that the applicable maximum penalties reflect a justifiable scale of moral culpability’ (recommendation 42);

- section 9(2) of the PSA be amended to:
 - require the court to consider the hardship that any sentence would impose on the offender in consideration of an offender’s characteristics, including gender, sex, sexuality, age, race, religion, parental status, and disability;
 - require the court to consider, if relevant, the offender’s history of abuse or victimisation;
 - require the court to consider probable effect that any sentence or order under consideration would have on any of the person’s family or dependants, whether or not the circumstances are ‘exceptional’;
 - expand subsection 9(2)(p) to clarify that cultural considerations include the impact of systemic disadvantage and intergenerational trauma on the offender (recommendation 126);
- the Queensland Government respond to and implement the recommendations of the Council’s *Community-based sentencing orders, imprisonment and parole options report*, noting the need to expand suitable, gender-specific services that support women being sentenced to community-based orders rather than short periods of imprisonment (recommendation 127); and
- the PSA and *Corrective Services Act 2006* be amended 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 (recommendation 129) – with these amendments not to commence until Queensland Corrective Services develops and implements a plan for sustainable expansion of court advisory services across Queensland (recommendation 130).

Queensland Government response to WSJ Taskforce Report Two

The Government released its response to Report Two in November 2022.¹⁷ The response supported 103 recommendations in full and 71 recommendations in principle, with the remaining 14 recommendations noted.¹⁸

The reforms the Government has committed to include moving to an affirmative model of consent which requires consent to be ‘agreed’ rather than ‘given’, the recognition of ‘stealthings’ (the non-consensual removal of a condom) as rape, as well as reforms to the laws of evidence and procedure as they apply to sexual offences.

Other reforms are aimed at better meeting the needs of women and girls as accused persons and offenders.

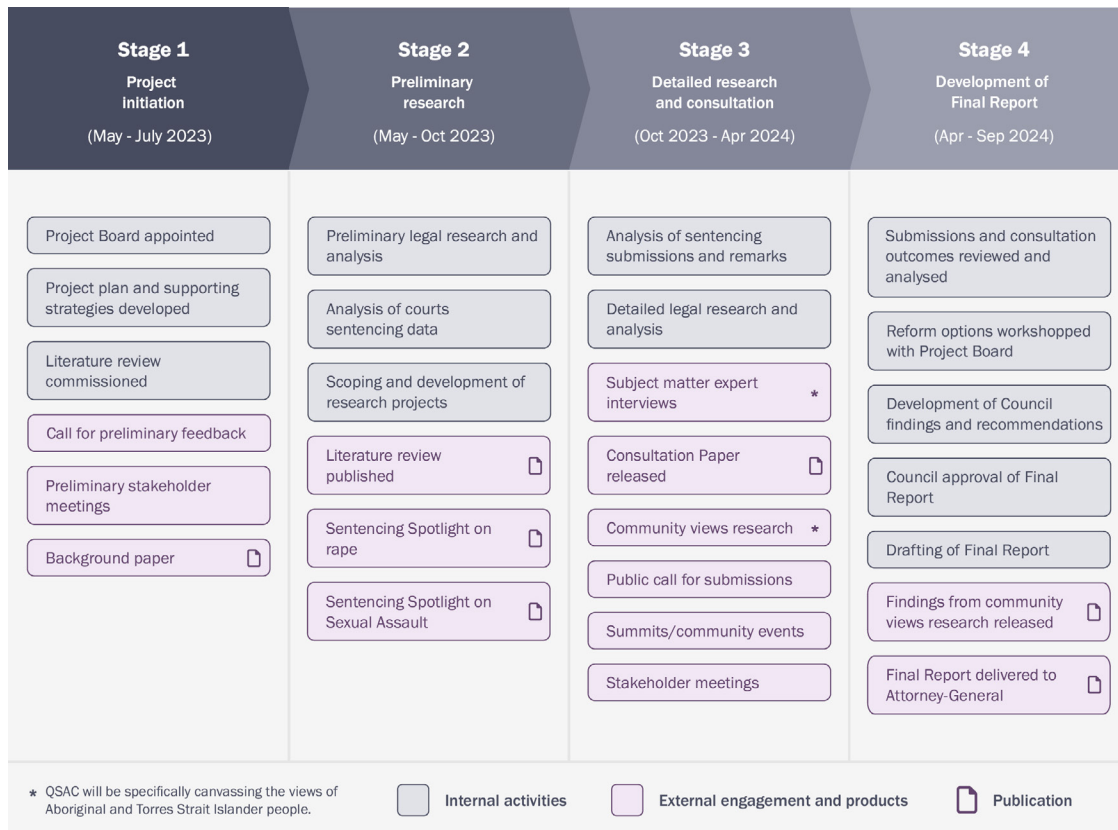
17. Queensland Government, *Queensland Government Response to Hear Her Voice - Report Two - Women and Girls’ Experiences Across the Criminal Justice System* (2022) <<https://www.publications.qld.gov.au/dataset/3212af28-07f4-47cf-a349-d59bb737f06e/resource/a0705c73-62bd-4263-ab2c-694e5735d058/download/qg-response-wsjtaskforce-report2.pdf>>.

18. Ibid.

Our approach to the review

Key dates and milestones

We will carry out our review of sentencing practices for sexual assault and rape offences in 4 stages. We will report to the Attorney-General with our findings and recommendations by 16 September 2024.



Stage 1: Project initiation: The Council’s project initiation phase, which has now concluded, involved establishing a Project Board, meetings with interested stakeholders and a call for preliminary feedback to inform the next stages of the review. The Council has commissioned researchers from Griffith University to prepare a literature review on sentencing practices for rape and sexual assault offences that we will publish in stage 2.

Stage 2: Preliminary research and issues identification: In stage 2, we will carry out detailed legal research and analysis. This will include a review of relevant appeal decisions, guidance provided under the PSA about the purposes, principles and factors of sentencing, and the approach to sentencing taken in other Australian states, territories and select overseas jurisdictions. We will analyse administrative courts data to review current and historical sentencing patterns and will prepare two *Sentencing Spotlights*: an updated *Spotlight* on rape and a new *Spotlight* on sexual assault. These will contain information about the number of people sentenced for these offences, the profile of those sentenced (including their age and gender) the types of penalties imposed, and the

prior offending history of those sentenced – as well as whether they were sentenced for subsequent offences.

During stage 2, we will also start significant planning for research projects to be completed during stage 3. These will include:

- commissioning research to explore community views about the seriousness of sexual assault and rape offences and the relevance of sentencing purposes and factors;
- a review of a sample of sentencing submissions and sentencing remarks to better understand current sentencing practices; and
- subject matter expert interviews with professionals involved in the sentencing process, including prosecutors, defence practitioners, victim support organisations and judicial officers.

Stage 3: Detailed research and consultation: In stage 3 of the review, we will carry out the research planned in stage 2 and use preliminary research and feedback to develop a detailed Consultation Paper.

We will publicly release this Consultation Paper and invite submissions to respond to a number of questions.

Once the Consultation Paper has been released, we will consult widely to invite feedback on the issues raised, including meetings with key stakeholders and community events.

Stage 4: Development of a final report: During the final stage of the review, we will review submissions and consultation outcomes and consider the findings of our research to develop recommendations. The Council will present its findings and recommendations in the form of a final report, due to be delivered to the Attorney-General by 16 September 2024. The report will be released publicly following its delivery to the Attorney-General.

More information

To find more information about the review, visit the [Council's website](#).

Our website includes a link to [subscribe to our newsletter](#).



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