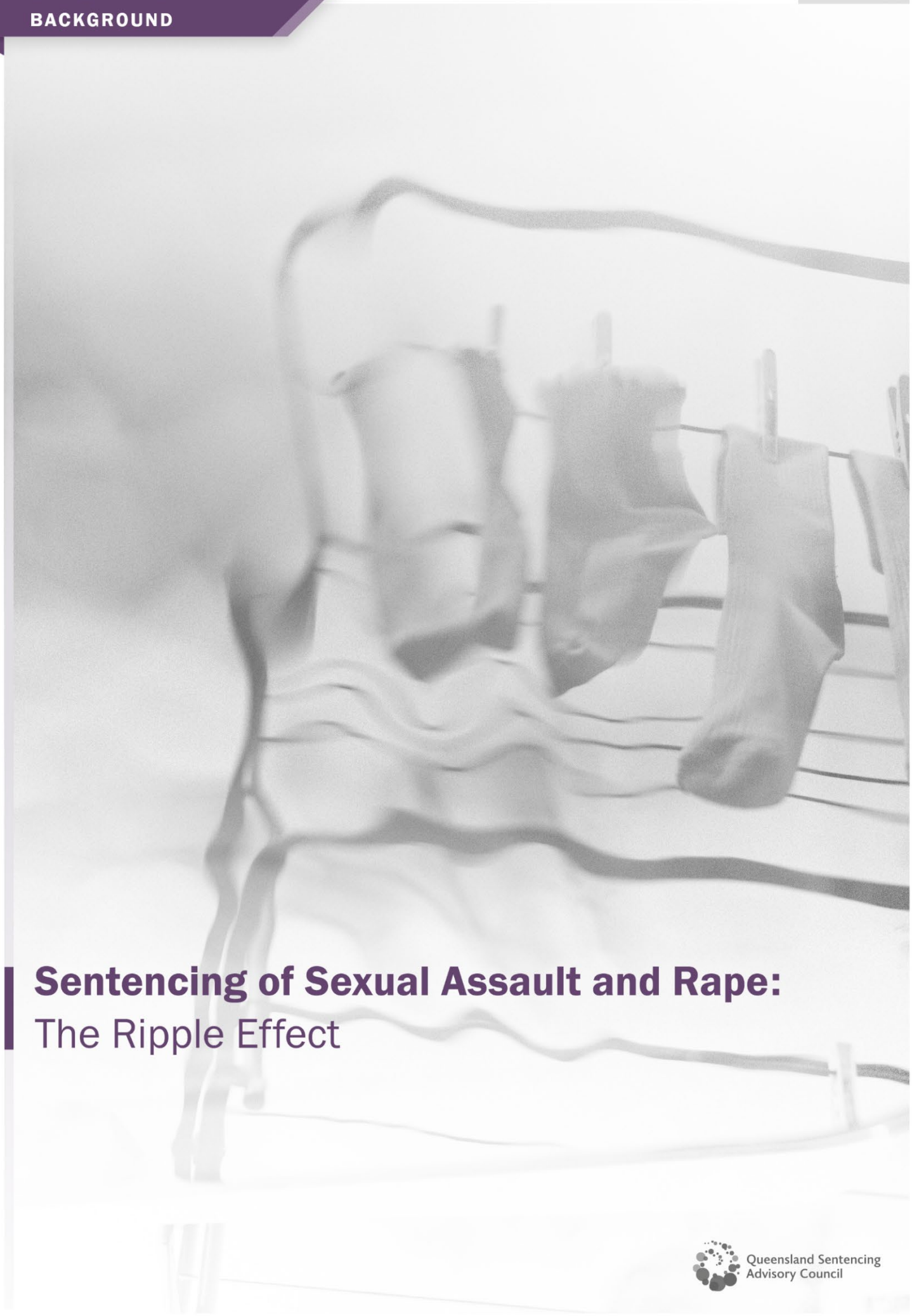
CONSULTATION PAPER:
BACKGROUND

March 2024



Sentencing of Sexual Assault and Rape:
The Ripple Effect

Queensland Sentencing Advisory Council

Warning to readers

This paper contains subject matter that may be distressing to readers. Material describing sexual violence offences, including case examples of rape and sexual assault, is included in this report. It also includes descriptions of the impact sexual violence offences can have on adult and child victims. If you need to talk to someone, support is available.

Visit our website for options for advice and support.

For publication information, see page 265 of this paper.

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Chapter 1 Introduction

1.1 Background

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:

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.

The Terms of Reference at Appendix 3 set out in detail what we have been asked to do.

For information about the Council's approach to Part 2 of the reference, visit the Council's website.

1.1.1 About this paper

This *Consultation Paper: Background* is focused on Part 1 of the Terms of Reference on the sentencing of 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.

In this paper, we present information about the sentencing of sexual assault and rape in Queensland, other Australian jurisdictions and select international jurisdictions based on our preliminary research and consultation to help inform responses to the issues and questions contained in our *Consultation Paper: Issues and Questions*.

For information about how to make a submission in response to our Consultation Paper, please visit our website.

1.1.2 Key issues the Council must consider

In undertaking our review, the Council has been asked to have regard to:

- 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;
- 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;
- 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.[1]

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;

[1] Attorney-General and Minister for Justice, 'Terms of Reference – Sentencing for Sexual Violence Offences and Aggravating Factor for Domestic and Family Violence Offences' (issued 17 May 2023) 1 — see Appendix 3.

- 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;
- 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.

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

1.1.3 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, victims-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).

1.1.4 Issues the Council may consider

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

1.2 The scope of the review

1.2.1 Sentencing practices for sexual assault and rape

The focus of this review is on sentencing practices for sexual assault and rape offences, including the legislative framework that guides sentencing and case law, current sentencing practices and any mitigating or aggravating factors on sentence.

For this reason, while this paper presents contextual information about the nature and extent of sexual violence offences and the context in which sexual violence offending occurs, the focus of the paper is on sentencing laws and practices in Queensland for these two offences, rather than for sexual violence offences more generally.

Rape and sexual assault are only two examples of sexual offences that can be charged when a person engages in unlawful sexual conduct. Other offences can be charged alongside or, in some cases, instead of these two offences, including, for example::

- attempt to commit rape;[2]
- assault to commit rape;[3]
- engaging in penile intercourse with a child (carnal knowledge with or of children under 16 years);[4]
- indecent treatment of children under 16 years;[5]

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2 *Criminal Code Act 1899* (Qld) sch 1, s 350 ('*Criminal Code* (Qld)').
3 Ibid s 351.
4 Ibid s 215. The offence has been renamed 'Engaging in penile intercourse with a child', see s 11 of the *Domestic and Family Violence Protection (Combating Coercive Control) and Other Legislation Amendment Act 2023* (Qld): ss 2, 11.
5 *Criminal Code* (n 2) s 210.

- repeated sexual conduct with a child (formerly named maintaining an unlawful sexual relationship with a child under the age of 16 years);[6]
- abuse of persons with an impairment of the mind;[7]
- incest;[8]
- procuring young person etc. for penile intercourse;[9]
- procuring sexual acts by coercion etc;[10]
- grooming children under 16;
- taking child for immoral purposes;[11] and
- child exploitation material offences.[12]

When a person pleads not guilty and a charge of rape proceeds to trial, they might be found guilty of a different offence (referred to as an 'alternative verdict').[13] Whether this is open to a jury depends on the circumstances of the case.[14]

While the focus of this paper is on sentencing for sexual assault and rape offences in Queensland, it also considers the approach in other Australian jurisdictions and select international jurisdictions. However, a direct comparison between Queensland sentencing outcomes and practices in other jurisdictions has not been undertaken, as the legislative and penalty frameworks and sentencing approaches are unique to each jurisdiction.

1.2.2 Community and victim views

The Terms of Reference require the Council to consider community views regarding the seriousness of sexual assault and rape offences and the purposes of sentencing in assessing whether current sentencing practices are adequate. We have also been asked to consult with victim survivors to invite their views.

We have commissioned the University of The Sunshine Coast to undertake focus group research to supplement previous findings on community views and to explore the views of members of the Queensland community. This research is exploring community views of offence seriousness and the importance of particular sentencing purposes using case vignettes, with several focus groups being held across the state both in person and online.

We are also working with victim survivor support and advocacy bodies to enable victim survivors to directly contribute to the review. We recognise that victim survivors' perspectives are unique and important to informing the Council's work. We acknowledge that any review which concerns the adequacy and appropriateness of current sentencing practices must necessarily be informed by their experiences and views.

1.2.3 What is out of scope

Certain issues are outside of scope for this review.

For example, the laws that govern the sentencing of children (individuals aged under 18 years of age) under the *Youth Justice Act 1992* (Qld) and sentencing outcomes for children are excluded from consideration, as the focus under the Terms of Reference is on the sentencing of adults under the PSA.

Decisions made by the Mental Health Court concerning offenders charged with sexual assault and rape offences do not form part of this review either, as they are not sentencing decisions. These decisions may include a finding that a person is of unsound mind at the time of the offence which means they are not criminally responsible for their actions.

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6 Ibid s 229B. The offence was renamed 'Repeated sexual conduct with a child' in 2023, see *Domestic and Family Violence Protection (Combating Coercive Control) and Other Legislation Amendment Act 2023* (Qld): ss 2, 16.

7 *Criminal Code* (Qld) (n 2) s 216.

8 Ibid s 222.

9 Ibid s 217.

10 Ibid s 218.

11 Ibid s 219.

12 This includes the offence of involving a child in making child exploitation material under s 228A: ibid.

13 *Criminal Code* (Qld) (n 2) s 578(1) provides that on an indictment charging a person with rape, 'the person may be convicted of any offence, if established by the evidence, defined in section 210(1) [Indecent treatment of children under 16], s 215 [Engaging in penile intercourse (carnal knowledge) with child under 16], s 216 [Abuse of persons with impairment of the mind], s 217(1) [Procuring young person or with an impairment of the mind for penile intercourse], s 218 [Procuring acts by coercion etc], s 222 [Incest] or s 352 [Sexual assaults].' An alternative verdict of attempted rape under s 350 is also available by operation of s 583.

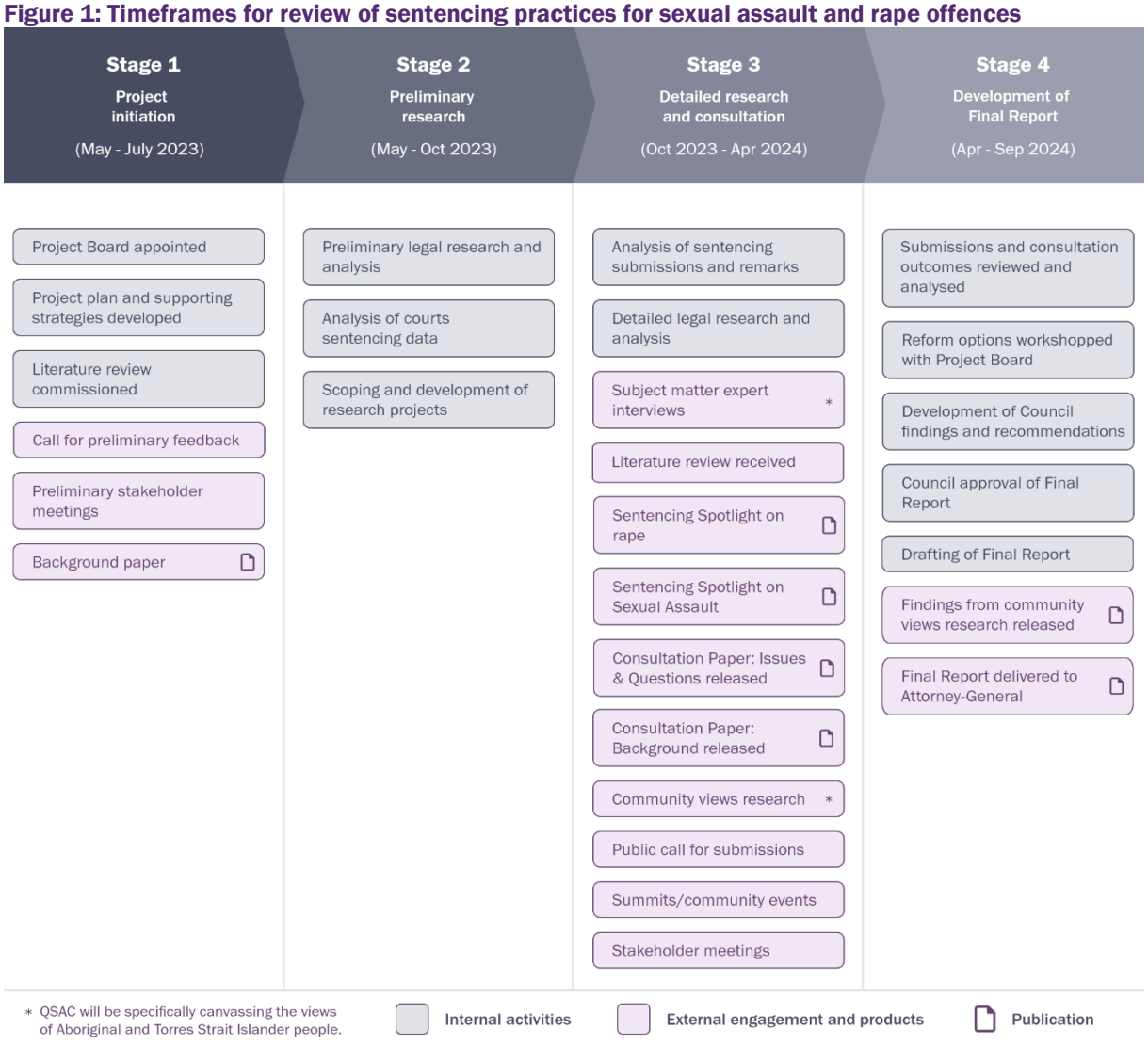
14 See *R v Bickell* [2020] QCA 37, 27 [148] (Morrison JA, dissenting as to the outcome) summarising the principles relevant to leaving alternative charges to the jury.

A detailed review of the operation of the *Dangerous Prisoners (Sexual Offenders) Act 2003* (Qld) ('DPSOA') is also excluded from this review, as it operates as a civil post-sentence scheme. Although rape and sexual assault are offences that may result in an order being made under the DPSOA (meaning the person is subject to detention or supervision at the end of their sentence), the PSA expressly prohibits a court from having regard to the potential for an offender to become subject to an order as a result of a dangerous prisoner application when imposing a sentence.[15] The Council will undertake some analysis to examine the intersection between sentencing for these offences and the operation of the DPSOA scheme, but this analysis will be limited. As the DPSOA scheme was raised during preliminary consultation, it is briefly discussed in Chapter 9.

1.3 The Council's approach

As with all its Terms of Reference projects, the Council has adopted a staged approach to the review. The key stages are illustrated in Figure 1.

Figure 1: Timeframes for review of sentencing practices for sexual assault and rape offences



1.3.1 Stage 1 – Project initiation

During the initial stage of the review, the Council established a Project Board to oversee its work on the review, undertook a range of project planning activities – including developing a research framework to guide the review – and commissioned Griffith University to undertake a literature review reviewing previous research undertaken on the sentencing of sexual violence offences.

15 *Penalties and Sentences Act 1992* (Qld) s 9(9)(b).

The Council published information on its website about the review, including a background paper exploring the Terms of Reference in more detail. We also invited preliminary feedback on issues to be explored and met with key stakeholders and agencies.

1.3.2 Stage 2 – Preliminary research

During Stage 2, we undertook background legal research on relevant case law and the legislative framework that guides sentencing for these offences in both Queensland and in other jurisdictions, and commenced our analysis of sentencing trends and outcomes based on data provided by Court Services Queensland.

During this stage, we also undertook detailed scoping and development work for research projects being undertaken during Stage 3. This includes:

- commissioning research to explore community views about the seriousness of sexual assault and rape offences and the relevance of sentencing purposes and factors;
- commencing a review of a sample of sentencing submissions and sentencing remarks to better understand current sentencing practices; and
- conducting 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.

1.3.3 Stage 3 – Detailed research and consultation

The publication of this *Consultation Paper: Background* during Stage 3 marks the mid-point of our work on the reference. It contains information of a general nature about the sentencing of rape and sexual assault, including the context in which these offences occur, sentencing practices and outcomes and the approach in other jurisdictions, to help inform responses to our *Consultation: Issues and Questions* paper.

The Council's *Consultation: Issues and Questions* paper contains **25 questions** highlighting key areas that we are seeking feedback on. A 6-week period has been provided for stakeholders and interested community members to respond to the information provided and the issues discussed in this document, with submissions due to the Council by **Monday, 22 April 2024**.

During this stage, we are undertaking community consultation, including with victim survivors of sexual violence. We also are consulting with a range of stakeholders, including legal professionals, key Aboriginal and Torres Strait Islander community representatives and organisations, and sexual violence support services.

All matters raised by stakeholders in submissions and meetings will be documented and summarised to assist the Council to reach a set of appropriate recommendations, which will be developed alongside the drafting of the Final Report in Stage 4.

In February 2024, we released two *Sentencing Spotlights* on rape and sexual assault exploring the profile of people sentenced for these offences, sentencing outcomes and recidivism over an 18-year data period (1 July 2005–30 June 2023). These papers explore sentencing outcomes for both children and adults sentenced for these offences. Demographic data presented in Chapter 4 has been drawn from these two publications.

During this phase of the review, we are also finalising work on research planned during Stage 2. The findings of this research will be reported by the Council in its Final Report.

1.3.4 Stage 4 – Development of 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 Monday, 16 September 2024. The report will be released publicly following its delivery to the Attorney-General.

1.4 Data sources

1.4.1 Administrative courts data

The Council conducted analysis of administrative data collected by Court Services Queensland on the characteristics of offenders and sentencing outcomes for those sentences for sexual assault and rape offences. Data reported in this paper covers an 18-year period (from July 2005 to June 2023) unless stated otherwise.

The courts data is generally presented in relation to the most serious offence ('MSO') for which a defendant was sentenced on a particular day. The determination of which sentence is the 'most serious' was ascertained using predetermined data flags developed by the Queensland Government Statistician's Office ('QGSO'). Cases in which the sentence imposed for an MSO was a life sentence were excluded from analysis considering sentence lengths– but are separately reported. Unless expressly stated otherwise, all data in this paper is referring to the MSO. For information on the limitations and exclusions relating to the data analysed, see Data sources and counting rules (page 103).

The Queensland Police Service ('QPS') and the Office of the Director of the Public Prosecution ('DPP') provided data about victim survivors and conduct details for rape and sexual assault offences that were sentenced during 2022–23. This information has been used to supplement the courts data and provide insights into the relationships between defendants and victim survivors, as well as contextual information about victimisation.

1.4.2 Analysis of sentencing remarks

As part of the Council's research into Queensland's sentencing practices for the offences of rape and sexual assault, we commenced an extensive qualitative analysis of sentencing remarks and sentencing submissions of cases involving rape and sexual assault finalised between July 2020 and June 2023. This provides extremely rich and useful information in relation to how offenders were sentenced in Queensland courts, but it also provided valuable insights into the harms experienced by victim survivors of rape and sexual assault.

At different points throughout this consultation paper, we have drawn on preliminary analysis of the sentencing remarks and sentencing submissions to present some early findings providing some understanding of how current sentencing laws and practices are being applied in cases involving rape and sexual assault offences. The preliminary findings are presented in textboxes for easy identification.

The study sample consists of a total of 150 sentencing remarks, with 75 drawn from rape cases and 75 from sexual assault cases using a randomised stratified sample. The findings presented have stemmed from the preliminary analysis of the coding that was completed at the time of writing this consultation paper. Approximately 47 per cent (n=70) of the sentencing remarks (inclusive of both rape and sexual assault cases) had been fully coded at the time the preliminary analysis was conducted.

The findings presented in this paper are preliminary observations, and – while reflective of the analysis to-date and an accurate depiction of current practices in sentencing – they may be subject to change on completion of the coding and analysis of the full study sample. Therefore, the results presented should be interpreted with caution.

1.4.3 Subject matter expert interviews

As noted in section 1.3.2, 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. At the time of writing this paper, 26 interviews were held with members of the judiciary, legal representatives (including private, Legal Aid Queensland and Aboriginal and Torres Strait Islander Legal Service practitioners) and public prosecutors from the QPS and DPP. Some of the issues identified through interviews are referred to in this paper; however, a full analysis of expert views will be presented in our Final Report.

1.5 Terminology

The Council acknowledges that the language we use when describing sexual offences and offending is important. Language can have a profound impact on a person's agency and identity.

1.5.1 Rape and sexual assault as 'sexual violence offences'

Sexual violence is a broad term used to mean any unwanted acts of a sexual nature perpetrated by one person against another person.

The language of 'sexual violence offences' is used in the Terms of Reference interchangeably with rape and sexual assault. Throughout this paper, we have adopted the same approach of using these terms, while acknowledging the large number of other sexual offences that fall within the category of 'sexual violence' that are not the subject of our current review.

The Council recognises that sexual violence offences are inherently violent. We acknowledge a broader and systemic problem regarding the classification of 'sexual offences' as distinct from 'violent offences'.[16]

1.5.2 Victim survivors/people who have experienced sexual violence

The Council uses the terms 'people who have experienced sexual violence' as well as 'victim survivors' throughout this paper in addition to the term 'victim'. This use of this language recognises that the experience of crime victimisation does not define who a person is.[17]

The Council acknowledges that many individuals who have experienced crime, including specific crime types such as family violence and sexual assault, prefer the term 'victim survivor' or 'survivor' rather than the term 'victim'[18] while some people do not identify with any of these terms.

'The terms 'victim' and 'victim survivor' are used throughout this paper to mean the person who has had (or is alleged to have had) the act of sexual violence committed against them. The Council notes that there are different legal definitions of who is a victim adopted for specific purposes, and that some of these definitions are broader than that used for the purposes of this paper.[19]

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'[20]).

1.5.3 Sentenced people/people who have committed sexual violence

The Council recognises that societal stigma around incarceration is a source of ongoing trauma for people who have experienced prison and can impede their reintegration into the community following release. The Council notes evidence presented to a recent Victorian Parliamentary Inquiry into its criminal justice system which suggested that terms such as 'prisoner' and 'offender' can perpetuate this stigma by characterising a person by the fact of their incarceration.[21] In addition, the Council understands that such language perpetuates a false dichotomy between people who have been a victim of crime and those who commit crime.

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16 See Sentencing Advisory Council (Victoria), *Sentencing of Offenders: Sexual Penetration of a Child under 12* (Report, June 2016) 2–3.

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

18 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.

19 See, for example, *Victims of Crime Assistance Act 2009* (Qld) s 5 which defines a 'victim' to mean: 'a person who has suffered harm — (a) because a crime is committed against the person; or (b) because the person is a family member or dependant of a person who has died or suffered harm because a crime is committed against that person; or (c) as a direct result of intervening to help a person who has died or suffered harm because a crime is committed against that person. Cf. the definition of the 'victim' for the purposes of the eligible persons (victims) register in the *Corrective Services Act 2006* (Qld) which is confined to 'the actual victim of the offence': s 320.

20 The term complainant used in this context 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.

21 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, 253.

In this paper, the term 'sentenced people' is predominantly used to refer to the people sentenced for a relevant offence in preference to 'offenders'. The terms 'offender' and 'prisoner' are used when discussing the operation of relevant legislation (for example, under the provisions of the PSA and the DPSOA) in reporting on relevant research which adopts this term. The term 'people who have committed sexual violence' is used for those who are dealt with outside of the criminal justice system.

Part A — The broader context of sentencing for sexual assault and rape

Chapter 2: Nature and extent of sexual violence

Chapter 3: Sexual assault and rape offences

Chapter 4: Who is involved in sexual assault and rape?

Chapter 5: Human Rights considerations

Chapter 2 Nature and extent of sexual violence

2.1 Introduction

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

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 offences to police and high attrition rates for sexual violence offences in the criminal justice system. It also considers community views about sexual violence and their influence on the criminal justice system and sentencing.

Finally, this chapter considers 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 review, the Women's Safety and Justice Taskforce ('WSJ Taskforce') *Report Two: Women and Girls' Experiences Across the Criminal Justice System*.

2.1.1 Sexual violence is serious, pervasive and gendered

Sexual violence is a major national health and welfare issue in Australia. It can have lifelong impacts for both victim survivors and perpetrators. Sexual violence has significant short-term and long-term effects on victim survivors' physical and mental health and wellbeing. Not only is the direct victim survivor deeply affected, but the impacts of sexual violence ripple out across families, communities and society.[1]

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 people and/or relationships.[2] The impacts of sexual violence are discussed further in Chapter 4.

Sexual violence affects people of all ages, backgrounds and sexual orientation. However, most victims are female. Many are children. Global and national studies show that women and girls are overwhelmingly the victims of sexual violence.[3]

Sexual violence is widespread in the Queensland and Australian community.

1 Commonwealth Government (Department of Social Services), *National Plan to End Violence against Women and Children 2022-2032* (2022) 41 ('*National Plan 2022-2032*').

2 Ibid 41; Judy Cashmore and Rita Shackel, 'The Long-Term Effects of Child Sexual Abuse', *Child Family Community Australia Paper No. 11* (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*, (ANROWS Research Report *14,* 2022).

3 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* (Catalogue No 4906.0, 15 March 2023) ('*PSS 2021-22*').

National rates

The Australian Bureau of Statistics ('ABS') *2021-22 Personal Safety Survey* ('PSS') estimates that 2.8 million people aged 18 or over had experienced sexual violence since the age of 15,[4] including 2.2 million women (representing 22% of all women aged 18 or over) and 582,400 men (6.1%).[5] Consistent with its 2016 PSS findings, the ABS found that 1 in 5 women had experienced sexual violence since the age of 15.[6] In contrast, 1 in 16 men had experienced sexual violence since the age of 15. National research has found that compared to Australian men, Australian women are:

- about 4 times more likely to experience sexual violence;[7] and
- more than 8 times more likely to experience sexual violence by a partner.[8]

When considering national victims of crime data in 2022, 32,146 sexual assault (including rape and other sexual offences) crimes were recorded by police.[9] This represents an increase from the previous year's data and was 'the highest recorded victimisation rate of sexual assault in the thirty year time series'.[10] Females accounted for more than 5 times the victimisation rate of male victims (206 victims per 100,000 females compared to 39 victims per 100,000 males). More than a third (36%) of all recorded sexual assaults in 2022 were domestic and family violence related (11,676 victims).[11]

Queensland rates

In 2022, there were 9,608 sexual offences reported to the QPS, representing an increase of 3.7 per cent from the previous year of 9,267.[12] This was the highest annual number of sexual offences recorded by QPS since 2001. Of the 9,608 offences recorded in 2022, over a third were for rape and attempted rape (38.9%, n=3,734), with the remaining two-thirds (61.1%, n=5,874) being for other sexual offences. [13]

Sexual offences accounted for 12.1 per cent of all QPS recorded victims in 2021-22 (n=7,835), with females comprising more than 4 in 5 (86.8%, n= 6,801) of all recorded victims of sexual offences.[14] This proportion remained consistent across both the Aboriginal and Torres Strait Islander and non-Indigenous victim cohorts, and female victims outnumbered males across all age groups. Females aged 10-29 years comprised almost 3 in 5 recorded victims of sexual offences.[15]

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4 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 were made face-to-face, and which the person targeted believed were able and likely to be carried out.

5 *PSS 2021-22* (n 3) Table 1.1. The PSS estimates information about populations of interest using survey responses and a person weighting approach. In this case, the ABS has estimated that 2.2 million (22%) women have experienced sexual violence based on the number of women who reported this outcome as a proportion of the total number of women who responded to the survey. Each respondent to the PSS survey represents many more people from their demographic group, the number of people they represent is calculated based on how likely they were to be selected for the survey. 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>.

6 *PSS 2021-22* (n 3) and Australian Bureau of Statistics, *Personal Safety Survey 2016* (8 November 2017).

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

8 Ibid 31.

9 Australian Bureau of Statistics, *Recorded Crime - Victims 2022* (29 June 2023) ('*ABS Victims 2022*'). Recorded means offences which may have been reported by a victim, witness or other person, or detected by police. Sexual assault definition is based on ANZSOC classification 0311 and 0312).

10 Ibid.

11 Ibid.

12 Queensland Police Service, *Queensland Crime Statistics* <https://mypolice.qld.gov.au/queensland-crime-statistics/ - accessed 12 September 2023>. Sexual offences include rape, sexual assault and other sexual offences.

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

14 Queensland Government Statistician's Office, Queensland Treasury, *Crime Report, Queensland, 2021-22* (Report, 2023) 68 ('*Crime Report*').

15 Ibid 70.

2.1.2 Males are overwhelmingly the perpetrators of sexual violence

Sexual violence is gendered. Just as women and girls are overwhelmingly the victims, men and boys are overwhelmingly the perpetrators.[16] Of the victims and survivors who spoke to the Royal Commission into Institutional Responses to Child Sexual Abuse about sexual abuse by an adult, almost all (93.9%) said they were abused by a man.[17] However, this finding 'does not negate the reality that male children in particular and male adults also suffer sexual victimisation by male and female offenders'.[18]

The 2021-22 PSS found that women were more likely to experience sexual violence from the age of 15 perpetrated by a male than a female. Of the 2.2 million women who experienced sexual violence, the overwhelming majority reported that that it had been perpetrated by a male person (99.3%, n=2,187,800).[19] Of the 582,400 males who experienced sexual violence since the age of 15, over half reported a male perpetrator (58.7%, n=341,700).[20] This study reported an estimated 737,200 women experienced sexual assault (including rape or other sexual offences) by a male in the last 10 years, of which 20 per cent experienced their most recent incident within the last 12 months.

When considering Queensland crime statistics for 2021–22, of the approximately 2,991 reported sexual violence offenders, 96.2 per cent were males (n=2,875).[21] Females accounted for less than 4 per cent of reported sexual violence offenders in 2021–22 (n=116). Offender demographics, including gender breakdown, for sentenced cases of rape and sexual assault in Queensland is discussed further in Chapter 4.

2.1.3 Sexual violence is experienced in different ways

Sexual violence occurs across a broad range of different relationships and locations. Despite this, misconceptions about sexual violence continue to prevail, with corresponding impacts upon the official reporting of offences to police – see section 2.3 below for more details.

Sexual violence is often perpetrated by someone known to the victim survivor

Most sexual violence offences are committed by someone the victim survivor knows. This may be a current or former intimate partner, parents or siblings, friends and colleagues.[22] For example, the recent PSS found that the majority of women who have experienced sexual assault (including rape or other sexual offences) by a male in the last 10 years, said that male person was someone they knew (85%), rather than a stranger (16%). For just over half of the women who knew the perpetrator, he was an intimate partner (53%), including a cohabiting partner (28%), and boyfriend or date (25%).[23]

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 mostly occurs in private locations such as people's homes. The recent PSS found that over two-thirds of the women who had experienced sexual assault (including rape or other sexual offences) by a male were offended against within a residential location (69%). Of these, around a third of all sexual assault incidents occurred in the victim's home (36%, n=266,700), with only 20 per cent being committed within the perpetrator's home (n=147,600).[24]

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16 Emma Fulu. Et al (n 3); *PSS 2021-22* (n 3). See also Chapter 4.

17 Commonwealth Government (Department of Prime Minister and Cabinet), *National Strategy to Prevent and Response to Child Sexual Abuse 2021-2030* (2021) 25.

18 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* 240.

19 *PSS 2021-22* (n 3) *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. There was 52,300 (2.4%) of women who reported experiencing sexual violence by both a male and a female.

20 Of the 341, 700 reporting a male perpetrator, 48, 200 of these (14.1%) involved both a male and female perpetrator: PSS *2021-22* (n 3) *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).*

21 *Crime Report* (n 3) 44. These figures included child offenders aged 10-17 years, which are not in scope for our review.

22 Australian Institute of Health and Welfare, *Sexual Assault in Australia*, 2020, 8-9 ('*Sexual Assault in Australia*').

23 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'.

24 PSS *2021-22* (n 3) *Sexual Violence (female experiences in PSS) - Incident characteristics.*

The Royal Commission into Institutional Responses to Child Sexual Abuse found that this also occurs in institutions, with offences predominantly being committed by someone known to the victim survivor, or someone in a position of trust.[25]

Sexual violence may happen once or many times

Sexual violence can be a one-off offence, or it can be something that happens more often as part of a pattern. For child sexual abuse and domestic and family violence survivors, sexual violence may happen over a long period of time.

Research shows that victim survivors may experience sexual violence many times in their life by different people.[26] For example, one study found that 15 per cent of women aged 18 to 24 years had reported experiencing sexual violence by a partner. Six years later this had increased to one-third of the women (33%), now aged between 24 and 30 years.[27]

Sexual violence can occur together with other forms of violence

Sexual violence can be perpetrated with other forms of violence. For example, physical and emotional abuse may commonly be committed alongside 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 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. Sexual violence may also be less visible and less understood for some groups in the community.[28]

There is limited publicly available data on the prevalence of sexual violence experienced by marginalised communities. Some of those communities are discussed below.

Aboriginal and Torres Strait Islander people

While there is limited published data available, research findings show 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 non-Indigenous Australians.[29] Analysis of data on sexual violence offences reported to the Queensland Police Service ('QPS') in 2022–23 found Aboriginal and Torres Strait Islander females were 2.5 times more likely to be victims of rape than non-Indigenous females, and Aboriginal and Torres Strait Islander males were more than 4.5 times more likely to be victims of rape than non-Indigenous males.[30] Aboriginal and Torres Strait Islander women were almost twice as likely to be a victim of non-aggravated sexual assault[31] than non-Indigenous women[32] and Aboriginal and Torres Strait Islander men were slightly more likely to be victims of non-aggravated sexual assault than non-Indigenous men.[33]

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25 Royal Commission into Institutional Responses to Child Sexual Abuse, *Final Report Volume 2: Nature and Cause* (Report 2017) 34 ('*Royal Commission on Child Sexual Abuse Final Report Vol 2*').
26 Natalie Townsend et al (n 2) 15.
27 Ibid 31.
28 *National Plan 2022-2032* (n 1) 41.
29 Australian Institute of Health and Welfare ('AIHW'), *Family, domestic and sexual violence in Australia*, 2018.
30 Queensland Government Statistician's Office analysis of Queensland Police Service unpublished data, extracted in September 2023.
31 Australian Standard Offence Classification (Queensland Extension) subgroup category 03121 'non-aggravated sexual assault'.
32 Ibid.
33 Ibid.

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%).[34] Evidence shows Aboriginal and Torres Strait Islander women and girls are especially vulnerable to sexual violence.[35]

The historical context of colonialism, dispossession, forced child removal and intergenerational trauma shapes Aboriginal and Torres Strait Islander peoples' rates of sexual violence. Those experiences often involved sexual violence and continue to contribute towards violence against Aboriginal and Torres Strait Islander women remaining invisible.[36]

Violence against Aboriginal and Torres Strait Islander people, including sexual violence, is perpetrated by people of all cultural backgrounds, in many different contexts and settings.[37] A 2001 NSW study found that 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.[38] Qualitative research with Aboriginal people in South Australia from 1987, found that of the 59 instances of rape reported by participants, 42 per cent of perpetrators were non-Indigenous, 41 per cent were Aboriginal and Torres Strait Islander and 17 per cent of these matters involved Aboriginal and non-Indigenous men acting together.[39]

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. 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 1.1 million women and 343,500 men reported experiencing sexual abuse (including rape or other sexual offences) before the age of 15.[40] This equates to 1 in 10 women and 1 in 28 men having experienced childhood sexual abuse. Australian research examining prevalence of child sexual abuse found females had prevalence rates of up to 26.8 per cent for non-penetrative abuse and 12 per cent for penetrative abuse. [41] In comparison, males had prevalence rates up to 12 per cent for non-penetrative abuse and 7.5 per cent for non-penetrative abuse.

Analysis of data on sexual violence offences reported to QPS in 2022–23 found children aged under 15 years accounted for 15.0 per cent of all victims of a rape offence reported to police, and young people aged 15–19 years accounted for a further 25.6 per cent (n=477 and n=813 respectively).[42] For children aged under 15, the number of female victims for rape offences was 5 times that of males. For young people aged 15–19, the number of female victims was 20 times that of males for rape offences.[43] In 2022–23, young people aged 15–19 accounted for 19.8 per cent of victims of non-aggravated sexual assault offences.

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34 *ABS Victims 2022* (n 9).

35 Women's Safety and Justice Taskforce, *Hear Her Voice: Women and Girls' Experiences Across the Criminal Justice System (*Report Two, Volume 1, 2022) 43 citing *Sexual Assault in Australia* (n 22) 3 ('*Hear Her Voice Report 2*').

36 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.

37 Our Watch, 'Challenging Misconceptions About Violence Against Aboriginal and Torres Strait Islander Women' (Webpage, Our Watch) accessed 14 February 2024.

38 Jacqueline Fitzgerald and Don Weatherburn, 'Aboriginal Victimisation and Offending: The Picture from Police Records, Crime and Justice Statistics' *NSW Bureau of Crime Statistics and Research* (Issue Paper No 17, December 2001) 3.

39 Monique Keel, *Family Violence and Sexual Assault in Indigenous communities: "Walking the Talk"*, Australian Centre for the Study of Sexual Assault (Briefing, 4 September 2004) 6, citing Edie Carter, *Aboriginal Women Speak Out* (Adelaide Rape Crisis Centre, 1987).

40 *PSS 2021-22* (n 3), '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.

41 Australian Institute of Family Studies, *The Prevalence of Child Abuse and Neglect* (CFCA Resource Sheet, 4 April 2017) <https://aifs.gov.au/cfca/publications/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* (Research Report No 33, Australian Institute of Family Studies (Cth), June 2015) 2.

42 Email from Kathryn Boersma, Principal Statistician, Crime Statistics Branch, Queensland Government Statistician's Office to April Chrzanowski, 17 January 2024 with supplementary Queensland Government Statistician's Office analysis of Queensland Police Service unpublished data, extracted in September 2023.

43 Ibid.

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 to 10 per cent of people without a disability.[44]

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 to 15%).[45] Research reflects that women with some form of disability experience higher rates of sexual violence. 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'.[46]

Men with disability are 2.6 times more likely to report an incident of sexual violence over their lifetime compared to men without disability.[47]

Data on some population cohorts with disability is limited, and even less is known about their experiences of sexual violence.[48] Data for some communities with disability include:

Aboriginal and Torres Strait Islander people with disability:[49]

- over one-third of the Aboriginal and Torres Strait Islander population have a disability (38%);
- more than 1 in 5 Aboriginal and Torres Strait Islander children have a disability. Almost one-quarter (23.8%) of all Aboriginal and Torres Strait Islander people with disability are children; and
- there are more Aboriginal and Torres Strait Islander boys with disability than girls (26% and 18% of all Aboriginal and Torres Strait Islander children respectfully).

Children with disability:[50]

- 8.2 per cent of Australian children 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%); and
- 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 one that is 'profound or severe').

The Royal Commission into Violence Abuse, Neglect and Exploitation of People with Disability observed there were limitations to reliable data on people with disability and specific forms of violence. The Royal Commission noted there was no publicly available or reliable data on the experiences of sexual violence for some people with disability.[51]

People from culturally and linguistically diverse backgrounds

Culturally and linguistically diverse ('CALD') is used to describe communities for whom English is not the main language or whose cultural norms differ from the wider community.[52] This broad description, amongst other factors, makes it difficult to measure how many culturally and linguistically diverse people have experienced sexual violence.

We know refugees and asylum seekers are subgroups within this cohort who have been exposed to many forms of violence, including 'persecution, political imprisonment, torture, sexual exploitation and mass trauma or genocide'.[53] Research suggests that 'women from non-English speaking backgrounds who are recent immigrants or refugees and whose cultural background places great emphasis on the dominant role of a husband in marriage, were viewed as particularly vulnerable to sexual exploitation and violence'.[54]

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44 Centre of Research Excellence in Disability and Health (CRE-DH), *Nature and Extent of Violence, Abuse, Neglect and Exploitation Against People with Disability in Australia: Research Report* (March 2021) 9 ('*Research Report*').

45 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*').

46 CRE-DH, *Research Report* (n 43) 14.

47 *Royal Commission on Disability Final Report* (n 44) 10.

48 Ibid 302–5.

49 Ibid 43–4.

50 Ibid 29.

51 Ibid 85–6. The Royal Commission noted some data is available on experiences of physical violence, and that the most reliable data on experiences of violence (the PSS) does not collect information specifically on various population cohorts discussed in this paper.

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

53 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.

54 Natalie Taylor and Judy Putt, 'Adult sexual violence in Indigenous and culturally and linguistically diverse communities in Australia', *Trends and Issues in crime and criminal justice* (September 2007) 3.

LGBTIQA+ people

Available data indicates that people who identify as LGBTIQA+ are likely to experience sexual violence at significantly higher rates than others.[55] These experiences may be hidden because sexual violence is often 'understood as heterosexual violence'.[56]

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%).[57] This was a rate of nearly 4 times higher than found in the general Australian public (13.3%). Of those who reported experiencing sexual violence, over two-thirds said they had experienced it multiple times (69.6%).[58] Again, this was at a much higher rate that among a general sample of people in Australia (45.4%).

The same study found:

> sexual violence and coercion was much more common among participants who had been assigned female at birth - trans men and non-binary people - compared to those who had been assigned male (61.8% vs 39.3%, p<0.001). Non-binary participants who had been assigned female at birth were most likely to report sexual violence (66.1%) followed by trans men (54.2%) and non-binary people assigned male at birth (44.5%). Whilst trans women least commonly reported sexual violence (36.1%), this remains almost twice that of the general public.[59]

A more recent study of LGBTQ people's experiences and perceptions of sexual violence found that 82 per cent of participants had had sex with a person because they felt they could not say no, and 80 per cent when they did not want to.[60] Over a third of respondents experienced someone having sex with them when they were unconscious or asleep.[61]

A 2014 study with 255 transgender Australians found 11.9 per cent of participants 'reported experiencing sexual assault, attempted rape and/or rape'.[62]

An ANROWS study into CALD trans women's experiences of sexual violence found over two-thirds of cisgender[63] and CALD trans women[64] reported experiencing a sexual assault since the age of 16, compared to half of the non-CALD trans women (50%).[65]The study also found for all respondents sexual assault was most commonly experienced 2 to 10 times, however the rate was 2 times higher for some CALD trans women, with more than a quarter (28%) experiencing 'sexual assault more than 10 times'.[66] Researchers concluded 'sexual violence is an endemic problem for trans women of colour living in Australia, as it is for every group of women'.[67]

People in the custodial system

Research into incarcerated peoples' experiences as victim survivors of sexual violence is limited. Assaults in custody are often underreported, making data collection difficult.

National data for 2022, found about 1 in 50 people released from prison reported they had been sexually assaulted by another person in custody.[68]

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55 *Sexual Assault in Australia* (n 22) 3.

56 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 (Cth), December 2015) 1–2.

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

58 Ibid.

59 Ibid.

60 Eloise Layar et al. *LGBTQ+ People's Experiences and Perceptions of Sexual Violence* (Research Summary Report, 2022) 15.

61 Ibid.

62 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, *International Journal of Transgenderism* 15(1) (2014).

63 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 Research Report, June 2020) 131.

64 N=18, 66%: Ibid.

65 Ibid.

66 Ibid.

67 Ibid 156.

68 This data was self-reported and likely to be an underestimate of the true number of sexual assaults in prison: Australian Institute of Health and Welfare, *The Health of People in Australia's Prisons 2022* (2023) 23.

Studies show incarcerated women have experienced higher rates of sexual victimisation across their life course than non-incarcerated women,[69] with some studies suggesting that up to 80 per cent of women in custody had a history of sexual victimisation and trauma.[70] A 2010 study of male and female prisoners in Queensland correctional centres found that three-fifths of women prisoners had been forced or frightened into some sort of sexual activity at some point in their lives (60.2%).[71] In contrast, only 13 per cent of male survey respondents said this had happened to them. For the women who reported forced experiences, the median number of forced sexual activity was 2, with some women reporting up to 500 events.[72] The NSW findings for the same research were similar, with 14 per cent of men and 59 per cent of women saying they 'had been forced or frightened into sexual activity during their lifetime'.[73]

More recent research of female prisoner experiences in Queensland has found almost 9 in 10 women had been sexually abused in their lifetime (89%) and 'up to 85 per cent had experienced childhood sexual abuse (with 37% of those having been abused before the age of 5)'.[74] In a 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]

Research into 'identifying characteristics of those at risk of sexual violence in men's prisons', has found several commonly associated factors, including:

- Younger age;
- Small physical stature;
- Prior sexual victimisation;
- Being new to prison;
- Expressing traditionally feminine characteristics; and
- Identifying as gay, bisexual or a transgender woman.[76]

Due to 'inconsistent definitions', the true number of transgender people in custody in Australia is unknown.[77] Research on transgender people's experiences of sexual violence in prison is limited, with most studies coming from the USA.[78] However, international research suggests that incarcerated transgender people are at 'higher risks of…sexual assault whilst in prison', with some reporting 'daily experiences of sexual coercion and psychological distress'.[79]

One Australian study involved interviews with 7 transgender women incarcerated in NSW.[80] For the 5 participants in male prisons, being a trans woman meant 'unwanted sexual advances from other prisons 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'.[81] Similarly, turning down sexual advances from male prisoners led to physical violence for some participants. In contrast, the 2 participants who were in a women's prison reported sexual violence was 'non-existent really', although both had 'strategies to avoid any problems arising'.[82]

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69 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* (ACSSA Issues no 13, Australian Institute of Family Studies (Cth), December 2012) 1-5, 16; Mary Stathopoulos and Antonia Quadara, *Women as offenders, women as victims: the role of corrections in supporting women with histories of sexual abuse* (2014) 13–14.

70 Mary Stathopoulos et al, *Addressing women's victimisation histories in custodial settings* (ACSSA Issues no 13, Australian Institute of Family Studies (Cth), December 2012) 16.

71 Tony Butler et al. *Sexual Health and Behaviour of Queensland prisoners with Queensland and New South Wales Comparisons*, National Drug Research Institute, Curtin University and School of Public Health and Community Medicine, University of New South Wales (2010) vii.

72 Ibid 20.

73 Juliet Richters at al. *Sexual Health and Behaviour of New South Wales Prisoners* (2008) viii.

74 Debbie Kilroy, *Women in Prison in Australia presentation at the Current Issues in Sentencing Conference*, Australian National University, Canberra (6-7 February 2016) 1. <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 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,* 383, citations removed.

77 Sam Lynch and Lorana Bartels, 'Transgender Prisoners in Australia: An Examination of the Issues, Law and Policy' (2017) 19 *Flinders Law Journal,* 190.

78 See ibid 192; Wilson et al. (n 76) 384–85.

79 Lynch and Bartels (n 77) 192 citing, Association for the Prevention of Torture, *LGBTI Persons Deprived of Their Liberty: A Framework for Preventive Monitoring* (Penal Reform International, 2013).

80 Wilson et al. (n 76).

81 Ibid 388.

82 Ibid 393.

2.2 Sexual violence is poorly understood

Confused and mistaken community views of sexual violence are widespread.[83] Misconceptions about what sexual violence is, when and how it happens and how to respond if someone discloses sexual violence contribute to low reporting and high attrition rates in the criminal justice system.

Firstly, misconceptions can discourage victim survivors from reporting the offence to police out of fear and stigma. Secondly, these misconceptions may influence the decisions of police and prosecutors about whether to charge and/or progress a case through the criminal justice system. Thirdly, jurors are members of the public and their attitudes and beliefs influence their decision making. How misconceptions contribute to attrition of sexual violence offences in the criminal justice system is discussed below.

Nationwide research indicates that:

- Over one-third of Australians (34%) believe that it is common for sexual assault accusations to be used as a way to get back at men;[84]
- Around one quarter of Australians (24%) think women who say they were raped had led the man on and then had regrets;[85]
- Around one in 10 Australians think if a woman is raped while drunk or affected by drugs, she is at least partly responsible;[86]
- 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;[87] and
- Around 1 in 10 Australians (14%) believe many allegations of sexual assault made by women are false.[88]

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.[89] Such beliefs can be broadly divided into 4 categories:[90]

> **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.[91]

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.[92] 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'.[93] Research has also found judges and police investigators to perceive emotional victims are more

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83 *Improving Justice Responses* (n 68) 35.
84 Christine Coumarelos et al, *Attitudes Matter: The 2021 National Community Attitudes Towards Violence Against Women Survey (NCAS), Summary for Australia* (ANROWS Research Report, 2023) 46.
85 Ibid.
86 Ibid 48.
87 Ibid.
88 Ibid. This question was only asked to one quarter of the sample.
89 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.
90 Fiona Leverick, 'What do we know about rape myths and juror decision making?' (2020) 24(3) *The International Journal of Evidence & Proof* 255, 256.
91 Ibid 257.
92 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.
93 Ibid 466–67.

credible.[94] This may not reflect reality as a victim survivor can be numb during questioning or have improved coping due to counselling.[95] A New Zealand jury study found jurors believed 'victims who are "good" - not drunk, not promiscuous and so on' were 'more likely to be truthful'.[96] 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'.[97]

When offences, perpetrators and victim survivors do not reflect this script 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.

2.3 Barriers to reporting and attrition in the criminal justice system

The figures discussed in Chapter 8 on sentenced cases are only a proportion of sexual violence offences perpetrated in Queensland and Australia. Even though sexual violence is common, it is one of the most under-reported crimes. Research suggests about 87 per cent of people who experience sexual violence do not report it to police,[98] with 'incidents of rape, sexual offences and child sexual abuse are significantly under-reported, under-prosecuted and under-convicted'.[99] Encouragingly, reporting sexual violence offences to police has increased in Australia, with a thirty-year high recorded in 2022.[100] However, despite this increase in reporting, there has not been a substantial change to attrition rates.

This section will briefly explore 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.[101]

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

- Fear they will not be believed;[102]
- Shock, confusion, guilt or shame about the offence; [103]
- Fear of the perpetrator;[104]
- Unsupportive community attitudes about women, racism and rape myth acceptance;[105]
- Lack of trust in the justice system or authorities, including from past experiences of harm and criminalisation;[106]

94 See research referred to in Patrick Tidmarsh and Gemma Hamilton, *Misconceptions of Sexual Crimes Against Adult Victims: Barriers to Justice* (Australian Institute of Criminology, No 611, November 2020) 6.
95 Ibid.
96 Tinsley, Baylis and Young (n 92) 475.
97 Ibid 476.
98 AIHW (n 29) 17.
99 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*').
100 *PSS 2021-22* (n 3).
101 Taylor and Gassner (n 18) 241.
102 *Challenging Misconceptions* (n 98) 3.
103 *Improving Justice Responses* (n 82) 26.
104 Commission of Inquiry into Queensland Police Service responses to domestic and family violence, *A Call for Change* (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).
105 *Hear Her Voice Report 2* (n 35). 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.
106 *Improving Justice Responses* (n 82) 27.

- Consequences of reporting, such as loss of familial relationships, may be required to move (loss of housing and community), safety fears or loss of Australian visa;[107]
- Difficulty identifying sexual violence;[108]
- Concerns about the justice system process;[109] and
- Not wanting a criminal justice outcome, for example children may fear reporting a parent.[110]

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'.[111] These include (but are not restricted to) Aboriginal and Torres Strait Islander peoples, CALD groups, LGBTQI+ communities, people in custody, sex worders, those living in rural areas and people with disabilities.[112]

It is also very common for victim survivors to delay disclosure of and/or reporting sexual violence. 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).[113] Similarly, victim survivors who experience sexual violence from a known perpetrator are more likely to delay seeking assistance compared to those who experience sexual offences by a stranger.[114]

In light of these barriers, only a small percentage of sexual violence offences are reported to police.[115] Some studies suggest as few as 13 per cent of sexual violence incidents are reported to police by females.[116] The PSS 2021-22 found that 9 in 10 women who experienced sexual assault by a male did not report the most recent incident to the police (92%).[117] Police were contacted about the most recent incident for 8.3 per cent of women who experienced sexual assault by a male (n=61,100), with the overwhelming majority having contacted the police themselves (92.5%, n=56,500). For women who had experienced sexual assault by a male in the last 10 years, the proportion who contacted police became smaller, with only 5.2 per cent reporting going to the police.[118]

When asked about why they did not report the most recent incident of sexual assault, women gave several reasons. The below table indicates (Table 1) that the most common response was the women felt they could deal with it themselves (33.5%), followed closely by not regarding it as a serious offence (32.8%), feeling ashamed or embarrassed (31.1%) and not believing police would be able to do anything (28.5%).

Table 1: Reasons for women not contacting police about the most recent incident of sexual assault by a male, 2021-22 PSS findings

Reason	Percentage
Felt they could deal with it themselves	33.5
Did not regard the incident as a serious offence	32.8
Felt ashamed or embarrassed	31.2
Did not think there was anything the police could do	28.6
Did not think the police would be able to do anything	28.5
Did not know or think the incident was a crime	27.3
Felt they would not be believed	25.7
Fear of the person responsible	21.0
Did not want person responsible arrested	16.0
Did not trust the police	14.2
Fear of legal processes	13.1
Did not want to ask for help	10.8
Cultural/language reasons	4.7

Source: Australian Bureau of Statistics, 2021-22 Personal Safety Study
Participants could give more than one reason

107 Especially 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: Women's Safety and Justice Taskforce*, Hear Her Voice Report 2* (n 35) 100–1, 103.
108 Ibid 101–3.
109 *Challenging Misconceptions* (n 98) 3.
110 *Improving Justice Responses* (n 82) 28.
111 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 (2023) 3.
112 Ibid 3; Taylor and Gassner (n 18) 241–42.
113 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'*).
114 *Challenging Misconceptions* (n 98) 4.
115 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) 2.
116 *Hear Her Voice Report 2* (n 35) 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.
117 Australian Bureau of Statistics, *Sexual Violence, 2021-22* (23 August 2023).
118 Ibid.

2.3.2 Why attrition rates continue to remain high

Attrition refers to the number of incidents which 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.[119] The WSJ Taskforce expressed concern in its second report that attrition rates have remained high in Queensland.[120]

There are many reasons why attrition rates continue to remain high despite numerous government and parliamentary reviews and legislative reforms to change this (see section 2.3 for more detail). Research into understanding attrition rates indicates it is a complex issue and it is often difficult to accurately measure the rate of attrition in sexual violence matters.[121]

Factors which 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.**[122] 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. [123]
- **Sexual offences can be difficult to prove beyond reasonable doubt.**[124] The nature of these offences often make 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.[125]
- **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.[126]

The Council is not aware of any Queensland attrition studies.[127] While findings from other jurisdictions provide insights and learnings for Queensland, there are also jurisdictional differences which 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.

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

Police are the entry point to the criminal justice system. Police play a 'critical role in providing an appropriate first response to a victim and determining whether and how reports of sexual assault progress through the courts'.[128] For victim survivors from marginalised backgrounds going to police can be extremely challenging. For example, the WSJ Taskforce heard from many sexual assault services that police responses were a significant barrier:

> [there are] very different police responses for women who have been attacked in [a] public place, one-off incident, physical trauma and evidence. Very poor response to women with a history of criminalisation, mental health history, drug usage, Aboriginal and Torres Strait Islander or CALD women.[129]

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119 Tidmarsh and Hamilton (n 93) 1.

120 *Hear Her Voice Report 2* (n 35) 147.

121 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* (2004), prepared for the Office of the Status of Women; Denise Lievore, *Non-Reporting and Hidden Recording of Sexual Assault: An International Review* (2003), prepared for the Commonwealth Office of the Status of Women; 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* (2006), prepared for the AIHW.

122 *Hear Her Voice Report 2* (n 35), 52.

123 Victorian Crime Statistics Agency, *Attrition of Sexual Offence Incidents Through the Criminal Justice System* (2021) 9 ('*Attrition of Sexual Offences*').

124 The Queensland Law Reform Commission reviewed 135 rape and sexual assault trials in 2018 and found 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.

125 *Improving Justice Responses* (n 82) 10 ('*Review of Consent*').

126 See, eg, Leverick (n 89) 255; James Chalmers, Fiona Leverick and Vanessa E Munro, 'The Provenance of What is Proven: Exploring (Mock) Jury Deliberations in Scottish Rape Trials' (Scottish Jury Research Working Paper No 2, 2019); Tidmarsh and Hamilton (n 93); Natalie Taylor, 'Juror attitudes and biases in sexual assault cases', *Trends & Issues in crime and criminal justice, Australian Institute of Criminology* (August 2007) 4–5.

127 A study of the proportion of reported sexual violence cases that do not progress through the justice system to a conviction.

128 *Hear Her Voice Report 2* (n 35) 147.

129 Ibid 154 citing QSAN submission to Women's Safety and Justice Taskforce, *Discussion Paper 3: Women and Girls' Experiences Across the Criminal Justice System as Victim-Survivors of Sexual Violence and also as Accused Persons and Offenders* (2022) 30.

A recent qualitative study of victim survivor experiences reporting sexual violence found most participants 'held poor perceptions of police, with many having had negative firsthand experiences of formal reporting'.[130]

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. In Queensland, the *Operational Procedures Manual* ('OPM') sets out how police are to investigate and charge sexual offences.[131] For example, the OPM proscribes who responsible officers are in sexual offence investigations and the responsibilities of investigative officers and sexual violence liaison officers.[132] The OPM also tells officers when an incident should be regarded as cleared, withdrawn[133] or unfounded.[134] In addition to the OPM, the QPS has online resources and guidelines for officers, including the *Response to Sexual Assault Guidelines* and the *Adult Sexual Assault Resource* package.[135]

The WSJ Taskforce heard from stakeholders that the quality of police investigations is inconsistent, and that investigation delays in rural, regional and remote parts of Queensland were common.[136] The report highlighted that the 'QPS regions with the least number of investigators are the Far Northern Region (114) and Northern Region (109)' which are regions with high rates of sexual violence.[137] The Taskforce also noted that 'in some cases, rape myths and stereotypes appeared to influence police decision-making as to whether or not a complaint should be progressed'.[138] Numerous submissions to the Taskforce from sexual assault services highlighted the 'impact of myths and misconceptions about rape and sexual assault shapes and influences some QPS officers' views about the credibility and believability of victims'.[139] Similar findings were made by the 2022 Commission of Inquiry into the QPS. While the Commission's findings related to all forms of domestic and family violence, it noted that 'in some cases, officers' values, attitudes and biases impact the QPS response to domestic and family violence' and sometimes officers were 'dismissive when victim survivors try to make a report of violence at a police station'.[140] The Commission recommended that QPS improve its training in relation to domestic and family violence by implementing programs that dispel myths that 'women frequently make up allegations of sexual assaults' and that 'an ideal victim exists'.[141]

In response to those reviews, QPS is improving its responses to sexual violence, including rolling out a statewide Sexual Violence Liaison Officer model, improving training and education to investigators, particularly in relation to trauma-informed approaches and reviewing decisions to discontinue investigations of to ensure 'unfounded and withdrawn sexual violence offences are finalised accurately as per QPS policy'.[142]

Studies consistently show a substantial rate of attrition during the police investigation stage.[143] A 2021 Victorian study found attrition was highest during this stage, with 75 per cent of incidents reported in the data period not progressing past the police investigation stage.[144] This study found in just over half of sexual violence incidents, an offender was not identified (52%). And of the remaining 48 per cent where an offender was identified, just over half resulted in police charging them (52%). A NSW BOCSAR study found that 'more than 80 per cent of sexual offences

130 Heydon et al. (n 111) 8.
131 Queensland Police Service ('QPS'), *Operational Procedure Manual: Chapter 2 - Investigative Process,* Issue 95 96 Public Edition (15 November 2023) [2.6.3] ('OPM Ch 2').
132 Ibid 63–6. Responding to child victim survivors is set out in *Chapter 7 Child Harm* Issue 96 Public Edition (15 November 2023).
133 QPS, *Operational Procedure Manual: Chapter 1 – Operational Management* defines victim withdrawn complaints as 'when the investigating officer has determined and documented in the occurrence that there is sufficient evidence that an offence has been committed but the victim no longer wishes to continue with the complaint, and the victim has formally withdrawn from the complaint'. A complaint cannot be withdrawn by the victim if a prosecution has commenced: OPM Issue 94 (3 July 2023), 61.
134 QPS told the WSJ Taskforce that unfounded sexual assault offences are defined as 'when an investigation has established that the alleged offence was not in fact committed. This includes a false report, an excused of mistake of fact is raised as reported by the informant, or there was no breach of law involved in the alleged offence. Inability to prove an element of an offence does not make an offence "not substantiated" nor does a decision by a complainant not to proceed after the offence has been reported': Report 2, 44. Under the OPM it appears this is action falls under 'Evidence indicates offence did not occur'.
135 QPS, OPM Ch 2 (n 130) 67. The guidelines are for responding to adult victim survivors.
136 *Hear Her Voice Report 2* (n 35) 158–59.
137 Ibid 159.
138 Ibid 151.
139 Ibid 152.
140 *A Call for Change* (n 103) 17.
141 Ibid recommendation 28: 25.
142 Queensland Police Service, *Sexual Violence Response Strategy 2023-25*, 11, 15–16.
143 *Attrition of Sexual Offences* (n 123) 16.
144 Ibid.

reported to police did not result in the initiation of criminal proceedings'.[145] A UK Government review found only 1.6 per cent of rapes reported to police resulted in a person being charged.[146]

Research suggests there are many reasons why a case may not progress following a reported sexual violence offence. They include:

- Police are unable to identify or locate a suspect;
- A victim withdraws their complaint; or
- Police decide not to prosecute.[147]

The 2021 Victorian study found the type of offence and victim survivor age impacted on the likelihood of progression through the police stages. 'Rape incidents were less likely to progress' through the police stages and that in general 'offences involving child and adolescent victims were more likely to progress than those involving adults'.[148]

Victim survivors can choose to continue progressing an investigation (and prosecution) or withdraw their complaint. Not all sexual violence cases reported to police are victim survivor decisions and once reported, victim survivors 'may decide to not cooperate or participate further in the investigation'.[149] There are many reasons why a victim survivor may decide to do this, including concerns the criminal justice system will be too distressing and/or its negative impact health and wellbeing, a need to move on, privacy concerns about personal records and a lack of support from friends, family and employers.[150] 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'.[151] It must not be overlooked that victim survivors may be pressured or coerced to withdraw a complaint, including by police and prosecutors.[152]

Prosecution stage

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,[153] 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.[154] Where a sexual assault offence is charged on indictment or it is a rape offence, the Office of the Director of Public Prosecution ('DPP') will prosecute. The OPM and the *Director's Guidelines* set out how sexual violence offences should be prosecuted and how to engage with victim survivors.[155] The DPP must determine whether there are reasonable prospects of a conviction and whether a prosecution is in the public interest.[156] 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.[157] The prosecutors and case lawyers in the employ of the DPP prosecute cases on behalf of the Director of the Queensland prosecution service 'who represents the Queensland community'. The DPP does not

145 Fitzgerald (n 115) 11.
146 UK Government (Ministry of Justice) *End to End Review of the Criminal Justice System Response to Rape* (2021) iii ('*End to End Review*').
147 Daly and Bouhours, (n 116) 609.
148 *Attrition of Sexual Offences* (n 123) 30.
149 Megan Anderson and LaDonna Long, 'Sexual Assault Victim Participation in Police Investigations and Prosecution' (2016) 31(5) *Violence and Victims* 822.
150 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.
151 Melanie Heenan and Suellen Murray, *Study of Reported Rapes in Victoria 2000-2003: Summary Research Report* (2006).
152 Denise Lievore, *No Longer Silent: A Study of Women's Help-Seeking Decisions and Service Responses to Sexual Assault* (June 2005), 46.
153 See n 5, Chapter 7 which explains the limited circumstances in which rape may be dealt with in the Magistrates Court.
154 Summary offences can be dealt with in higher courts when the offender is also charged with indictable offences.
155 QPS, *Operational Procedures Manual: Chapter 3 - Prosecution Process* OPM Issue 98 Public Edition (7 February 2024); Office of the Director of Public Prosecution, Draft *Director's Guidelines 2022* as at 30 June 2022 ('*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).
156 *Director's Guidelines* (n 155) Guideline 4, 2–8.
157 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.

represent victim survivors or witnesses and are not their lawyers. While the DPP cannot take instruction from victim survivors about how a case should be run, they do have obligations to victim survivors, including:

(a) to treat a victim with courtesy, compassion, respect and dignity;

(b) to take into account and to treat a victim in a way that is responsive to the particular needs of the victim, including, his or her age, sex or gender identity, race or indigenous background, cultural or linguistic diversity, sexuality, impairment or religious belief.[158]

The *Director's Guidelines* also prescribe information which the prosecutor or case lawyer must provide to victims when considering whether to discontinue a matter, or in advance of trial. [159] For example, the DPP ' must…seek the views of any victim whenever serious consideration is given to discontinuing a prosecution for violence or sexual offences'.[160] When engaging in the plea negotiation process, the DPP 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[161] – consistent with rights recognised under the Charter of Victims' Rights for a victim to be kept informed about these matters.[162] However, while victim survivors' views 'must be recorded and properly considered prior to any final decision, those views alone are not determinative'; the DPP has the ultimate discretion to decide whether or not to proceed with the prosecution, having regard to the above mentioned factors.

Unfortunately, there is little research on attrition during this stage and in relation to the reasons why cases are discontinued. NSW data on sexual assault and aggravated sexual assault cases in 2018-19, found of the 1,099 finalised charges 21 per cent were withdrawn by the prosecution.[163] This rate was similar for the NSW equivalent sexual assault offences of sexual touching (16%) and sexual act offences (18%).[164] Research suggests that 'prosecutors' decisions are primarily based on evidentiary considerations' so cases with the highest prospects of success are more likely to proceed.[165] A 2006 BOCSAR study showed the cases that had progressed through the court system had a higher proportion of cases with victims more likely to be regarded as credible and other evidence that could be used to corroborate victim testimony (e.g. physical injuries).[166]

The public interest test requires prosecutors to make decisions on prosecuting cases 'about the probability of success, based on expectations of how judges and juries are likely to view the complainant and [their] story'.[167] Following a person being charged by police, prosecutors will review the file to determine whether the charge is made out on the evidence, and whether the case satisfies the public interest test and should be prosecuted:

> Cases that proceed are subject to continuous reassessment because the circumstances of the case can change over time. In addition, different evidentiary standards apply at each decision-making stage: the police decision to charge is based on the prima facie test, which is a more inclusive standard than the reasonable prospects test applied by the prosecutor, while the jury's decision to convict is based on the stringent standard of beyond reasonable doubt.[168]

Studies show common factors in sexual violence matters which were prosecuted included: 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.[169] 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.[170]

158 Ibid 29.
159 Ibid 32–4.
160 Ibid 27.
161 Ibid 33.
162 *Victims of Crime Assistance Act 2009* (Qld) sch 1AA, div 2.
163 NSW Bureau of Crime Statistics and Research, *NSW Criminal Court Statistics 2018-2019: Number of Finalised and Proven Charges for Selected Law Parts Relating to Sexual Assault ('NSW Criminal Court Statistics 2018-2019')*. This included the NSW equivalent offences to rape in Queensland, *Crimes Act 1900* (NSW) ss 61I, 61J and 61JA.
164 Ibid.
165 Fitzgerald (n 115) 11.
166 Ibid 11.
167 Taylor (n 126) 1.
168 Lievore 2004 (n 121) (references omitted, emphasis in original).
169 Taylor (n 126) 2; Fitzgerald (n 115) 11.
170 Karen Iles, Director and Principal Solicitor, Violet Co Legal and Consulting, Committee Hansard, Canberra, 25 July 2023, pp 40-41 to Legal and Constitutional Affairs References Committee, *Current and Proposed Sexual Consent Laws in Australia (*Report, September 2023) 40 ('*Sexual Consent Laws in Australia*').

Undoubtedly, some attrition is due to victim survivors deciding to withdraw their complaint. As discussed earlier, there are many reasons a victim survivor may choose to withdraw their complaint. In relation to the prosecution stage, these may include the time taken to progress the matter to court, the possibility of being further traumatised from court proceedings, a desire to move on with their lives, external pressures or their own reconciliation with the offender.

There have been positive learnings from the Sexual Assault Response Team in Townsville (a multidisciplinary, interagency team supporting victim survivors) in relation to prosecutors needing to balance the public interest considerations in proceeding while not excessively retraumatising the victim survivor:

> Discussions with the [Sexual Assault Support Service] worker allow the prosecutor to make a more accurate assessment as to the likely effect proceeding with the matter may have on the complainant's wellbeing and a more accurate view as to whether the request from the complainant is the result of outside influences.[171]

Court hearing stage and final outcomes

The final stage of the criminal justice process where attrition rates remain high is the court stage. 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 or physical trace'.[172] The 2006 BOCSAR study into attrition of sexual offences estimated 'that approximately 8 per cent of sexual offences committed against children and 10 per cent of recorded sexual offences against adults reported to police are ultimately proven in court'.[173] A New Zealand study found that 'for sexual violence victimisations reported in 2020, after two years 42 per cent resulted in court action, 12 per cent had a conviction and 7 per cent had a prison sentence'.[174]

National data on sexual assault outcomes (including rape) finalised in higher criminal courts from 2010-11 to 2019-20, found that 19.7 per cent of defendants had their matter withdrawn by prosecution and of the 4 in 5 defendants (78.7%, n= 19,353) that had their matter adjudicated either by plea of guilty or by trial, a quarter were acquitted (24.9% n=4,828).[175] The majority of those with an adjudicated outcome pleaded guilty and around a quarter were found guilty by a court (53.8% and 20.7% respectfully).[176]

While a much smaller number of sexual assault (including rape) cases were adjudicated nationally in the Magistrates Courts from 2010-11 to 2019-20 (n=10,516), a similar proportion of adjudicated cases in the Magistrates Courts were acquitted (20.2%). In contrast to the higher courts, a larger proportion of defendants pleaded guilty and a smaller percentage were convicted following a trial (62.1% and 16.5% respectfully).[177]

Rape has one of the highest proportion of not guilty pleas of any offence in Queensland, with over a quarter of cases sentenced during the 18-year data period pleading not guilty (28.3%). In contrast, 16.1 per cent of sexual offences sentenced, and only 0.9 per cent of all offences sentenced involved a final plea of not guilty. This means a significant portion of rape cases went to trial, where in many cases a jury determined the outcome. The Queensland Law Reform Commission reviewed 135 rape and sexual assault trials held during 2018.[178] Of the 135 trials, the majority were discharged[179] (64%, n=87), with around one-third resulting in a conviction (36%, n=48).[180] There were similar findings in NSW, where of 1,099 sexual assault and aggravated sexual assault charges, two-thirds of defendants were acquitted or otherwise disposed of or withdrawn (35% and 31% respectfully).[181]

The role of a jury in a trial is to decide questions of fact, and to apply the law as stated by the judge to those facts to reach a verdict. Juries are required to decide whether or defendant is guilty as charged[182] and 'given the

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171 Office of the Director of Public Prosecutions Queensland, *Annual Report 2021-22* (2023) 36.
172 *Improving Justice Responses* (n 82) 10.
173 Fitzgerald (n 115) 4.
174 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
175 Australian Bureau of Statistics, *Sexual Assault - Perpetrators* (2 February 2022) Table 1: Sexual assault defendants, 2010-11 to 2019-20, Summary statistics by court level. Adjudicated outcome is a court outcome concluded through a judgment or decision by the court as the whether the defendant is guilty of the charge/s against them. This includes guilt outcome (by trial or plea) or acquittal.
176 A 'guilty finding by the court' means 'an outcome of criminal proceedings whereby the court (i.e., Jury, Judge, Magistrate etc.) has determined that the defendant is guilty of a criminal charge(s): ibid Table 10.
177 Ibid.
178 28 trials involving a complainant under 12 were excluded as consent was not an issue, and therefore out of scope of the QLRC review: *Review of Consent* (n 124).
179 Discharged means on all charges of rape or sexual assault in a 2018 trial, either by the jury returning a verdict of not guilty or the defendant was otherwise discharged: ibid 26.
180 Ibid: The DPP provided the QLRC with information the during the 2018 calendar year, 546 matters involving rape and sexual assault charges were finalised. Of these, 308 were recorded as resulting in conviction whether by way of plea of guilty or conviction after trial and 238 resulted in a discharge. This reflected a conviction rate of 56% and a discharge rate of 44%.
181 *NSW Criminal Court Statistics 2018-2019* (n 163).
182 Queensland Courts, *Juror's Handbook*, 1.

complexity of community thinking and values around sexual behaviour', jurors may find it challenging to reach the evidentiary threshold for guilt.[183] Discussed earlier, sexual violence cases can be difficult to prove beyond reasonable doubt because these offences often occur without witnesses and with limited to no physical evidence. Adding to this are the community misconceptions about sex, gender and sexual violence jurors bring with them into the courtroom.

Research into juror attitudes about sexual violence may influence not only 'their judgments about the credibility of the complainant and the guilt of the accused, but also influence judgments more than the facts of the case presented and the manner in which testimony is given'.[184] One Australian study on a mock sexual assault trial found that:

> individual juror differences in terms of demographics and the beliefs, attitudes and expectations that jurors (members of the public) brought with them into the courtroom were what primarily influenced their judgments about the credibility of the complainant's testimony and guilt of the accused (credibility and guilt were highly correlated). On average, and consistent with previous research, males were significantly less likely than females to perceive the complainant as credible. Higher credibility was also associated with more positive and less stereotypical attitudes toward rape victims in general.[185]

Research also shows that during trials, both prosecutors and defence counsel may reference or reinforce aspects of rape myths.[186] A recent study into sexual assault trials in NSW found prosecutors typically relied on evidence that enlivened 'expectations that the "true complainant" will act in a particular way'.[187] These included:

> ...evidence of immediate complaint (73% of trials), corroborative/supportive evidence (85%), complainant distress (81%), consistency of complainant accounts (37%), a strong focus on the complainant's verbal or physical resistance (67%) and the presence of injuries (56%).[188]

In that same study, the absence of these attributes noted by prosecutors were used by defence counsel to argue no offence had occurred.[189] Similarly, a New Zealand study of trials found defence counsel referenced supposed prevalence of false allegations, with some practitioners 'using signifiers such as the term "cry rape" or argued that sexual violence is an easy accusation to make and hard to disprove'.[190]

Queensland prosecutors told the WSJ Taskforce that 'misconceptions about sexual violence concerning consent...are used by defence lawyers against victims at criminal trials and that prosecution efforts to neutralise them don't always work'.[191]

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 how the criminal justice system responds 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. Similarly, the WSJ Taskforce has been a pivotal 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. The Taskforce made 188 recommendations in *Report Two: Women and Girls' Experiences Across the Criminal Justice System* and the Queensland Government is currently implementing the majority of those recommendations. Some of these are discussed briefly in section 2.4.1 and in the *Consultation Paper: Issues and Questions*.

For more information about the Taskforce report and recommendations related to this review see *Background Paper 1 – Review of Sentencing for Sexual Assault and Rape Offences: About the Terms of Reference – Part 1*. 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 11.12.

183 Tidmarsh and Hamilton (n 93) 2.
184 Taylor (n 126) 2.
185 Ibid 4.
186 Tinsley, Baylis and Young (n 92) 472.
187 Julia Quilter and Luke McNamara, *Experience of Complainants of Adult Sexual Offences in the District Court of NSW: A Trial Transcript Analysis*, NSW Bureau of Crime Statistics and Research: Crime and Justice Bulletin No. 258 (2023) 14.
188 Ibid.
189 Ibid 21.
190 Tinsley, Baylis and Young (n 92) 472.
191 *Hear Her Voice Report 2* (n 35) 55–6.

2.4.1 Australian reviews

Over the last 2 years, the Australian Capital Territory ('ACT'),[192] NSW,[193] Queensland,[194] Tasmania[195] and Victoria[196] have amended their sexual consent laws. With the exception of Tasmania, those amendments were made following reviews on consent laws for sexual violence offences.[197] All of these reviews also made recommendations on ways to improve the criminal justice system response to sexual violence, such as addressing misconceptions and myths, reducing attrition rates, and improving the experience for victim survivors in all parts of the criminal justice system.

Two reviews were released in September 2023; Tasmania's Commission of Inquiry into the Tasmanian Government's Response to Child Sexual Abuse in Institutional Settings[198] and the Commonwealth Senate's Legal and Constitutional Affairs References Committee review into current and proposed sexual consent laws in Australia.[199]

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;[200]
- Establishing a restorative justice scheme for sexual violence;[201]
- Introducing new jury directions to address misconceptions about sexual violence;[202]
- Funding an education program on reforms to the criminal justice system for judges, prosecutors, criminal defence lawyers and police;[203]
- Establishing an independent body to prevent and reduce sexual violence and support victim survivors;[204]
- Legislative reform to prevent some penalty options being available for sexual offences (e.g., Intensive Correction Orders and suspended sentences);[205]
- Consideration of a rebuttable presumption in sentencing for sexual offending that the offending caused certain harms for the victim survivor; and[206]
- Developing a sexual assault bench book.[207]

A review by the West Australian Law Reform Commission into criminal justice system responses to sexual offending (including consent) was completed in November 2023. In conjunction with that review, the West 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.[208]

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192 *Crimes (Consent) Amendment Bill 2022* (ACT).

193 *Crimes Legislation Amendment (Sexual Consent Reforms) Act 2021 No 43* (NSW).

194 *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 124). *Hear Her Voice Report 2* (n 35) made further recommendations to the definition of consent (recommendation 43). This was supported by the Government, with a commitment to legislate an affirmative model of consent. This work is underway.

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

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

197 *Review of Consent* (n 124) and *Hear Her Voice Report 2* (n 35); 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 82).

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

199 *Sexual Consent Laws in Australia* (n 170).

200 *Hear Her Voice Report 2* (n 35) rec 1, 11; *Improving Justice Responses* (n 82) rec 1, xxix; *Consent in Relation to Sexual Offences* (n 197) recommendation 10.4 xx; *Listen. Take Action* (n 93) recs 2, 19, 43, 74.

201 *Improving Justice Responses* (n 82) recs 28–36, xxxiv-xxxv; *Listen. Take Action* (n 93) rec 13, 63; *Hear Her Voice Report 2* (n 35) recs 90–2, 23; *Sexual Consent Laws in Australia* (n 170) rec 9, viii.

202 *Improving Justice Responses* (n 82) rec 78, xli; *Consent in Relation to Sexual Offences* (n 197) recs 8.1, 8.3–8.7, xvii-xviii; *Hear Her Voice Report 2* (n 35) rec 77, 22; Tasmania Commission of Inquiry, rec 16.15, 159; *Sexual Consent Laws in Australia* (n 170) rec 12, viii-ix.

203 *Improving Justice Responses* (n 82) rec 69, xl; *Consent in Relation to Sexual Offences* (n 197) rec 10.2, xx; *Listen. Take Action* (n 197) recs 16–17, 69–70; *Hear Her Voice Report 2* (n 35) 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 170) rec 10, ix.

204 *Improving Justice Responses* (n 82) rec 90, xliii; *Hear Her Voice Report 2* (n 35) rec 15, 14.

205 *Listen. Take Action* (n 197) rec 23(c), 80.

206 Ibid rec 23(g), 80.

207 *Hear Her Voice Report 2* (n 35) rec 73, 22; *Listen. Take Action* (n 197) rec 18, 70; *Sexual Consent Laws in Australia* (n 170) rec 11, viii.

208 Attorney-General's Department, *Review of Sexual Consent Laws in South Australia: Discussion Paper* (December 2023).

The Australian Law Reform Commission was issued with Terms of Reference in January 2024. This review will examine justice responses to sexual violence.[209] In conjunction with this review, the Commonwealth Government has established a Lived Experience Expert Advisory Group (EAG) to inform this work. The EAG will consider:

- the impacts of legal frameworks on victim survivors;
- the impacts of law enforcement and court processes on victim survivors;
- matters related to supports and services for victim survivors, within, and adjacent to, the justice system; and
- alternative and transformative approaches to justice.[210]

2.4.2 International reviews

Several reviews to improve the criminal justice response to rape in the last 10 years have been completed overseas in the United Kingdom,[211] Northern Ireland,[212] Scotland,[213] New Zealand[214] and Canada.[215]

Like our domestic reviews, these inquiries made recommendations to address misconceptions and myths about sexual violence, reducing attrition rates, legislative reform to consent and evidence laws, and improving the experience for victim survivors in all parts of the criminal justice system. For example:

- the Canadian review recommended developing training for criminal justice system professionals (victim service providers, police and Crown Prosecutors) on 'the role that discriminatory myths and stereotypes can play in the misapplication of the law'.[216]
- the New Zealand review recommended judges in sexual violence cases 'should have access to detailed and up-to-date guidance on instances in which guidance judicial directions to the jury may be appropriate in sexual violence cases and examples of how those directions should be framed'. [217]
- The Scottish and Northern Ireland reviews recommended enhancing the quality of jury involvement by addressing common rape myths and stereotypes.[218]

209 Australian Law Reform Commission, Terms of Reference: Justice Responses to Sexual Violence (2024) <https://www.alrc.gov.au/inquiry/justice-responses-to-sexual-violence/terms-of-reference/>.
210 The Hon Mark Dreyfus KC MP, Attorney-General 'National roundtable on justice responses to sexual violence' (Media Release, 23 August 2023).
211 *End to End Review* (n 146).
212 Sir John Gillen, *Report into the Law and Procedures in Serious Sexual Offences in Northern Ireland: Part 1* (2019) ('*The Gillen Report*').
213 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*').
214 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*').
215 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).
216 Ibid rec 4.
217 *Justice Response to Victims of Sexual Violence* (n 214) rec 28, 13.
218 *The Dorrian Review* (n 213) recommendation 5, 15–6; *The Gillen Report* (n 212) rec 4, 29.

Chapter 3 Sexual assault and rape offences

3.1 Introduction

In this chapter we examine the offences of sexual assault and rape and the legislative changes over time to those offences, including the law applying to the issue of consent.

We also examine key legislative amendments relating to child sexual violence offences more broadly.

3.2 Sexual assault and rape offences

3.2.1 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).[1]

One type of sexual assault involves a person unlawfully and indecently assaulted another person.[2] For conduct to be 'indecent' it must have a sexual connotation or motivation.[3] It can include unwanted kissing and inappropriate sexual touching.

Sexual assault can also include forcing another person to commit to an act of gross indecency, or making a person see an act of gross indecency.[4] For example, if the person masturbates in front of another person.

There are 'circumstances of aggravation'[5] which are treated as being more serious forms of sexual assault and carry higher maximum penalties.

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;[6]
- 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;[7]
- if an act of gross indecency is done by the person procured (recruited, enticed or force) 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).[8]

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.[9]

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1 Section 352(1)(a) of the *Criminal Code Act 1899* (Qld) sch 1 ('*Criminal Code* (Qld)') does not expressly state that consent is an element of the offence. However, assault is an element and is defined in section 245 as being 'without the other's consent'. See also s 347.
2 Ibid s 352(1)(a).
3 *R v McBride* [2008] QCA 412 [20]; R *v Jones* (2011) 209 A Crim R 379; [2011] QCA 19 [29]–[32]. See also *R v BAS* [2005] QCA 97 [16] citing *R v Harkin* (1989) 38 A Crim R 296 [301].
4 *Criminal Code* (Qld) (n 1) s 352(1)(b).
5 For the definition of a circumstance of aggravation, see ibid s1.
6 Ibid s 352(3)(a).
7 Ibid s 352(3)(b).
8 Ibid s 352(3)(c).
9 Ibid s 352(2).

10 years imprisonment:

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

3.2.2 Rape

Rape is defined in section 349 of the *Criminal Code* 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;[10] or
- The person penetrates the vulva, vagina or anus of another person with a thing or part of the body that is not a penis;[11] or
- The person penetrates the mouth of the other person with the person's penis.[12]

The maximum penalty for rape is **life imprisonment**.[13]

3.2.3 Consent

A key element of both sexual assault and rape is that the act was done by the defendant without the complainant's consent. Put briefly, consent means to agree to the behaviour. This issue will be further discussed below.

The age of consent in Queensland is 16 years.[14] This is not formally prescribed, but rather inferred from many child sexual offences which apply where the child is under 16 years.[15] It can be an offence to engage in sexual activity with a child under 16 years, even if the child agrees, because for some offences, consent is not an element of the offence.[16] This means, only a person aged 16 year or over can provide effective, legal consent to a range of sexual acts that are prescribed by the offences in Chapter 32 of the *Criminal Code* (Qld). However, there will also be circumstances where a person is aged 16 years or older is unable to consent.

Children under 12 cannot consent

A child under the age of 12 cannot consent to a sexual act.[17] Where a complainant is aged 12 years or over, but is under 16 years, the prosecution must prove the act occurred without consent, otherwise an alternative charge could be considered which does not include consent as an element of the offence such as engaging in penile intercourse with child under 16.[18]

'Freely and voluntarily given'

Currently, consent needs to be 'freely and voluntarily given' by a person 'with the cognitive capacity' to do so.[19] 'Cognitive capacity' means the person knows or understands what they are doing and are agreeing to it.[20] The Court of Appeal has said:

> The giving of consent is the making of a representation by some means about one's actual mental state when that mental state consists of a willingness to engage in an act. Although a representation is usually made by

10 Ibid s 349(2)(a). The words 'engages in penile intercourse with' replaced has 'carnal knowledge with or of' on the coming into force of s 17 of the *Domestic and Family Violence Protection (Combating Coercive Control) and Other Legislation Amendment Act 2003* (Qld).

11 *Criminal Code* (Qld) (n 1) s 349(2)(b).

12 Ibid s 349(2)(c).

13 Ibid s 349(1).

14 Prior to 23 September 2016, the age of consent for anal intercourse was 18 years: see *Health and Other Legislation Amendment Bill 2016* (Qld).

15 *Criminal Code* (Qld) (n 1) ss 210, 213, 215, 218A–218B, 219, 223, 228, 229A, 229B–229BC.

16 If a person is charged with rape and the complainant is aged over 12 but under 16 years, the prosecution must prove the act occurred without consent, otherwise an alternative charge could be considered which does not include consent as an element of the offence. See *R v Manning* [2014] QCA 49 [39]–[40], [43] (Morrison JA) ('*Manning*').

17 *Criminal Code* (Qld) (n 1) s 349(3).

18 *Manning* (n16) [39]–[40], [43] (Morrison JA). Under *Criminal Code* (Qld) (n 1) s 578(1) a person charged with rape may be alternatively convicted of indecent treatment of children (s 210(1)), engaging in penile intercourse with a child under 16 (s 215), abuse of persons with an impairment of the mind) s 216), procuring young person etc. for penile intercourse (s 217(1)), procuring sexual acts by coercion etc. (s 218), incest (s 222) or sexual assault (s 352).

19 Ibid s 348(1).

20 This did not equate to a "legal" capacity. The amendment brought in the existing case law about an incapacity to consent, for example, due to youth, intellectual impairment or intoxication: Explanatory Notes, Criminal Law Amendment Bill 2000, 9.

> words or actions, in some circumstances a representation might also be made by remaining silent and doing nothing. Particularly in the context of sexual relationships, consent might be given in the most subtle ways, or by nuance, evaluated against a pattern of past behaviour.[21]

Under the 'freely and voluntarily given' model, a person was not to be taken to have consented to an act only because that person did not, before or at the time the act was done, say or do anything to communicate that she or he did not consent to the act. A person's consent to an act may not be freely and voluntarily given if it was obtained:

> by force; or
>
> by threat or intimidation; or
>
> by fear or bodily harm; or
>
> by exercise of authority; or
>
> by false and fraudulent representations about the nature or purpose of the act; or
>
> by a mistaken belief induced by the accused person that the accused person was the person's sexual partner.[22]

There can be different ways that consent is not given, and a person can change their mind and withdraw consent.[23] For example, consent may not be given in circumstances where the complainant was asleep.[24]

Proposed amendments to consent

On 11 October 2023, the Criminal Law (Coercive Control and Affirmative Consent) and Other Legislation Amendment Bill 2023 was introduced, following the recommendations of the Women's Safety and Justice Taskforce.[25], This Bill proposes to make changes to the definition of consent,[26] including:

- to provide that 'consent means free and voluntary agreement',[27] (rather than that consent be freely and voluntarily 'given');
- to set out additional guidance to make clear, for example, that consent can be withdrawn at any time, that a person who does not offer physical or verbal resistance is not, by reason only of that fact, to be taken to consent, and that a person does not consent to an act just because they consented to the same or a different act with the same or a different person;[28]
- to expand on the list of non-exhaustive circumstances where there is no consent.[29]

The Bill was referred to the Legal Affairs and Safety Committee for detailed consideration. On 16 November 2023, the Committee extended the reporting date for the Inquiry to 19 January 2024.

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21 *R v Makary* [2019] 2 Qd R 528, 543 [50] (Sofronoff P and Bond J agreeing).
22 *Criminal Code* (Qld) (n 1) s 348(2).
23 Ibid s 349(3).
24 *R v Bevinetto* [2019] 2 Qd R 320 (Sofronoff P, Henry and Crow JJ agreeing); *R v Smith* [2020] QCA 23.
25 Women's Safety Justice Taskforce, *Hear Her Voice, Report Two: Women and Girls' Experiences Across the Criminal Justice System* (2022) vol 1, rec 43, 216 ('*Hear Her Voice Report 2*').
26 Criminal Law (Coercive Control and Affirmative Consent) and Other Legislation Amendment Bill 2023 (Qld) s 13 ('Affirmative Consent Bill').
27 Ibid proposed new provision in *Criminal Code* (Qld) (n 1) s 348(1).
28 Ibid proposed new provision in *Criminal Code* (Qld) (n 1) ss 348(3)–(4).
29 Ibid proposed new provision in *Criminal Code* (Qld) (n 1) s 348AA.

3.3 Parties and excuses

3.3.1 Parties to an offence

People can be guilty of an offence if they:

- do or do not do something to enable or aid (assist, help or encourage) someone else in committing the offence;[30]
- counsel (urge or advise) another person in committing the offence;[31] or
- procure (bring about, cause to be done, prevail on, persuade, try to induce) any other person to offend.[32]

This can encompass a wide variety of circumstances. In relation to rape or sexual assault, an example could be restraining the complainant while another person commits the offence.[33] Depending on the circumstances of the case, being present during a rape may be sufficient grounds to be a party.[34] The party provisions have also been used where a person assists their partner to sexually abuse their own children.[35] The same maximum penalties and consequences that apply to the principal person will also apply to any person charged as being a party to an offence.[36]

3.3.2 The excuse of mistake of fact

The state of mind of an accused person is not an element of the offence of sexual assault or rape. However, a person may be excused from criminal responsibility for these offences if he or she can prove that they committed the offence under an honest and reasonable, but mistaken, belief that the complainant gave consent. Section 24 of the *Criminal Code* (Qld) provides:

> **24 Mistake of fact**
>
> (1) A person who does or omits to do an act under an honest and reasonable, but mistaken belief in the existence of any state of things is not criminally responsible for the act or omission to any greater extent than if the real state of things had been such as the person believed to exist.
>
> (2) The operation of this rule may be excluded by the express or implied provisions of the law relating to the subject.

Section 24 applies to any person charged with a criminal offence against the *Criminal Code* (Qld). Voluntary intoxication is not relevant to whether a belief is reasonable but can be considered when deciding whether the belief was honestly held.[37]

While principally a matter for trial, where a person is found to have an honest and mistaken belief that the complainant consented, but it is found not to be reasonable, this can be a matter taken into account at sentence.[38]

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30 *Criminal Code* (Qld) (n 1) s 7(1).
31 Ibid s 7(2).
32 If a person counsels someone to commit an offence, and the offence is in fact committed, it does not matter whether the offence committed was the specific one counselled or a different one, or that it was committed in a different way. What matters is that the facts constituting the offence actually committed are a probable consequence of carrying out the counsel: Ibid s 9.
33 *R v Degn* [2021] QCA 33; *R v BDF* (2022) 10 QR 477; *R v Lahai* [2023] QCA 81.
34 *R v Doran; R v Zevenbergen; R v Butler; R v Sealey* [2023] QCA 177 (Morrison and Dalton JJA and Wilson J agreeing). Cf*R v Butler & Lawton & Marshall* [2011] QCA 265 [69], as cited in *R v Peter; R v Banu; R v Ingui* [2023] QCA 1 [46] (McMurdo and Bond and Dalton JJA agreeing).
35 See *R v ABF; R v MDK* [2021] QCA 240.
36 *Criminal Code* (n 1) ss 7(3),(4).
37 Queensland Supreme and District Courts, *Queensland Supreme and District Courts Criminal Directions Benchbook* (November 2021) 80.1.
38 *R v Enright* [2023] QCA 89 [90] (Mullins P, Bond JA and Boddice AJA); *R v Stephens* (1994) 76 A Crim R 5, 5, 7 (Pincus, Davies JJA, Lee J); cited in *R v Gill; Ex Parte Attorney-General* (Qld) [2004] QCA 139 [5] (de Jersey CJ).

Proposed amendments to mistake of fact

On 11 October 2023, the Criminal Law (Coercive Control and Affirmative Consent) and Other Legislation Amendment Bill 2023 was introduced. This Bill proposed to make changes to the excuse of mistake of fact,[39] including to provide that:

- A court must not have regard to the voluntary intoxication of a person when deciding if the person's belief that there was consent was honest and reasonably held;[40] and
- A person's belief that there was consent is not reasonable if the person did not say or do anything to ascertain if the other person consented, unless the accused person can show they have an impairment which substantially contributed to being unable to ascertain consent;[41]

As noted above, this Bill was introduced following the recommendation of the Women's Safety and Justice Taskforce.[42]

3.4 Legislative history of both offences

Both rape and sexual assault have undergone significant reforms during the 18-year period which data presented in this paper relates to. To assist in analysing their impacts, this section briefly considers the legislative history of these two offences in Queensland.

3.4.1 Sexual assault

The current offence of sexual assault was inserted in the *Criminal Code* (Qld) in 2000.[43] The earliest forms of this offence formed part of the original *Criminal Code* (Qld) which commenced on 1 January 1901 and included indecent acts[44] and indecent assaults on females,[45] both of which carried a maximum penalty of 2 years, and indecent assault on males[46] which had a maximum penalty of 3 years.

Early forms of the offence were limited to indecent acts, however since 1989, it has expanded to include a wider range of sexual conduct. Table 2 shows the significant amendments to sexual assault over the last 30 years. In 2000, some conduct was removed and included instead in the offence of rape.[47]

39 Affirmative Consent Bill (n 26) s 14.
40 Ibid proposed new provision in *Criminal Code* (n 1) s 348A(2).
41 Ibid proposed new provision in *Criminal Code* (n 1) s 348A(3).
42 *Hear Her Voice Report 2* (n 25) rec 43, 216.
43 *Criminal Law Amendment Act 2000* (Qld) ('CLAA').
44 *Criminal Code* (Qld) (n 1) s 227. This was a misdemeanour offence.
45 Ibid s 350. This was a misdemeanour offence.
46 Ibid s 337. This was a misdemeanour offence.
47 CLAA (n 43) cl 24, 26.

Table 2: Amendments to Queensland offence of sexual assault

Date	Details	Relevant legislation
1975	• Maximum penalty for indecent assault on males (s 337) and indecent assaults on females (s 350) increased to 7 years imprisonment.	*The Criminal Code and the Justices Act Amendment Act 1975* (Qld)
1989	• Offence of indecent assaults on females (s 350) repealed. • Offence of indecent assault on males (s 337) repealed and replaced with a new offence of indecent assaults. • New s 337 offence was gender neutral. Offence comprised 2 limbs, unlawfully and indecent assaults another and procures another person, without consent, to commit or witness an act of gross indecency. The maximum penalty remained 7 years. • In the new s 337, circumstances of aggravation were added: • (i) 'carnal knowledge against the order of nature', which had a maximum penalty was life imprisonment. • (ii) penetrating the vagina or anus with an object or any part of the body other than a penis or mouth contacting anus or any part of genitalia, which had a maximum penalty of 14 years.	*The Criminal Code, Evidence Act and Other Amendments Act 1989* (Qld)
1990	• Section 337 wording, 'against the order of nature' was amended to be 'anal intercourse'.	*The Criminal Code and Another Act Amendment 1990* (Qld)
1997	• Section 337 was renamed as 'sexual assaults' and the maximum penalty was increased to 10 years (consistent with other sexual offences). • Circumstances of aggravation were amended, making penetrating the vagina or anus with an object or any part of the body other than a penis a standalone subsection with a maximum penalty of life imprisonment. • New circumstances of aggravation of being armed or in company were added which had a maximum penalty of life imprisonment.	*Criminal Law Amendment Act 1997* (Qld)
2000	• Section 337 was repealed and the new offence of sexual assault (s 352) was introduced. • Removal of conduct now covered in the offence rape e.g., anal intercourse.	*Criminal Law Amendment Act 2000* (Qld)

3.4.2 Rape

The offence of rape was established in the original *Criminal Code* (Qld) introduced in 1899 under section 347:

> Any person who has carnal knowledge of a woman, not his wife, without her consent, or with her consent, if the consent is obtained by force or by means of threats or intimidation of any kind, or by fear of bodily harm, or by means of false and fraudulent representation as to the nature of the act, or, in the case of a married woman, by personating her husband, is guilty of a crime, which is called rape.

Like the current offence, the maximum penalty was life imprisonment,[48] however prior to the introduction of the *Criminal Code* (Qld), a person convicted of rape could be sentenced to death.[49] Unlike today, the original offence was gendered with only a woman victim recognised and criminalised a male. Further, the offence of rape only included 'carnal knowledge' (penile/vaginal intercourse) and a husband could not be found to have raped his wife.[50] Sodomy was a separate offence,[51] however it was primarily focused on men engaging in consensual sex.

Table 3 shows there have been significant amendments to the offence of rape in the last 30 years.

48 *Criminal Code* (Qld) (n 1) s 348. This was 'with hard labour'. The punishment of hard labour was removed on 1 December 1988 by the *Corrective Services (Consequential Amendments) Act 1988* (Qld).

49 Queensland Parliament, *Parliamentary Debates*, Legislative Assembly, Criminal Code Bill 1899, Second Reading – Resumption of Debate, 27 September 1899, 151, 159; Queensland Parliament, *Parliamentary Debates*, Queensland Legislative Council, Criminal Code Bill 1899, Second Reading ,7 November 1899, 819.

50 *Criminal Code* (Qld) (n 1) s 353, as at 1 January 1901.

51 Ibid s 208 - repealed 23 September 2016, see *Health and Other Legislation Amendment Act 2016* (Qld) s 4.

Table 3: Amendments to Queensland offence of rape

Date	Details	Relevant legislation
1989	• The offence was amended to replace 'woman' with 'female' and define 'married woman' to include 'a woman living with a man though not lawfully married to him and 'husband' has a corresponding meaning.'[52]	*The Criminal Code, Evidence Act and Other Amendments Act 1989* (Qld)
1990	• Definition of carnal knowledge was expanded to include 'carnal knowledge by anal intercourse'.	*The Criminal Code and Another Act Amendment 1990* (Qld)
1997	• The offence was made more gender neutral, with removal of gendered references. • The definition of 'carnal knowledge' was expanded to include 'penetration to any extent'.[53] • Carnal knowledge was added to section 1 of the *Criminal Code*[54] • Clarified that the 1990 amendment re anal intercourse meant rape included non-consensual sodomy.	*Criminal Law Amendment Act 1997* (Qld)
2000	• *Criminal Code* restructured to allow for consolidated and gender-neutral section for rape and sexual assaults (Chapter 32). Rape is now s 349. • Rape was expanded to include penetration by the offender of the vagina, vulva and anus of the victim by any body part or object, and penetration of the mouth of victim by the offender's penis. This conduct was previously included in the offence of sexual assault. • The definition of genitalia is expanded to include surgically constructed organs, for both males and females.	*Criminal Law Amendment Act 2000* (Qld)
2023	• The term 'carnal knowledge' was replaced with 'penile intercourse' and applied to all relevant sexual offences in the *Criminal Code*, including rape. The definition was not altered.	*Domestic and Family Violence Protection (Combating Coercive Control) and Other Legislation Amendment Act 2023* (Qld)

3.5 Conclusion

Changes to the offence of rape and sexual assault over time, including the type of conduct captured, maximum penalties and the definition of consent, are of direct relevance to sentencing as they may partly account for changes in sentencing practices over time and the types of issues commonly raised at sentence.

In the following chapters of this paper, we consider who is involved in these offences, the sentencing framework courts must apply in sentencing, relevant case law and sentencing practices for these offences in Queensland.

Equivalent offences in other Australian and select international jurisdictions and sentencing frameworks are discussed in Chapter 10.

52 *The Criminal Code, Evidence Act and Other Acts Amendment Act 1989* (Qld).
53 CLAA (n 43). The definition of 'married female' remained the same as it was for 'married woman'.
54 Explanatory Notes, CLAA (n 43) cl 6.

Chapter 4 Who is involved in sexual assault and rape?

4.1 Introduction

In this chapter we present the demographic characteristics of people sentenced for sexual assault and rape offences between July 2005 and June 2023 ('18-year data period') as well as victim survivors of sentenced sexual assault and rape offences.

The chapter discusses research on factors contributing to the commission of sexual violence offences, including by those who commit child sexual offences, as well as the impacts of this type of offending on victim survivors.

4.2 Key data findings

As part of its work for this review, the Council has published two *Sentencing Spotlights* on Sexual Assault and Rape (February 2024).[1]

The Council's analysis was based on Queensland Courts data on cases where sexual assault or rape was the most serious offence (MSO) sentenced over the 18-year period. As the data in that analysis included outcomes for both adults and children sentenced for these offences, the key findings presented below include some demographic information for children.[2] However, the data presented in Chapter 8 focuses only on sentenced adults.

As discussed in Chapter 2, sentenced cases are unlikely to be reflective of all cases of sexual harm that could be charged as sexual assault or rape given the high rates of underreporting and rates of attrition. There is a complex range of historical, structural, community and individual-level factors that impact on the reporting of these offences, as well as who is charged with, convicted of and sentenced for these offences. The findings discussed below should be read with this limitation in mind.

Demographics and details of sentenced people

1 **Almost all people sentenced for these offences were male.**

For sexual assault, 98.5% were male. For rape, 98.9% were male.

2 **Rape was committed by younger people compared to sexual assault.**

On average, people sentenced for rape were younger at the time of committing the offence (31.8 years) compared to sexual assault (36.0 years). For comparison, the average age of all offences (not just sexual offences) was 31.6 years.

3 **The average age was younger for Aboriginal and Torres Strait Islander people.**

On average, Aboriginal and Torres Strait Islander people committed rape at the age of 27.6 years and sexual assault at 29.1 years (33.2 years and 38.1 years, respectively, for non-Indigenous people).

While the analysis found that Aboriginal and Torres Strait Islander offenders were younger than non-Indigenous offenders, this may be because the average age of the Aboriginal and Torres Strait Islander population is younger in comparison to the non-Indigenous population.

1 Queensland Sentencing Advisory Council, *Sentencing Spotlight on Sexual Assault* (2024); Queensland Sentencing Advisory Council, *Sentencing Spotlight on Rape* (2024).

2 Child defendants made up 8.1% of sentencing cases involving sexual assault (MSO, n=168), and 12.5% of sentenced cases involving rape (MSO, n=260).

4 **Aboriginal and Torres Strait Islander people were disproportionately represented.**

Although Aboriginal and Torres Strait Islander peoples represent approximately 4.6% of Queensland's population (aged 10 years and over), they accounted for almost a quarter of people sentenced for sexual assault (20.5%) and for rape (23.3%) during the 18-year data period.*

For comparison, Aboriginal and Torres Strait Islander people make up 18.0% of all offences (not just sexual offences) sentenced in Queensland.

5 **There were few repeat sentenced offenders for the same index offence.**

For sexual assault, 4.0% were repeat offenders. For rape, 2.1% were repeat offenders.

A repeat offender was defined as anyone sentenced for the same offence (rape or sexual assault) on a subsequent occasion over the 18-year period.

6 **Far North Queensland had the highest rate of people sentenced.**

The number of cases sentenced per 100,000 population in Far North Queensland was 111.6 for sexual assault and 123.8 for rape. This was almost 3 times that of the metropolitan region for both offences.[3]

7 **People were more likely to plead not guilty to these offences than to other sexual offences.**

People sentenced for rape pleaded not guilty in 26.8% of cases. This is much higher than for sexual offences generally where 15.0% plead not guilty.

For sexual assault, 6.0% pleaded not guilty. While this was lower than for rape and lower compared to sexual offences generally, it was much higher compared to all offences sentenced in Queensland (not just sexual offences) where only 0.9% entered a plea of not guilty.

Data note: *The data on Aboriginal and Torres Strait Islander people relates to adults sentenced only. For this reason, it is different to the information contained in our *Sentencing Spotlights*.

4.2.1 Research findings

While the Council's review is focused on the sexual offences of rape and sexual assault, it has considered research about people who commit sexual offences more broadly. Although, some findings may be more applicable to particular offences, such as those perpetrated against children, they may still be applicable to perpetrators of sexual assault and rape.

Research on people who commit sexual offences has reached a variety of consistent conclusions:

- Sexual offences that come to the attention of police represent only a small proportion of all sexual offences that occur in the community.
- People imprisoned for sexual offences represent only a small proportion of all people dealt with by the criminal justice system for a sexual offence.
- Most victim survivors are victimised by someone known to them, most commonly a family member.
- The overwhelming majority of those who commit sexual offences are men.
- People who commit sexual offences tend to be older than other offenders.
- Only a small minority of people convicted of a sexual offence report having been sexually abused in childhood.
- Most people who commit sexual offences are not mentally ill.
- The risk of reoffending is greatest for those individuals who started offending at an early age, have stable deviant sexual preferences, have multiple convictions for sexual offending, have committed diverse sexual offences and who target male child victims.
- Those who commit sexual offences tend to be generalist offenders (that is, to commit offences of different types rather than just sexual offences), with their sexual offending embedded in more general offending behaviour.

3 The Far North Queensland region is based on the Cairns Supreme Court boundary with some modifications to align with LGAs. The metropolitan region covers Brisbane (from Caboolture to Redland) and Ipswich.

- People who commit sexual offences are not a homogenous group, with different types of people exhibiting different patterns and precursors of offending.
- Sex offender treatment programs, especially those delivered in the community, have a small but significant effect on reducing sexual offence recidivism.[4]

4.3 Why do people commit acts of sexual violence?

The reasons why some people commit acts of sexual violence while other people do not are multifaceted and complex.

Research suggests the commission of sexual violence offences is driven by both micro and macro risk factors at the individual and relationship, organisational and community, system and institutional, and societal levels.[5]

Forms of sexual offending can also 'vary along a broad spectrum of behaviours, from non-contact offences such as exhibitionism to rape'.[6]

People who perpetrate sexual violence are diverse in many ways, including their personal characteristics and in the way they commit their offences. Among those who use sexual violence 'there are differences related to severity, frequency and the form of their use of violence'.[7] However, there is some evidence that individuals who commit acts of sexual violence may also commit other forms of violence, and the risk factors may overlap.

4.3.1 Profile of those who use sexual violence and their risk factors

Most people who commit sexual offences are 'similar to the general offender population in terms of demographic, psychosocial and criminal history variables': [8]

> 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.[9]

Research suggests that those who use sexual violence, particularly men, typically commit their first offences as teenagers, and 'most individuals who commit sexual violence as young adults will continue to do so, especially, if, like the vast majority of perpetrators, they avoid criminal detection and sanction'.[10]

Globally, research into those who use sexual violence is very unevenly distributed across different offender populations, institutional settings and geography. For example, much of the scholarship comes from North America and much of the research is based on those whose offending has been detected and prosecuted, despite this cohort representing: 'only a tiny proportion of the population of perpetrators'.[11] There are some studies, however, which consider offending patterns across different countries. For example, a study undertaken by the United Nations into male perpetrated physical and sexual violence in the Asia-Pacific region, found that 24.1 per cent of participants reported having perpetrated sexual violence (rape) against a woman (partner and non-partner).[12]

Table 4 summarises risk factors commonly identified in explaining men's use of sexual violence applying a social-ecological model which takes into account the complex interplay between individual, relationship, community and societal factors that may put them at risk for using violence or act as protective factors:[13]

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4 Karen Gelb, *Recidivism of Sex Offenders Research Paper* for the Victorian Sentencing Advisory Council (January 2007) vii.
5 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.
6 Gelb (n 4) 3.
7 Michael Flood et al (n 5), 7.
8 Denise Lievore, 'Thoughts on Recidivism and Rehabilitation of Rapists' (2005) 28(1) *UNSW Law Journal* 293, 294.
9 Ibid.
10 Michael Flood et al (n 5) 8.
11 Ibid 41–63.
12 Emma Fulu et al, *Why Do Some Men Use Violence Against Women and How Can We Prevent It? Quantitative Findings from the UN Multi-Country Study on Men and Violence in Asia and the Pacific* (Bangkok: UNDP, UNFP, UN Women and UNV, 2013) 29. More than 10,000 men from 6 countries in the Asia-Pacific participated in this quantitative study.
13 Michael Flood et al (n 5) 34–5.

Table 4: Social-ecological model of risk factors for those who use sexual violence and child sexual abuse

Level	Sexual Violence (Adults)	Child Sexual Abuse
Individual	• Childhood: witnessing or experiencing abuse • Pornography use • Risky sexual scripts • Early age of first sexual experience • Gender inequitable attitudes	• Childhood: witnessing or experiencing abuse • Poor mental health (e.g., depression, low self-esteem) • Problems in social deficits (e.g., social skills, empathy, loneliness) • Maladaptive sexual behaviours • Early age of first sexual experience • Attitudes supportive of violence/disinhibition to use violence
Relationships	• Lack of relationship stability • Multiple partners • Risky sexual behaviour patterns	• 'Blockage' to normal sexual relationships
Community	• Aggressive male peer groups and relations • Hypermasculine settings	
Societal	• Rape culture • Gender inequality • Social norms and practices that emphasise men's control and dominance over women[14]	

Source: 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) 34–5.

Understanding what factors may contribute to the commission of sexual violence helps to prevent and reduce future sexual violence. Certain risk factors may be more common for some offenders than others, and not all risk factors will be present for all offenders. Sexual violence risk factors 'differ for different categories of perpetrator' due to 'gender, race and ethnicity, sexual orientation and other forms of social difference and inequality'.[15]

The Confluence Model, which has been described to 'fit broadly within the social-ecological model', has become the 'predominant etiological model' for sexual violence perpetration by men.[16] This model emphasises 2 risk factors:

1. 'hostile masculinity (a distrusting and angry disposition toward women)'; and
2. 'impersonal sexual orientation (a desire to engage in uncommitted sexual involvements for physical gratification)'.[17]

This model suggests:

> There are two 'paths' that may contribute to male-perpetrated sexual aggression. The first is interpersonal sex, characterised by high frequency non-committal, casual sex. The second is hostile masculinity, a set of traits associated with insecurity, defensiveness, distrust, hostility and dominance towards women, which is thought to originate from cultural environments and early-life experiences.[18]

Consistent with this model, in the UN multi-country study, the most commonly reported motivation for committing acts of rape across sites was related to men's sense of sexual entitlement.[19] Entertainment seeking was the second most commonly reported motivation.[20]

14 Andra Teten Tharp et al, 'A Systematic Qualitative Review of Risk and Protective Factors for Sexual Violence Perpetration' (2013) 14(2) *Trauma, Violence & Abuse* 133.
15 Flood et al. (n 5) 45.
16 Ibid 36.
17 Ibid 36–7.
18 Ibid 37.
19 Fulu et al. (n 12) 39. In most countries this was reported by 70-80 per cent of men who had ever raped a woman or girl.
20 Ibid 43.

4.3.2 Sexual violence against children

Discussed in Chapter 2, children and young people experience high rates of sexual violence. Understanding why some people commit sexual offences against children is critical to efforts to prevent and respond to those who commit these offences.

The majority of child sex offenders are not paedophiles. Paedophiles are 'those individuals who are sexually attracted to young children' and they 'may or may not act on this attraction'.[21] While some child sex offenders 'are attracted to children', others are sexually interested in and/or offend against both children and adults, and 'may act out of opportunity rather than an exclusive sexual interest in children'.[22] Research suggests 'situational and environmental factors can play a key role in sexual offending against children'[23] and that some child sexual offences:

> may therefore be explained as extensions of more general antisocial patterns of behaviour, perhaps involving opportunism, the exploitation of interpersonal relationships or the disregard of socially acceptable codes of behaviour.[24]

The first Australian nationally representative research into the prevalence of child sexual offending behaviours and attitudes which surveyed a sample of 1 965 Australian adult men found that:

- Around 1 in 6 (15.1%) respondents reported sexual feelings towards children. Approximately one third of this group reported sexually offending against children.
- Around 1 in 10 (9.4%) of those surveyed had sexually offended against children. Approximately half of this group reported sexual feelings towards children.
- Combined, almost 1 in 5 (19.6%) Australian men in the study reported having sexual feelings for children and/or having sexually offended against children.

Of the 4.9 per cent of men in this study with sexual feelings who reported offending against children, they were more likely than men with no sexual feelings or offending against children to:

- be married, working with children, earning higher incomes;
- report anxiety, depression, and binge drinking behaviours;
- have been sexually abused or had adverse experiences in childhood;
- be active online, including on social media, encrypted apps and cryptocurrency; and
- consume pornography that involves violence or bestiality.[25]

Those findings support earlier work by the Royal Commission into Institutional Responses to Child Sexual Abuse ('Royal Commission') which identified a range of risk factors that may influence an adult to sexually abuse a child (in any setting), such as:

- Adverse experiences in childhood, such as physical, emotional and sexual abuse and neglect;
- Interpersonal, relationship and emotional difficulties, including difficulty connecting with other adults, intimacy problems and poor social skills, and emotional affiliation with children;
- Distorted beliefs and 'thinking errors' that may facilitate child sexual abuse; and
- Indirect influences, such as contextual or 'trigger' factors.[26]

These risk factors are consistent with those identified by other research summarised in Table 4 (page 37 above).

The Royal Commission also set out 4 pre-conditions which must be met before an adult will sexually abuse a child: 'motivation to sexually abuse; overcoming internal inhibitions the perpetrator may have about sexually abusing a child; overcoming external barriers to access a child; and overcoming the child's resistance'.[27]

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21 Kelly Richards, 'Misconceptions about child sex offenders', *Trends & Issues in Crime and Criminal Justice* (No. 429, Australian Institute of Criminology, 2011) 2.
22 Ibid 2.
23 Ibid 2 citing Stephen W. Smallbone and Richard K. Wortley, 'Child Sexual Abuse: Offender Characteristics and Modus Operandi' *Trends and Issues in Crime and Criminal Justice* (No. 193 Australian Institute of Criminology, 2001).
24 Smallbone and Wortley (n 23) 6.
25 UNSW Australian Human Rights Institute, *Identifying and Understanding Child Sexual Offending Behaviours and Attitudes among Australian Men* (November 2023) 3.
26 Royal Commission into Institutional Responses to Child Sexual Abuse, *Final Report Volume 2: Nature and Cause* (Report 2017) 14.
27 Ibid 15.

The Royal Commission identified 4 'typologies', drawn from research, that reflected the patterns displayed by adult male perpetrators of child sexual abuse:

- **'fixated, persistent' perpetrators** have a longstanding sexual attraction to children, are often repeat offenders and may actively manipulate environments to enable them access;
- **'opportunistic' perpetrators** are less fixated on the sexual abuse of children and may engage in other types of criminal behaviour, using children for sexual gratification and exploit situations where they have access to and authority over children; and
- **'situational' perpetrators** do not usually have a sexual preference for children but sexually abuse children in response to 'stressors' in their own lives, such as social isolation, lack of positive adult relationships or low self-esteem; and
- **'professional perpetrators'** use their workplace and employment to conceal their targeting and sexual abuse of children. They may reflect characteristics of the 'fixed, persistent', 'situational' and 'opportunistic' typologies and can apply to female offenders as well. [28]

The Royal Commission noted there was 'no typical profile of women who sexually abuse women identified in research'[29] but did observe 3 "typologies" of female perpetrators of child sexual abuse during their private sessions and public hearings:

- **'predisposed' perpetrators**, who may have a history of child sexual abuse victimisation;
- **'teacher-lover' perpetrators**, who view themselves as in love with their victim; and
- **'male-coerced' perpetrators**, who in the context of a domestically abusive relationship with a male, were forced into offending. [30]

Relevance of a history of child sexual abuse

Several studies have identified witnessing or experiencing domestic and family violence as a risk factor for perpetrating violence, including sexual violence.[31]

In the case of child sexual abuse, the relationship between being a victim survivor and committing acts of child sexual abuse as an adult, is complex. The vast majority of child victims of sexual abuse do not go on to commit acts of child sexual abuse and it is clear from the research that being a victim of child sexual abuse does not cause someone to become a perpetrator.[32] Further, not all sexual violence perpetrators have experienced abuse as a child.[33]

Researchers have found there is an association, however, between experiencing sexual abuse (and other types of maltreatment) as a child and a person's risk of committing child sexual abuse.[34] One study, for example, found that 'almost one in 10 boys' who were sexually abused at 12 years or older were later convicted of a sexual offence,[35] and 'while the majority (99%) of male and female victims of child sexual abuse were not charged for a sexual offence, child sexual abuse victims were 7.6 times more likely to be charged with sexual offences than the general population'.[36]

As discussed in *Consultation Paper: Issues and Questions*, the question of whether a person who has committed a sexual offence has themselves been a victim of violence, including sexual violence, is a factor that may be taken into account by a court at sentence. Legislative reforms proposed to be introduced in Queensland will soon require courts to have regard to this.

28 Ibid 128–30.
29 Ibid 15.
30 Ibid 129.
31 Flood et al (n 5) 33.
32 Richards (n 21) 4 (emphasis in original and citations removed).
33 Ibid.
34 Ibid (emphasis in original and citations removed).
35 James RP Ogloff et al. 'Child Sexual Abuse and Subsequent Offending and Victimisation: A 45 Year Follow-up Study', *Trends & Issues in Crime and Criminal Justice* (No. 440, Australian Institute of Criminology, 2012) 5.
36 Ibid.

4.3.3 Recidivism rates for sexual violence

There is strong public concern about the risk of individuals who have perpetrated sexual violence reoffending, particularly where this involves the person committing new sexual offences.

Understanding rates of recidivism and risks posed by individuals of reoffending is an important aspect of sentencing for these offences given the purposes of sentencing for offences such as these which are strongly focused not only on punishment, denunciation and deterrence but also on promoting community safety.

At a whole of population level, determining the true rate of reoffending (also referred to as 'recidivism') is challenging. This is because measuring recidivism for those convicted of a sexual offence depends on a range of factors including, what definition of recidivism is used, what population recidivism is measured for, the type and nature of any treatment, and the length of follow-up after the person's release into the community (if they have been in custody).[37]

Generally, two types of research are used to assess recidivism: official reports of reoffending (i.e., rearrest and/or reconviction rates); and self-reports by offenders.

The most common definition of recidivism used is rates of reconviction, measured generally as a return to prison. This is likely to understate the true rate of reoffending as victim survivors may not disclose the abuse and in the case of a child, a caregiver may not detect the offending. Further, as discussed in Chapter 2, even when this type of offending is reported, sexual violence charges have high rates of attribution. As Gelb notes:

> Given that the rates of reporting, detection, arrest and successful prosecution of sexual offences are all very low, the proportion of all sex offenders who end up in prison represents only a small minority of all sex offenders.[38]

For these reasons, self-reporting by detected sexual violence offenders is regarded as a 'valuable complement to research based on official sources of data'.[39] Some caution, however, is needed when considering this as it is possible 'that offenders under-report their offending behaviour'.[40]

Considering both types of recidivism studies, findings suggest that 'sex offenders typically have lower rates of recidivism than do other kinds of offenders and that these rates vary for different sub-groups of sex offender'.[41] International and Australian research findings show:

> most serious violent and sexual criminals do not have previous convictions for violent or sexual offences and are not reconvicted for violent and sexual offending. The rates of homologous violent and sexual offending (reoffending with the same specific offence as the index offence) have thus consistently been found to be lower than they are for other kinds of criminal behaviour. However, as most sexual offences are never reported to police, the recidivism rates found in the literature are likely to represent conservative estimates.[42]

Another important consideration relevant to recidivism, as well as to risk assessment and treatment, is that many people who commit sex offences 'have versatile criminal careers' and allowing for different types of sex offenders, sexual offending is often 'embedded in more general criminal behaviour'.[43]

Management of people sentenced for sexual offences, including sexual offending programs and interventions and their effectiveness is discussed further in Chapter 9.

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37 David Greenberg et al. 'Recidivism of Child Molesters: A Study of Victim Relationship with the Perpetrator', (2000) 24(11) *Child Abuse & Neglect* 1485. See also Richards (n 21), 4–5.
38 Gelb (n 4) 21.
39 Ibid.
40 Ibid. See comments by Richards (n 21) 6.
41 Gelb (n 4) 21.
42 Ibid 21–2, referring to Nigel Walker, *Dangerous People* (Blackstone Press, 1996).
43 Gelb (n 4), 28 referring to Soothill et al. 'Sex Offenders: Specialists, Generalists - Or Both? A 32-Year Criminological Study' (2002) 40 *British Journal of Criminology* 56–67.

4.4 Victim survivors of sexual violence

4.4.1 Key data findings

The Council analysed sentencing remarks for 118 cases where rape was the most serious offence sentenced, between July 2022 and June 2023. In all cases the person was sentenced as an adult. For more information about the Council's methodology and findings see section Sentences based on selected case characteristics.

Victim Survivors in sentenced rape cases

1 **Almost all victim survivors were female.**

The overwhelming majority of all sentenced rape (MSO) cases in 2022-23 involved a female victim survivor (95.8%). There were only 5 cases involving male victim survivors.

2 **Over half of victim survivors were children.**

In rape (MSO) cases sentenced in 2022-23, more than half involved victim survivors that were children aged under 18 years (56.8%).

3 **Most victim survivors knew the perpetrator.**

In the vast majority of cases, the victim survivor was raped by someone known to them (87.3%), with 10.2% offended against by a stranger. When the victim survivor was a child, the proportion of a cases where the victim survivor knew the perpetrator was higher (92.5%), compared to when the victim survivor was an adult (80.4%).

4.4.2 Who are the victim survivors of sexual violence?

Victim survivors of sexual violence have uniquely individual experiences which may be shaped and compounded by a diverse range of inequalities, such as sexism, racism, ageism and ableism.[44] Applying a lens of intersectionality is central to acknowledging how experiences of victimisation are shaped when these different forms of inequality overlap.[45]

As discussed in Chapter 2:

- most victim survivors of sexual violence are female;
- certain communities experience sexual violence at higher rates, including Aboriginal and Torres Strait Islander people, children and young people, people with disability, people from culturally and linguistically diverse backgrounds LGBTIQA+ people, and people in the prison system;
- sexual violence is often perpetrated within a domestic and family violence context, with the most common offender being a family member;[46]
- prior victimisation or exposure to violence may also increase a person's risk of future victimisation.[47]

44 See Eileen Baldry and Leanne Dowse, 'Compounding Mental and Cognitive Disability and Disadvantage' in Duncan Chappell (ed), Policing and the Mentally Ill: International Perspectives (Routledge, 1st ed, 2013) 219 for further discussion on the compounding effects of complex needs.

45 Women's Safety and Justice Taskforce, *Hear Her Voice, Report Two: Women and Girls' Experience across the Criminal Justice System* (2022) vol 1, 50–1 ('*Hear Her Voice Report 2*').

46 Australian Bureau of Statistics, *Sexual Violence - Victimisation*, (23 August 2023) based on the Australian Bureau of Statistics' *Personal Safety Survey 2021–22* ('*Sexual Violence - Victimisation*'); 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* (ANROWS Research Report 14, 2022) 8.

47 *Sexual Violence - Victimisation* (n 46).

4.4.3 The traumatic impact of sexual violence on victim survivors

The impacts of sexual violence are different for each victim survivor. For many victim survivors, the offending can have significant and lasting impacts on their mental and physical health and wellbeing. Sexual violence is 'very often an experience in trauma' and trauma has 'a neurobiological impact' affecting a person's brain and nervous system.[48] Victim survivors may experience the impact of sexual violence 'physically and psychologically over both the short and long term'.[49]

The effects of sexual violence are experienced differently among victim survivors and across individuals' life courses. Further, the impacts of sexual violence are variable for each person and may change over time. Although each person is affected differently, some impacts are commonly experienced by victim survivors of sexual violence. These include:

- mental health;
- physical health;
- interpersonal relationships;
- education, employment and economic security;
- sexual identity, gender identity and sexual behaviour;
- connection to culture;
- interactions with society;
- spirituality and religious involvement (particularly for children abused within an institutional setting); and trust in other people and institutions.[50]

Sexual violence can cause a victim survivor to feel 'shock and anger, fear and anxiety, hyper-alertness and hypervigilance, irritability and anger'.[51] Victim survivors may also experience:

> disrupted sleep, nightmares, rumination and other reliving responses, increased need for control, tendency to minimise or deny the experience as a way of coping, tendency to isolate oneself, feelings of detachment, emotional constriction, feelings of betrayal, and a sense of shame.[52]

Women who experience intimate partner sexual violence (either perpetrated alone or with other non-sexual violence) may also experience a greater burden of disease than those women who experience non-sexual domestic violence only, with impacts lasting after abuse has stopped.[53] Intimate partner sexual violence is also 'associated with increased severity of PTSD symptoms … higher likelihood of clinically significant distress; higher likelihood of experiencing depression; and higher rate of suicide attempt and threat',[54] as well as negative impacts to sexual health, including being at increased risk of reproductive coercion.[55]

Understanding the effects of trauma on children's development

The impacts of sexual violence offences will be greater for children as 'sexual abuse can affect the emotional, social and physical development' of a child.[56] The Royal Commission observed that child sexual abuse can have a complex and profound effect on a person's life, differ by individual, change over time, and be triggered by a later event.[57] For example, a victim survivor 'may feel few impacts of the child sexual abuse until they experience a major life event in adulthood, such as forming an intimate relationship or having a child themselves'.[58]

Trauma affects 'the chemistry, structure and function of the developing human brain, especially when it is repeated or ongoing'.[59] This means 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'.[60]

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48 Dr Lori Haskell and Dr Melanie Randall, *The Impact of Trauma on Adult Sexual Assault Victims* (2019) 5 report submitted to Justice Canada.
49 Ibid 8.
50 Australian Institute of Health and Welfare, *Sexual Assault in Australia* (August 2020) 7; Royal Commission into Institutional Responses to Child Sexual Abuse, *Final Report Volume 3: Impacts* (Report 2017) 73 ('*Royal Commission on Child Sexual Abuse Final Report Vol 3'*).
51 Haskell and Randall (n 48) 9.
52 Ibid.
53 Australia's National Research Organisation for Women's Safety, *Intimate Partner Sexual Violence: Research Synthesis* (2nd ed, 2019) 2.
54 Ibid.
55 Ibid.
56 *Royal Commission on Child Sexual Abuse Final Report Vol 3* (n 50) 77.
57 Ibid 22–30.
58 Ibid 27.
59 Ibid 80.
60 Ibid.

The impacts of sexual violence can differ according to a child's stage of development. For example:

> **Babies and toddlers:** An infant who has not yet developed verbal skills may not hold a concrete narrative memory of the abuse, although the memory may be stored in their sensory systems (sight, smell, sound, taste and touch). Children at this stage may manifest their trauma physically. For example, they may have difficulty sleeping and eating, and may be hard to console.[61]
>
> **Preschool age:** A preschool child with verbal skills may regress to earlier stages of development, causing them to fear being alone or near unfamiliar adults, or have difficulties with sleeping and learning. They may not want to engage with peers or may lose skills they had mastered, such as bladder or bowel control. They may become quiet or withdrawn.[62]
>
> **Primary school age**: Children at this stage of development will often believe the sexual abuse they are experiencing is their fault and may develop a negative self-image and internalise their feelings. They may suffer disturbances in specific skills, including social and communication skills, memory and the ability to make sense of the behaviours of others.[63]
>
> **Adolescence**: Adolescent children may have problems with interpersonal relationships and regulating emotions and may experience ongoing vulnerability to stress and further sexual abuse or other forms of abuse. The repertoire of defence mechanisms and attempts at self-soothing that a child may have previously used, can change with adolescence to include the abuse of alcohol or other drugs, the use of food for comfort or punishment, social withdrawal, isolation and impulsivity, as well as having sex at an early age or having many sexual partners.[64]

The Royal Commission said:

> There is a growing body of research that shows the impact of such cumulative harm on the developing brain. It shows how chronic stress sensitises neural pathways and overdevelops regions in the brain involved in anxiety and fear responses. Meanwhile, other neural pathways and regions in the brain are undeveloped. Whereas brief stress promotes healthy regulatory abilities, repeated exposure is damaging and can interfere with a child's ability to monitor and regulate their emotions, behaviours and thoughts.[65]

The trauma of sexual violence can be further compounded because of the relationship to the perpetrator. Research into child sexual abuse suggests 'abuse by trusted adults who are close to the child can increase the impacts'.[66] The Australian Child Maltreatment Survey found the most common perpetrator for child sexual abuse were 'known adolescents aged under 18' (12.9%), followed by 'parents and other adult parent-like caregivers in the home (7.8%).[67]

Factors that influence impacts

A range of 'complex and connected factors influence' the way sexual violence may impact a victim survivor.[68] These factors include:

- the nature of the assault, including how long it lasted;
- the extent of physical injuries;
- the victim survivor's relationship to the perpetrator;
- whether the victim survivor has had prior victimisation, such as a childhood history of abuse or neglect;
- how family, friends and others respond to what the victim survivor says about the assault;
- the institutional, social and historical contexts in which the offending occurred;
- individual characteristics; circumstances and experiences of the victim survivor; and
- sources of strength and resilience available to each individual victim survivor. [69]

The way boys and girls experience and are impacted by sexual violence may also vary. The Australian Child Maltreatment Survey found there is a 'massive gender disparity in child sexual abuse' figures, with girls experiencing much higher rates of sexual abuse than boys (37.3% vs 18.8%).[70] Despite those figures, boys still experience high rates of sexual violence and reported numbers are likely to not reflect the true rate, as boys are more likely to be

61 Ibid 81.
62 Ibid 82.
63 Ibid.
64 Ibid 83.
65 Ibid 29 (citations removed).
66 Ibid 36.
67 Divna Haslam et al. *The Prevalence and Impact of Child Maltreatment in Australia: Findings from the Australian Child Maltreatment Study: Brief Report* (2023) 17.
68 *Royal Commission on Child Sexual Abuse Final Report Vol 3* (n 50) 30.
69 Haskell and Randall (n 48) 8; *Royal Commission on Child Sexual Abuse Final Report Vol 3* (n 50) 30.
70 Divna Haslam et al. (n 67) 19.

inhibited in disclosing abuse and therefore may not access supports and assistance.[71] Studies suggest that compared to women survivors, male survivors of child sexual abuse are more at risk of anxiety related symptoms and disorders and 'may be particularly susceptible to internalising effects'.[72]

Re-traumatisation

Many victim survivors experience cumulative harm, that is they experienced multiple adverse of harmful circumstances and events prior to and/or after their experiences of sexual violence. Repeated interpersonal victimisation (including sexual violence) and child sexual abuse can also result in complex trauma, which 'is commonly associated with psychological, psychosocial, functional, educational, and health challenges'.[73]

The intersection of inequalities experienced by a victim survivor may produce additional difficulties and impact upon their ability to engage with the criminal justice system or service system.[74] The criminal justice system itself has also been recognised as a potential source of secondary trauma for victim survivors of sexual violence,[75] and the presence of intersecting disadvantages may increase the likelihood of experiencing this secondary trauma.[76]

In relation to child victim survivors, there is research suggesting that:

> children who have been sexually abused are more likely than other children to be re-victimised both as adolescents and adults. They are also more likely to have been targeted by the perpetrator specifically because of their particular vulnerabilities including having socially isolated parents who lack partners and other supports.[77]

Recent national data found that when a child experiences sexual abuse, it rarely happens only once. Study participants who experienced child sexual abuse reported that:

1. For the majority it happened more than once (78%);
2. For almost half, it happened more than 6 times (42%); and
3. For over 1 in 10, it happened more than 50 times (11%).[78]

Ripple effects

Sexual violence not only affects the victim survivor but has ripple effects on a wider network of people. 'These ripple effects can continue over time, affecting subsequent generations. Those affected can include the victim's family, carers and friends', the community and wider society.[79] The Royal Commission referred to 'the experiences of parents, carers, siblings, partners and children' as secondary victims and that the impact of child sexual abuse can also be significant for them.[80] Secondary victims can suffer negative impacts on their 'mental health, relationships, family functioning, employment, financial security and social connectedness'.[81]

While the exact cost of sexual violence to the Australian economy is unknown, estimates for the cost of violence against women and children is approximately $22 billion.[82] Of that cost, around $12 billion is estimated for physical and sexual violence.[83] It is also estimated that due to the higher prevalence of physical and sexual violence experienced by some communities, the costs to those cohorts will be higher. For example, the underrepresentation of Aboriginal and Torres Strait Islander women may result in an additional cost of $1.2 billion, and women with disability may have additional costs of $1.7 billion to the Australian economy.[84]

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71 Judy Cashmore and Rita Shackel, The Long-Term Effects of Child Sexual Abuse, *Child Family Community Australia Paper No. 11* (2013) 18.
72 Ibid 20.
73 *Hear Her Voice Report 2* (n 45) 52 citing Australia's National Research Organisation for Women's Safety, *Constructions of Complex Trauma and Implications for Women's Wellbeing and Safety from Violence: Key Findings and Future Directions* (2020) 1; see also Cherie Toivonen, *Responding to Adult Survivors of Child Sexual Abuse Across Three Distinct Service Sectors: A Review of the Current Literature* (Report for the NSW Ministry of Health, 2019) 10.
74 *Hear Her Voice Report 2* (n 45) 50–1. See also Toivonen (n 73).
75 *Hear Her Voice Report 2* (n 45) 301–6.
76 Elizabeth A Armstrong, Miriam Gleckman-Krut and Lanora Johnson, 'Silence, Power, and Inequality: An Intersectional Approach to Sexual Violence' (2018) 44 *Annual Review of Sociology* 99, 108.
77 Cashmore and Shackel (n 71) 5.
78 Divna Haslam et al. (n 67) 19.
79 *Royal Commission on Child Sexual Abuse Final Report Vol 3* (n 50) 202.
80 Ibid.
81 Ibid.
82 Estimated cost for 2015–16: KPMG, *The Cost of Violence Against Women and Their Children: Final Report* (May 2016) 4.
83 Ibid 4.
84 Ibid 9–10.

How do Queensland courts understand the impacts of sexual violence?: Sentencing remarks preliminary findings*

Quotes from the sentencing remarks analysed on rape and sexual assault illustrate how courts publicly describe the impact of sexual violence on the victim during sentencing:

> It is a very poignant letter talking about the terrible adverse impact upon her as a result of what happened to her as a child. She has had to deal with significant and severe depression and anxiety, and has been diagnosed with post-traumatic stress disorder. (MCL5_R3)

> Of equal significance is the fact that subsequent to these events her grades suffered and she ended up dropping out school at the age of – well, not much older than what she would have been at the end of grade 10. That means that or the extent of her education is not as much as she might have otherwise hoped it would be. Her education outcomes are not as she would have hoped them to have been. Her employment opportunities are consequentially not what she might have hoped they have been. And through all of this she also struggles with the emotional fallout. All of that is the ongoing and profound effect of your moments of sexual gratification that you felt some sense of entitlement to on that night. (MCL5_R10)

> The complainant describes self-harming; she describes hating herself and the world, feeling like nothing matters, and that no one can save her. She has dropped out of school, had to change schools. Her relationship with her mother is fractured, and she feels like, she says, that she will never heal and never get back what she lost. (MCM5_R5)

> In that statement she makes it clear she has suffered significant emotional and psychological harm as a result of your offending. She suffers flashbacks, she has trouble sleeping, it has affected her ability to be physically intimate or affectionate with members of her family or with people she is in relationships with, it has affected her relationship with her partner, she feels anxious, and she no longer feels safe. She has been having counselling for over a year. Her extended family has also suffered the consequences of this; others in her family have been affected. She found giving evidence in Court over a period of two days extremely traumatic both physically and emotionally. She has been diagnosed with post-traumatic stress disorder. That diagnosis is confirmed in the documents provided by her treating psychologist. I accept that diagnosis, and indeed there is no challenge to it. Those documents express the opinion that there was a significant improvement in the complainant's symptoms initially, but in fact they have worsened during the last six months, that is, in the period leading up to and including the trial. The complainant has had multiple counselling sessions to date and would benefit from further sessions, to be able to recover. I take into account the very significant impact on the complainant in sentencing you today. (RM5_R8)

> The victim impact statements confirm that this family has been confronted with the sort of upset and turmoil that no one should really have to go through… Her family have had to leave and move interstate. The complainant has difficulty tolerating crowded places, she feels scared that someone else will try and take advantage of her. She has lost her confidence, her ability to trust people. She feels on guard. She is unable to enjoy the things that she used to enjoy. She has lost the normality that she had as a child and she holds you responsible for that loss. (HCRC_SA9)

> She confirms that she has seen her granddaughter left in a state of confusion, being scared. she describes her as being broken. She says that she has seen her fear in going out, and that she has been constantly blaming herself for what happened. And needs professional support so that she can try and find a way to again live a free and happy life where she is able to trust other people. (HCRC_SA9)

* These results should be interpreted with caution. The findings presented are from the partial coding of sentencing remarks that was completed at the time of the writing. They may be subject to change on completion of the coding and analysis of the full study sample: see section *Consultation Paper: Background*, Chapter 1.

Chapter 5 Human rights considerations

5.1 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 recommendations, are compatible with rights protected under the *Human Rights Act 2019* (Qld) ('HRA').[1] This section discusses relevant human rights under the HRA. In the Chapter 9 of the *Consultation Paper: Issues and Questions*, the Council discusses if there are any potential issues with existing provisions under the PSA being compatible.

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'.[2] The limitation must be reasonable and justified 'in a free and democratic society based on human dignity, equality and freedom.'[3] 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;
>
> (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).[4]

The HRA came into full effect on 1 January 2020.[5] 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). 'Fundamental legislative principles' include the requirement that legislation has sufficient regard to the 'rights and liberties of individuals'.[6] This includes a requirement that Explanatory Notes provided when a Bill is introduced should provide a brief assessment of how the Bill is consistent with fundamental legislative principles and any reasons it is inconsistent.[7]

1 Terms of reference, Appendix 3, 3.
2 *Human Rights Act 2019* (Qld) s 8 ('HRA').
3 Ibid s 13(1).
4 Ibid s 13(2).
5 *Proclamation No 2.—Human Rights Act 2019 (commencing remaining provisions) 2019* (Qld) SL 2019/224. Some provisions commenced on assent (7 March 2019) others on proclamation (1 July 2019) and remaining provisions (1 January 2020).
6 *Legislative Standards Act 1992* (Qld) s 4(2)(a).
7 Ibid s 23(1)(f).

5.2 Rights of victim survivors

Rape and sexual assault offences involve a serious breach of human rights, as explained by the former United Nations Special Rapporteur on Violence Against Women and Girls, its Causes and Consequences ('UN Special Rapporteur'):

> 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.[8]

Several rights set out in the HRA are relevant when considering the impact of rape and sexual assault on victim survivors. These include:

- right to enjoy human rights without discrimination (section 15(2));
- protection from torture and cruel, inhuman or degrading treatment (section 17)
- privacy and reputation (section 25);
- protection of families and children (section 26); and
- right to liberty and security of person (section 29).

In a 2021 report, the then UN Special Rapporteur made the following recommendation in respect of sentencing rape:

> (a) Rape should be sanctioned in a way commensurate with the gravity of the offence, and the use of fines as the only sanction should be abolished;[9]
>
> (b) States should include among aggravating circumstances the following situations: the perpetrator is a current or former spouse or intimate partner, or a family member, or the perpetrator abuses power or authority over the victim; the victim was or was made vulnerable, the victim was a child, or the act was committed in the presence of a child; the act resulted in physical and/or psychological harm for the victim; the act was committed by two or more people; and the act was committed repeatedly, with the use of violence, or with the use or threat of use of a weapon;
>
> (c) States should review and abolish all mitigating circumstances that are not in accordance with human rights standards, especially "marry your rapist" provisions, and cease their application on the basis of gender stereotypes and myths on rape.[10]

The current United Nations Special Rapporteur has reported on the impact of violence against Indigenous women and girls, stating in 2022:

> (73) The effects of violence suffered by indigenous women and girls permeate all aspects of their lives and severe affect their human rights to life, dignity, personal integrity and security, health, privacy, and personal liberty, and their rights to a health environment and to be free from ill-treatment.... Indigenous women and girls do not only experience gendered forms of violence, they also experience gendered consequences of violence, as they often bear the consequences of such violence disproportionately. [11]
>
> (75) States must ensure that their domestic legislation on gender-based violence against women is fully applicable to indigenous women and girls and sensitive to their experiences, including by ensuring specific provisions account for all forms of violence against them, such as environmental, spiritual, political and cultural violence. Additionally, States must ensure that indigenous women are appropriately consulted and that their participation is sought in any legislative processes related to violence against them.[12]

The rights of victims in Queensland are recognised in the *Charter of Victims' Rights* in Schedule 1AA of the *Victims of Crime Assistance Act 2009* (Qld) ('VOCA Act'), These rights, while recognised as not legally enforceable,[13] are relevant to the assessment of sentencing practices as part of the Council's current review.

The Council notes that during the Legal Affairs and Safety Committee inquiry into support provided to victims of crime recommended:

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8 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'*).

9 In accordance with General Comment No. 36 (2018) of the Human Rights Committee, sanctions should exclude the death penalty.

10 *UN Rape as Systematic Human Rights Violation* (n 8) 15 [90].

11 Reem Alsalem, Special Rapporteur on violence against women and girls, its causes and consequences, *Violence against indigenous women and girls*, UN Doc A/HRC/50/26 (21 April 2022) 17.

12 Ibid 18.

13 *Victims of Crime Assistance Act 2009* (Qld) s 7 ('VOCA Act').

> The Queensland Government, as part of its review of the *Human Rights Act 2019*, consider whether recognition of victims' rights under the Charter of victims' rights in the *Victims of Crime Act 2009* should be incorporated into the *Human Rights Act 2019*.[14]

The Committee noted support by stakeholders, including the Women's Legal Service Queensland and knowmore, that victims' rights should be recognised in the HRA, and for these rights to be legally enforceable.[15]

5.3 Rights of people charged and convicted of criminal offences

5.3.1 Recognition and equality before the law

Every person is equal before the law and is entitled to the equal protection of the law without discrimination.[16] This means a sentencing court should treat all people equally when applying the law. The Queensland Human Rights Commission ('QHRC') has noted that '[s]ometimes it will be necessary for certain groups to be treated differently in order to have equal protection of the law. This is known as substantive equality.'[17] This right is based on the fundamental principle of equality, which concerns both formal equality (like cases are to be treated alike) and substantive equality (requiring the differential treatment of persons whose situations are significantly different).[18]

This right is modelled on Article 16(1) and Article 26 of the International Covenant on Civil and Political Rights ('ICCPR').

This right might be relevant to sentencing laws, policies, acts or decisions that:

- assist or recognise the interests of Aboriginal and Torres Strait Islander peoples or members of other ethnic groups;
- disproportionately impact people who have an attribute or characteristic (for example, sex, race, age, disability, location);
- establish eligibility requirements for access to services or support (such as legal aid);
- impact service delivery of sentencing orders. For example, the availability and accessibility of specific local services and programs to support community-based sentence management; and
- impact access to courts - for example, some criminal law courts in regional and remote areas of Queensland are only accessible at certain times.[19]

5.3.2 Protection from torture and cruel, inhuman or degrading treatment

Every person has the right not be 'treated or punished in a cruel, inhuman or degrading way'.[20]

This right might be relevant to sentencing laws, policies, acts or decisions that:

- introduce new types of penalties are introduced such as mandatory minimum sentences,
- introduce or permit corporal punishment, and
- subject a person to a harsh prison regime.[21]

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14 Queensland Parliament, Legal Affairs and Safety Committee, *Inquiry into Support provided to Victims of Crime* (Report No 48, 57th Parliament, May 2023) rec 3.
15 Ibid 4.
16 HRA (n 2) s 15(3).
17 Queensland Human Rights Commission, *Fact Sheet: Right To Recognition And Equality Before The Law* (October 2021) 2 ('*QHRC Factsheet: Equality*').
18 Ibid 2. See also *Thilemmenos v Greece* [2000] (Judgment) (European Court of Human Rights, App No 34369/97, 6 April 2000), [44]; *Victoria Police Toll Enforcement v Taha* (2013) 49 VR 1.
19 *QHRC Factsheet: Equality* (n 17) 2.
20 HRA (n 2) s 17(b).
21 For a full list of how this right could be relevant to law, policies, acts or decisions see Queensland Human Rights Commission, *Fact Sheet: Right to Protection From Torture And Cruel, Inhuman Or Degrading Treatment* (November 2021) 2.

5.3.3 Right to Property

Under the HRA, the right to property protects a person from having their property (such as money) taken arbitrarily.[22] While not a sentencing consideration under the PSA, a consequence for a person who is convicted of an act of violence (which includes rape and sexual assault[23]) may be financially accountable following their conviction and sentence. Under the VOCA Act, the State may seek to recover financial assistance from a person.[24]

The Queensland Parliament's Community Support and Services Committee ('the Committee') recently considered this right as the Victims of Crime Assistance and Other Legislation Amendment Bill 2023 has sought to increase the maximum amounts payable to victims of crime. If amounts payable are increased, this will increase the amount of money the State may recover from a person who has been convicted of a criminal offence. The Committee noted the person will be given notice of the amount sought to be recovered and have an opportunity to respond and may dispute the notice.[25] If the debt is not paid, it may be transferred to the State Penalties Enforcement Registry for debt recovery.[26] The Committee was satisfied the potential limitation to human rights was reasonable and justified.[27]

5.3.4 Cultural rights

All people have cultural rights and 'must not be denied the right… to enjoy their culture, to declare and practise their religion and to use their language.'[28] In addition, 'Aboriginal and Torres Strait Islander peoples hold distinct cultural rights'.[29] The right of Aboriginal and Torres Strait Islander peoples includes the right 'not to be subjected to forced assimilation or destruction of their culture'.[30]

Under the PSA, if a person is an Aboriginal or Torres Strait Islander person, a court must consider any community justice group ('CJG') submission about the person's relationship to the community, cultural considerations or any programs and services for people in which the CJG participates.[31] This can help a court understand the background of the person in the context of the offending, as well as local programs and services which could best help the person rehabilitate.

This right might be relevant to sentencing laws, policies, acts or decisions that:

- Limit the ability of an Aboriginal and Torres Strait Islander person to take part in cultural practice or maintain a connection to their community.[32]

5.3.5 Right to liberty and right not to be subjected to arbitrary detention

Section 29 of the HRA recognises that every person has the right to liberty and security, that a person must not be subjected to arbitrary arrest or detention,[33] and that a person must not be deprived of the person's liberty except on grounds, and in accordance with, procedures established by law. These provisions are based on Article 9 of the ICCPR.

This right might be relevant to sentencing laws, policies, acts or decisions that:

- Detain a person for the purposes of national security; and
- Detain a person on remand or in a watch house.[34]

22 HRA (n 2) s 24.
23 VOCA Act (n 13) sch 3.
24 Ibid pt 16.
25 Community Support and Services Committee, Victims of Crime Assistance and Other Legislation Amendment Bill 2023 (Report No 37, 57th Parliament, November 23) 10–11.
26 Ibid.
27 Ibid.
28 HRA (n 2) s 27.
29 Ibid s 28(1).
30 Ibid s 28(3).
31 *Penalties and Sentences Act 1992* (Qld) s 9(2)(p) ('PSA').
32 Queensland Human Rights Commission, *Fact Sheet: Cultural rights of Aboriginal and Torres Strait Islander peoples* (July 2019), 3.
33 HRA (n 2) s 29(2).
34 For a full list see Queensland Human Rights Commission, *Fact Sheet: Right to Liberty And Security Of Person* (July 2019), 3.

5.3.6 Right to humane treatment when deprived of liberty

A person who is deprived of liberty (for example, if held in a watch house or prison), must be treated with humanity and respect.[35] A person who has not been convicted of an offence must be separated from persons who have been convicted, unless it is reasonably necessary (for example, it might be necessary if there is over-crowding in prisons).

This right might also be relevant to sentencing laws, policies, acts or decisions that:

- enable a public entitlement to detain a person;
- relate to the conditions of a person's detainment; and
- allow a person to be detained in a place with limited facilities.

5.3.7 Right to a fair hearing

A person charged with a criminal offence has the right to a fair hearing.[36] This means that a charge should be decided by a competent, independent, and unbiased court. The hearing and decisions of the court should be available to the public unless it is not in the interests of justice (for example, if the person charged with the offence is a child, the court may be closed to members of the public to protect the child's identity).

This right might be relevant to sentencing laws, policies, acts or decisions that:

- limit an appeals process;
- reverse the onus of proof;
- impact the way a witness, such as a victim, gives evidence in a sentence hearing; and
- regulates how media can report.[37]

5.3.8 Rights in criminal proceedings

A person charged with a criminal offence is presumed to be innocent until proven guilty and is entitled to minimum guarantees.[38] These include the right to:

- be told of the nature of the charge, in a language or way that the person understands;
- have the free assistance of an interpreter or specialised communication tools (if needed);
- have time and facilities to prepare their case or talk to their lawyer;
- have their matter heard without too much delay;
- defend themselves personally or with legal assistance (if eligible, through legal aid);
- examine witnesses against them;
- not have to testify against themself or say they are guilty unless they choose to do so; and
- if convicted, the right to have any conviction or sentence reviewed by a higher court.[39]

Legislation which 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 (discussed at section 6.10.2), may infringe the right to liberty and the right to not be subjected to arbitrary detention.[40]

At the time the mandatory penalty was introduced in 2012 (prior to the HRA), 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.

35 This right was considered in *Owen-D'Arcy v Chief Executive, Queensland Corrective Services* [2021] QSC 273 in respect of prolonged solitary confinement for a prisoner. *Castles v Secretary to the Department of Justice* (2010) 28 VR 141; [2010] VSC 310 [113] discussed IVF treatment for a woman in a Victorian prison.
36 HRA (n 2) s 31.
37 For a full list see Queensland Human Rights Commission, *Fact Sheet: Right to a Fair Hearing* (July 2019), 2.
38 HRA (n 2) s 32.
39 Ibid.
40 Ibid s 29.

> 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.[41]

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. This was viewed as justified on similar community protection grounds.[42]

The QHRC has made previous submissions to this Council which 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'.[43]

This right might also be relevant to sentencing laws, policies, acts or decisions that:

- affect the admissibility of evidence;
- restrict access to information and material to be used as evidence;
- any change which affects how a person can appeal a decision;
- mandatory sentencing which affects a person's right of appeal;
- affect double jeopardy laws; and
- change an offence so the person accused has the evidential burden.[44]

5.3.9 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.[45] 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. This right is based on Article 14 of the ICCPR. The United Nations Human Rights Committee has stated 'it does not prohibit the resumption of a criminal trial justified by exceptional circumstances, such as the discovery of evidence which was not available or known at the time of the acquittal.'[46]

This right is reflected in the *Criminal Code Act 1899* (Qld) ('*Criminal Code* (Qld)') which also protects a person from being punished twice for the same offence.[47] The Court of Appeal may order a re-trial for the offence of murder where there is fresh and compelling evidence and it is in the interests of justice.[48] A Bill recently introduced seeks to add 10 offences to the exception, including sexual assault (in aggravated circumstances where the person is liable to life imprisonment)[49] and rape.[50] In the Statement of Compatibility, it was stated:

> The purposes of the limitations on the right to not be tried more than once and the right of children to protection in their best interests are to ensure individuals acquitted of serious prescribed offences are able to be brought to justice where fresh and compelling evidence of guilt emerges and to preserve the integrity of the criminal justice system. The emergence of compelling new evidence of guilt after an acquittal undermines the legitimacy of the acquittal, and an absolute prohibition on retrial for prescribed offences undermines the integrity of the criminal justice system and public confidence in that system.
>
> The scope of the limitations on the right to not be tried more than once and the right of children to protection in their best interests is tightly constrained, 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. The extent of the limitation is also restricted by a range of procedural safeguards, including that a retrial must be in the interests of justice, only one application for a retrial may be made, and the police may only reinvestigate an offence in relation to a possible retrial with the consent of the DPP or if the DPP has advised the acquittal would not be a bar to retrial.[51]

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41 Explanatory Notes, Criminal Law (Two Strike Child Sex Offenders) Amendment Bill 2012 (Qld) 2-3.
42 Ibid.
43 Queensland Human Rights Commission, Preliminary submission 3 to Queensland Sentencing Advisory Council, *Penalties for Assaults on Public Officers* (9 January 2020) 9 [31].
44 For a full list see Queensland Human Rights Commission, *Fact Sheet: Rights in Criminal Proceedings* (July 2019), 3.
45 HRA (n 2) s 34.
46 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].
47 *Criminal Code Act 1899* (Qld) sch 1, ss 16–17 ('*Criminal Code* (Qld)').
48 Ibid s 678B(1).
49 Ibid ss 352(3)(a)–(c).
50 Criminal Code and Other Legislation (Double Jeopardy Exception and Subsequent Appeals) Amendment Bill 2023. The Statement of Compatibility discussed the scope of the limitations: Statement of Compatibility, Criminal Code and Other Legislation (Double Jeopardy Exception and Subsequent Appeals) Amendment Bill 2023, 8.
51 Statement of Compatibility, Criminal Code and Other Legislation (Double Jeopardy Exception and Subsequent Appeals) Amendment Bill 2023, 8.

This right might also be relevant to sentencing laws, policies, acts or decisions that:

- allow a person to be punished again for the same offence; and
- allow a person to be detained after their sentence has finished (for example, convicted sex offenders).[52]

5.3.10 Right to protection against retrospective criminal laws

Under the HRA, a person has the right:

- not to be punished for conduct that was not a criminal offence at the time it was committed;
- not be given a penalty that is greater than that which applied to the offence when it was committed; and
- if a penalty is reduced after the person committed the offence but before a person is sentenced, to get the benefit of the reduced penalty.[53]

This right is reflected in the *Criminal Code* (Qld) which protects a person from being punished for an offence unless it was an offence at the time when it was committed or to be punished any greater than the older law allowed (or that the newer law allows).[54]

This right may be limited when new sentencing considerations and schemes are introduced if they apply retrospectively. The mandatory life sentence for a 'repeat child sex offence' is partially retrospective and was discussed in section 5.3.8. The SVO scheme also does not apply retrospectively.[55]

The Court of Appeal has also noted that generally, amendments to section 9 of the PSA are procedural, and they can apply to a person when sentenced and not when the offence was committed.[56] However, the amendment under the PSA (now s 9(4)(c)) requiring a sentence of actual imprisonment be served for a sexual offence when the victim is a child under 16, is not procedural and is not retrospective. This means it only applies to offences committed after its introduction on 26 November 2010.[57] The Court of Appeal has said amendment

> is not merely procedural; it has a substantive effect, making the imposition of actual imprisonment mandatory in the ordinary case. By doing so, it can be said … to increase the minimum sentence within the meaning of s 180(1) of the *Penalties and Sentences Act*; with the result that the increase should be taken to apply only to offences committed after s 9(5)(b) commenced.[58]

This right might also be relevant to sentencing laws, policies, acts or decisions that:

- apply more severe penalties than what existed at the time a person committed an offence;
- introduce new sentencing options which apply to offences before it commenced; and
- change parole conditions that apply to imprisonment orders before it commenced.[59]

52 For a full list see Queensland Human Rights Commission, *Fact Sheet: Right Not To Be Tried Or Punished More Than Once* (July 2019), 1.
53 HRA (n 2) s 35.
54 *Criminal Code* (Qld) (n 47) s 11, see also PSA (n 31) s 180.
55 See *R v Mason & Saunders* [1998] 2 Qd R 186.
56 See *R v Truong* [2000] 1 Qd R 663; *R v Hutchinson* [2018] QCA 29.
57 *R v Koster* [2012] QCA 302 [38] Holmes JA (McMurdo P and Applegarth J agreeing on this issue) ('*Koster*'). Introduced by *Penalties and Sentences (Sentencing Advisory Council) Amendment Act 2010* (Qld).
58 Ibid [38].
59 For a full list see Queensland Human Rights Commission, *Fact Sheet: Right to Protection Against Retrospective Criminal Laws* (July 2019), 2.

Part B — The sentencing of sexual assault and rape

Chapter 6 The sentencing framework for sexual assault and rape

6.1 Introduction

In this chapter, we discuss the general approach to sentencing in Queensland, including current forms of sentencing guidance provided under the *Penalties and Sentences Act 1992* (Qld) ('PSA'), and general principles that apply under the common law.

This chapter also considers the types of penalty orders available and particular considerations that apply when imposing a sentence of imprisonment. Lastly, we discuss some of Queensland's mandatory sentencing schemes which can apply when sentencing sexual assault and rape offences.

6.2 General approach to sentencing in Australia

The process of sentencing in Queensland, as in other Australian states and territories, is not a mechanical or mathematical exercise.[1] Queensland courts sentence by applying an 'instinctive synthesis' approach:

> The task of the sentencer is to take account of all of the relevant factors and to 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.[2]

'There is no single correct sentence' and sentencing judges are to be allowed as much flexibility in sentencing as is in keeping with consistency of approach and applicable legislation.[3] Consistency in sentencing requires like cases to be treated alike and different cases, differently.[4] It does not require exact replication.

Unless legislation fixes a mandatory penalty, 'the discretionary nature of the judgment required means that there is no single sentence that is just in all the circumstances'.[5] Sentencing courts have a wide discretion yet must take into account all relevant considerations (and only relevant considerations) including legislation and case law.[6]

6.3 What guides sentencing in Queensland

Different forms of guidance are provided to guide a court in sentencing. Sentencing guidance can 'range 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'. [7]

The forms of sentencing guidance in Queensland, including for rape and sexual assault, include:

- the maximum (and, some cases, mandatory) penalties that apply;
- the general purposes, principles and factors set out under the PSA;
- specific provisions and legislative schemes established under the PSA that courts must apply in sentencing for specific types of offences or in certain circumstances, including factors that a court must consider in sentencing an offender for an offence of a sexual nature committed in relation to a child under 16 years; and factors that a court must consider in sentencing cases of violence and/or physical harm;

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1 *Markarian v The Queen* (2005) 228 CLR 357, 372–5 [30]–[39] (Gleeson CJ, Hayne and Callinan JJ) ('*Markarian*') as cited in *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*').

2 *Dalgliesh* (n 1) 39–40 [4]–[7] citing *Wong* (n 1) 611 [75].

3 *Markarian* (n 1) 371 [27] (Gleeson CJ, Hayne and Callinan JJ).

4 *R v Pham* (2015) 256 CLR 550, 559 (French CJ, Keane and Nettle JJ), citing *Wong* (2001) (n 1) 591 [6] (Gleeson CJ), 608 [65] (Gaudron, Gummow and Hayne JJ) and *Hili v The Queen* (2010) 242 CLR 520, 535 [49] (French CJ, Gummow, Hayne, Crennan, Kiefel and Bell JJ).

5 *Dalgliesh* (n 1) 40 [7].

6 *Markarian* (n 1) 371 [27] (Gleeson CJ, Gummow, Hayne and Callinan JJ); *Barbaro v The Queen* (2014) 253 CLR 58, 70 [25] (French CJ, Hayne, Kiefel and Bell JJ).

7 Sentencing Advisory Council (Victoria), *Sentencing Guidance in Victoria* (Report, 2016) 22.

- appellate court decisions setting out principles and factors that apply in sentencing for offences involving rape and sexual assault, which expand on and reinforce the principles and factors expressly stated under the PSA (such as that the offence involved a breach of trust or involved a victim that was particularly vulnerable due to their age);
- sentencing outcomes based on other sentenced cases involving rape and sexual assault that may share similar characteristics to the case currently before the court being sentenced.

In addition to these forms of guidance, Queensland Courts have developed supplementary resources to assist sentencing judges and magistrates in the task of sentencing. These resources include the *Benchbook on Sentencing*[8] and the *Chief Magistrate's Notes*[9] which highlight decisions of particular relevance to the Magistrates Court.

6.4 Key legislative amendments impacting sentencing

There have been a range of legislative amendments to sentencing practices in Queensland which has impacted how courts respond to sexual assault and rape offences. Some of these are set out in Table 5. Some of these amendments are examined in greater detail in other parts of this paper.

8 Michael Shanahan AM, *Benchbook on Sentencing* (last updated April 2017) <https://www.sclqld.org.au/collections/main-research-collections/texts-journals-commentaries-and-reference/benchbook-on-sentencing>.

9 Court Services Queensland, *Chief Magistrate's Notes* <https://www.courts.qld.gov.au/__data/assets/pdf_file/0009/656613/mc-cm-notes.pdf>.

Table 5: Key legislative amendments which may impact sentencing rape and sexual assault

Date	Details	Relevant legislation
1992	• The *Penalties and Sentences Act 1992* (Qld) introduced as a single enactment setting out the penalties and principles to promote a consistent approach to sentencing.	*Penalties and Sentences Act 1992* (Qld)
1997	• The serious violent offences scheme introduced (rape and indecent assault (as sexual assault was then called) are listed offences in Schedule 1) (see 6.10.1). • PSA s 9 sentencing factors amended for an offence of violence. • New s 156A Cumulative order of imprisonment inserted, which must be made in particular circumstances (eligible offences include the offence of rape).	*Penalties and Sentences (Serious Violent Offences) Amendment Act 1997* (Qld)
2003	• The PSA amended to insert factors which a court must have primary regard when sentencing an offence of a sexual nature committed in relation to a child under 16 years. • Specific child sexual offences introduced in *Criminal Code* and penalties increased for some child sex offences.[10] • The *Dangerous Prisoner (Sexual Offender) Act* introduced which can apply to a person sentenced for a 'serious sexual offence' (involving violence or against a child). A person may be subject to continued supervision or detention after their sentence if a judge is satisfied the person is a serious danger to the community without an order.	*Sexual Offences (Protection of Children) Amendment Act* (Qld) *Dangerous Prisoner (Sexual Offenders) Act 2003* (Qld)
2004	• *Child Protection (Offender Reporting) Act 2004* (Qld) introduced	*Child Protection (Offender Reporting) Act 2004* (Qld)
2006	• *Corrective Services Act* introduced. • Court Ordered Parole regime introduced, however sexual offences are excluded from the scheme.	*Corrective Services Act 2006* (Qld)
2010	• PSA amended so that a person sentenced for a sexual offence against a child under 16 'must serve an actual term of imprisonment, unless there are exceptional circumstances'[11] and that the principles in section 9(2)(a) (regarding imprisonment being treated as a sentence of last resort) do not apply. • SVO scheme was amended to add s 161B(5) which requires a court to treat the age of the child (under 12 years) as being an aggravating factor when deciding whether to declare a person convicted of an SVO.[12] • PSA amended so a court must not consider if a person will be subject to a dangerous prisoner application.	*Penalties and Sentences (Sentencing Advisory Council) Amendment Act 2010* (Qld) *Dangerous Prisoner (Sexual Offenders) and Other Legislation Amendment Act 2010* (Qld)
2012	• Mandatory 'repeat child sexual offence' scheme introduced - section 6.10.2 for more details.	*Criminal Law (Two Strike Child Sex Offenders) Amendment Act 2012* (Qld)
2016	• PSA amended to insert s 9(10A) requiring courts to treat domestic violence as an aggravating factor, unless there are exceptional circumstances. • PSA amended to reintroduce principle that imprisonment should only be imposed as a last resort, with legislative exceptions including if the offence involves personal violence or the victim of a sexual offence was a child under 16.[13]	*Criminal Law (Domestic Violence) Amendment Act 2016* (Qld) *Youth Justice and Other Legislation Amendment Act (No. 1) 2016* (Qld)
2023	• PSA, amendments to good character requiring a court to consider whether the sentenced person has a history of domestic violence orders (s 11). • PSA amended requiring the court to consider whether the person is a victim of domestic violence and whether the commission of the offence is wholly or partly attributable to the effect of the domestic violence. Courts must treat this as a mitigating factor, unless there are exceptional circumstances.	*Domestic and Family Violence Protection (Combating Coercive Control) and Other Legislation Amendment Act 2023* (Qld)
2024	• Proposed amendments to the PSA s 9 not yet passed or in force, requiring a sentence court to have regard to: • The hardship of any sentence imposed on the person because of their characteristics and any probable effect (regardless of exceptional circumstances) on the person's family and dependants. • The sentenced person's history of being abused or victimised. • Cultural considerations if the person identifies as Aboriginal and Torres Strait Islander. • New aggravating factors if the victim of a domestic violence offence was a child or a child was exposed to domestic violence.	Criminal Law (Coercive Control and Affirmative Consent) and Other Legislation Amendment Bill 2023

6.4.1 Reforms to child sexual offences

Over the past 20 years, the Queensland Parliament has implemented a range of significant reforms to child sexual offences. These reforms were instigated on the growing understanding of the impact of sexual violence on victim survivors, particularly in relation to children.

Noted above in Table 5, 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'.[14] Parliament was of the view these reforms would ensure 'a tougher sentencing regime [would] apply for persons convicted of sexual offences against children'.[15] Importantly, the sentencing reforms were 'designed to ensure that child sex offences are recognised as offences **equating in seriousness to offences of violence**'.[16]

In relation to the amendments to the 2010 SVO scheme, Parliament chose the threshold of under 12 years to be consistent 'with the approach adopted in the *Criminal Code* (Qld) where certain offending is aggravated by virtue of the victim being under 12 years and where a child under 12 is legally incapable of giving consent'.[17] It was intended to 'encapsulate any degree of violence'.[18]

In 2020, the Court of Appeal has affirmed that:

> These amendments 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.[19]
>
> 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.[20]

In 2012, Parliament introduced a mandatory sentence of life imprisonment for a person convicted of a repeat 'serious child sex offence'.[21] The aim of the new scheme was to 'toughen sentences' and reflect 'that child sex offending is so heinous and presents such a risk to the safety of the community that the strongest legislative response is called for to ensure appropriate punishments are imposed'.[22] How the scheme operates is discussed in section 6.10.2.

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10 For example, the maximum penalties for indecent treatment of children under 16 (s 210) were increased from 10 to 14 years and where the child is under 12 from 14 to 20 years.

11 *Penalties and Sentences Act 1992* (Qld) s 9(4)(c) (note, this was s 9(5) in 2010 when the amendment was made) ('PSA'). The Explanatory Notes provided some guidance on what factors a court may consider when determining exceptional circumstances, such as closeness in age between the sentenced person and child: Explanatory Notes, Penalties and Sentences (Sentencing Advisory Council) Amendment Bill 2010, 7.

12 PSA (n 11) s 161B(5) applies to offences that a) involved the use, counselling or procuring the use, or conspiring or attempting to use, violence against a child under 12 years; or b) caused the death of child under 12 years.

13 This principle was removed 28 March 2014 and reintroduced 1 July 2016: see *Youth Justice and Other Legislation Amendment Act 2014* (Qld), *Youth Justice and Other Legislation Amendment Act (No. 1) 2016* (Qld).

14 Explanatory Notes, Sexual Offences (Protection of Children) Amendment Bill 2002, 1. 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*.

15 Explanatory Notes, Sexual Offences (Protection of Children) Amendment Bill 2002, 7.

16 Ibid 2 (emphasis added).

17 Explanatory Notes, Penalties and Sentences (Sentencing Advisory Council) Amendment Bill 2010, 5.

18 Ibid 13.

19 *R v Stable (a pseudonym)* [2020] QCA 270, 13 [33] (Sofronoff P, and Fraser and Philippides JJA agreeing).

20 Ibid.

21 PSA (n 11) pt 9B.

22 Explanatory Notes, Criminal Law (Two Strike Child Sex Offenders) Amendment Bill 2012, 1.

6.5 The *Penalties and Sentences Act 1992* (Qld)

6.5.1 Introduction

The PSA is the key piece of legislation that guides sentencing for offences in Queensland. The Act has its own purposes, including:

- collecting into a single Act general powers of courts to sentence convicted persons;
- providing for a sufficient range of sentences for the appropriate punishment and rehabilitation of offenders, and, in appropriate circumstances, ensuring that protection of the Queensland community is a paramount consideration;
- promoting consistency of approach in sentencing;
- providing fair procedures for imposing sentences and dealing with sentenced persons who do not comply with the conditions of their sentence;
- providing sentencing principles that are to be applied by courts; and
- promoting public understanding of sentencing practices and procedures.[23]

6.5.2 Sentencing purposes

Section 9(1) of the PSA (reproduced at **Appendix 5**) sets out the purposes of sentencing, limited to the following 5 purposes (including combinations of them):

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.

The PSA does not suggest that one purpose should be more, or less, important than any other purpose; in practice, their relative weight must be assessed taking into account the individual circumstances involved. The purposes overlap and cannot be considered in isolation. They are guideposts to the appropriate sentence — sometimes pointing in different directions.[24]

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'.[25]

While a sentence must not be 'extended beyond what is appropriate to the crime merely to protect society', the propensity of an offender to commit future acts of violence, and the need to **protect the community** is a legitimate sentencing consideration.[26]

Deterrence and **rehabilitation** have a forward-looking, crime prevention focus. Deterrence aims to discourage the offender and other potential offenders from committing the same or a similar offence.[27]

Denunciation in a sentencing context is concerned with communicating 'society's condemnation of the particular offender's conduct'.[28]

The Council has been asked to determine whether sentences imposed for sexual assault and rape offences adequately reflect community views about the sentencing purposes of just punishment, denunciation and community protection in particular. The Council's approach in responding to this aspect of the Terms of Reference is discussed in section 1.2.2.

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23 PSA (n 11) s 3.
24 *Veen v The Queen (No. 2)* (1988) 164 CLR 465, 476 (Mason CJ, Brennan, Dawson and Toohey JJ) ('*Veen*').
25 *Hoare v The Queen* (1989) 167 CLR 348, 354 (Mason CJ, Deane, Dawson, Toohey and McHugh JJ) (emphasis in original).
26 *Veen* (n 24) 473, 475.
27 Arie Freiberg, Fox and Freiberg's *Sentencing: State and Federal Law in Victoria* (Law Book Co, 3rd ed, 2014) 250–1.
28 *Ryan v The Queen* (2001) 206 CLR 267, 302 [118] (Kirby J) ('*Ryan*').

6.5.3 General sentencing factors (section 9)

General and specific sentencing factors to which a court must have regard in sentencing (as they apply to the facts of each case) are set out in sections 9(2)–(11) of the PSA. Section 9 applies to any sentence for potentially any offence committed by an adult.

Imprisonment must generally only be imposed as a last resort and a sentence allowing an offender to stay in the community is preferable (section 9(2)(a) of the PSA).[29] However, these two principles do not apply to offences involving the use of (or counselling or procuring the use of, or attempting or conspiring to use) violence against another person, or offences that resulted in physical harm to another person (section 9(2A) of the PSA).[30] Section 9(3) sets out the factors the court must have primary regard to when sentencing an offender under section 9(2A). These are set out in Table 6 below.

Sections 9(2A) and (3) were introduced in 1997. In considering the purpose of these changes to the law, the Court of Appeal has stated that:

> The evident purpose of the enactment of these provisions in 1997 was to reflect the Parliament's intention that the community expected that crimes of violence were to be punished more severely by the courts than they had been until then.[31]

The principle of imprisonment as a last resort also does not apply when 'sentencing an offender for any offence of a sexual nature committed in relation to a child under 16 years'.[32] Unless 'exceptional circumstances'[33] exist, the court must sentence a person to a term of actual imprisonment.[34]

As discussed in section 6.3, section 9 has also been amended in relation to the sentencing of individuals for sexual offences against children for the same purpose. When sentencing a person for any offence of a sexual nature against a child under 16 or a child exploitation offence, the court must apply section 9(4) and have primary regard to the factors in section 9(6).

Table 6 sets out the factors in section 9 that must be applied when sentencing offences generally. Table 7, sets out factors which a court must have primary regard to when sentencing a person for offences involving violence or that resulted in physical harm to another person, and Table 8 when sentencing offences of a sexual nature committed in relation to children under 16.

Section 9 is reproduced in **Appendix 5** as it appears in the PSA.

The Terms of Reference ask the Council to determine if current sentencing factors set out in the PSA are adequate for the purposes of sentencing rape and sexual assault. This is explored in our *Consultation Paper: Issues and Questions*.

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29 Some types of sexual assault have been found to be within scope of section 9(2)(a) imprisonment as a last resort. In *Biswa v Queensland Police Service* [2016] QDC 333 Judge Morzone QC determined that 'the nature and circumstances of the offending [attempting to cuddle her, touching her bare skin, kissing her inner thigh and attempting to grab her groin] were less serious…than comparatives provided' and 'imprisonment ought be one of last resort', 3 [43].

30 PSA (n 11) ss 9(2)(a), 9(2A).

31 *R v O'Sullivan and Lee; Ex parte A-G (Qld)* (2019) 3 QR 196, 224 [75] (Sofronoff P, Gotterson JA, Lyons SJA) ('*O'Sullivan*').

32 PSA (n 11) s 9(4)(b).

33 When deciding whether exceptional circumstances exist, the court may consider the closeness in age between the offender and the child: ibid s 9(5).

34 Ibid s 9(4)(c).

Table 6: General sentencing principles and factors, PSA section 9

Section	General factors applying to all offences
9(2)	In sentencing an offender, a court must have regard to—
(a)	Principles that a sentence of imprisonment should only be imposed as a last resort and a sentence that allows the person to stay in the community is preferable
(b)	The maximum penalty and any minimum penalty for the offence
(c)	The nature of the offence and how serious the offence was, including: any physical, mental or emotional harm done to a victim, including harm mentioned in a victim impact statement; and the effect of the offence on any child under 16 years who may have been directly exposed to, or a witness to the offence
(d)	The extent to which the offender is to blame for the offence (culpability)
(e)	Any damage, injury or loss caused by the offender
(f)	The offender's character, age and intellectual capacity
(g)	The presence of any aggravating or mitigating factor concerning the offender
(gb)	Whether the offender was a victim of domestic violence and the offence can be partly or wholly attributed to this
(h)	The prevalence of the offence
(i)	How much assistance the offender gave to law enforcement agencies in the investigation of the offence or other offences
(j)	Time spent in custody by the offender for the offence before being sentenced
(k)–(m)	Other sentences imposed on the offender or that the offender is liable to serve
(p)	Submissions made by a representative of the community justice group in the offender's community, if the offender is an Aboriginal or Torres Strait Islander person
(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 of the dangerous prisoners scheme
9(9A)	Voluntary intoxication of the offender by alcohol or drugs is not a mitigating factor
9(10)	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
9(10A)	Domestic violence is an aggravating factor unless it is not reasonable because of exceptional circumstances[35]
9(10B)	If the person sentenced is a victim of domestic violence, court must treat as mitigating: (a) the effect of the domestic violence on the offender, unless it is not reasonable due to exceptional circumstances; 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(11)	Despite the offender's criminal history, the sentence must not be disproportionate to the gravity of the offence
	Proposed additional factors:[36] *The hardship that any sentence imposed would have on the offender and the probable effect on a person for whom the offender is primary caregiver, caring for in an informal care relationship or is the person's unborn child (if the person is pregnant)* *The offender's history of being abused or victimised* *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.*

35 For example if the victim has previously committed an act of serious domestic violence, or several acts of domestic violence against the offender.

36 See Criminal Law (Coercive Control and Affirmative Consent) and Other Legislation Amendment Bill 2023 (Qld) cl 83.

Table 7: Sentencing factors for offences of violence/resulting in physical harm, PSA section 9

Section	Principles and factors
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

Table 8: Sentencing factors for sexual offences committed in relation to a child under 16 years, PSA section 9

Section	Principles and factors
9(4)(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 offender must serve an actual term of imprisonment, unless there are exceptional circumstances (and in doing so, may have regard to the closeness in age between the offender and child)
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(7AA)	The court must not have regard to the offender's good character if it assisted the offender in committing the offence

6.5.4 Assessing offence seriousness

The PSA requires a judge to assess the seriousness of the offence when determining an appropriate sentence.[37]

Offence seriousness is generally viewed as comprising 2 key components:

1. the harm caused; and
2. the culpability of the offender.[38]

Harm is defined as 'the degree of injury done or risked by the act'.[39] Listed above in Table 6, under the PSA harm includes 'any physical, mental or emotional harm done to the victim'.[40] "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'.[41]

Culpability is the extent to which a person is responsible (to blame) for an offence and for the harm they caused. Generally, the more culpable a person is, the more serious the offence will be assessed to be and the more severe

37 PSA (n 11) s 9(2)(c).
38 Andrew von Hirsch and Andrew Ashworth, *Proportionate Sentencing: Exploring the Principles* (Oxford University Press, 2005) 144.
39 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.
40 PSA (n 11) s 9(2)(c)(i).
41 Ibid s 4.

the sentence. To determine the culpability of the person being sentenced, judges and magistrates consider the person's intention, awareness and motivation for committing the offence. The court will consider factors such as whether the offence was:

- deliberate (committed with the person's knowledge of its consequences or likely consequences), reckless, or in careless (negligent) disregard for the consequences;
- planned in advance or committed on the spur of the moment (opportunistic);
- committed while in possession of a weapon;
- committed by a person in complete control of their own actions (or for example, whether the person was mentally disordered).

The Terms of Reference require the Council to determine whether penalties currently imposed on sentence for rape and sexual assault are appropriate, including if they adequately reflect community views about the seriousness of this form of offending. This is explored further in Chapter 4 of *Consultation Paper: Issues and Questions*.

6.6 Sentencing principles in case law

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 principles are often discussed in judgments issued by the Queensland Court of Appeal. These sentencing principles apply to all cases in the Queensland courts.

- **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 the objective circumstances of the offence to meet other sentencing purposes (such as community protection).[42]
- **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.[43]
- **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.
- **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;[44] (b) a more serious offence; or (c) a circumstance of aggravation.[45]

For more information about the common law sentencing principles refer to the Council's, *Queensland Sentencing Guide*.

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42 *Markarian* (n 1) 385 [69] (McHugh J); *Veen* (n 24) 473–4. PSA (n 11) s 9(11) expressly applies this principle to previous convictions.

43 *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).

44 *R v Boney; Ex parte A-G* (Qld) [1986] 1 Qd R 190. McPherson J observed that 'as the defendant had been neither charged nor convicted of rape, he could not be punished for it' at [208].

45 *R v D* [1996] 1 Qd R 363, 403. Note *R v Cooney* [2019] QCA 166, 6–7 [27]–[35] (Henry J, Gotterson JA agreeing at [1] and Bradley J agreeing at [72]), where a defence De Simoni argument in a serious assault case failed — the manner in which the offender's blood ended up on a police officer's cut hand was inadvertent physical proximity rather than a direct application as required by the section ('applies'). This meant that the court could consider emotional harm caused to the officer as a result of the blood, because the Crown had not foregone the opportunity to charge a circumstance of aggravation.

6.7 Aggravating and mitigating factors in sentencing

6.7.1 Aggravating and mitigating factors

Under section 9 of the PSA, a sentencing judge is required to take any aggravating or mitigating factors into account when determining a sentence.

Aggravating factors are details about the offence, the victim, and/or the offender that tend to increase the person's culpability and the sentence received.

Mitigating factors are details about the offender and the offence that tend to reduce the severity of the sentence.

Both aggravating and mitigating factors can impact on the sentence imposed, depending on their relevance and the weight placed on them by the court. At times 'many of these factors conflict with each other'.[46]

Circumstances of aggravation (also called 'aggravating circumstances') operate differently to aggravating factors. Circumstances of aggravation are any circumstances by reason of which the person who has been convicted of an offence is subject to a greater punishment than that to which they would be subject if the offence were committed without the existence of this.[47] Circumstances of aggravation are generally set out in the section that establishes the offence with a higher maximum penalty applying. For example, there are two specific subsections of section 352 of the *Criminal Code* (Qld) 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 (see discussion at section 3.2.1).

6.7.2 Aggravating and mitigating factors in sentencing sexual offences

The following factors are regarded in statute and case law as important aggravating considerations in sexual offence sentencing:

- victim particularly vulnerable due to age and/or disability;[48]
- offender's relevant criminal history;[49]
- offence involved use of a weapon;[50]
- offence involved additional use of violence;[51]
- abuse of position of trust;[52]
- offender's knowledge of harm caused because of their profession;[53]
- domestic violence offence;[54]
- victim became pregnant to, and/or had a baby fathered by the offender;[55] and
- risk of and actual transmission of disease.[56]

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46 *R v Symss* (2020) 3 QR 336, 345 [31] (Sofronoff P, Morrison JA agreeing at [43] and McMurdo JA agreeing at [44]).

47 *Criminal Code Act 1899* (Qld) sch 1 ('*Criminal Code* (Qld)') s 1.

48 PSA (n 11) s 9(6)(b); *R v CCT* [2021] QCA 278; *R v Thompson* [2021] QCA 29, 13 [45] (Williams J and Philippides JA agreeing).

49 PSA (n 11) s 10: This is determined by considering the nature of the previous conviction, its relevance to the current offence, and the time that has elapsed since the conviction.

50 *R v Stirling* [1996] QCA 342;

51 *R v K* [1993] QCA 425 10 (Davies JA and Thomas J); *R v Benjamin* (2012) 224 A Crim R 40; *R v SDM* [2021] QCA 135 [21] (Mullins JA, Fraser JA and Henry J agreeing); *R v Newman* [2007] QCA 198, 8 [44] (Williams JA and White J agreeing) ('*Newman*').

52 PSA (n 11) s 9(6)(e); *R v WBM* [2020] QCA 107 (Applegarth J with Fraser and Mullins JJA agreeing) citing R v BBP [2009] QCA 114

53 In *RAZ; Ex parte Attorney-General (Qld)* [2018] QCA 178, 5 [24] Sofronoff P said, 'the respondent's position as a magistrate meant that, while he was committing these crimes [sexual offences against a child], he knew very well what his criminal acts were doing to his victim and would continue to do.'

54 PSA (n 11) s 9(10A): Does not apply if the court considers it would be unreasonable to do so due to exceptional circumstances.

55 *R v MBY* [2014] QCA 17, 17 [75] (Morrison JA, Muir JA and Daubney J agreeing) ('*MBY*'); *Dalgliesh* (n 1) 42 [20], 43 [26], 45 [36].

56 *R v Heckendorf* [2017] QCA 59, [31] (McMurdo JA) (Fraser JA, Mullins J agreeing); *R v Robinson* [2007] QCA 349 [29]; *R v Porter* [2008] QCA 203 [29]; *R v Lawrence* [2002] QCA 526, 16 (McMurdo P, Helman and Philippides JJ agreeing)

The following factors are regarded in statute and case law as important mitigating considerations in sentencing for sexual offences:

- guilty plea;[57]
- lack of criminal history or no relevant/recent convictions;[58]
- good character;[59]
- age of offender such as young or elderly;[60]
- assistance to law enforcement, such as full admissions;[61]
- offender is a victim of domestic violence;[62]
- offender is a victim of child sexual abuse;[63]
- remorse;[64]
- rehabilitation efforts after offence or willingness to engage in rehabilitation;[65]
- impact of childhood trauma and disadvantage;[66]
- if a person's time in prison will be more onerous;[67]
- cognitive impairment and/or mental illness;[68] and
- significant health conditions.[69]

6.7.3 Guilty plea as a mitigating factor

A Queensland sentencing court must take the offender's guilty plea into account and may reduce the sentence it would have imposed had the offender not pleaded guilty (taking into account the timing of the plea).[70] The courts have indicated the more serious the offence, the less significance a plea of guilty will carry in terms of the ultimate sentence imposed and sometimes the maximum penalty is still called for.[71] However, even where the offence is quite serious, some reduction in the sentence is warranted in the event of a guilty plea.[72]

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57 PSA s 13. See Appendix 5.

58 *R v Smith* [2020] QCA 23, 30 [49] (Morrison JA, Holmes CJ and McMurdo JA agreeing) ('*Smith*'); *R v Wallace* [2023] QCA 22, 6 [19] (Bowskill CJ and Bond JA agreeing) ('*Wallace*').

59 PSA (n 11) ss 9(2)(f), 9(3)(h), 9(6)(h); *Ryan* (n 28). 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: s 9(6A).

60 *Wallace* (n 58); *Newman* (n 51) 8 [44].

61 PSA (n 11) s 9(2)(i); *Smith* (n 58) 30 [49]. PSA (n 11) 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).

62 PSA (n 11) 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.

63 Generally, there needs to be evidence as to the causal connection between the offending being sentenced and an offender's own victimisation: *MBY* (n 55) 16-17 [74] - [75].

64 PSA (n 11) s 9(2)(g) and s 9(6)(i); *Smith* (n 58) 30 [49].

65 *R v D'Arcy* [2001] QCA 325 [167] ('*D'Arcy*').

66 *R v KU; ex parte Attorney-General (Qld) (No 2)* [2011] 1 Qd R 439 476-477 [133] and [140], 480 [149 (de Jersey CJ, McMurdo P and Keane JA agreeing); *Wallace* (n 58) 6 [19] (; *MBY* (n 55)13-7 [60]-[76] citing *Bugmy v The Queen* [2013] HCA 37 and *Munda v Western Australia* [2013] HCA 38.

67 See *O'Sullivan* (n 31) [156] where it was acknowledged 'The perverse morality that exists in prisons means that offenders convicted of crimes against children are liable to suffer brutal attacks.' O'Sullivan was brutally attacked in prison and he must serve his sentence in protective custody, which was a mitigating factor. It was noted, 'The mitigatory effect of being held in a protected part of a prison depends upon proof that incarceration in such a place is, for particular reasons, more onerous than being kept in the general population of a prison: see *R v Males* [2007] VSCA 302' [156] fn 87.

68 PSA s 2(f); *Veen* (n 24) 476–7; *R v WBK* (2020) 4 QR 110, 129 [54] (Lyons SJA and Boddice J agreeing).

69 'An offender's ill-health is a mitigating factor in sentencing when imprisonment will impose a greater burden on the offender than on others or where there is a serious risk that imprisonment will impose a greater burden on the offender than others or where there is a serious risk that imprisonment will have a gravely adverse effect on his health': *D'Arcy* (n 65) citing *R v Pope* [32] QCA 318; CA No 271 of 1996, 30 August 1996.

70 PSA (n 11) s 13. See Appendix 5.

71 *R v Mahony & Shenfield* [2012] QCA 366 [37].

72 See, for example, *R v Bates; R v Baker* [2002] QCA 174, 11–12 [58], [60] (Williams JA) where the Court of Appeal allowed an appeal by an offender who received a life sentence on this basis substituting a determinate sentence of 18 years' imprisonment finding that the failure of the sentencing judge to take the guilty plea into account in mitigation represented an error in the exercise of the sentencing discretion ('*Bates and Baker*'); and *R v Duong* [2002] QCA 151 where the Court of Appeal accepted the offenders must receive some benefit for their guilty pleas notwithstanding their lateness: at 9 [38]; and that it involved 'an horrendous crime calling for severe punishment': at 10 [45]. In that instance, sentences of 12 years' imprisonment on two offenders, and 9 years' imprisonment on the others with a serious violent offence declaration were not disturbed on appeal.

There are three reasons why a guilty plea is generally accepted as justifying a lower sentence than would otherwise be imposed:

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'.[73]
2. The plea has a utilitarian value to the criminal justice system. It saves public time and money.
3. In particular cases — especially sexual violence cases, crimes involving children and, often, elderly victims — there is particular value in avoiding the need to call witnesses, especially victims, to give evidence.[74]

Commonly, when there is a guilty plea and other mitigating features, such as a lack of prior criminal history or a commitment by the offender to their rehabilitation, the court will set a parole eligibility date earlier than the statutory half-way mark, and often at, or around, the one-third mark. The Court of Appeal has said:

> The degree of weight to be given to that result of the plea is a matter for a sentencing judge's discretion and is not to be second guessed by an appellate court. In absence of any statutory indication of the weight to be given to various considerations, it is generally for the sentencing judge and not the Court of Appeal to determine the appropriate weight to be given to the matters which are required to be taken into account in exercising a statutory power....However, as this court said in *R v BAY*,[75] the weight to be given to a guilty plea depends upon the nature of the crime, the time at which the plea was indicated or entered and the extent of any cooperation with prosecution authorities.[76]

In the absence of remorse by the offender for their actions, the focus moves to the willingness of the offender to facilitate the course of justice. [77]

As to the utilitarian value of a plea, courts have recognised that the public interest is served by an accused person who accepts guilt and pleads guilty to an offence charged,[78] even if there is a high likelihood of conviction had the case proceeded to trial.[79] This is because, unless there is some incentive for a defendant to plead guilty, there is always a risk they will proceed to trial in the absence of an incentive not to.[80]

While the degree of leniency may vary according to the degree of conviction certainty (as it appears to the sentencing judge), a guilty plea must be considered as a factor.[81]

The person's motive for pleading guilty is not a basis for not taking the plea into account.[82]

6.7.4 Good character

As noted above in section 6.7.2, the courts are required to consider the offender's character when sentencing.[83] A person's character is not determined by reference to the offence they are being sentenced for.[84] Section 11 of the PSA (reproduced at **Appendix 5**) sets out how the court is to assess an offender's character. These include:

> (a) the number, seriousness, date, relevance and nature of any previous convictions of the offender; and
>
> (b) the history of domestic violence orders made or issued against the offender, other than orders made or issued when the offender was a child; and
>
> (c) any significant contributions made to the community by the offender; and
>
> (d) such other matters as the court considers are relevant.

73 *R v Randall* [2019] QCA 25 5 [27] (Sofronoff P and Morrison JA and Burns J agreeing) ('*Randall*').
74 *R v Thomson* (2000) 49 NSWLR 383, 386 [3]. This principle has been cited with approval by the Queensland Court of Appeal. See, for example, *Bates and Baker* (n 72) 14 [76] (Atkinson J).
75 [2005] QCA 427 [53].
76 *R v Crothers (a pseudonym)* [2020] QCA 268, 5, [17] (Sorfronoff P, Fraser JA and Bradley J agreeing) referencing *Minister for Aboriginal Affairs v Peko-Wallsend Ltd* (1986) 162 CLR 24, at 41, per Mason J.
77 *Cameron v The Queen* (2002) 209 CLR 339, 343 [11], [13]–[14] (Gaudron, Gummow and Callinan JJ) ('*Cameron*'); and *R v McGuire & Porter* (2000) 110 A Crim R 348, 358 (de Jersey CJ), 362 and 366 (Byrne J).
78 *R v Harman* [1989] 1 Qd R 414, 421; *Cameron* (n 77) 360–1 [66]–[68] (Kirby J).
79 *R v Bulger* [1990] 2 Qd R 559, 564 (Byrne J).
80 Ibid.
81 *R v Ellis* (1986) 6 NSWLR 603, 604 (Street CJ).
82 *R v Morton* [1986] VR 863, 867 cited in *Bates and Baker* (n 72) [83] (Atkinson J).
83 PSA (n 11) ss 9(2)(f), 9(3)(h), 9(6)(h), with the exception in s 9(6A).
84 *Ryan* (n 28) [23]–[24] (McHugh J).

The requirement to consider domestic violence orders made against the offender was only introduced in February 2023.[85] In the case of sexual offences against a child under 16 years, the court 'must not have regard to the offender's good character if it assisted in committing the offence'.[86]

The treatment of 'good character' is a contentious issue where sexual offending is involved. We consider this issue in Chapter 7 and in the *Consultation Paper: Issues and Questions*.

6.7.5 Offending as a child, sentenced as an adult

If a person has committed an offence when they were a child (aged 10 years or old and under 18 years),[87] in some cases they can be sentenced as an adult.[88] When sentencing, the court must take certain factors into account, such as:

- the person was a child when they committed the offence; [89]
- the 'sentence that might have been imposed… if sentenced as a child';[90] and
- the court cannot order the person 'to serve a term of imprisonment longer than the period of detention that the court could have imposed…if sentenced as a child.'[91]

For example, in *R v LAL*,[92] the person was 15 years old when he committed a sexual offence against a child and 32 years old when he was convicted and sentenced. As explained in *R v LAL*,[93] when a person offends as a child but is to be sentenced as an adult, this can be a challenging task:

> Sentencing the applicant is difficult. He is an adult to be dealt with for sexual offences committed upon a child – but he was himself a child, albeit an adolescent, and a victim of child sexual abuse, when the offences were committed 17 years ago.
>
> Had the applicant been sentenced as a child, he would have been sentenced to a period of probation with no conviction recorded, to encourage his rehabilitation.
>
> However, as the learned sentencing judge recognised, the applicant, as an adult, did not require guidance or support to rehabilitate – rehabilitation had been achieved long ago. He posed no risk to children and there was no call for personal deterrence.[94]

6.8 Sentencing options

6.8.1 Introduction

The PSA provides for two broad categories of penalty options:

- non-custodial options such as fines and good behaviour bonds and community-based orders such as community service and probation; and
- custodial penalties, which involve the court imposing a sentence of imprisonment.

The PSA also provides for other orders a court can make in addition to a sentence. Relevant additional orders are discussed in section 6.8.4.

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85 *Domestic and Family Violence Protection (Combating Coercive Control) and Other Legislation Amendment Act 2003*.

86 PSA (n 11) s 9(6A). This section was introduced following recommendation 74 by the Royal Commission into Institutional Responses to Child Sexual Abuse, *Criminal Justice Report: Executive Summary and Parts I to II* (Report, 2017) 99.

87 Before 12 February 2018, a 'child' for the purposes of the *Youth Justices Act 1992* (Qld) ('YJA'), was a person who had not turned 17 years. This was changed by the *Youth Justice and Other Legislation (Inclusion of 17-year-old Persons) Amendment Act 2016* (Qld), which amended the YJA by omitting the definitions of 'adult' and 'child' in schedule 4 of the YJA, thereby applying the definitions of these terms contained in the *Acts Interpretation Act 1954* (Qld). The amendment came into force on 12 February 2018. This meant that until this time, young people who were 17 were treated as adults for the purposes of sentencing.

88 YJA (n 87) ss 140–1.

89 Ibid s 144(2).

90 Ibid s 144(2)(b). This does not bind the court to impose this sentence. A court may impose a 'sterner penalty' if there is a reason to: see *R v LAL* [2019] 2 Qd R 115, 117-8 (2) (Ryan J, Sofronoff P and Crow J agreeing) ('*LAL*').

91 YJA (n 87) s 144(3)(a).

92 *LAL* (n 90).

93 Ibid.

94 Ibid [115]-[117].

Noted above, when sentencing a person convicted of a sexual offence against a child under 16 years, the court must order an actual term of imprisonment, unless there are exceptional circumstances.[95] An 'actual term of imprisonment' is defined in section 9(12) as 'a term of imprisonment served wholly or partially in a corrective services facility'.

Sentences of indefinite detention are also available to courts in sentencing for sexual offences.[96] Following the introduction of the *Dangerous Prisoners (Sexual Offenders) Act 2003* (Qld), these orders have fallen into disuse. No indefinite sentences were imposed during the 18-year data period for either sexual assault or rape. For this reason, these forms of orders are not discussed further in this paper.

6.8.2 Non-custodial penalties

Non-custodial orders are orders that do not involve a term of imprisonment being imposed. Non-custodial options in Queensland include:

- **good behaviour bond/recognisance:** a requirement to appear before the court if called on to do so and to 'be of good behaviour' (not to break the law) for a set period (up to 3 years);
- **fine:** an order to pay an amount of money. The maximum fine depends on the type of offence and the court hearing the matter. A fine can be ordered in addition to, or instead of, any other sentence with or without a conviction being recorded;
- **a community service order:** an order to do unpaid community service between 40 and 240 hours, usually within 12 months, and to comply with reporting and other conditions, with or without a conviction being recorded.[97]
- **a probation order:** an order between 6 months and 3 years, with or without a conviction being recorded, that is served in the community with monitoring and supervision by an authorised corrective services officer.

For more information about the different sentencing orders, see our *Queensland Sentencing Guide*.

6.8.3 Custodial penalties

Custodial penalties involve the court imposing a sentence of imprisonment. When imprisonment is ordered, including if the sentence is suspended, the judge or magistrate is required to state the reasons for the sentence or for these reasons to be recorded.[98]

For most offences, imprisonment is a sentence of last resort, meaning it should only be imposed if no other type of sentence is appropriate. As discussed above, this does not apply in certain circumstances, including if an offence involved violence or resulted in physical harm to a person, or was an offence of a sexual nature committed in relation to a child under 16 years.

Forms of custodial penalties

Custodial penalties that can be imposed by a court include:

- **a combined prison and probation order:** a sentence of imprisonment of 12 months or less, immediately followed by a period of probation in the community for a minimum of 9 months and up to 3 years;[99]
- **an intensive correction order:** a period of up to 12 months imprisonment served in the community under intensive supervision; [100]
- **a wholly suspended sentence of imprisonment:** a sentence of up to 5 years suspended in full for a set period of time (called the 'operational period') of up to 5 years.[101] The only condition of this order is that the person not commit another offence punishable by imprisonment during the operational period of the order;

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95 PSA (n 11) s 9(4)(b) and see s (9)(5)(b) regarding closeness in age between the offender and the child being a factor in deciding whether there are exceptional circumstances.

96 See PSA (n 11), pt 10. See also *Criminal Law Amendment Act 1945* (Qld) s 18 (Indeterminate detention of offenders convicted of sexual offences) which can be ordered if a person has been found guilty of an offence of a sexual nature committed in relation to a child under the age of 16.

97 PSA (n 11) ss 100–3.

98 Ibid s 10.

99 Ibid s 92(1).

100 Ibid pt 6.

101 Ibid s 144. The limit is 3 years in Magistrates Courts - see *Criminal Code* (Qld) (n 47) s 552H.

- **a partially suspended sentence of imprisonment:** a sentence of up to 5 years suspended for a set period of time (called the 'operational period') of up to 5 years after the person has served part of the prison sentence in custody. As for wholly suspended sentences, the only condition of this order is that the person not commit another offence punishable by imprisonment during the operational period of the order;
- **imprisonment:** which can be for a period up to (and including) the maximum penalty for the offence. Most individuals are released on parole at some time after reaching their parole release or parole eligibility date.

6.8.4 Additional orders

There are several additional orders a court can make at the time of sentence. Some that are relevant in sentencing for rape and sexual assault are described below.

Compensation and restitution orders

A court may make an order requiring that the offender make restitution or pay compensation for property loss or personal injury.[102]

Either order can be made in addition to any other sentence to which the offender is liable.[103]

The court may also order that the offender is to be imprisoned (for a default period) if the offender fails to comply with the order.[104] An order for default imprisonment must not be longer than 1 year.[105]

If a court considers it appropriate to make an order for compensation and to impose a fine or make another order for payment of an amount of money, but if the offender cannot pay both, the court must give preference to making an order for compensation.[106]

Non-contact orders

If a court convicts an offender of a personal (indictable) offence, the court may make a non-contact order in addition to any other order (unless an order instead can be made under the *Domestic and Family Violence Protection Act 2012).*[107]

A non-contact order is an order that requires that the person not contact the victim against whom the offence was committed, or someone who was with the victim when the offence was committed, for a stated period of time and/or that the person not go to a stated place, or within a stated distance of a stated place, for a stated period of time.[108] The time stated must be, if the person is sentenced to imprisonment (where this is not suspended), 2 years after the day on which the term of imprisonment ends, or otherwise 2 years after the day on which the order is made.[109]

There are criteria set out under the Act that define the circumstances in which an order can be made and factors to which the court must have regard.[110]

Domestic violence orders

If the person being sentenced is convicted of a 'domestic violence offence', the court may, on its own initiative, make a protection order against the person if satisfied the necessary criteria are met.[111] The Court may also decide to vary an existing domestic violence order if one is already in force.

Passport orders

Where a person is convicted of an offence and the court records a conviction, the court may order that the person:

(a) must remain in Australia or the State; or

(b) must not apply for, or obtain, an Australian passport; or

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102 PSA (n 11) s 35.
103 Ibid s 35(2).
104 Ibid s 36(2).
105 Ibid s 37(a).
106 Ibid s 14.
107 Ibid s 43B.
108 Ibid s 43C(1).
109 Ibid s 43C(2).
110 Ibid ss 43C(3)–(4).
111 *Domestic and Family Violence Protection Act 2012* (Qld) s 42.

(c) must surrender any passport held by the offender.[112]

This order stays in force for the duration of the sentence whether or not it is one that involves, in whole or part, a term of imprisonment.[113]

6.9 Sentences of imprisonment

As discussed in Chapter 8, many sentences imposed for rape, require a person to serve an immediate sentence of imprisonment.

This means a court must set a head sentence and may also set a parole eligibility date.

6.9.1 Imprisonment and parole

Parole is 'a form of conditional release of offenders sentenced to a term of imprisonment, which allows an offender to serve the whole or part of their sentence in the community, subject to conditions'.[114] Parole aims to improve public safety by reintegrating the person into the community and minimising the likelihood of reoffending.

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. If it were safer, in terms of likely reoffending, for prisoners to serve the whole sentence in prison, then there would be no parole.[115]

Prisoners who do not apply for or are not granted parole and are released from prison at the end of their sentence are not subject to supervision,[116] nor provided the support of the parole system.[117]

A person on parole must comply with conditions and can be returned to prison at any time during the remainder of their sentence, in accordance with the Parole Board's statutory powers (which have a primary focus on community safety).[118] If a person fails to comply with the conditions of their parole order, the Parole Board may amend, suspend or cancel parole.[119]

Types of parole

Queensland has a 'mixed system where orders for release on parole are either made by the court at the time of sentence or by the Parole Board sometime during the sentence period'.[120] This means that when a court decides to sentence an offender to imprisonment with parole, there are two different approaches to setting a parole eligibility date that may apply:[121]

1. Court ordered parole – where a court sentences an offender to a term of imprisonment of 3 years or less the court must set a parole release date at the time of sentence, unless specific circumstances apply.[122] The offender must be released on that date, subject to the power of the Parole Board to order that the parole order be suspended.[123] The court may fix any day of the offender's sentence as their parole release date, including the day

112 PSA (n 11) s 195(1).
113 Ibid s 195(4).
114 Arie Freiberg et al, 'Parole, Politics and Penal Policy' (2018) 18(1) *QUT Law Review* 191, 191.
115 Walter Sofronoff KC, *Queensland Parole System Review: Final Report* (Report, 2016) 1 [3] (emphasis in original) ('*Queensland Parole System Review: Final Report*').
116 An exception to this is the *Dangerous Prisoners (Sexual Offenders) Act 2003* (Qld) ('DPSOA') which provides a system for preventative detention and supervision of a certain class of offender beyond the expiry of their full time sentences. The 'particular class of prisoner' are those detained in custody serving a period of imprisonment for a 'serious sexual offence': DPSOA s 5. The court will determine whether the prisoner should be ordered to remain in custody (continuing detention order) or be released into the community under extended supervision (supervision order): DPSOA s 13(5).
117 Parole Board Queensland, *Parole Manual* (2019) 11.
118 Queensland Corrective Services, *Ministerial Guidelines to the Parole Board Queensland* (issued pursuant to *Corrective Services Act 2006* (Qld) ('CSA') s 242E) [1.2].
119 CSA (n 118) s 205.
120 *Queensland Parole System Review: Final Report* (n 115) 71 [315].
121 The relevant provisions regarding parole are in the PSA (n 11) pt 9 div 3.
122 Ibid s 160B.
123 See CSA (n 118) ss 205(2), 208B(5). The grounds for suspending or cancelling a parole order include that the person poses a serious and immediate risk of harm to another person, is preparing to leave the state without permission or poses and unacceptable risk of committing another offence.

of sentence or the last day of the sentence.[124] **A person convicted of a sexual offence cannot be sentenced to court ordered parole.**[125]

2. Board ordered parole – where a court either chooses to set the date a person becomes eligible for release on parole or makes no order (meaning, in most instances, that the person must serve 50 per cent of their sentence before being eligible for release on parole),[126] the Parole Board will decide whether the person should be released when an application is made. The actual date of their release is at the discretion of the Parole Board and can vary greatly depending on the circumstances of the case and of the offender. In some cases, offenders serve their full sentence in custody. **This is the only type of parole available when a person is sentenced for a sexual offence.**[127]

The Council in its final report, *Community-based Sentencing Orders, Imprisonment and Parole Orders*, recommended that court ordered parole be extended to sexual offences and that courts have a dual discretion to set either a parole release date or a parole eligibility date.[128] This is discussed further in section 5.3 of *Consultation Paper: Issues and Questions*.

Setting of a parole eligibility date

As noted above, courts have discretion under the PSA to set a parole eligibility date for sentences of imprisonment that are longer than 3 years, or of any length if the person is being sentenced for a sexual offence.[129] Courts declining to set a parole eligibility date, meaning parole eligibility is set legislatively at 50 per cent of the head sentence, is a common approach adopted by courts when sentencing people convicted following a trial.

It is accepted common practice in Queensland (also referred to as a 'rule of thumb')[130] that mitigating factors (including a timely plea of guilty) will usually be reflected in setting parole eligibility at approximately one-third of the head sentence[131] (this also represents a one-third reduction from the statutory 50%).[132] However, the Court of Appeal increasingly has 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'.[133]

The Court has also said that when a judge postpones an offender's parole eligibility date beyond the 'one-third mark' where there is a plea of guilty, they may be expected to provide reasons for doing so.[134] And when exercising the discretion to postpone a person's parole eligibility date past the statutory 50 per cent mark, this must be supported by a 'good reason'.[135]

6.9.2 Sentencing for more than one offence

Concurrent and cumulative sentences

When a court sentences a person to imprisonment for more than one offence, the court will say whether some or all of it is to be served concurrently (at the same time) or cumulatively (one after the other). Usually, sentences of imprisonment will be served concurrently unless a mandatory cumulative sentence applies or the court orders otherwise.

In deciding what order to make, the court must consider the principle of totality to ensure the total sentence reflects the overall criminality and is not crushing - see section 6.6 above.

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124 PSA (n 11) s 160G.
125 Ibid s 160D.
126 CSA (n 118) s 184(2). Legislated exceptions include where a person is convicted of a serious violent offence under the SVO scheme (in which case parole eligibility is set at 80% or 15 years, whichever is less) and minimum non-parole periods that apply to life sentences: see CSA, ss 181, 181A(2), 182(2).
127 PSA (n 11) s 160D. See footnote 129 below.
128 Recommendation 47: Queensland Sentencing Advisory Council, *Community-based Sentencing Orders, Imprisonment and Parole Orders: Final report* (Report, July 2019) xxxii.
129 PSA (n 11) ss 160C(5), 160D(3). The exceptions to this are: (a) where an offender is sentenced to a period of imprisonment that is more than 3 years if the offender has a current parole eligibility date — in which case the court must fix the date the offender is eligible for parole (PSA (n 11) s 161C(2)); and (b) where an offender is sentenced to a period of imprisonment that includes a term of imprisonment for a serious violent offence or sexual offence in circumstances where the offender has a current parole eligibility date or release date — in which case the court must fix the date the offender is eligible for parole): PSA (n 11) s 161D(2).
130 *Randall* (n 73) [43].
131 *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.
132 CSA s 184(2).
133 *R v WBV* [2023] QCA 79 [6] (Boddice JA);
134 Ibid; R v *Granz-Glenn* [2023] QCA 157 [12] (Bond, Flanagan JJA and Bradley J agreeing).
135 *Randall* (n 73) [37].

When sentences are to be served concurrently, the longest sentence is called the head sentence and the shorter sentence (or sentences) are served at the same time.

Sentencing approach - global sentence vs order for cumulation

There are 2 common approaches to sentencing a person who has committed a series of offences constituting one or more episodes of offending. A judge can:

1. impose a global head sentence on the most serious offence to reflect the seriousness of the offending; or
2. order two or more cumulative sentences.[136]

The first option is the most common approach for 'imposing sentences for a number of distinct, unrelated offences'.[137] This approach allows a judge to fix a sentence for the most serious offence, which is higher than it would be alone, but also take into account the overall criminality involved in the other offences. It is referred to as the 'global sentence'. This approach can be complicated in some cases, including by the operation of the SVO scheme.[138]

The second approach to impose 2 or more cumulative sentences. There are many reasons why a cumulative sentence may be preferred. For example, the Court of Appeal recently held that it was appropriate to impose a cumulative sentence for separate sexual attacks on 2 women 'because it was separate offending, against another complainant'[139] and the offending 'was so serious'.[140]

6.10 Mandatory sentencing schemes and provisions

There are several statutory sentencing schemes in the PSA which apply to sentencing broadly as well as to sexual offences specifically. This section examines these briefly.

6.10.1 Serious violent offences scheme

Introduced in 1997, the serious violent offences ('SVO') scheme requires a person declared convicted of certain listed offences[141] to serve 80 per cent of their sentence (or 15 years, whichever is less) in prison before being eligible for release on parole.[142] This is different to the ordinary rules applying to the setting of a parole release or parole eligibility date - see section 6.9 above for how parole is set in Queensland.

The making of a declaration is mandatory for sentences of imprisonment of 10 years or more, and discretionary for sentences of imprisonment between 5 and less than 10 years. The SVO scheme, as it applies to sentences of 10 years or more, is a form of mandatory sentencing.

The scheme applies to certain listed offences[143] if they are sentenced in the District or Supreme Courts. Rape and sexual assault are listed offences. The SVO declaration attaches to the offence rather than the offender. However, the circumstances of the offender can be relevant to the decision made by the court whether to make a declaration in circumstances where this is discretionary.

The Council has previously examined the operation of the SVO scheme and recommended the scheme be reformed in its final report, *The '80 per cent Rule': The Serious Violent Offences Scheme in the Penalties and Sentences Act 1992*. Some of the anomalies and inconsistencies identified in that review are discussed in Chapter 10 of the *Consultation Paper: Issues and Questions*, including those specific to sexual offences.

136 *R v Derks* [2011] QCA 295, [26] (McMurdo P, White JA and Fryberg agreeing).
137 *R v Nagy* [2004] 1 Qd R 63, 72 [39] (Williams JA).
138 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* (Report, 2022).
139 *Wallace* (n 58) 7 [22].
140 Ibid 13 [49] (Dalton J).
141 Or of counselling, procuring, attempting or conspiring to commit such an offence.
142 CSA (n 118) s 182.
143 PSA (n 11) sch 1.

6.10.2 Repeat serious child sex offences scheme

Introduced in 2012, the repeat serious child sex offences scheme amended the PSA[144] and the CSA[145] to provide 'a new mandatory sentencing regime of life imprisonment, with a 20 year non-parole period, for certain repeat child sex offenders'.[146] An adult offender convicted of a serious child sex offence[147] that was committed after 19 July 2012,[148] and who has a prior conviction (as an adult) for a relevant serious child sex offence[149] must be sentenced to life imprisonment, or an indefinite sentence.[150]

A serious child sex offence is one listed in Schedule 1A of the PSA or an offence that involved counselling or procuring the commission of an offence listed in Schedule 1A that was committed in relation to a child under 16 years and in circumstances in which an offender convicted of the offence would be liable to life imprisonment.[151] Rape and sexual assault are both prescribed offences.

6.10.3 Mandatory minimum non-parole period for life sentences

If a court imposes a life sentence (other than for a repeat serious child sex offence) for an offence of rape or aggravated sexual assault, the mandatory minimum non-parole period of 15 years applies (unless sentenced alongside murder to which higher non-parole periods apply).[152] A court can set a later parole eligibility date (but not an earlier one).[153]

6.10.4 Serious organised crime circumstance of aggravation

Part 9D of the PSA requires that it is a circumstance of aggravation when an offence is committed as part of the person's involvement in a criminal organisation.[154] The sentence must include an extra, mandatory 7 years' imprisonment (served wholly in custody) in addition to, and cumulatively upon the sentence for the prescribed offence itself. Rape and sexual assault are both subject to this circumstance of aggravation.[155]

6.10.5 Section 156A - Cumulative sentences

The court must order a cumulative sentence 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 other post-prison community-based release;
- on a leave of absence from prison;
- unlawfully at large after escaping from lawful custody under a sentence of imprisonment. [156]

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.[157]

144 Ibid pt 9B.
145 CSA (n 118) s 181A.
146 Explanatory Notes, Criminal Law (Two Strike Child Sex Offenders) Amendment Bill 2012, 1.
147 PSA (n 11) sch 1A.
148 Date of assent and commencement.
149 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.
150 PSA (n 11) ss 161E(2), 161E(3).
151 Ibid s 161D.
152 CSA (n 118) s 181. Special rules, however, apply for those convicted of a prescribed offence committed with a serious organised crime circumstance of aggravation: see ss 181(2A)–(2B).
153 Ibid s 181(3).
154 PSA (n 11) ss 161O–161Q.
155 Ibid ss 349(4), 352(4).
156 Ibid s 156A, sch 1.
157 Ibid sch 1.

Chapter 7 Case law analysis

7.1 Introduction

The Council has been asked to examine the current sentencing practices for sexual assault and rape offences and to identify any trends or anomalies that occur in sentencing these offences. To do that, 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.

This chapter sets out the case law in Queensland that applies to the sentencing of sexual assault and rape, and also presents preliminary findings from our analysis of sentencing remarks.

7.2 The application of sentencing purposes and factors

In Chapter 6 we discussed the statutory purposes of sentencing set out in the *Penalties and Sentences Act 1992* (Qld) ('PSA'). The PSA alters the sentencing calculus for certain offences. Relevantly, when sentencing an offence which involved the use of personal violence or an offence of a sexual nature against a child under 16 years, deterrence and community protection are factors to which a court must have primary regard.[1]

From a review of Court of Appeal decisions, it is clear the purposes of punishment, denunciation, deterrence and community protection are given significant weight by Queensland courts in sentencing sexual assault and rape offences.[2]

However, at common law, that is, from a review of Court of Appeal decisions, it is clear the purposes of punishment, denunciation, deterrence and community protection are also given significant weight by Queensland courts in sentencing sexual assault and rape offences.[3] Indeed, the Court of Appeal has acknowledged the community expectation that 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 …[4]

The High Court of Australia has recognised that the various purposes of sentencing can overlap and sometimes point in different directions.[5] Rehabilitation is relevant to community protection, particularly if the offending person is young and has a limited criminal history.[6] It may also be relevant where there is evidence of a person's good prospects of rehabilitation and objectively low risk of reoffending.[7] This is discussed further below.

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1 Reflected in the various factors, see *Penalties and Sentences Act 1992* (Qld) ss 9(1),(3)–(6) ('PSA').

2 See for example *R v Misi; Ex parte Attorney-General* (Qld) [2023] QCA 34 [4] (Mullins P, Dalton and Flanagan JJA); *R v Pham* [1996] QCA 3 (*'Pham'*); *R v GAW* [2015] QCA 166 (*'GAW'*); *R v H* (1993) 66 A Crim R 505; *R v Williams; Ex parte Attorney-General* (Qld) [2014] QCA 346 [58], [73] (McMeekin J, Henry JJ agreeing) (*'Williams'*); *R v McConnell* [2018] QCA 107 [22] (Fraser JA, Sofronoff P and Philippides JA agreeing) ('*McConnell*'); *R v Ruiz; Ex parte Attorney-General* (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).

3 Ibid.

4 *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).

5 *Veen v The Queen [No 2]* (1988) 164 CLR 465, 476 (Mason CJ, Brennan, Dawson and Toohey JJ) (*'Veen No 2'*).

6 See *R v Bainbridge* (1993) 74 A Crim R 265, 268; *R v Dullroy; Ex Parte Attorney-General (Qld)* [2005] QCA 219. Cf *R v Hopper; ex parte Attorney-General (Qld)* [2015] 2 Qd R 56 [28] (Fraser JA) citing *R v Horne* [2005] QCA 218 (*'Horne'*); *R v Mules* [2007] QCA 47 [21] (*'Mules'*).

7 See *R v Theohares* [2016] QCA 51 [29]-[31] (Philippides J. Holmes JA and Philip McMurdo JA agreeing) (*'Theohares'*). See also PSA (n 1) ss 9(3)(g), 9(6)(g).

Sentencing purposes: Sentencing remarks preliminary findings*

Preliminary findings from the sentencing remark analysis found magistrates and judges often refer to some or all of the sentencing purposes set out in s 9(1) of the PSA. While it was not uncommon to see a magistrate or judge mention all six purposes, it was more common to see one to three purposes mentioned. For example, in a sexual assault case, the magistrate stated:

> In sentencing you today, I take into account the rule and provision to section 9 of the Penalties and Sentences Act. In particular, I note the sentencing guidelines which include that sentences must be imposed to deter you from committing the same or a similar offence. And to make it clear, the community acting through this court denounces this sort of conduct you're involved in. (LCMC_SA3)

In a rape case, the judge stated:

> 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.
>
> Our community finds it abhorrent that men like you, with no previous criminal convictions take the decision to sexually abuse a child. And the sentence I impose must condemn your conduct on behalf of the community, and it must punish you. It must also, of course, balance those features against your prospects of rehabilitation...(MCM5_R5)

There were some instances where no specific purpose for the sentence was stated, it was simply said: 'In sentencing you I have regard to the principles of sentencing mentioned in section 9 subsection (1) of the Penalties and Sentences Act...' (RL5_R1).

* These results should be interpreted with caution. The findings presented are from the partial coding of sentencing remarks that was completed at the time of the writing. They may be subject to change on completion of the coding and analysis of the full study sample: see Chapter 1.4.2.

7.2.1 Specific principles and factors if the victim survivor is a child under 16 years

As discussed in section 6.4 there have been significant legislative changes to statutory sentencing guidance that applies to the offences of sexual assault and rape. The two most significant changes took place in **2003,** requiring a court to have primary regard to prescribed sentencing factors when sentencing a person for an offence of a sexual nature against a child[8] (now PSA ss 9(4)–(6)) and in **2010,** to require a person in these circumstances to serve an actual term of imprisonment unless there are exceptional circumstances.[9] The latter will be discussed first.

More broadly though, in *R v Stable (a pseudonym)*,[10] the Court of Appeal discussed the context in which these changes were introduced and their intended purpose:

> These amendments 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. They were partly the result of the legislature's acceptance of the findings of the *Axis Report* that:
>
> > "the psychiatric and social problems found in victims included anxiety disorders, post traumatic stress disorders, disassociation disorders, depression, risk of suicide and/or self harm, sexual dysfunction and general relationship problems. The tangible and intangible costs of child sexual abuse to the victim and the community are significant."
>
> As has been said, the Explanatory Notes said that the amendments were made to ensure that such offences were to be equated in seriousness to offences of violence.[11]

The Court went on to discuss the impact of legislative changes to sentencing practices:

> In *R v Kilic*[12] Bell, Gageler, Keane, Nettle and Gordon JJ said that current sentencing practices with respect to sexual offences may be seen to depart from past practices by reason of changes in understanding about the long-term harm done to victims. 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

8 *Sexual Offences (Protection of Children) Amendment Act 2003* (Qld) inserting what is now PSA (n 1) s 9(4)(c).
9 *Penalties and Sentences (Sentencing Advisory Council) Amendment Act 2010* (Qld).
10 [2020] QCA 270 (*'Stable'*).
11 Ibid [33]—[34] (Sofronoff P, Fraser and Philippides JJA).
12 (2016) 259 CLR 256, 266—7 [21] (*'Kilic'*).

> 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.[13]

Exceptional circumstances - PSA s 9(4)(c)

Prior to 2010, it was an established sentencing principle in common law that 'other than in exceptional circumstances, those who indecently assault or otherwise deal with children should be sent to [prison]'.[14] In 2010, Parliament amended section 9(5) of the PSA (now s 9(4)(c)) so that a person sentenced for a sexual offence against a child under 16 'must serve an actual term of imprisonment, unless there are exceptional circumstances'.[15] When deciding whether exceptional circumstances exist, the court may consider the closeness in age between the person being sentenced and the child.[16]

There is no statutory definition of what may amount to 'exceptional circumstances'.

In *R v Quick; Ex parte Attorney-General* (Qld),[17] there was a discussion about what factors, either alone or in combination, constituted 'exceptional circumstances'. In that case, Quick pleading guilty to an ex officio indictment, had a lack of prior criminal history, demonstrated remorse and was considered a low risk of reoffending. Chesterman J considered that these factors were mitigating but common to sexual violence cases and not exceptional. Quick also had a diagnosis of depression since the offences and difficulty coping in custody, had anxiety due to charge and investigation and had suffered public humiliation and embarrassment. The Court considered these factors were 'usual consequences which commonly flow from the discovery and prosecution of sexual offences. Again there is nothing exceptional about them.'[18]

The Chief Justice de Jersey (as his Honour then was) also observed:

> In cases of this character, those features are not unusual. Neither is the aggregation of them. As synonyms for "exceptional", the Macquarie Dictionary offers "unusual" and "extraordinary".
>
> Of course whether the aggregation of such features warrants the conclusion the offender should be spared imprisonment, is a matter for careful assessment. That assessment falls to be made within the supervening context of a reasonable community expectation that adults who sexually abuse minors will serve a term of actual imprisonment. Sentencing courts should be astute to acknowledge that expectation. It is an expectation which, I believe, has strengthened over recent years, as the prevalence of this species of crime, and its devastating effects on victims, have become more apparent.[19]

In the case of *R v Tootell; ex parte Attorney-General (Qld),*[20] the Court of Appeal observed:

> … there is no one clear prescription for what circumstances are capable of being regarded as exceptional. Consideration must be given not only to the unusualness of individual factors but to their weight; and factors which taken alone may not be out of the ordinary may in combination constitute an exceptional case.
>
> … The mitigating circumstances must be considered against a background of matters such as the egregiousness of the offending and the need for deterrence in determining whether they can be said to amount to exceptional circumstances of that kind.[21]

The Court of Appeal has also noted that a finding of exceptional circumstances is not a two-stage process, it is 'one part of the overall process of "instinctive synthesis"'.[22] Importantly, the Court of Appeal also found that such circumstances could be established by a 'combination' of individual factors.[23] Thus, consideration of each set of factors will be case-specific.

An example of what has amounted to 'exceptional circumstances' is in *R v Theohares.*[24] In that case, a 'man of advanced age' plead guilty to two counts of indecent treatment committed against a 12-year-old girl. The offending involved groping the girl's buttocks and breasts when she entered the applicant's takeaway store. The Court

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13 *Stable* (n 10) [45].
14 *Pham* (n 2) 3. See also *R v Gallagher; Ex parte A-G (Qld)* [1999] 1 Qd R 200; *R v L; Ex parte A-G (Qld)* [2000] QCA 123; *R v M; Ex parte A-G (Qld)* [2000] 2 Qd R 543; *GAW* (n 2).
15 PSA (n 1) s 9(4)(c). Note that this was previously s 9(5) in 2010 when the amendment was made. *Penalties and Sentences (Sentencing Advisory Council) Amendment Act 2010* (Qld) s 5.
16 PSA (n 1) s 9(5).
17 [2006] QCA 477 (*'Quick'*).
18 Ibid [37] (Chesterman J).
19 Ibid [7]–[8] (de Jersey CJ and Chesterman J agreeing. Holmes JA dissenting).
20 [2012] QCA 273.
21 Ibid [24]–[25].
22 *R v BCX* (2015) 255 A Crim R 456, 465 [35] (Burns J, with McMurdo P agreeing). Philippides JA also agreed at [2] that sentencing under s 9(4) required an integrated approach. Followed in *Theohares* (n 7); *R v Schenk; Ex parte Attorney-General (Qld)* [2016] QCA 131; R v Clark [2016] QCA 173. Cited in *R v HCK* [2023] QCA 65 [40] (Bond JA, McMurdo and Fraser JJA agreeing).
23 Ibid 463–4 [30] (Burns J, with McMurdo P agreeing).
24 *Theohares* (n 7).

considered that exceptional circumstances were established as the offending was 'of a very low level and occurred on a single day and within a short time frame', and in addition:

> [t]he applicant was extremely remorseful for his behaviour. The applicant's pleas of guilty saved the complainant from being required to give evidence, were entered at the earliest possible time and, indeed as the applicant's counsel stated, obviated the need for the Crown to confer with the complainant. Fortunately, the complainant does not appear to have suffered serious consequences as a result of the offending.
>
> ...
>
> The applicant has complied with all conditions of bail with no breaches alleged. The applicant's conduct while on bail, his lack of criminal history, his prior good character and good work history and references, indicate excellent prospects of continued rehabilitation and a very low risk of reoffending. The need for personal deterrence does not feature in this case.[25]

There have been different opinions in the Court of Appeal on whether exceptional circumstances exist in a particular case. For example, in *R v GAW*,[26] the majority (Margaret McMurdo P and Holmes JA) found that it was open to the primary judge to conclude there were exceptional circumstances in a case which involved a man lifting his 13-year-old step-daughter's skirt to see the underpants which she had purchased with him earlier that day, after which he grabbed or groped one of her arse cheeks on the outside. Philippides JA, in dissent, opined that there were not exceptional circumstances in this case.[27]

Exceptional circumstances: Sentencing remarks preliminary findings*

From the sentencing remarks reviewed so far, often magistrates and judges do not expressly state or explain the factors considered in determining whether exceptional circumstances exist. For example, in a sentence of a charge of rape a judge simply stated that:

> There can be no dispute that exceptional circumstances are not demonstrated in your case, and I specifically make a finding that there are not exceptional circumstances. (RL5_R8).

However, there were instances where the court clearly outlined the factors considered and the reasoning for their decision that exceptional circumstances did not apply:

> It has been urged upon me that there are exceptional circumstances, such that a penalty not involving actual incarceration will be imposed today. There has been a delay since 2019, during which you, on the supervision order, have made good progress towards rehabilitation. You are now 74 years of age and are experiencing declining health and sexual dysfunction. The risk to the community is mitigated by the supervision order and your ongoing treatment with [medical practitioner/psychiatrist]. Taking into account the factors personal to you, in particular, that you are ageing, are in declining health and have made good progress towards rehabilitation, **the overall circumstances are, nevertheless, not sufficiently exceptional to exempt you from the usual operation of section 9(4).** That must be so when the personal factors and the mitigating factors are balanced against the serious nature of these offences. (MCL5_R18, District Court Judge; emphasis added)

* These results should be interpreted with caution. The findings presented are from the partial coding of sentencing remarks that was completed at the time of the writing. They may be subject to change on completion of the coding and analysis of the full study sample: see Chapter 1.4.2.

Where victim survivor over 16 years but under 18 years

In *R v Manser*,[28] the complainant was aged 17 years. The Court discussed the common law approach that imprisonment should be imposed for sexual offences unless there are exceptional circumstance where the victim survivor is a minor but not under 16 years:

> ... s 9(2)(a) of the *Penalties and Sentences Act* requires a sentencing court to have regard to the principle that a sentence of imprisonment should only be imposed as a last resort. Section 9(5) expressly excludes the application of that sub-section in cases of sexual offences against children under 16 years of age (as was the complainant in *Quick*); but it continues in effect (with exceptions in cases involving violence and physical harm) where the offence is committed against a young person aged 16 or older.
>
> The *Quick* approach, it follows, cannot extend to offences of the latter kind. A sentencing judge cannot simultaneously be guided by a principle that imprisonment is to be a last resort, on the one hand, and act on the premise that it is to be imposed in all but exceptional cases, on the other. That conclusion, as a matter of statutory interpretation, is reinforced by the fact that 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. Nor does it mean that imprisonment was an

25 Ibid [29]—[31] (Philippides J, with Holmes JA and Philip McMurdo JA agreeing).
26 *GAW* (n 2).
27 Ibid [66].
28 [2010] QCA 32 (*'Manser'*).

> inappropriate sentence in the present case, where the applicant did not have the benefit of the principle in s 9(2), because, at least in the case of the second complainant, violence was used in the commission of the offence.[29]

The application of PSA ss 9(4)-(6)

As discussed in section 6.5.3, if the victim survivor is a child under 16 years, specific sentencing principles apply.[30] Some offences of a sexual nature against a child prescribe the child's age as an element of the offence.[31] 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. In the case of rape, a child under 12 years is incapable of giving consent.[32] Therefore, if a person is convicted of sexual assault or rape and the victim is under the age of 16 years, the sentencing considerations outlined in section 9(4)–(6) of the PSA may not automatically apply. This point is illustrated in *DMS v Commissioner of Police*.[33]

In *DMS*, the appellant, a 48-year-old family friend, indecently touched the complainant twice.[34] The complainant was 15 years and 11 months. DMS was charged with sexual assault instead of indecent treatment of children under 16 years,[35] as the prosecution could not negate beyond a reasonable doubt that DMS *knew* the victim was under 16 years at the time of the offence. This meant the sentencing factors in PSA ss 9(4)–(6) did not apply.[36]

Similarly, in *R v Downs*,[37] the applicant was a manager at a pizza store and sexually assaulted 8 employees aged between 15 and 17 years. As it was accepted that the exact ages of some of the victim survivors was unknown at the time the offences were committed, section 9(6) of the PSA did not apply. [38] Where sub-sections 9(4)–(6) of the PSA apply, the principle of 'imprisonment as a last resort' (discussed in section 6.5.3) does not apply and the sentencing court must consider the factors outlined in s 9(6).

7.2.2 General principles and factors if the victim survivor is 16 years or over

If a victim of sexual assault or rape is over 16 years,[39] section 9(2)(a) states that a court must have regard to the principle that a sentence of imprisonment should only be imposed as a last resort, and that a sentence which allows the person being sentenced to stay in the community is preferable.

However, the principles prescribed under s 9(2)(a) are not applicable to offences that 'involved the use of, or counselling or procuring the use of, or attempting or conspiring to use, violence against another person' or 'that result in physical harm to another person'.[40] See section 6.5.3 for a summary of the factors and principles to which a court must have primary regard to in these circumstances.

An offence of violence - application of section 9(2A) of the PSA to rape and sexual assault offences

If the offence involved an element of 'personal violence' as described under section 9(2A), a sentencing court will apply 'an entirely different sentencing regime', as explained in *R v Oliver*:[41]

> 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.
>
> 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

29 Ibid [13]-[14] (de Jersey CJ, Holmes JA and Muir JA).
30 See PSA (n 1) s 9(4)–(6).
31 See, eg, Indecent treatment of children under 16: *Criminal Code Act 1899* (Qld) sch 1, s 210 ('*Criminal Code* (Qld)').
32 *Criminal Code* (Qld) (n 31) s 349(3).
33 [2020] QDC 345 ('*DMS*').
34 The touching involved the appellant putting her hand down the front of the complainant's underwear and touching the skin on the top of her pubic hairline twice, despite the complainant pushing her hand away.
35 *Criminal Code* (Qld) (n 31) s 210.
36 *DMS* (n 33) [8], [11] (McGinness DCJ). Note, DMS was still liable to be a reportable offender pursuant to the *Child Protection (Offender Reporting and Offender Prohibition Order) Act 2004* (Qld) s 5, unless s 5(2) applied: see discussion at [33] (McGinness DCJ).
37 [2023] QCA 223 ('*Downs*').
38 *Downs* (n 37) [3], [45] (Morrison JA, Mullin P and Bond JA agreeing).
39 Or the prosecution cannot prove the person knew the victim was over 16 years: see *DMS* (n 33) and 7.2.1 above.
40 PSA (n 1) 9(2A).
41 [2018] QCA 348 [25].

> 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.[42]

Rape

The act of rape itself is an inherently violent offence.[43] The Court of Appeal has stated:

> Because the offence of rape involves physical harm to another, s 9(2)(a) which provides that a sentence of imprisonment should only be imposed as a last resort and a sentence that allows the offender to stay in the community is preferable, has no application.[44]

As explained by the Victorian Court of Appeal:

> 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 any 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.[45]

However, where there is additional substantial violence and injury beyond the penetration of rape, this is a significant aggravating feature.[46] The lack of additional physical violence, no use of weapon and no evidence of premeditation may distinguish one case from a comparable case.[47]

Where a victim is sleeping, this conduct has been described as 'a violation' but in the context that 'no violence was used'.[48]

Sexual assault

The Court of Appeal interpretation of section 9(2A) (and its predecessor – section 9(3)) is limited in the context of sexual assault.[49] In District Court appeals, judges have interpreted section 9(2A) differently in relation to similar offending conduct.

In *Biswa v Queensland Police Service*,[50] the appellant approached the complainant waiting for a bus and attempted to cuddler 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 despite being pushed away and told to stop. This was not considered to involve 'violence against another person' for the purposes of s 9(2A).[51]

In *Braga v Commissioner of Police*,[52] the offending occurred in a communal toilet area in a pub. As the complainant walked past the appellant, he grabbed her by the elbow and around the waist and pulled her body into his. The complainant tried to push him off, but he lifted her and carried her into the female toilet area and attempted to kiss her on the mouth and neck. She felt a bite on her neck. In this case, the conduct constituted 'personal violence' for the purposes of the application of section 9(2A).[53]

In *R v Manser*,[54] the offender was sentenced in relation to two counts of sexual assault against two complainants. The first count of sexual assault occurred when the first complainant woke to find the offender touching his penis under his shorts and underpants.[55] The second count involved the offender touching the complainant's testicles through his underwear. The second complainant was awake, and there was a physical struggle and resistance from

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42 Ibid [26]—[28].
43 *Williams* (n 2) [62]; *R v MBY* [2014] QCA 17 [71] (Morrison JA, Muir JA and Daubney J agreeing) ('*MBY*'); *R v Benjamin* (2012) 224 A Crim R 40 ('*Benjamin*'); *R v Tong (a pseudonym)* [2021] QCA 261 [41]—[42] (Sofronoff P, McMurdo JA and Applegarth J agreeing); *R v Smith* [2022] QCA 55 [38](a) (Morrison JA, Fraser and Bond JJA agreeing) ('*Smith*').
44 *R v KU & Ors; ex parte Attorney–General (Qld) (No 2)* [2008] QCA 154 [157] (de Jersey CJ, McMurdo P and Keane JA).
45 *DPP v Mokhtari* [2020] VSCA 161 [41].
46 *R v Cox* [2011] QCA 277 [26], [27] ('*Cox*'). *Smith* (n 43) [38] (Morrison JA, Fraser and Bond JJA agreeing).
47 *Smith* (n 43) [38] (Morrison JA, Fraser and Bond JJA agreeing).
48 *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' ('*Enright*').
49 For other offences there has been some guidance: see *R v Barling* [1999] QCA 16 for arson; *R v Breeze* [1999] QCA 303 for a threat in the course of a robbery; and *R v Tobin* [2008] QCA 4 for a bomb threat.
50 [2016] QDC 333.
51 Ibid [38].
52 [2018] QDC 48.
53 Ibid [28] (Robertson DCJ).
54 *Manser* (n 28).
55 Ibid [3] (de Jersey CJ, Holmes JA and Muir JA).

the second complainant.[56] On appeal, it was noted that for the purpose of applying section 9(2A) 'at least in the case of the second complainant, violence was used in the commission of the offence.'[57]

In *R v Downs*,[58] a manager of a pizza store sexually assaulted eight employees and the conduct involved unclipping a bra, touching and squeezing breasts, punching a breast, a slap on the bottom, grabbing one complainant's breasts and lifting her.[59] On appeal, it was upheld that as sub-sections 9(4) and (6) of the PSA did not apply, a sentence of imprisonment should only be imposed as a last resort'.[60] Downs was sentenced to 18 months imprisonment, suspended after serving five months.

Section 9(2A): Sentencing remarks preliminary findings*

Preliminary analyses of sentencing remarks indicate that there has been a recognition by the courts' that some acts of sexual assault fall within the scope of s 9(2A). However, of the cases reviewed, it was difficult to discern any pattern in its application.

For example, in a sexual assault sentence involved 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" (LCMNC_SA5).

In contrast, a sexual assault offence which involved the sentenced person touching the victim's breast, removing the shoulder strap of their garment to expose their breast and the sentenced person "…had to be pushed away on several occasions. Then when the complainant was attempting to move away from you and the distress that you were causing her, you've grabbed her calf and tried to pull her back towards you." (LCMC_SA3). In this case the magistrate noted that "a period of sentence is to be a sentence of last resort." (LCMC_SA3).

* These results should be interpreted with caution. The findings presented are from the partial coding of sentencing remarks that was completed at the time of the writing. They may be subject to change on completion of the coding and analysis of the full study sample: see Chapter 1.4.2.

7.3 Assessing the seriousness of sexual assault and rape offences

The Terms of Reference ask the Council to identify whether the current approach to sentencing supports courts in imposing appropriate sentences. Understanding how courts assess the seriousness of these offences is an important consideration in making this assessment.

This section explores Queensland Court of Appeal and District Court decisions that have discussed the use of sentencing 'ranges' to guide Queensland courts when assessing the seriousness of an offence and to guide sentencing for these offences.

What is commonly referred to in Australia as sentencing 'ranges' are generally based on an analysis by Courts of Appeal of sentences imposed for similar offending in other comparable cases. These cases may indicate the type and length of sentence which is in 'range', while recognising that courts have a wide sentencing discretion.

Sentencing 'ranges' indicated by past sentencing practices are not fixed points. Rather, as the High Court of Australia has recognised, they are simply to be used as yardsticks to be considered in the sentencing exercise:

> Sentences are not binding precedents, but are merely "historical statements of what has happened in the past". As was said in *Hili v The Queen*, "[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" … Examination of sentences imposed in comparable cases may inform the task of sentencing but such examination goes beyond its rationale when it is used to fix boundaries that, as a matter of practical reality, bind the court.[61]

In *R v Kilic,*[62] the High Court of Australia also explained that sentencing practices might change over time:

> 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.[63]

56 Ibid [4] (de Jersey CJ, Holmes JA and Muir JA).
57 Ibid [14] (de Jersey CJ, Holmes JA and Muir JA).
58 *Downs* (n 37).
59 Ibid [8]—[27], [32](i) (Morrison JA, Mullin P and Bond JA agreeing).
60 Ibid [3], [45] (Morrison JA, Mullin P and Bond JA agreeing).
61 *DPP (Vic) v Dalgliesh (a pseudonym)* (2017) 262 CLR 428, 454 [83] (emphasis in original, footnotes omitted).
62 *Kilic* (n 12).
63 Ibid 267 [21] (Bell, Gageler, Keane, Nettle and Gordon JJ).

When referring to Court of Appeal decisions as a basis for establishing a 'range', it is important to keep in mind that if the Court has dismissed an appeal because it cannot find an error, this 'is not the same as an endorsement that the sentence imposed below would be one that the members of the Court might have imposed'.[64] As reiterated recently in *R v EO*:[65]

> The cases in which a sentence was not disturbed on appeal are also of limited relevance because the outcome does not suggest that the case was at the higher or lower end of the range open to the sentencing judge.
>
> The cases where a sentence was substituted by this court are of more relevance.[66]

7.3.1 General aggravating factors

As outlined above, for sexual violence offences against children under 16 years, a court is required to consider the factors outlined in section 9(6) of the PSA. A consideration of those factors outlined in sections 9(6)(a)-(e) will, ordinarily, reveal the aggravating features in an individual case (see Table 8 for a list of factors).

However, there are several aggravating factors, discussed at section 6.7, that are generally viewed as increasing the seriousness of sexual violence offending. These include (without being exhaustive):

- victim particularly vulnerable due to age and/or disability;[67]
- offender's relevant criminal history;[68]
- offence involved additional use of violence[69] or a weapon;[70]
- abuse of position of trust;[71]
- domestic violence offence;[72]
- victim became pregnant to, and/or had a baby fathered by the offender;[73] and
- risk of and actual transmission of disease.[74]

In the following sections, we explore other aspects of rape and sexual assault that are viewed as relevant to an assessment of the seriousness of an offence, which is sometimes described as the 'objective seriousness' of the offending.

64 *Cox* (n 46) [25] (McMeekin J, Fraser J and Margaret Wilson AJA agreeing).
65 [2019] QCA 145.
66 Ibid 5–6 (McMurdo JA, Gotterson JA and Philippides JA agreeing).
67 PSA (n 1) s 9(6)(b); *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*').
68 PSA (n 1) s 10: This is determined by considering the nature of the previous conviction, its relevance to the current offence, and the amount of time that has elapsed since the conviction.
69 *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*').
70 *R v Stirling* [1996] QCA 342.
71 PSA (n 1) s 9(6)(e); *R v WBM* [2020] QCA 107 (Applegarth J with Fraser and Mullins JJA agreeing) ('*WBM*'), citing *R v BBP* [2009] QCA 114 ('*BBP*').
72 PSA (n 1) s 9(10A): Does not apply if the court considers it would be unreasonable to do so due to exceptional circumstances.
73 *MBY* (n 43) 17 [75] (Morrison JA, Muir JA and Daubney J agreeing); *DPP (Vic) v Dalgliesh (a Pseudonym)* (2017) 262 CLR 428, 436 [20], 438 [26], 443 [36] (Kiefel CL, Bell and Keane JJ).
74 *R v Heckendorf* [2017] QCA 59, [31] (McMurdo JA) (Fraser JA, Mullins J agreeing); *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).

Vulnerability of victim survivors

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 and can make the offending more serious.

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. A child under 16 years is recognised as an inherently vulnerable group in the PSA.[75] Some other vulnerable victim survivor cohorts include (without being exhaustive):

- Women;[76]
- Children;[77]
- Aboriginal or Torres Strait Islander peoples;[78]
- a person with a disability;[79]
- a person from a culturally or linguistically diverse background;[80]
- a person who is asleep or unconscious when the offending occurs.[81]

7.3.2 Rape offences

Types of penetration

The offence of rape can involve different types of penetration.[82] In the 2003 decision in *R v D*,[83] the Court of Appeal considered the legislature's intention to raise the penalties being imposed for digital rape of a child by moving this behaviour into the offence of rape:

> This offence of rape involved digital penetration of the vagina … The facts of this case were therefore less serious than if the offence of rape had involved penile penetration. Nevertheless the intention of the legislature is to raise the penalty to be imposed in cases where the rape involves digital penetration, in the past, an offence charged as indecent dealing with a maximum penalty of 10 years.[84]

When considering the different categories of penetration to assess the level of seriousness and criminality, the Court of Appeal said in *R v Wark*,[85]:

> Whilst cases of penile vaginal or penile anal penetration will often be more serious and attract heavier penalties than cases involving only digital penetration, the appropriate sentence in each 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.[86]

In *R v Colless,*[87] the applicant was sentenced for 18 offences charged for separate attacks on 11 women including 5 digital rapes. In this case, the nature of these rapes was viewed as being 'overwhelmed' by the seriousness of the offending conduct as a whole:

> 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 features (weapons, extra brutality, threats of serious harm, premeditation, residual injury etc), a rape accomplished digitally may generally be seen to be 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 substantially reduced risk of infection. Although his Honour did not express those distinctions, he plainly considered that any limiting significance of its being digital penetration was in this case overwhelmed by the

75 PSA (n 1) ss 9(4)–9(6).
76 See, eg, *Daniel* (n 4) 515–16.
77 See Ibid; *CCT* (n 67) [241] (Applegarth J, Sofronoff P and McMurdo JA agreeing). R v NAF [2023] QCA 197 [31] (Boddice JA, Mullins P and Cooper J agreeing).
78 See, eg, *Daniel* (n 4) 512.
79 See *R v Libl; Attorney-General of Queensland (Qld)* [1996] QCA 63, 6 (Fitzgerald P, McPherson JA and Helman J); *R v Cutts* [2005] QCA 30 [22] (McMurdo P) ('*Cutts*').
80 See *R v VN* [2023] QCA 220 [30] (Bowskill CJ and Morrison and Dalton JJA) ('*VN*').
81 See *Enright* (n 48) [90]–[91].
82 PSA (n 1) s 349.
83 [2003] QCA 88.
84 Ibid.
85 [2008] QCA 172.
86 Ibid [2] (McMurdo P).
87 [2011] 2 Qd R 421 ('*Colless*').

> circumstance that the applicant, a "predatory serial rapist", engaged in a "course of conduct" using violence and causing physical and psychological injury to his victims. [88]

In the recent decision of *R v Wallace*,[89] the Court of Appeal highlighted 'the need to consider the particular circumstances of each case rather than … generalisations as to what kind of rape is worse or more serious'.[90]

In *R v SDM*,[91] the Court of Appeal supported the view that rape by fisting was not by its nature less serious than a penile rape.[92] The court also referred to *R v Kellett*, where it was acknowledged that such an act can involve conduct that is "brutal', 'degrading' and 'injurious'.[93] In *Kellett*, it was found to be open to the sentencing judge to conclude that the penetration of the complainant's vagina by fisting - which caused grievous bodily harm - was an 'act designed to humiliate and degrade'.[94]

The use of additional violence

The act of rape, by its very nature, is inherently violent. However, the use of additional violence in the commission of the offence is generally viewed as making examples of this offending particularly serious, with the Court noting that authorities 'tend to distinguish between cases of rape which involve and do not involve substantial violence'.[95]

A review of Court of Appeal decisions found in several cases the use of additional violence was the decisive feature in cases resulting in a sentence of 10 years or more being imposed.[96]

In the 2007 case of *R v Newman,*[97] a 17-year-old with no criminal history was sentenced for rape and grievous bodily harm committed against an elderly woman in her home. The Court said*:*

> in cases of violent rape where the offender is entitled to the benefit of a plea of guilty, the range of appropriate sentences is between 10 and 14 years imprisonment.[98]

In the recent decision of *R v Wallace,*[99] Bowskill CJ, endorsed this 'range':

> *Newman* is authority for the proposition that in cases where rape and grievous bodily harm are involved, on a plea of guilty, the sentencing range is 10 to 14 years' imprisonment.[100] Youth and lack of prior criminal history support sentencing at the lower end of this range'.[101]

Where there is no additional violence

In *Director of Public Prosecutions v Dalgliesh (a Pseudonym)*,[102] the High Court of Australia acknowledged that the act of sexual penetration of a child involves violence, whether or not there is additional violence:

> sexual abuse of children by those in authority over them has been revealed as a most serious blight on society. The courts have developed — as the Court of Appeal accepted in "emphatically" rejecting the respondent's submission that "there was no violence accompanying the offence"— an awareness of the violence necessarily involved in the sexual penetration of a child, and of the devastating consequences of this kind of crime for its victims.[103]

In the 2014 case of *R v GAR,*[104] Muir JA undertook an extensive review of sentencing decisions for rape and concluded this analysis:

> shows that sentences for rape do not tend to exceed 10 or 11 years unless accompanied by substantial violence. Where the violence is not substantial and there is a timely guilty plea, a sentence of less than 10 years

88 Ibid [17].
89 [2023] QCA 22 ('*Wallace*').
90 Ibid [13]. See also *R v RBG* [2022] QCA 143 [4] (Dalton JA) citing *R v Smith* [2020] QCA 23 [34]–[37] (Morrison J).
91 *SDM* (n 69) 6 [21].
92 Ibid 7 [27] (Mullins JA, Fraser JA agreeing at [1] and Henry J agreeing at [52]).
93 *R v Kellett* [2020] QCA 199 [103] (Morrison JA).
94 Ibid.
95 *R v Tory* [2022] QCA 276 [38] (Kelly J, McMurdo and Dalton JJA agreeing) ('*Tory*').
96 See also *R v Buchanan* [2016] QCA 33 ('*Buchanan*'); *R v Benjamin* (n 43).
97 *Newman* (n 69).
98 *R v Flew* [2008] QCA 290 [23] ('*Flew*'). See also *R v Walsh* [2008] QCA 391 [19]; *Wallace* (n 89) [17]; *R v Willey* [2008] QCA 318 [16].
99 Wallace (n 89).
100 *Newman* (n 69) [20], [43] (Williams JA).
101 *Wallace* (n 89) [17] (Bowskill CJ, Bond JA agreeing); citing *Newman* (n 69) [54] (Jerrard JA). See also *Flew* (n 98) [23] (Keane JA).
102 (2017) 262 CLR 428.
103 *DPP (Vic) v Dalgliesh (a Pseudonym)* (2017) 262 CLR 428 [57] (Kiefel CJ, Bell and Keane JJ).
104 [2014] QCA 30.

> is the norm. No rule of thumb, of course, can be applied. The circumstances of each case must be addressed…[105]

In a recent 2022 case of *R v Tory,*[106] the above observations were referred to with approval:

> That is a helpful starting point for two reasons. The first is that the authorities tend to distinguish between cases of rape which involve and do not involve substantial violence. The second is that each case falls to be considered by reference to its particular facts and to cite ranges for offending can be problematical.[107]

Most recently in the 2023 decision of *R v VN*,[108] the Court of Appeal cautioned sentencing courts against using physical injury and harm as a 'tool for comparison' as this misunderstands the significant psychological impact of this offending on the victim survivor:

> 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.[109] 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 the non-physical harm referred to in paragraph [30] above. 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. 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. She was robbed of the opportunity to develop as a sexual being in her own time and on her own terms. 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.[110]

Child victims

The case of *R v SAG*[111] outlined several factors that may aggravate a sentence in a case of maintaining a sexual relationship (now 'repeated sexual conduct with a child'):

- a young age of the child when the relationship thereafter maintained first began;
- a lengthy period for which that relationship continued;
- if penile rape occurred during the course of that relationship;
- if there was unlawful carnal knowledge of the victim;
- if so, whether that was over a prolonged period;
- if the victim bore a child to the offender;
- if there had been a parental or protective relationship;
- if the offender was being dealt with for offences against more than one child victim; and
- if there had been actual physical violence used by the offender; and if not whether there was evidence of emotional blackmail or other manipulation of the victims.[112]

It also set out several factors which may mitigate the penalty, including:

- conduct showing remorse, such as the offender voluntarily approaching the authorities, or seeking help for the family;
- cooperation with investigating bodies;
- admissions of offending;
- co-operating with the administration of justice; and
- sparing the victims from a contested hearing. [113]

105 *R v GAR* [2014] QCA 30 [29] (Muir JA, Fraser and Morrison JJA agreeing).
106 *Tory* (n 95).
107 Ibid [38].
108 *VN* (n 80).
109 See, eg, *Newman* (n 69) [20]; *Flew* (n 98) [23], *R v Benjamin* (n 43) [58]–[59], [63].
110 *VN* (n 80) [32] (Bowskill CJ, Morrison and Dalton JJA).
111 [2004] QCA 286.
112 *R v SAG* [2004] QCA 286 [19] (Jerrard JA, Atkinson and Philippides JJ agreeing).
113 Ibid.

While these factors were outlined in the context of the previous offence of maintaining a sexual relationship with a child (now referred to as repeated sexual conduct with a child), some factors may also be applicable to other offences of sexual violence committed against children.

Rape in the context of domestic violence

The relationship between the person being sentenced and the victim, and its relevance to sentencing will always depend on the circumstances of the case.[114] In May 2016, the PSA was amended to reflect that if an offence was committed within a domestic violence context, this is an aggravating factor, unless there are exceptional circumstances.[115]

Since the 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.[116] For example, in *R v McConnell*,[117] the Court of Appeal 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. Furthermore, *Stephens*, *Beaver*, *Stallan* and *Robinson* were all decided before the commencement on 1 July 1997 of the amendment to the *Penalties and Sentences Act 1992* introducing the qualification to the general rule that a sentence of imprisonment should be imposed as a last resort, that it does not apply to an offence involving violence or physical harm. [118]

In *R v SDM,*[119] 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.[120]

Domestic and family violence as an aggravating circumstance: Sentencing remarks preliminary findings*

The Council's preliminary analysis of sentencing remarks supports the premise that, where required, the court have actively applied s 9(10A) when sentencing people for sexual assault and rape offences. Comments made include:

> That the offending occurred in a domestic relationship is an aggravating feature. (MCL5_R12)
>
> These domestic violence offences are a scourge on our society. Young women such as these complainants are entitled to feel safe. And when mistreated by people like you, severe penalties are called for. So much is recognised by the existence of the relevantly recent addition of subsection (10A) to section 9 of the Penalties and Sentences Act, which requires the Court to treat the fact that these offences, other than the chocking, are domestic violence offences as an aggravating factor. (MCM5_R1)
>
> It is a domestic violence offence, and you will be declared to have been convicted of a domestic violence offence. (HCMC_SA5)

Of the sentencing remarks reviewed to date, very few sexual assault cases (MSO) have been found to have the aggravating feature of being a domestic violence offence. While this analysis is incomplete and ongoing, the cases analysed suggest that cases sentenced for sexual assault (MSO) more often are those which have occurred within a work environment or are perpetrated by a stranger.

* These results should be interpreted with caution. The findings presented are from the partial coding of sentencing remarks that was completed at the time of the writing. They may be subject to change on completion of the coding and analysis of the full study sample: see Chapter 1.4.2.

114 See *R v Gesler* [2016] QCA 311 [31]; *R v McCauley* [2000] QCA 265, 5–6 (Thomas JA, Davies and McPherson JJA agreeing).

115 PSA (n 1) 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, eg, *R v Blockey* [2021] QCA 77 [11] (Sofronoff P and McMurdo JA and Boddice J); *R v Solomon* [2022] QCA 100.

116 See *R v O'Sullivan; Ex parte A-G (Qld): R v Lee; Ex parte A-G (Qld)* [2019] QCA 300; *R v Hutchinson* [2018] QCA 29; *McConnell* (n 2) [22] (Fraser JA, Sofronoff P and Philippides JA agreeing).

117 *McConnell* (n 2).

118 Ibid.

119 *SDM* (n 69).

120 Ibid [37].

Rape of a stranger in a public place

In 2000, in *R v Basic,*[121] ('*Basic*') a 31-year-old male grabbed a 19 year old woman while she was walking down the street on her way to work in the early morning and raped her. He was sentenced to eight years' imprisonment with an SVO for the offence of rape, with lesser terms of imprisonment imposed in relation to the remaining count of assault with intent to rape (2 years imprisonment), and a count of indecent assault with a circumstance of aggravation (3 years imprisonment).[122] The complainant was severely affected[123] and the Court of Appeal expressed the impact of the offence:

> The offence was committed upon a young woman alone in a public place. Although the complainant was not brutally bashed the offence was humiliating, degrading and a terrifying attack upon a young woman. It has had the expected effect of making her fearful of going out alone in public.[124]

On appeal, McMurdo P considered several cases said to be comparable[125] and concluded that 'these comparable sentences demonstrate that the sentence imposed in this case was within the appropriate range of seven to 10 years'.[126]

In 2006, in *R v Kahu,*[127] (*'Kahu'*) Keane JA (as his Honour then was) cited *Basic* with approval and observed that:

> sentences for the rape of a young woman alone in a public place where there has not been a brutal bashing of the victim, and where the offender had no like prior convictions. This review of the authorities demonstrated that the range is between seven and 10 years where the offender has pleaded guilty.[128]

In 2010, in *R v Dowden*,[129] Holmes JA (as her Honour then was) considered the cases that led to McMurdo P's conclusion in the 2000 decision of *Basic*. It was identified that those cases had substantial violence involved, and that sentences of between 9 and 11 years' imprisonment were given. Holmes JA (as her Honour then was) critically observed that:

> From the foregoing, it can be seen that the submission of the trial prosecutor, that the range of seven to 10 years identified in *Basic* was applicable to "rape of a stranger without violence", was wrong.[130]

The Court of Appeal noted the aggravating features of *Dowden* included the attack on the complainant by a stranger, in public and at night with the threatened use of a weapon.[131] On the other hand, the appellant was young, had no history of sexual offending and it was considered that there was no significant degree of violence as used in other cases.[132] In addition, the assault was not protracted and repeated[133] and there was no threat of harm to prevent the complaint to authorities.[134] On this basis, the sentence of nine years was reduced to eight years imprisonment with no parole eligibility date set.

In 2012, the range of 7 to 10 years was cited with approval in *R v Benjamin*.[135] In that case, the distinction between cases where a sentence range of about 7 to 10 years was appropriate and cases where a sentence range of about 10 to 14 years was appropriate:

> the material difference in the two ranges is the presence and extent of any physical violence inflicted upon the victim additional to the act of physical violation constituting the rape. That difference will be obvious in some cases, particularly where there are other aggravating features.
>
> However, there will inevitably be some overlap between the two ranges. There are two reasons for this of particular relevance in the present case. Firstly, there may be cases where there is a significant degree of additional violence but it is not as extreme as in the cases tending to attract sentences in the upper half of the 10 to 14 year range. Secondly, those cases may involve a plea of guilty, resulting in a lowering of the sentence that would otherwise be imposed after a trial. Head sentences in cases of that kind might well commence marginally above the intersection point of 10 years common to both ranges but after discounting to allow for a guilty plea might finish marginally below that point.[136]

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121 (2000) 115 A Crim R 456 ('*Basic*').
122 The offending was in relation to the digital penetration to the complainant's vagina. Note, this offending would now be characterised as a charge of rape.
123 *Basic* (n 121) 458 (McMurdo P, McPherson JA and Mackenzie J agreeing).
124 Ibid 459 (McMurdo P, McPherson JA and Mackenzie J agreeing).
125 These included *R v George* 226 of 1991, 13 June 1991, *R v Sorbey*, 243 of 1993, 27 April 1995, *R v Q* 248 of 1994 (6 October 1994) and *R v O'Brien*, 418 of 1997, 6 March 1998.
126 *Basic* (n 121) 460 (McMurdo P, McPherson JA and Mackenzie J agreeing).
127 [2006] QCA 413 ('*Kahu*').
128 Ibid [41] (Keane JA).
129 [2010] QCA 125 ('*Dowden*').
130 Ibid [29] (Holmes JA).
131 Ibid.
132 Ibid, referring to *R v SAN* [2205] QCA 114; *R v SAS* [2005] QCA 442 ('SAS'); and the cases considered in *Basic* (n 121).
133 *Dowden* (n 129130130) [35] (Holmes JA) referring to: *Basic* (n 121); *Kahu* (n 127); *SAS* (n 132).
134 Ibid.
135 *Benjamin* (n 43).
136 Ibid [76]—[77] (Henry J).

In 2014, in the case of *R v Williams; ex parte Attorney-General (Qld)*,[137] the Court of Appeal increased the non-parole period which was originally ordered after 3 years of an 8-year imprisonment sentence. The case involved the rape of a 20-year woman while she was out for her evening run. McMeekin J stated:

> Absent quite exceptional circumstances, in my opinion, offending conduct of the type here demands a sentence which requires the offender to serve longer than only three years imprisonment. The sentence imposed fails to suitably punish him, deter him and others, and denounce the conduct. Those exceptional circumstances are not present here.[138]

In 2016, the range of 10 to 14 years described in *Benjamin* was cited with approval in *R v Buchanan*.[139]

Rape of a stranger with burglary

Rape committed alongside burglary is often viewed as particularly serious.

In the 2008 case of *R v Richards*,[140] the applicant broke into the home of the complainant and her infant child. He had disguised himself with a stocking on his head and armed himself with a knife which he used to cut the telephone line. He raped the complainant after he threatened her with a knife. Richards was sentenced to 8 years imprisonment but had served one year imprisonment which could not be declared. Dutney J adopted the prosecutor's submissions that:

> where someone is raped by a stranger in a public place the range is 7 to 10 years. Where someone is raped by a stranger in their home you can expect another 2 years on top of that range, taking it to 9 to 11 years. And further, the Court of Appeal has held that where there are significant acts of violence then greater terms of imprisonment, up to 15 years, can be made in relation to offenders who have no previous conviction for violence for these sorts of offences.[141]

In *R v Utley*,[142] the applicant was sentenced to 10 years imprisonment with an automatic SVO declaration for the offence of rape (MSO) into context of a burglary. In considering the sentence imposed, the Court of Appeal stated:

> The applicant had entered a dwelling with the intention of raping the female complainant. He did so whilst armed with a broken bottle. He used that bottle to first cut the female complainant and then menace her into compliance with his sexual demands. The female complainant suffered actual injuries which required sutures. The rape involved anal penetration without the use of a condom. The female complainant feared catching a disease.
>
> A consideration of other relevant authorities supports the conclusion that the sentence of 10 years imprisonment imposed in the present case fell within a proper exercise of the discretion after giving due regard to the pleas of guilty. Indeed, the aggravating features would have supported the imposition of a higher period of imprisonment on the offence of rape than that imposed by the sentencing Judge in the exercise of his discretion.[143]

'Uninvited to bedroom'

The phrase 'uninvited to bedroom' is generally used to refer to instances the person who committed the offence and complainant are staying in the same accommodation, but in separate rooms and the person enters the complainant's room and commits a sexual offence.[144] In *R v Basacar*,[145] the circumstances of the applicant entering the complainant's room was an aggravating feature:

> I agree with her Honour that, as a general proposition, sentences for rapes of this type can be expected to fall within seven and nine years imprisonment. There are, of course, a number of factors, identified in the cases, which will bear on the sentence imposed: among others, whether threats or violence are used, whether the victim is harmed and whether there is a weapon involved.
>
> In the present case none of those factors existed, and the applicant might well have received a sentence of less than eight years. But there was the additional feature of his having illicitly entered the room in which the complainant was sleeping; and that, I think, makes it impossible to say that the learned sentencing judge's decision to impose a sentence of eight years imprisonment went beyond a proper exercise of sentencing discretion.[146]

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137 *Williams* (n 2).
138 Ibid [99] (McMeekin, Henry JJ agreeing. Holmes JA in dissent).
139 *Buchanan* (n 96).
140 [2008] QCA 211.
141 Ibid [29] (Dutney J).
142 [2017] QCA 94.
143 [25]—[26] (Boddice J, Fraser and Philippides JJA agreeing).
144 See *R v Q* [2003] QCA 421; *R v Raymond* [1994] QCA 441; *R v Press* [1997] QCA 7; *R v Miller* [2012] QCA 68.
145 [2006] QCA 352.
146 *R v Basacar* [2006] QCA 352 [2] (Holmes JA).

Multiple offenders

Rape committed by multiple offenders is treated as being 'significantly more serious (allowing for special cases) than rape by a single assailant',[147] and will warrant 'an adjustment in a comparison with sentences imposed on single assailants'.[148] As explained in *R v AAH & AAG*:[149]

> Whilst all rapes must be denounced and violent rapes more so, a pack of men raping a woman … lifts the offending to a level which must be condemned in the strongest terms. The punishment must reflect community outrage and the need for general deterrence.[150]

Party to a rape

In the case of *R v Wano; ex parte Attorney-General (Qld),*[151] the respondent and a co-offender broke into the complainant's house and the co-offender raped and sexual assaulted her while she was asleep. Wano made full admissions which led to the charges. The Court observed that while Wano did not actually carry out the rape offence, he was a 'willing and active accomplice in it'.[152] With respect to the appropriate penalty in those circumstances, Henry J observed:

> I would not regard the fact that [the co-accused] actually carried out the rape as inevitably warranting the imposition of a lesser penalty on [Wano], who was, by the time of the sex offending, a willing and active accomplice in it.[153]

As Wano was only 17 years at the time of the offence,[154] and had made significant admissions, the Court of Appeal imposed a head sentence of three and a half years imprisonment on the rape offence with a parole eligibility date after 12 months.

Serious sexual offender convicted after trial of multiple rapes

Where a person has a history of sexual violence and is being sentenced for multiple rapes, the 'range' of 15 to 20 years imprisonment applies as community protection is considered paramount.[155]

In *R v Turnbull*,[156] Applegarth J illustrated the complexity when sentencing these types of cases:

> In arriving at an appropriate sentence there are no tools by which a court can precisely calibrate the violent and degrading nature of multiple rapes that occur over a protracted period against one or two victims and compare that conduct with offences of the present kind over a longer period. There is no arithmetic in comparing a case where there are a large number of complainants over a prolonged period (for example *Colless* where there were 11 complainants over a period of 27 months) with the three episodes of attempted rape and rape that occurred against three complainants in this case in the first half of 2001. The offending conduct on each occasion must be considered along with all of the circumstances. Multiple rapes committed over the period of a day or two against one victim may call for greater punishment than rapes committed against separate complainants over a long period. A comparison between *R v Colless* and the horrific case of *R v Mahony & Shenfield* illustrates the point.
>
> Account must be taken of the number of episodes and the number of victims because a serial rapist without a prior criminal history is in some respects similar to a rapist who has previously been sentenced for rape and served that sentence. One difference is that in the latter case there is a strong case for a protective sentence because the previous sentence has not been effective to personally deter the offender.[157]

In *R v Grace*,[158] a case in which the applicant had been convicted of various offences, including 3 counts of rape of three different 15-year-old girls[159] who were 'troubled and vulnerable' and he had lured to his house via Facebook, an overall sentence of 17 years was reduced on appeal to 14 years. Boddice J wrote:

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147 *R v AAH & AAG* [2009] QCA 321 [38] (Chesterman JA).
148 Ibid.
149 Ibid.
150 Ibid [91] (White J).
151 [2018] QCA 117.
152 *R v Wano; Ex parte A-G (Qld)* [2018] QCA 117 [54] (Henry J).
153 Ibid.
154 Prior to 12 February 2018, a 'child' for the purposes of the YJA was a person who had not turned 17 years. This was changed by the *Youth Justice and Other Legislation (Inclusion of 17-year-old Persons) Amendment Act 2016* (Qld) and a 'child' is 'an individual who is under 18': *Acts Interpretation Act 1954* (Qld) sch 1.
155 *Robinson* (n 74) [27] (Keane JA, Holmes JA agreeing at [33] and Jones J agreeing at [34]); *R v Edwards* [2004] QCA 20; *R v Turnbull* [2013] QCA 374 [34] (Applegarth J, Gotterson JA agreeing at [1] and Morrison JA agreeing at [2]) ('*Turnbull*').
156 *Turnbull* (n 155).
157 Ibid [48]–[49] (Applegarth J, Gotterson and Morrison JJA agreeing).
158 [2022] QCA 10.
159 Ibid [125] (Boddice J, McMurdo JA and Daubney J agreeing), where it was noted that 'Whilst the sentencing Judge accepted he may have thought they were 16 and even one was 17, it made "little difference".

> A consideration of comparable authorities support a conclusion that sentences in excess of 15 years' imprisonment fall within a sound exercise of the sentencing discretion where the offender who raped multiple complainants has used stupefying drugs and reoffending whilst on bail, where the conduct engaged in involved violence in public over an extended period or when the offender has prior sexual offending and masqueraded as a police officer.[160]
>
> In the present case, whilst the appellant provided two of the complainants with alcohol to excess and the offending was predatory and calculated, it did not involve violence in public places, was not carried out over a greatly extended period of time and did not have the aggravating features of re-offending whilst on bail.[161]

Breach of trust

The betrayal of trust by a parent, family member or guardian, is considered to be a serious aggravating factor in cases involving children, and especially young children.[162] In *R v GAE; Ex parte Attorney-General (Qld),*[163] Holmes JA (as her Honour then was, with whom Fraser JA and Douglas J agreed) said:

> [o]ne has to look at the overall criminality, not just rape by itself, or indecent treatment, or making or distributing exploitation material. The head sentence must reflect the most serious breach of trust by a grandfather of his grandchildren.[164]

In *R v BBP,*[165] the appellant was convicted after trial of raping and indecently dealing with his 10-year-old niece. Chesterman JA (with whom McMurdo P and Keane JA agreed) stated:

> The offence was an appalling betrayal of responsible adulthood which should have protected and nurtured the child. The complainant was entitled to expect affection and protection from the appellant. Instead the appellant took her from her own room and denied her, by threats, the protection her father would have provided. His conduct was dreadful and deserves severe punishment.
>
> ...
>
> In KU the range of five to eight years was said to be appropriate where there was a plea of guilty and no breach of trust. In the applicant's case there was no plea; there was breach of trust. The range for offending of this kind will therefore extend beyond eight years.

In the recent case of *R v WBM*,[166] the Court of Appeal endorsed the remarks in *R v BBP,*[167] and also noted the 'the fact that the betrayal of trust was by a father, rather than an uncle or a step-father whose relationship with the child's family is severed, is no small thing.'[168]

It will also be considered a breach of trust where the person who committed the offence holds a position of trust such as a taxi driver,[169] teacher,[170] and priest.[171]

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160 Ibid [132] (Boddice J, McMurdo JA and Daubney J agreeing) (footnotes omitted), referring to *R v Meizer* [2001] QCA 231; *R v Markary* [2018] QCA 257; and *Colless* (n 87).
161 Ibid [133] (Boddice J, McMurdo JA and Daubney J agreeing)
162 *R v GAE; Ex parte A-G (Qld)* [2008] QCA 128 ('*GAE*'); *BBP* (n 71).
163 *GAE* (n 162).
164 Ibid [19] (Holmes JA).
165 *BBP* (n 71).
166 *WBM* (n 71).
167 *BBP* (n 71).
168 *WBM* (n 71) [49]. See also *CCT* (n 67) [255].
169 *Cutts* (n 79) [22] (McMurdo P).
170 *R v Kay* [1996] QCA 192; *Quick* (n 17); *R v Schneider; ex parte Attorney-General (Qld)* [2008] QCA 25; *Dick v The Queen* (1994) 75 A Crim R 303; *R v Wright* [1996] QCA 104; *R v D'Arcy* [2001] QCA 325 [2] ('*D'Arcy*').
171 See, eg, *Ryan v The Queen* (2001) 206 CLR 267 ('*Ryan*').

Breach of trust: Sentencing remarks preliminary findings*

The Council's preliminary sentencing remark analysis showed that in cases where a child is the victim of rape, breach of trust was a key aggravating feature, particularly where the person was a parent or held parental responsibilities:

> It was instilled in her that, as a father figure in her life, she was and should have been able to trust you and confide in you, and by your conduct, which might be described as both selfish and gratuitous, you betrayed that most basic of trust that every child should be able to enjoy with a parental figure. Therefore, the gross breach of trust is a relevant and aggravating feature in your offending. (RL5_R4)

> The complainant, your stepdaughter, the girl that you offended against, was only a vulnerable…girl. You had been in a relationship with her mother for some years…. So you occupied a very special position of trust. You had a responsibility and an obligation to care for her, to provide her with safety and protection and not use her for your own perverse sexual gratification. (RL5_R8)

Violations of trust by a family member was also a factor where the victim survivor was an adult:

> The offending itself involved a breach of trust. It was particularly so because there was a 20 year age difference between yourself and the complainant. And she…held you up as an uncle, someone in whom she had respect, and ought to have had the confidence to know that – or to think that she would not be improperly treated by you in the manner which you were…(RL5_R6)

A breach of trust was also applied where the victim survivor was an adult, in a sexual assault by an employer:

> You were in effect their employer, and in that capacity they were entitled to feel safe in your company, and your offending therefore involves a breach of the trust they were entitled to have in you…. You destroyed the trust that they had in you. (HCRC_SA5)

* These results should be interpreted with caution. The findings presented are from the partial coding of sentencing remarks that was completed at the time of the writing. They may be subject to change on completion of the coding and analysis of the full study sample: see Chapter 1.4.2

7.3.3 Sexual assault offences

Many aggravating factors which apply to rape, discussed above will also apply to the offence of sexual assault.

Sexual assault with burglary

In *R v Gesler*,[172] the applicant was convicted after trial of burglary by break, sexual assault and supplying a dangerous drug to a minor. He was sentenced to 4 years' imprisonment (MSO), with parole eligibility fixed at the halfway point. Gesler was 48 years old and knew the 17-year-old complainant. Gesler broke into her house and sexually assaulted her while she was asleep. The complainant woke and screamed at him to get out of her bed and her house. He repeatedly apologised. The applicant's counsel argued that more significant sentences are imposed when they are committed by a stranger to the complainant, to which Henry J stated:

> No such trend is obvious from the cases to which this court was referred. That is unsurprising. Elevating such a singular consideration to such a determinative level would be to overlook the variability of relevant considerations on sentence, even as between generally similar cases. Such considerations include the physical or emotional harm done to the victim, whether acquainted with the offender or not. It was submitted offending of the present kind when committed upon a stranger, warrants greater weight being placed on community protection and deterrence than where the victim is known to the offender, because a broader proportion of the community need to be protected from the former type of offender than the latter. Such a submission might carry some force in respect of a serial offender. However, it is misconceived as a means of distinguishing Billy and Forrester from the present case given that each involved one sexual assault burglary victim. Further, bearing in mind this applicant broke in and assaulted a sleeping victim the fact that he knew her hardly seems a logical basis to assume he poses any less a degree of danger to the community and deterrence is any less important than would be the case if he had not known her.[173]

172 *Gesler* (n 114).
173 Ibid [31].

Sexual assault of a stranger in public

In *R v Kane, Ex parte Attorney-General (Qld)*[174] the Court of Appeal considered the serious features where a person sexually assaults a victim in public to be:

- Targeting a woman in a public place;
- Removing her to a secluded area;
- The acts of sexual assault;
- Overcoming her resistance and protests; and
- Not desisting until a passer-by approached.[175]

On appeal, the Court of Appeal found that sentence of 18 months' imprisonment suspended after 282 days (almost 9 months) failed to reflect the seriousness of the offence. The Court increased the sentence to 3 years imprisonment, but as Kane had been in the community for over 7 months under the suspended sentence, the Court did not interfere with partially suspended part of the sentence, after 282 days. The Court held that the structure of the suspended sentence will ensure:

> if Mr Kane were not successful with his rehabilitation and were to commit another offence punishable by imprisonment during the operational period of the partially suspended sentence, the balance of the sentence that he may be ordered to serve could be up to three years (less the presentence custody of 282 days)...[176]

In *R v Sologinkin*,[177] the 39-year-old applicant was convicted of one count of sexual assault after trial, and sentenced to 4 months' imprisonment, wholly suspended with a 12-month operational period. The complainant was a female croupier at a casino. Sologinkin assaulted her by touching her on her genital area over her pants as he walked past her. The offending was described as 'a crude and opportunistic sexual offence by a man of mature years against a vulnerable woman in her workplace.'

Sexual assault in public

In *R v Lothian*,[178] the appellant was convicted after a trial of one count of sexual assault and one count of assault occasioning bodily harm. The complainant and Lothian had previously been in a relationship. Lothian and the complainant were at the same nightclub when he approached her twice and sexually assaulted her. When she left the nightclub he followed her and pushed her onto a taxi, resulting in bodily harm. He was sentenced to concurrent periods of 12 months' imprisonment. With respect to the sexual assault offence, the term of imprisonment was suspended after four months, with an operational period of 12 months. On the assault occasioning bodily harm offence, a parole release date was set after four months. Morrison JA observed:

> In my view the proper characterisation of the offending conduct in this case means that it was almost inevitable that a custodial sentence would be applied, given that it was after a trial and not on a plea of guilty. The sexual assault was brazen as it was carried out in a public place, and even with the prior history of a relationship for a period of time, it seems likely that it was done in a way meant to demean or humiliate the complainant.[179]

Sexual assault and a short term of imprisonment

In *R v Rogan*,[180] the applicant sexually assaulted the complainant after a drinking together at a party. The offending behaviour involved unwanted touching, exposing her breast and unwanted kissing. 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). President Sofronoff, with whom the other members of the Court agreed, observed that:

> In my respectful opinion, previous cases such as *R v Owen*[181] and *R v Demmery*[182] 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. In my respectful opinion, the question is what identifiable benefit is gained by the community by the imposition of such a sentence. If personal deterrence and rehabilitation as factors are put to one side, as they must be on the evidence in the present case, there remain, relevantly, the factors listed in s 9(3) of the *Penalties and Sentences Act 1992* (Qld) insofar as they address general deterrence and denunciation. General deterrence is largely met by the head sentence, as has been the sentencing practice in Queensland. When considerations of

174 [2022] QCA 242.
175 *R v Kane, Ex parte A-G (Qld)* [2022] QCA 242 [27] (Mullins P, Dalton JA, Flanagan JA).
176 Ibid [30].
177 [2020] QCA 271.
178 [2018] QCA 207.
179 *R v Lothian* [2018] QCA 207 [99] (Morrison JA, Sofronoff P and Philippides JA agreeing).
180 [2021] QCA 269.
181 [2008] QCA 171 [11].
182 [2005] QCA 462 [21], [26].

> denunciation arise, as they have here having regard to his Honour's remarks about the seriousness of the offending conduct, there also arises for consideration, as a counterweight, the degree of remorse evidenced by the offender for the reasons given in *R v O'Sullivan and Lee; Ex parte Attorney-General* (Qld).
>
> In this case, there was evidence of real remorse, acknowledgement of wrongdoing and insight, as well as the timely plea of guilty … There was, in my view, no factor left which justified the serious step of actually imprisoning the applicant.
>
> In my view, in the circumstances of this case, there was no benefit to the community to be served by the applicant's having to serve a further period of actual incarceration …[183]

Sexual assault in domestic violence context

In *R v SDF*,[184] the applicant pleaded guilty to one count of sexual assault (domestic violence offence). The applicant was the 63-year-old grandfather of the 18-year-old complainant. The offending occurred in the context of the applicant looking after the complainant and occurred while the complainant was sleeping. She woke to him sexually assaulting her. He was sentenced to 12 months' imprisonment, to be suspended after four months for an operational period of 12 months. He had no previous criminal history, a good work history and suffered from depression. The primary judge considered it to be a serious breach of trust. On appeal the Court of Appeal found that the sentence was unreasonably severe in light of the offending being 'unpremeditated, and momentary offence committed by this 63-year-old man with no prior convictions who was found to be remorseful. He had a good work history. Denunciation of the applicant's serious offence and deterrence of others justify a term of imprisonment but not one as long as 12 months for this particular offending.'[185] The Court reduced the sentence to one of 8 months imprisonment, to be suspended after two months and four days (the time served at appeal) for an operational period of 12 months.

7.3.4 Mitigating factors

As discussed in section 6.7, statute and case law provide for mitigating considerations to be taken into account in sentencing. Not all factors relevant to sentencing are given the same weight and will depend on the individual circumstances of the case and the gravity of the offending.[186]

The seriousness of the offence is a crucial matter - in some cases, matters in mitigation may never outweigh the seriousness of the offence and the maximum penalty will be imposed.[187] There are exceptional cases where the circumstances are unusual and mitigating factors can have significant weight despite serious offending, resulting in a lenient sentence.[188]

This section will briefly discuss the case law on:

- Plea of guilty, remorse;[189] and assistance to law enforcement, such as full admissions;[190]
- lack of criminal history or no relevant/recent convictions;[191]
- good character;[192]

183 Ibid [18]–[20] (Sofronoff P). See also *Andersen v Commissioner of Police* [2020] QDC 23.
184 [2018] QCA 316.
185 Ibid [26].
186 *R v Shales* [2005] QCA 192, 9 (de Jersey CJ, McPherson and Keane JJA agreeing).
187 *R v Mahony & Shenfield* [2012] QCA 366 [37] (Gotterson JA, Muir JA and Applegarth J agreeing) ('*Mahony & Shenfield*').
188 See *R v Sprott; Ex parte Attorney-General (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.
189 PSA (n 1) ss 9(2)(g), 9(6)(i); *Smith* (n 90) 30 [49] (Morrison JA, Holmes CJ and McMurdo JA agreeing).
190 PSA (n 1) s 9(2)(i); *Smith* (n 90) 30 [49] (Morrison JA, Holmes CJ and McMurdo JA agreeing). PSA (n 1) 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).
191 *Smith* (n 90) 30 [49] (Morrison JA, Holmes CJ and McMurdo JA agreeing); *Wallace* (n 89), 6 [19] (Bowskill CJ and Bond JA agreeing).
192 PSA (n 1) ss 9(2)(f), 9(3)(h), 9(6)(h). See, eg, *Ryan* (n 171). 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: s 9(6A).

- the sentenced person's history of victimisation,[193] impact of childhood trauma and disadvantage;[194]
- rehabilitation efforts after offence or willingness to engage in rehabilitation;[195]

significant health conditions,[196] including cognitive impairment and/or mental illness.[197]

Plea of guilty, remorse and cooperation

In section 6.7.3, the Council discussed the plea of guilty as a relevant sentencing factor. The objective and subjective value of the plea was explained in *R v Pike*:[198]

> A guilty plea has a "utilitarian value". It has an objective factor, as well as subjective considerations, the latter including whether the plea was attended by remorse, a willingness to facilitate the course of justice and an acknowledgment of responsibility, by the offender.[199]

A plea of guilty made late may not call for as much of a discount as an early plea.[200] Also a plea of guilty may not always result in a reduced sentence, particularly in cases where the offending conduct is extremely serious.[201]

Where the confession discloses offences not known by the authorities, this is worth significant leniency. As explained in *AB v The Queen*,[202]

> An offender who confesses to crime is generally to be treated more leniently than the offender who does not. And an offender who brings to the notice of the authorities criminal conduct that was not previously known, and confesses to that conduct, is generally to be treated more leniently than the offender who pleads guilty to offences that were known. Leniency is extended to both offenders for various reasons. By confessing, an offender may exhibit remorse or contrition. An offender who pleads guilty saves the community the cost of a trial. In some kinds of case, particularly offences involving young persons, the offender's plea of guilty avoids the serious harm that may be done by requiring the victim to describe yet again, and thus relive, their part in the conduct that is to be punished. And the offender who confesses to what was an unknown crime may properly be said to merit special leniency. That confession may well be seen as not motivated by fear of discovery or acceptance of the likelihood of proof of guilt; such a confession will often be seen as exhibiting remorse and contrition.[203]

This was reiterated in *Ryan v The Queen*,[204] by Kirby J, that there is a public interest in the law to encourage person to plead guilty, which extends to the victim:

> [93] ...A confession by an offender allows a victim a public vindication. In the particular matter of serial criminal offences against children and young persons, a confession by the offender may also facilitate the provision, where appropriate, of community assistance to the victim or the payment of compensation and an extension of greater family understanding and support. ...
>
> [94] Unless persons such as the appellant are encouraged to bring unreported cases to notice, the likelihood is that, in the great majority of instances, such crimes will not be reported. They will therefore go unpunished. Accordingly, both from the point of view of society and of the victims of crime, there are strong reasons of policy why the law should encourage offenders to make full confessions. It should certainly not discourage them.

193 PSA (n 1) s 9(10B) was introduced in the *Domestic and Family Violence Protection (Combatting Coercive Control) and Other Legislation Amendment Act 2023,* which commenced 23 February 2023 and requires a court to take into account '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.'

194 *R v KU; ex parte Attorney-General (Qld) (No 2)* [2011] 1 Qd R 439 476–7 [133], [140], 480 [149 (de Jersey CJ, McMurdo P and Keane JA agreeing); *Wallace* (n 89) [19] (Bowskill CJ and Bond JA agreeing); *MBY* (n 43) 13–17 [60]–[76] (Morrison JA, Muir JA and Daubney J agreeing) citing *Bugmy v The Queen* [2013] HCA 37 and *Munda v Western Australia* [2013] HCA 38.

195 *D'Arcy* (n 170) [167].

196 'An offender's ill-health is a mitigating factor in sentencing when imprisonment will impose a greater burden on the offender than on others or where there is a serious risk that imprisonment will impose a greater burden on the offender than others or where there is a serious risk that imprisonment will have a gravely adverse effect on his health': *D'Arcy* (n 170) citing *R v Pope* [32] QCA 318; CA No 271 of 1996, 30 August 1996.

197 PSA (n 1) s 9(2)(f); *Veen No 2* (n 5) 476–7; *R v WBK* (2020) 4 QR 110, 129 [54] (Lyons SJA and Boddice J agreeing).

198 [2021] QCA 285 (Bradley J, Fraser and McMurdo JJA agreeing). See also *R v Ungvari* [2010] QCA 134 [30] (White JA). *R v Dib* [2003] NSWCCA 117 [4] (Hodgson JA).

199 *R v Pike* [2021] QCA 285 [26]–[27] (Bradley J, Fraser and McMurdo JJA agreeing) citing *Siganto v The Queen* (1998) 194 CLR 656, 663–4 [22] (Gleeson CJ, Gummow, Hayne and Callinan JJ).

200 *Cameron v The Queen* (2002) 209 CLR 339, 359 [65](4) (Kirby J); *R v Holder* [1983] 3 NSWLR 245; *R v Bulger* [1990] 2 Qd R 559; and cf *R v Dodge* (1988) 34 A Crim R 325,331; *R v Heferen* (1999) 106 A Crim R 89, 92 [12]; *R v Thomson* (2000) 49 NSWLR 383, 414–415 [132].

201 PSA (n 1) s 13: wording 'may'. See *Mahony & Shenfield* (n 187) [37] (Gotterson JA, Muir JA and Applegarth J agreeing).

202 (1999) 198 CLR 111 [113] (Hayne J).

203 Ibid [113] (Hayne J).

204 (2001) 206 CLR 267.

> Encouraging a full confession may also be an important first step in securing help for, and counselling of, the offender. This is, likewise, one of the objectives of criminal punishment and thus of judicial sentencing.[205]

In *R v Ruiz; Ex parte Attorney-General (Qld)*,[206] the Court of Appeal discussed how remorse may be considered in light of sentencing considerations of risk of reoffending and community protection:

> Importantly, the respondent was remorseful. An offender's remorse may be evidence from which one can infer a reduced risk of reoffending, and therefore remorse can reduce the importance of community protection as a factor in sentencing. It may also signify less of a need for denunciation than when an offender shows no regret for his or her offending. See *R v O'Sullivan; Ex parte Attorney-General (Qld)*; *R v Lee; Ex parte Attorney-General (Qld)* [2019] QCA 300, at paragraphs 127 to 130[207]

> An offender who is not remorseful lacks any understanding about what he or she did that was wrong and, as a result, presents a real risk of doing the same things again. It is that risk from which the community should be protected. Judge Sheridan found that the respondent was genuinely remorseful. In the circumstances of this case, that was evidence that the respondent did not present a serious risk of reoffending, or at least presented less of a risk of reoffending than would otherwise have been the case.[208]

Plea of guilty and remorse: Sentencing remarks preliminary findings*

Preliminary analyses of the sentencing remarks found that the 'guilty plea' was the most often referenced factor of mitigation. The value of the plea of guilty was explained in different ways such as evidence of cooperation, accountability, reduced risk of reoffending, and sparing the victim to give evidence:

> "…you have pleaded guilty to one count of sexual assault. I take into account the plea of guilty and reduce the penalty I would otherwise have imposed by reason of the plea. It shows cooperation with the administration of justice and has saved the cost of a trial." (HCMNC_SA3)

> "I do, however, regard your plea of guilty to be of significant utility. There was a very strong case, but, notwithstanding that, you have accepted responsibility at a very early stage. In my view, that hopefully can provide the Court with some comfort that you will not offend in a similar way…. I simply intend to order your release on a suspended sentence at the customary one third mark to acknowledge your plea of guilty on a strong case." (RL5_R8)

> "…I will order that you be considered eligible for parole after you have served four years of that term, to take into account in particular your pleas of guilty, which have saved this very traumatised young woman from having to give evidence." (MCM5_R5)

> "In any event, by your plea of guilty you have spared the complainant from having to give evidence and you have admitted your wrongdoing. For that reason I am satisfied that allowance must be made for your plea of guilty in determining the sentence which is just in all the circumstances here." (RM5_R10)

Frequently guilty pleas were directly equated with remorse:

> "I've taken your timely plea into account in determining the sentence to be imposed upon you today. I also accept your plea of guilty as an indication of remorse." (MCL5_R12)

> "I must have regard to your plea of guilty…. I am satisfied that your plea of guilty is also attended by remorse, which is borne out in the letter that you provided to the complainant, which was given to her very recently. I am satisfied that you are genuinely remorseful for the pain and suffering that you caused the complainant all those years ago. You have obviously had a long time in custody to reflect on the way you behaved, not just with this complainant but others." (MCL5_R8)

Where a person has pleaded not guilty, this is relevant to whether the person has demonstrated remorse:

> "Mr XXXX, you were entitled to plead not guilty to the charges and defendant yourself without, thereby, attracting the risk of the imposition of a penalty more serious than would otherwise have been imposed. Having said this, of course, you cannot claim in mitigation that you have demonstrated any remorse." (MCM5_R3)

> "I have regard to those factors in section 9(3) of the Penalties and Sentences Act. One of those factors relevantly is your lack of remorse. You are not to be penalised for exercising your right to a trial, but your statements following upon your conviction on the 8th of September 2022 and your attitude to the offences in so far as it can be discerned from the report of Ms XXXX confirmed your lack of remorse." (MCM5_M17)

* These results should be interpreted with caution. The findings presented are from the partial coding of sentencing remarks that was completed at the time of the writing. They may be subject to change on completion of the coding and analysis of the full study sample: see Chapter 1.4.2.

205 *Ryan* (n 171) [93]–[94].
206 *Ruiz* (n 2).
207 Ibid (Sofronoff P, McMurdo and Mullins JJA agreeing).
208 Ibid [21]–[22] (Sofronoff P, McMurdo and Mullins JJA agreeing).

Lack of criminal history or no relevant/recent convictions

Youth and a lack of criminal history can often support a sentence at the lower end of the range.[209] As stated in *R v Wallace*:[210]

> Given his young age, and lack of prior criminal history, these things provide some optimism for his prospects of rehabilitation (including by requiring his attendance at appropriate treatment programs); and certainly favour a sentence which factors this into account ...[211]

A court must take into account a person's criminal history, and a lack of criminal history may mitigate the sentence, as explained in *R v Smith*:[212]

> The very serious nature of the offending conduct has been set out above. It calls for a sentence that reflects the need to deter others who might be inclined to violate a woman sleeping in her own bed. The applicant's young age, immediate and genuine remorse, cooperation with the authorities (in the form of his early plea and admissions that enabled a more extensive set of offences to be pressed),[213] and his willingness to take steps towards treatment, all serve to moderate his sentence, both as to the head sentence and the time he should serve in custody.[214]

Good character

A court is required to consider the character of the person being sentenced.[215] When considering a person's character, a court may take into account any previous convictions (and their nature), any contributions to the community, any history of domestic violence and any other relevant matter.[216] However, 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'.[217]

The High Court of Australia has recognised the relevance of a person's character in sentencing, which can refer the inherent moral qualities of a person[218] which may suggest a person's criminal actions were 'out of character' (if there are no previous or similar convictions) and be relevant to whether a person is likely to reoffend.[219] In criminal law, a distinction between 'character' and 'reputation' of the person is not always made.[220] 'Reputation' may refer to how members of the public view a person,[221] for example, as evidenced by character references given to the sentencing court.

The High Court has warned against using a one-dimensional view of a person and a consideration should be consider in reference to the standard of proof required:

> That task was not to be performed by assigning a single label to the appellant's character or his antecedents as either "good" or "bad". Rather, the question for the primary judge was, what was known about the appellant's character and antecedents? Was what was known of those matters to be taken into account in a way that favoured the appellant, or in a way that did not? Importantly, did the case fall between these extremes? Was the state of the material before the primary judge such that the appellant's character and antecedents worked neither in his favour nor against him?[222]

Whether a person is 'otherwise good character' will vary according to the person and the High Court has acknowledged 'it is impossible to state a universal rule.'[223] Hayne J has observed that a person's 'character' and reputation is not inevitably aggravating or mitigating, that is the task of the sentencing judge or magistrate to determine. [224] Hayne J went on to state:

> First, and most obviously, is the proposition from which any consideration of sentencing must begin, namely, that it is not a mathematical process. Metaphorical references to "credit", "discount", or the like, must therefore not be taken literally. Secondly, what has become known as the "two-stage" process of sentencing, in which a prima facie sentence is identified and then adjusted up or down according to the influence of particular factors,

209 *Wallace* (n 89) [17] (Bowskill CJ and Bond JA agreeing) citing *Newman* (n 69).
210 Ibid.
211 Ibid [19] (Bowskill CJ and Bond JA agreeing).
212 [2020] QCA 23.
213 See *AB v The Queen* (1999) 198 CLR 111; [1999] HCA 46.
214 *Smith* (n 90) [51] (Morrison JA, Holmes CJ and McMurdo JA).
215 PSA (n 1) ss 9(2)(f), 9(3)(h), with the exception in s 9(6A). See Appendix 5.
216 Ibid s 11(1). See Appendix 5.
217 PSA (n 1) s 9(6A). See Appendix 5. This section was introduced following recommendation 74 by the Royal Commission into Institutional Responses to Child Sexual Abuse.
218 *Melbourne v The Queen* (1999) 198 CLR 1 [33].
219 *Ryan* (n 171) [28]–[29] (McHugh J), [68] (Gummow J).
220 Ibid [33].
221 *Melbourne* (n 218) [33].
222 *Weininger v The Queen* (2003) 212 CLR 629 [27].
223 *Ryan* (n 171) [31] (McHugh J).
224 Ibid [145] (Hayne J).

> is a process which leads to error. What the sentencer must do is instinctively synthesise the various competing factors. Thirdly, and no less importantly, the one-dimensional view of "character" from which some common law rules of evidence proceeded can no longer be accepted without qualification. Nor can reputation any longer be thought to be a safe and certain guide to all aspects of a person's character. Fourthly, like so many factors to which a sentencer may refer, the fact that an offender has done good things in the past, or has been well reputed in the community, may, Janus-like, wear two aspects. The fact that this offender was, to outward appearances, a devoted minister to his adult parishioners is admirable. But the appellant was able to secure the trust of his victims and their parents because he was thought to be worthy of respect. Is his assiduous attention to his adult parishioners relevant to sentence? If it is, does it make his crimes less, or more, worthy of punishment? The appellant's contention is that it must be seen as mitigating. But that is not so, and it is not so because it fails to recognise that character and reputation may intersect with the purposes of criminal punishment in more than one way.[225]
>
> ...
>
> the task of the sentencer requires consideration of what the offender did, and why, as well as who the offender is, and requires consideration of the particular purposes for which sentence is to be imposed. There will be many competing strands of information which are available to be taken into account.[226]

The relevance of having no previous convictions is assessed as part of 'character' of the person being sentenced and will usually attract a more lenient sentence. As explained by the High Court:

> Of course, past criminal convictions may also be relevant to a court's assessment of the "character" of the person being sentenced. However, for a very long time, the absence (or existence) of prior convictions and the fact that a person is a first offender have been regarded as separate and special considerations in sentencing. The absence of prior convictions (quite apart from issues of character) will usually attract more lenient punishment. 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.
>
> 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.[227]

In *Ryan v The Queen*[228] McHugh J held that two logically distinct stages in the sentencing process needed to be distinguished regarding good character. First, the sentencing judge must determine whether the prisoner is of otherwise good character. In making this assessment, they must not consider the offences for which the prisoner is being sentenced. Second, if a prisoner is of otherwise good character, the sentencing judge must take that fact into account. However, the weight that must be given to the prisoner's otherwise good character will vary according to all of the circumstances of the case. The seriousness of the offence may reduce the weight of good character and a person may not be entitled to any significant leniency.[229] Evidence of good character may also be given less weight if the offending occurred over a lengthy period instead of being an isolated incident.[230]

Good character may be prior to the offending and/or the time between when the offences were committed and the convictions. The latter is more common in cases where there has been a substantial delay between a matter progressing to the courts, such as historical child sexual offences. There is some debate on how much weight good character has when there has been a delay. For example in *R v 'D'Arcy*,[231] Chesterman J held that the appellant's conduct in the 30 years between the offending and convictions to have become a successful politician were indicative of rehabilitation,[232] whereas McMurdo P and McPherson JA (in separate reasons) did not consider the appellant's 'unblemished record' or 'good character' carried much weight and in light of the gravity of the offending, determined this 'can only be a small mitigating factor'.[233] Similarly, in other cases, a person's work history and lack of relevant criminal history have been determined to carry limited weight in sentencing for sexual violence offences.[234] Recently in *R v FVN*[235] it was stated:

> 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, his Honour found: "Your treatment of those [complainant] children, to my mind, demonstrates your true character, which you have

225 *Ryan* (n 171) [144] (Hayne J)
226 Ibid [143]–[145] (footnotes omitted) (Hayne J).
227 *Weininger v The Queen* (2003) 212 CLR 629 [58]-[59] (Kirby J).
228 *Ryan* (n 171).
229 Ibid [35] (McHugh J).
230 Ibid [174] (Callinan J).
231 *D'Arcy* (n 170).
232 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).
233 *D'Arcy* (n 170) [144] (McMurdo P), [147] (McPherson JA).
234 *CCT* (n 67) [248] (Applegarth J, Sofronoff P and McMurdo JA agreeing).
235 [2021] QCA 88.

> 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."[236]

History of victimisation, disadvantage and trauma are always relevant to sentencing

In the case of *Bugmy v The Queen*,[237] the High Court of Australia confirmed that disadvantage and trauma in life is always relevant to sentencing.[238] Childhood exposure to violence may mitigate the person's moral culpability and the effects do not diminish over time.[239] Generally, where a sentenced person is also a victim survivor of abuse, this is as a relevant mitigating sentencing consideration,[240] but there will generally need to be some evidence as to the causal connection between the offence for which the person is being sentenced and their own victimisation.[241]

The circumstances of experiencing domestic violence, childhood deprivation, abuse and dysfunction must be balanced with the gravity of the offence. In *Munda v Western Australia*[242] the High Court stated:

> Mitigating factors must be given appropriate weight, but they must not be allowed 'to lead to the imposition of a penalty which is disproportionate to the gravity of the instant offence.'[243]

In respect of sexual violence offences, the balance between taking mitigating factors into account and the gravity of offence was explained in *R v MYB*.[244] In that case, the applicant was sentenced for offences of maintaining a sexual relationship with a child under 16 and for two counts of rape. The Court of Appeal concluded:

> In my opinion the sentencing judge clearly took into account, as a mitigating factor, the applicant's personal circumstances of childhood deprivation, abuse, the dysfunction nature of his upbringing, and its impact on his adult life. However, the sentencing judge was balancing that with the gravity of the offence and its impact upon the complainant. Thus he referred to the applicant's personal circumstances as possibly explaining his conduct "which the community at large – and I speak here of the community across all cultures – would and should find disgusting, disgraceful and revolting". The learned sentencing judge was correct to point out that the applicant's personal circumstances could not be an excuse for his conduct. In that he was plainly right, as those circumstances may act as a mitigating factor, the weight of which was to be balanced against other competing sentencing considerations. His Honour then immediately went on to characterise the nature of the offence as involving grievous suffering by the complainant, the applicant's conduct being focussed on his own sexual gratification, the offences being prolonged, repetitive and involving fear and control, and then most significantly that it resulted in the complainant conceiving a child, against her will. That his Honour was balancing the various considerations, and in particular the applicant's personal circumstances against the serious nature of the offence, is made clear by his Honour's express statement to that effect. [245]

As discussed in section 6.5.3, proposed changes to the PSA a court must take into account:[246]

- the sentenced person's 'history of being abused or victimised'; and
- '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.'

Rehabilitation

Rehabilitation is linked to the sentencing purpose of community protection:

> The protection of the community is also contributed to by the successful rehabilitation of offenders. This aspect of sentencing should never be lost sight of and it assumes particular importance in the case of first offenders and others who have not developed settled criminal habits. If a sentence has the effect of turning an offender towards a criminal way of life, the protection of the community is to that extent impaired. If the sentence induces or assists an offender to avoid offending in future, the protection of the community is to that extent enhanced.[247]

A person's prospects of rehabilitation is a relevant sentencing consideration[248] and the court must have primary regard to this when sentencing offences of physical violence, or of a sexual nature committed against a child under 16 years.[249] Where there is evidence of good prospects of rehabilitation, this is usually treated as a mitigating

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236 Ibid [46].
237 (2013) 249 CLR 571 ('*Bugmy*').
238 Ibid.
239 Ibid 572, 595 [44] (French CJ, Hayne, Crennan, Kiefel, Bell and Keane JJ).
240 *R v Reid* (1998) (Supreme Court of New South Wales Court of Criminal Appeal, 24 July 1998); cf *R v Van Gelder* (2003) 142 A Crim R, Perry J[33]; *JL v The Queen* [2014] NSWCCA 130.
241 *R v AWF* (2000) 2 VR 1. *Bugmy* (n 237). PSA (n 1) s 9(10B)
242 (2013) 249 CLR 600.
243 Ibid 619 [53].
244 [2014] QCA 17.
245 *MBY* (n 43) [75] (Morrison JA, Muir JA and Daubney J agreeing). Footnotes in original omitted.
246 See Criminal Law (Coercive Control and Affirmative Consent) and Other Legislation Amendment Bill 2023 (Qld) cl 83.
247 *Yardley v Betts* (1979) 1 A Crim R 329, 333 (King CJ and Mitchell J)
248 PSA (n 1) ss 9(1)(b), 9(3)(g), 9(6(g), 9(7)(g) and 9(2)(o) if required for bail. See Appendix 5.
249 Ibid ss 9(3)(g), 9(6(g). See Appendix 5.

factor.[250] Rehabilitation has been described as 'reformation of attitude or character so that the offender regards participation in criminal conduct unacceptable.'[251]

Rehabilitation is relevant to community protection, particularly if a person is young:

> …because the rehabilitation of young offenders is in the interests of the community, "youthful offenders with limited criminal histories and promising prospects of rehabilitation who have pleaded guilty and co-operated with the administration of justice, even where they have committed serious offences … should receive more leniency from courts than would otherwise be appropriate".[252]

However, youth and prospects of rehabilitation will not be the dominant factor where the offending is very serious and there is a need for general deterrence.[253]

In *R v D'Arcy*,[254] Chesterman J observed that:

> Judicial opinion is divided on whether rehabilitation can be proved in the absence of demonstrated remorse. Some judges seem to have held that it is only be an acceptance of guilt and expressions of contrition that rehabilitation is proved.[255]

While remorse is generally accepted as being evidence of rehabilitation, Chesterman J also indicated that rehabilitation may be demonstrated by evidence of 'a substantial period of law-abiding and socially useful living'.[256] When considering the rehabilitative progress a person has made, a court may take into account the time between the offending and the sentence.[257]

A person's prospects of rehabilitation may be reflected in the parole eligibility date:

> Protection of the community is relevant to both the fixing of the head sentence and the period before the offender becomes eligible for parole.[258] There may be cases in which the circumstances support a conclusion that a longer period in actual custody is warranted, for the protection of the community, even where the just and proportionate head sentence is less than 10 years. But implicit in that is a forecast of future behaviour; essentially a finding that the prospects of rehabilitation for the offender are so limited as to require them to serve all, or almost all, of the sentence imposed.[259]

Mental Health

A person's impaired intellectual or mental capacity is relevant to the court when assessing the person's culpability (blameworthiness). For example, a person with impaired intellectual or mental capacity may not exercise appropriate judgement, make rational choices, appreciate the conduct is wrong, or have the intent to commit the offence.[260]

As the Victorian Court of Appeal has explained in *R v Verdins*,[261] a mental health condition is relevant to sentencing because:

1. The condition may reduce the moral culpability of the offending conduct, as distinct from the offender's legal responsibility. Where that is so, the condition affects the punishment that is just in all the circumstances; and denunciation is less likely to be a relevant sentencing objective.
2. The condition may have a bearing on the kind of sentence that is imposed and the conditions in which it should be served.
3. Whether general deterrence should be moderated or eliminated as a sentencing consideration depends upon the nature and severity of the symptoms exhibited by the offender, and the effect of the condition on the mental capacity of the offender, whether at the time of the offending or at the date of sentence or both.
4. Whether specific deterrence should be moderated or eliminated as a sentencing consideration likewise depends upon the nature and severity of the symptoms of the condition as exhibited by the offender, and the effect of the condition on the mental capacity of the offender, whether at the time of the offending or at the date of the sentence or both.

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250 *R v Tran; Ex Parte Attorney-General (Qld)* [2018] QCA 22, [42]; *R v Free; Ex parte A-G (Qld)* (2020) 4 QR 80 [73] (Philippides JA, Bowskill J, Callaghan J).
251 *D'Arcy* (n 170) [164].
252 *Hopper* (n 6) [28] (Fraser JA) citing *Horne* (n 6) and *R v Mules* (n 6) [27].
253 Ibid [91]–[92] (Morrison JA).
254 *D'Arcy* (n 170).
255 Ibid [167].
256 Ibid [170].
257 *R v Law; Ex parte A-G (Qld)* [1996] 2 Qd R 63, 66 (Pincus JA, Davies JA, Demack J)
258 Citing *Veen No 2* (n 5) 473, 475.
259 Citing cf *Bugmy* (n 237) 537–8; cf also *Todd v The Queen* [2020] VSCA 46, [60] (a case in which there was evidence the offender's sexual sadism disorder which fuelled the fantasies that culminated in the murder of a young woman "presently cannot be cured").
260 See, eg, *R v Verdins & Ors* [2007] VSCA 102. Cited in *R v JAD* [2021] QCA 184 [3].
261 [2007] VSCA 102.

5. The existence of the condition at the date of sentencing (or its foreseeable recurrence) may mean that a given sentence will weigh more heavily on the offender than it would on a person in normal health.
6. Where there is a serious risk of imprisonment having a significant adverse effect on the offender's mental health, this will be a factor tending to mitigate punishment.[262]

A person's impaired intellectual or mental capacity is also relevant to whether the person is danger to the community.[263]

A complicating feature can be where a person has a mental health condition but also voluntarily consumed alcohol. While voluntary intoxication is not mitigating, the Court of Appeal held that this does not 'exclude mitigation for any other matter which, either wholly or in part, provided an excuse for the taking of alcohol and was causally connected to the offending'.[264]

7.4 Impacts of the Serious Violent Offences scheme

As discussed in section 6.10.1, the Serious Violent Offences (SVO) scheme was introduced in 1997,[265] and requires a person declared convicted of the relevant listed offences[266] to serve 80 per cent of their sentence (or 15 years, whichever is less) in prison before being eligible for release on parole.[267] The making of a declaration is mandatory for sentences of imprisonment of 10 years or more,[268] and discretionary for sentences of imprisonment greater than 5 years and less than 10 years.[269] The SVO scheme, as it applies to sentences of 10 years or more, is a form of mandatory sentencing.

The Council has previously been asked to consider operation and efficacy of the SVO scheme. One of the Council's findings were that the scheme may distort sentencing practices by restricting courts in recognising a person's plea of guilty and other relevant mitigating factors through the setting of an earlier parole eligibility date, thereby exerting downward pressure on head sentences to ensure the imposition of a sentence that is 'just in all the circumstances'. As the Court of Appeal has acknowledged, 'The fact that the applicant would be subject to a serious violent offender declaration and not eligible for parole until having served 80 per cent of his sentence needed to be taken into account in arriving at a head sentence that was just in all the circumstances.'[270] The Council was also concerned by the short time a person with a declaration may spend supervised on parole.[271] These findings are illustrated in the decisions of *R v SDM*,[272] and *R v Wallace*[273] discussed below.

In *R v SDM*,[274] the Court of Appeal considered a sentence of 7 years imprisonment with an SVO declaration for rape (Most Serious Offence ('MSO'), domestic violence offence). The Court found the SVO declaration made the sentence manifestly excessive[275] and increased the sentence to 7.5 years and made no parole eligibility date (meaning SDM would be eligible for release one day after half the sentence is served[276]). The Court considered that:

> Such a head sentence for count 3 (the rape with the fist) reflects a discount for the guilty plea and the other mitigating factors, but has regard to the overall criminality of the offending for all three counts and the aggravating factor that count 3 was a domestic violence offence. The effect of not setting the date for eligibility for parole before one-half of the sentence has been served ensures the sentence as a whole provides for adequate punishment for the offending and has the potential to foster the applicant's treatment and rehabilitation over a parole period of sufficient length to give some prospect of those aims being achieved.[277]

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262 *R v Verdins & Ors* [2007] VSCA 102 [32] (footnotes omitted) (Maxwell P, Buchanan and Vincent JJA) restating the principles in *R v Tsiaras* [1996] 1 VR 398. This approach has also been adopted in Queensland, see, eg, *R v JAD* [2021] QCA 184 [50]; *R v Goodger* [2009] QCA 377 [19]; *R v Collard* [2019] QCA 105 [3], [48].
263 *Veen No 2* (n 5) 476–7.
264 *R v Adam* (2022) 10 QR 343 [47] (Kelly J, Sofronoff P and Mullins JA agreeing).
265 *Penalties and Sentences (Serious Violent Offences) Amendment Act 1997* (Qld) ss 10, 17
266 Or of counselling, procuring, attempting or conspiring to commit such an offence. The relevant listed offences include rape and sexual assault: PSA (n 1) sch 1.
267 *Corrective Services Act 2006* (Qld) s 182 ('CSA').
268 PSA (n 1) s 161A
269 Ibid s 161B(3). An SVO declaration can also be made where a person is convicted on indictment and sentenced to a term of imprisonment in certain circumstances: s 161B(4).
270 *Turnbull* (n 154) [56] (Applegarth)
271 Queensland Sentencing Advisory Council, *The '80 per cent rule': The Serious Violent Offence Scheme in the Penalties and Sentences Act 1992 (Qld): Final Report* (2022). The Council concluded that it is in the interest of community safety for serious offenders who have spent a significant amount of time in prison to be supervised in the community upon their release and to serve a longer, rather than shorter period under supervision.
272 *SDM* (n 69).
273 *Wallace* (n 89).
274 *SDM* (n 69).
275 Ibid [47] (Mullins JA, Fraser JA and Henry J agreeing).
276 CSA (n 267) s 184(2).
277 *SDM* (n 69) [47] (Mullins JA, Fraser JA and Henry J agreeing).

The recent case of *R v Wallace*[278] illustrates the downward pressure caused by the SVO scheme. Wallace pleaded guilty and was sentenced to a total head sentence of 13.5 years imprisonment for violent sexual offending involving an assault occasioning bodily harm on one complainant and two counts of rape, one attempted rape and grievous bodily harm on another complainant. Wallace was 19 years old and had no criminal history. The Court of Appeal held the sentence was manifestly excessive when considering other cases, which would have supported a sentence of 11 years for the conduct on the second complainant (rape (MSO)). However, because those cases all pre-dated the introduction of the SVO scheme,[279] 'they had the benefit of being able to apply for parole at an earlier stage than 80 per cent.'[280] Because Wallace was required to serve 80 per cent and a cumulative sentence of 12 months for the assault on the first complainant, 'significant amelioration… was called for'.[281] Wallace was re-sentenced to 10 years imprisonment for the rape offence (MSO) on the second complainant.

Serious violent offence declarations: Sentencing remarks preliminary findings*

In the sample of sentencing remarks analysed to date, no declarations were made for a conviction of rape or sexual assault to be an SVO. However, for some rape sentences, there was a discussion of whether an SVO declaration should be made.

In some sentencing remarks, the seriousness of the offence and the opportunity to rehabilitate while on parole was an important consideration:

> "The prosecutor submits that I should consider a serious violent offender order – you have had that previously. With respect to his submissions, my view is that the previous two rapes for which you were sentenced very clearly did require a serious violent offender order. Despite that having been imposed in the past, in my view, there is nothing about the context of the current offending that would require a serious violent offender order.
>
> Although I may not completely agree with your barrister's submissions, I certainly agree that a substantial period of time on parole will be a very important part of your rehabilitation; that cannot be achieved with a serious violent offender order, and, as I say, I do not think there is anything about the circumstances – as despicable as rape is – of the current offence for which I am sentencing you that would persuade me, in an overall context, that a serious violent offender order is appropriate." (MCM5_R3)

Similarly, another judge was also concerned about rehabilitation being impacted if a declaration requiring a person to spend 80% of their sentence in custody before being eligible for release on parole:

> "And as was emphasised by Ms XXXX in this matter, any such order would mean that any period of supervision would be correspondingly significantly reduced…. Ultimately, I am not satisfied that it is a proper course to consider the ordering of a serious violent offence declaration and, accordingly, it does not necessarily give rise to any consideration with regard to the penalty to be imposed." (RM5_R3)

It is important to note that these decisions were not made in a silo but within the context of all the other factors, mitigating and aggravating, that were submitted to the court for consideration.

* These results should be interpreted with caution. The findings presented are from the partial coding of sentencing remarks that was completed at the time of the writing. They may be subject to change on completion of the coding and analysis of the full study sample: see Chapter 1.4.2.

7.5 Effect of the *Child Protection (Offender Reporting and Offender Prohibition Order) Act 2004* (Qld)

It can be a relevant sentencing consideration to take into account the effect of the *Child Protection (Offender Reporting and Offender Prohibition Order) Act 2004* (Qld) ('*CPOROPOA Act*').[282] An overview of how the CPOROPOA Act is used to manage people sentenced for a sexual offence is in Chapter 9.5.2.

In *R v Rodgers*,[283] the applicant was convicted of 'extremely low level offending'. McMurdo JA wrote:

278 *Wallace* (n 89).
279 Ibid (Bowskill CJ, Bond JA agreeing), citing *R v Soper* [1994] QCA 254 (11 years' imprisonment imposed on a 22 year old offender with a relevant prior conviction); *R v Adcock; Ex parte Attorney-General (Qld)* [1994] QCA 525 (11 years' imprisonment imposed on an older – but age not specified – offender with a substantial criminal history); *R v O'Brien* [1998] QCA 80 (11 years' imprisonment imposed on a 28 year old offender, with prior convictions for burglary and indecent assault).
280 *Wallace* (n 89) [21] (Bowskill CJ, Bond JA agreeing).
281 Ibid [22] (Bowskill CJ, Bond JA agreeing).
282 See, eg, *R v Bunton* [2019] QCA 214 [27]–[31] (Morrison JA, Sofronoff P and Fraser JA agreeing).
283 [2013] QCA 192 [40]–[42].

> Of course, the onerous nature of the Reporting Act's requirements does not call for courts to craft sentencing orders which are calculated to avoid its operation, if, in the individual case, that would serve some proper purpose. In the present case, however, there was no evident purpose to be served by subjecting the applicant to this regime.[284]

In *Ruiz*,[285] the respondent was convicted of one count of rape and 2 counts of indecent treatment of a child under 16 (under 12) and sentenced to a head sentence of 3 years imprisonment suspended after 12 months for an operational period of 3 years. On appeal, the Attorney-General argued Ruiz should be under correctional supervision either on a parole order or probation.[286] It was argued that supervision was a need to protect the community and to bolster the respondent's prospects of rehabilitation.[287] The Court of Appeal did not agree. With respect to the risk of Ruiz's risk of reoffending, the Court said:

> Of course, there is always a risk of reoffending in almost every case; however … the respondent will, in any case, have to comply with the regime imposed upon him as a result of his convictions by the *Child Protection (Offender Reporting and Offender Prohibition Order) Act 2004* (Qld), and this will reduce the risk that the respondent will commit another sexual offence. At least that is one of the express objects of the Act.
>
> The reporting and other obligations with which the respondent will have to comply are very onerous and are designed to assist in preventing reoffending by convicted sexual offenders. No submission was made to Judge Sheridan that, in the circumstances of this case and having regard to the respondent's personal character as discussed, something more severe was required. Nor was there any evidence led by the Crown that could have supported such a submission.[288]

284 Ibid [11] (McMurdo JA).
285 *Ruiz* (n 2).
286 Ibid [2] (Sofronoff P, McMurdo and Mullins JJA agreeing).
287 Ibid [14] (Sofronoff P, McMurdo and Mullins JJA agreeing).
288 Ibid [20]–[25] (Sofronoff P, McMurdo and Mullins JJA agreeing).

Chapter 8 Sentencing outcomes

8.1 Introduction

A key aspect of the Council's review is to examine current sentencing practices and advise as to whether these are appropriate and adequately reflect community views about the seriousness of these offences and relevant sentencing purposes.

In this chapter, we present sentencing outcomes for sexual assault and rape offences sentenced over an 18-year period from July 2005 to June 2023. Unless stated otherwise, the data focuses on people sentenced as adults for sexual assault or rape as the most serious offence (MSO). Sentencing outcomes for rape and sexual assault are presented separately noting the different conduct captured within these offences and different maximum penalties that apply.

The chapter also includes the Council's findings on sentencing outcomes for selected comparator offences between July 2020 to June 2023, to contrast with outcomes for sexual assault and rape offences.

8.1.1 Data sources and counting rules

Courts database

As noted in section 1.4, the Council used sentencing data from the Courts Database to obtain information about the offences a person was sentenced for and the penalty that was imposed. The Courts Database, which is maintained by the Queensland Government Statistician's Office ('QGSO'), contains information collected from an administrative information system used by court staff.

The courts data is presented in relation to the most serious offence ('MSO') for which an offender was sentenced on a particular day. The determination of which sentence is the 'most serious' was ascertained using predetermined data flags developed by QGSO. The *Technical Paper for Research Publications*, available on the Council's website, provides more information about the counting rules, methodology and terminology in relation to court data used in this paper.

Some data analysis in this chapter uses categories of offences referred to as Queensland Australian Standard Offence Classification ('QASOC') categories.[1]

Data analysis considerations

The data analysis presented in this chapter considers all sentencing outcomes for the period of July 2005 to June 2023, where the case involved rape [*Criminal Code Act 1899* (Qld) sch 1 s 349 ('*Criminal Code* (Qld)')] or sexual assault (*Criminal Code* (Qld) s 352) and the person was being sentenced under the *Penalties and Sentences Act 1992* (Qld) ('PSA').[2]

As discussed in section 3.4, significant amendments made in 2000 to the *Criminal Code* (Qld) impacted both offences. Those amendments included changes to the definition of both offences, and each offence moved within the *Criminal Code* (Qld) - rape moved from section 347 to section 349 and sexual assault moved from section 337 to section 352. Offences charged under the previous sections of 347 and 337 have been excluded from this analysis.

The data presented in this chapter differs slightly to that in the *Sentencing Spotlight on rape*. This is due to differences in the data inclusions:

1 The Queensland extension to the Australian Standard Offence Classification (ASOC) scheme. The ASOC scheme aims to provide 'a uniform national statistical framework for classifying offences used by criminal justice agencies in Australia' and was developed by the Australian Bureau of Statistics in consultation with criminal justice agencies: Queensland Government, Office of Economic and Statistical Research, *Australian Standard Offence Classification (Queensland Extension) (QASOC)* (2008) 1.

2 See section 1.2.3 for why children sentenced under the *Youth Justice Act 1992* (Qld) ('YJA') have been excluded.

- this analysis commonly 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 that some total calculations will differ between these reports.

Sentence outcomes that are amended following a successful appeal are not updated within the dataset. However, some appeal outcomes for rape are presented and some specific cases are discussed at section 8.2.10.

The information we present is descriptive only. Several factors that may impact sentencing are not accounted for in presenting this data. These factors include:

- the type of conduct involved and its relative seriousness as well as the context in which it occurred;
- whether the person was sentenced for a single offence, multiple counts of the same offence and/or multiple offences against the same or multiple victims;
- 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;[3]
- whether the offence was committed when the person was a child, in which case the court must take into account the sentence that might have been imposed had the person been sentenced as a child.[4]
- any impact as a result of responding to the COVID-19 pandemic.

8.2 Sentencing outcomes for rape

Over the 18-year data period, there were 2,234 cases involving an adult sentenced for at least one offence of rape. Of those cases, 1,818 involved a rape offence being sentenced as the MSO. All but one of these cases (excluded from further analysis in this chapter)[5] were sentenced in the higher courts and almost all were sentenced in the District Court (98.7%, n=1,795).

The following analysis explores the penalty outcomes for the 1,817 rape (MSO) offences sentenced in the higher courts between July 2005 to June 2023. For some analysis, the information was not available in the administrative data for the entire period, so a shorter time period was used. Additional analysis was also undertaken for offences sentenced in 2022–23, supplementing the administrative data with information obtained from the sentencing remarks for these cases, so as to identify details about the offence conduct, victim age and relationship between the offender and victim survivor.

3 See *Penalties and Sentences Act 1992* (Qld) ('PSA') s 159A. 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 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 bey reducing the head sentence that might otherwise have been imposed, and/or making a different type of sentencing order.

4 Prescribed by YJA (n 2) s 144.

5 A defendant may elect (choose) for an offence of rape to be dealt with (be sentenced) in the Magistrates Court if the person pleads guilty and the victim is 14 years of age or older: *Criminal Code Act 1899* (Qld) sch 1, s 552B(1)(a) ('*Criminal Code* (Qld)'). However, a Magistrate has an overriding discretion not to deal with the matter if the defendant may not be adequately punished under summary conviction: s 552D. The maximum sentence of imprisonment a Magistrate can give for rape is 3 years imprisonment: s 552H(1)(b). If a person is charged with rape and a serious organised crime circumstance of aggravation, it cannot be dealt with in the Magistrates Court: s 552D(2A).

8.2.1 Key data findings

RAPE

1 **Almost all people sentenced for rape had to serve time in prison as part of their sentence.**

Over the 18 years, 98.7% of all penalties imposed for rape were custodial and of those, 96.5% 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 has been decreasing as the proportion of partially suspended sentences has been increasing.

3 **Custodial sentence lengths have remained relatively stable over the 18 years.**

The median custodial sentence length for rape over time ranged each year from between 5.0 and 6.0 years (with the average ranging between 5.1 to 6.3 years).

4 **Penile rape has the highest median sentence for all types of rape conduct.**

In 2022–23, the median custodial penalty length for penile rape was 6.0 years compared to 3.0 years for digital/object rape and 3.0 years for oral rape.

5 **Sentences were longer when the victim survivor was a child.**

In 2022–23, custodial penalties for penile rape of a child were longer than when the victim survivor was an adult (median 7.5 years, compared to 5.5 years), and median custodial sentences for digital/object rape were also longer when the victim survivor was a child (3.0 years v 2.5 years).

6 **Cases involving child victim survivors were more likely to involve digital or oral rape than offences against adult victim survivors.**

In 2022–23, there were far more cases where the victim survivor was a child involving digital/object rape (46.3%) or oral rape (14.9%) as compared to where the victim survivor was an adult (25.5% and 3.9%).
In contrast, penile rape was far more common in cases where the victim was an adult (70.6%), than when the victim was a child (38.8%).

7 **Imprisonment was more common where the perpetrator was a stranger.**

When the perpetrator was known to the victim survivor, imprisonment was ordered in just over half of the cases (54.5%). It was rare that the perpetrator was a stranger, with only 12 cases sentenced in 2022–23, but in these cases three-quarters of cases had an imprisonment sentence imposed.

8 **Almost 1 in 20 people sentenced as an adult committed the offence when they were a child.**

The Council found over the 18-year data period, 4.6% of cases involved a person sentenced an adult who had committed the rape offence when they were a child. All were male and most were non-Indigenous (n=63/84).

9 **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, 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.

10 **People were often sentenced for more than one offence, and usually for another sexual offence.**

Four in five cases (79.8%) sentenced for rape (as the most serious offence sentenced), were also sentenced for other offences at the same time. Most of these cases involved the person being sentenced for another sexual offence (such as rape, indecent treatment of children under 16 years or sexual assault).

11 **Over one-third of rape cases occurred in a domestic and family violence context.**

Since July 2016, 35.5% of all rape offences were sentenced as a domestic violence offence. They were more likely to receive a sentence of imprisonment than a non-DV rape offence (70.9% v 63.2%); with the difference being statistically significant.

12 **Most people had parole eligibility fixed at or below 50% of their head sentence.**

Since July 2011, three-quarters of people who pleaded guilty (74.4%) had their parole eligibility set below 50%, 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% had parole eligibility set below 50% of the head sentence.

8.2.2 Custodial penalties

Of the 1,817 rape offences sentenced between July 2005 and June 2023, almost all received a custodial penalty (98.7% n=1,793), with this proportion remaining relatively stable over time. This section explores the Council's data findings for custodial penalties sentenced for rape over this period.

Type of custodial penalty

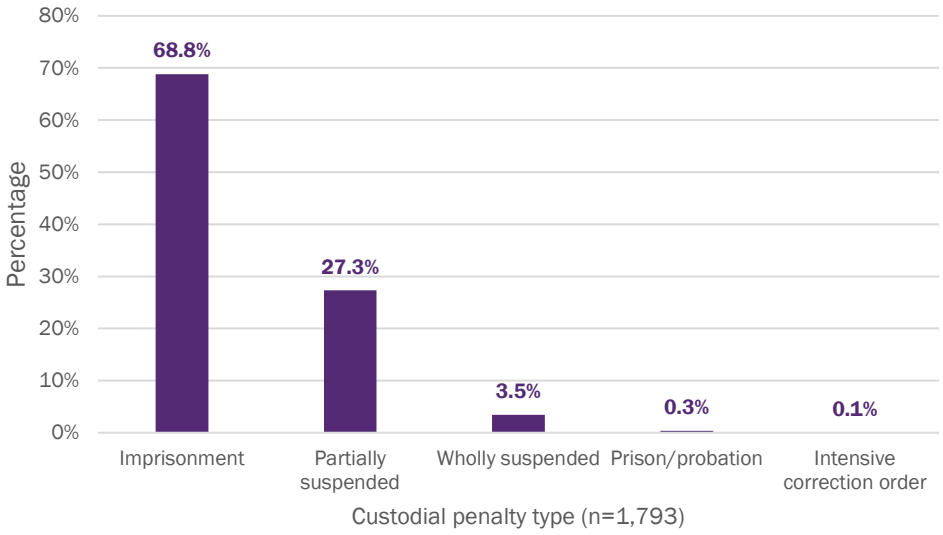
Figure 2 sets out the types of custodial penalties ordered over the 18-year data period. The most common penalty was a sentence of imprisonment (68.8%), followed by partially suspended sentences (27.3%). The high use of immediate imprisonment orders is unsurprising given the seriousness of this offence rape.

Wholly suspended sentences accounted for a small proportion (3.5%, n=62) of all custodial penalties. The Council briefly reviewed the sentencing remarks for 45 of those cases, to better understand the reasons a wholly suspended sentence was made. The key reasons were:

- the person committed the rape offence/s when they were a child (see section 8.2.4); and
- substantial time was spent in custody prior to sentence which was taken into account in deciding the sentence, but not formally declared as time served pursuant to section 159A(3B)(c) of the PSA.

Figure 2 shows that very few prison/probation or intensive correction orders ('ICO') were made during the data period.

Figure 2: Custodial penalty type for rape (MSO)



Data notes: MSO, adults, higher courts, 2005–06 to 2022–23
Source: Queensland Government Statistician's Office, Queensland Treasury - Courts Database, extracted September 2023.

Length of custodial penalties

Table 9 sets out the sentence lengths imposed for custodial penalties for rape. The median imprisonment sentence for rape was 6.5 years, with the average slightly higher at 6.6 years.[6] The longest term of imprisonment imposed on an MSO charge of rape was life imprisonment, and this was imposed in 7 cases.

When considering partially suspended sentences the median sentence length was 3.0 years (average 3.4 years), suspended after a median duration of 1.0 year (average 1.1 years). The median wholly suspended sentence was 2.5 years (average 2.6 years).

Table 9: Summary of custodial sentence lengths for rape (MSO), by penalty type

Custodial penalty type	N	Average (years)	Median (years)	Minimum (years)	Maximum (years)
Imprisonment (excludes prison-probation orders)	1,234	6.6	6.5	0.3	Life*
Partially suspended sentence					
Sentence length	490	3.4	3.0	1.0	5.0
Time before suspension	490	1.1	1.0	0.0	3.0
Wholly suspended sentence	62	2.6	2.5	0.5	5.0
Imprisonment with probation	6^	-	-	-	-
Intensive correction order	1^	-	-	-	-
All custodial penalties	**1,786**	**5.5**	**5.0**	**0.2**	**Life***

Data notes: Rape (MSO), adults, higher courts, 2005–06 to 2022–23.
Source: Queensland Government Statistician's Office, Queensland Treasury - Courts Database, extracted September 2023.
*7 life sentences were imposed for rape which have not been included in the mean and median calculations for imprisonment
^ Summary statistics for sample sizes less than 10 have not been presented.

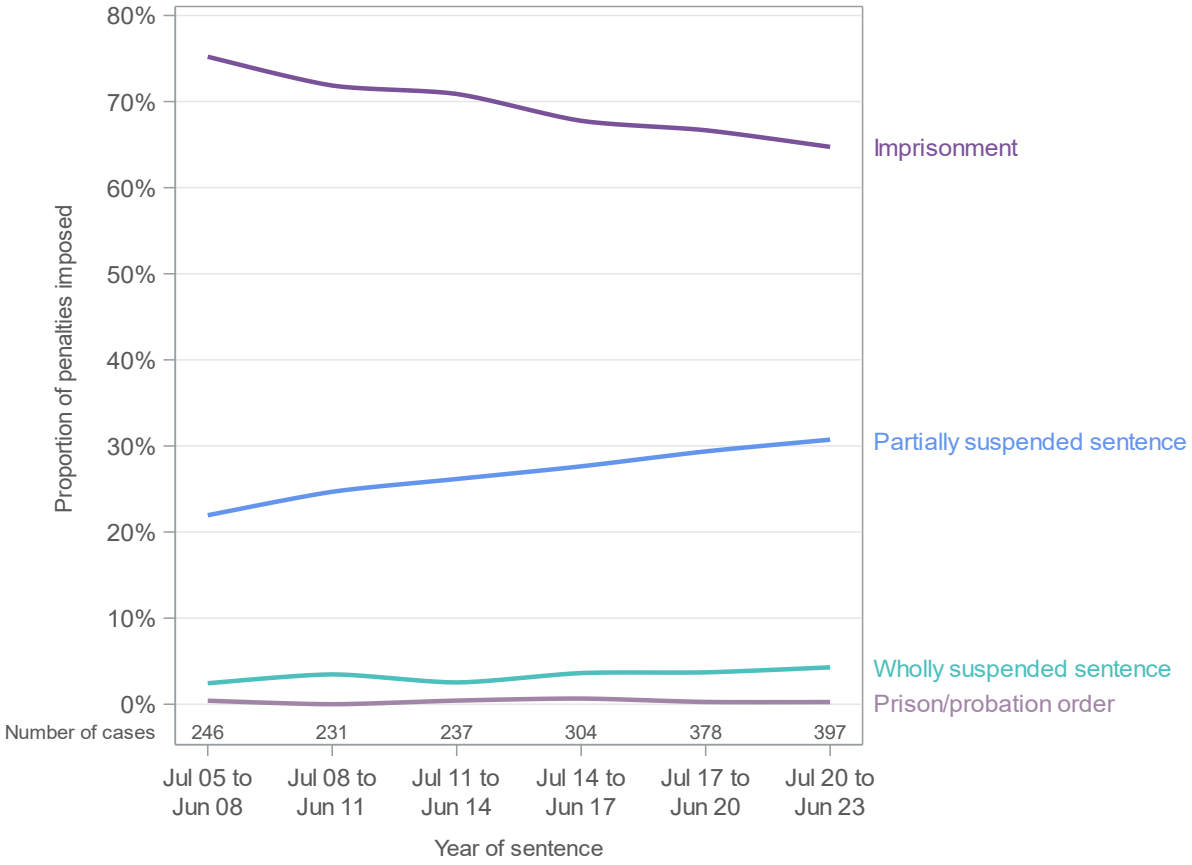
[6] This excludes combined prison-probation orders which are presented separately in Table 9.

Custodial penalties over time

The Council has been asked to assess whether sentencing practices are adequate for rape. To inform this assessment, the Council wanted to know whether there had been any change in the penalty outcomes, including custodial penalty lengths over the 18-year period.

Our analysis found that almost all rape cases received a custodial penalty (98.7%), and that while the proportion of custodial penalties was consistently high (at, or just below, 100%), the proportion of sentences of imprisonment decreased while those receiving partially suspended sentences increased over the data period, as shown in Figure 3 below. The use of wholly suspended sentences and combined prison/probation orders remained consistently low across the data period.

Figure 3: Custodial penalty type as a proportion of all penalties 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. See Table 27 in Appendix 4 for more detail.
Source: Queensland Government Statistician's Office, Queensland Treasury - Courts Database, extracted September 2023.

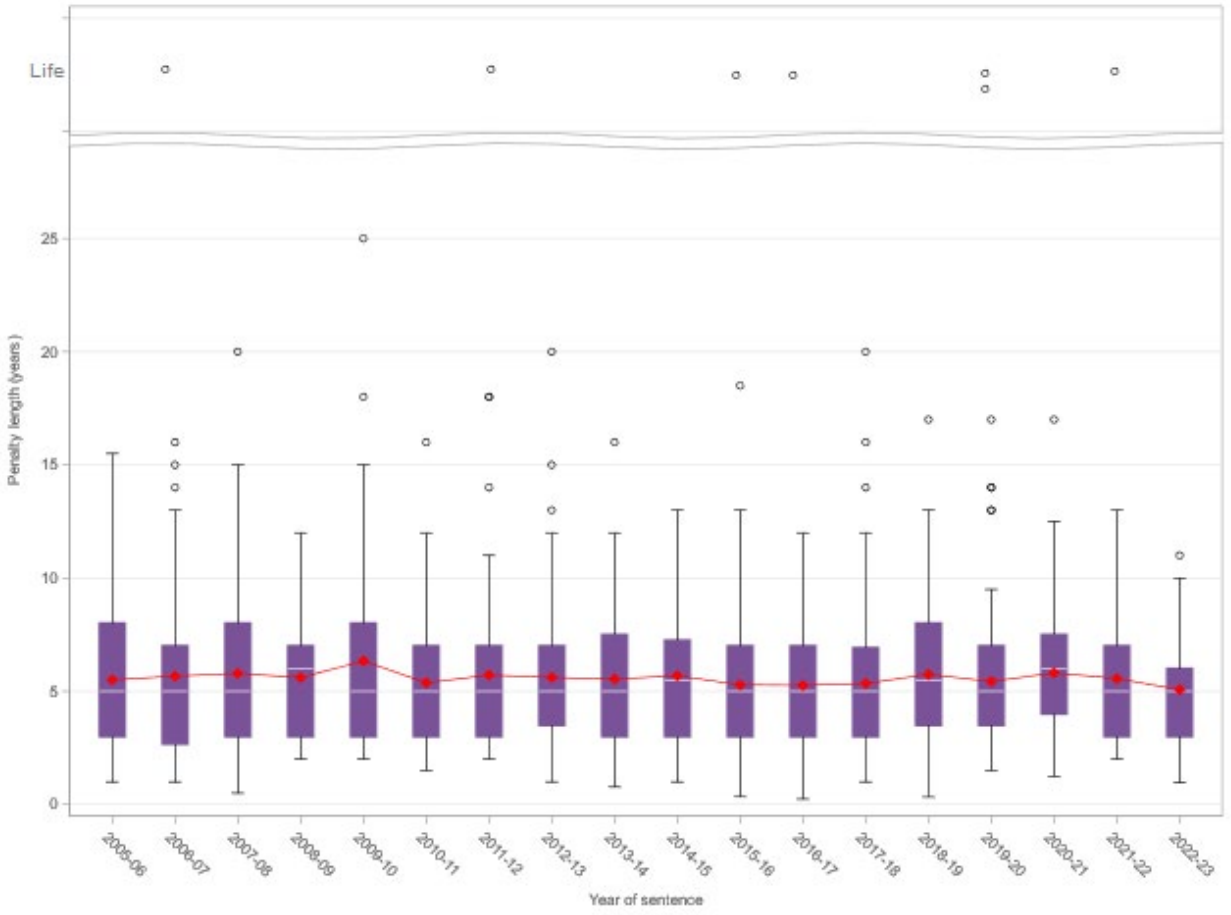
Focusing then on sentence duration, the boxplot shown in Figure 4 below shows the distribution of the length of all custodial penalties combined, imposed for rape (MSO) each year.

Our analysis suggests there has been little variation in the lengths of custodial penalties for rape over the 18-year data period. The median custodial sentence has ranged between 5.0 and 6.0 years, with the average ranging between 5.1 and 6.3 years, over this time.

A limitation of this analysis is that it does not take into account important factors that might show changes over time – for example, any differences in a given year in the type and seriousness of the offences sentenced, whether the victim was an adult or a child and any relationship between the victim and the person sentenced, including whether the offence was committed in the context of domestic and family violence.

The Council hopes to undertake further analysis of a sample of cases over the next stage of this review to address some of these limitations.

Figure 4: Summary of custodial penalty length for rape (MSO) by year of sentence



Data notes: Custodial penalty (MSO), adults, higher courts, 2005–06 to 2022–23. See Table 28 in Appendix 4 for more detail.
Source: Queensland Government Statistician's Office, Queensland Treasury - Courts Database, extracted September 2023.

Life sentences

Over the 18-year data period, 7 cases resulted in a sentence of life imprisonment being imposed. In 4 of these cases, the court's imposition of a life sentence was mandatory due to the operation of the repeat serious child sex offence scheme under section 161E of the PSA.[7]

Of the remaining 3 cases, 2 resulted in the sentence being reduced on appeal:

- The first involved a person convicted following a trial of one count of maintaining a sexual relationship with a child and 2 counts of rape of a girl aged between 5 and 7 years involving multiple instances of penile rape. He was a close family friend of the complainant's family. On appeal, the sentences of life imprisonment imposed on each count were set aside and a sentence of 18 years substituted.[8]
- The second involved over 30 offences, including multiple counts of rape, committed against a 13-year-old girl over a 15-hour period while she was held captive in the person's home. On appeal, this sentence was reduced to 18 years taking into account the applicant's intervention to prevent the child's death at the hands of his co-offender and his cooperation with police.[9]

The final case involved a person who had pleaded guilty to over 50 offences, including 18 counts of rape. The offences were committed against a 22-year-old woman he was in a relationship with over a period of 23 days during which the complainant was subjected to extreme physical and sexual violence.

The small number of life sentences for rape over the data period is consistent with statements made by the Court of Appeal that the imposition of life imprisonment for an offence other than murder, to which a mandatory life sentence applies, is exceptional.[10]

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7 See section 6.10.1 for a discussion of this scheme.
8 *R v Robinson* [2007] QCA 99 ('*Robinson*').
9 *R v Mahony & Shenfield* [2012] QCA 366 ('*Mahony & Shenfield*').
10 *Robinson* (n 8) [38] (Keane JA). See also *Mahony & Shenfield* (n 9) [39] (Gotterson JA, Muir and Applegarth JJA agreeing) affirming this earlier statement.

8.2.3 Non-custodial penalties

Of the 1,817 rape offences sentenced in the higher courts over the data period, only 24 (1.2%) resulted in a non-custodial penalty being imposed. Of those 24 cases, 21 involved an offence committed by a person who was a child at the time of the offence but sentenced as an adult.[11] The remaining 3 cases involved an adult offender.

The most common non-custodial penalty imposed was a probation order (n=17, 70.8%), with a median sentence of 2.0 years (average 2.4 years). Of these, all except one were an offence committed as a child (n=16).

Of the remaining 7 people receiving non-custodial penalties:

- 3 received a community service order (all for an offence committed as a child);
- 2 received a good behaviour order (all for an offence committed as a child); and
- 2 were convicted of the offence but not further punished.[12]

8.2.4 Penalties for specific cohorts

The following section focuses specifically on the sentencing outcomes for women, Aboriginal and Torres Strait Islander persons, and children sentenced as adults.

Women sentenced for rape

Over the 18-year data period, only 18 women were sentenced for rape, all of whom received a custodial penalty. As shown in Table 10Table 10, the most common penalty received was an imprisonment order (66.7%, n=12), with a median imprisonment sentence length received being 6.0 years (average 6.3 years), compared to 6.5 years for men (median 6.6 years). A further 22.2 per cent (n=4) received a partially suspended sentence, with the remaining 11.1 per cent (n=2) receiving a wholly suspended sentence. No combined prison and probation orders, ICOs or life imprisonment sentences were imposed on women for rape.

Aboriginal and Torres Strait Islander people sentenced for rape

In total, over the 18-year period, 424 cases sentenced involved an Aboriginal or Torres Strait Islander person. Of these, 5 resulted in a non-custodial penalty, whilst the remaining 419 resulted in a custodial penalty, with no difference in the likelihood of a custodial penalty for Aboriginal and Torres Strait Islander people compared to non-Indigenous people.

There were, however, statistical differences in the type of custodial penalty imposed on Aboriginal and Torres Strait Islander people compared to non-Indigenous people.[13] Aboriginal and Torres Strait Islander people were more likely to have received a sentence of imprisonment for rape – see Figure 5 Table 10. Four in 5 Aboriginal and Torres Strait Islander people received imprisonment (80.0%) compared to around 3 in 5 non-Indigenous people (65.0%) and this difference was statistically significant. Conversely, non-Indigenous people were significantly more likely to receive a partially suspended sentence for rape (31.1% vs 16.2%).

As discussed in Chapter 2, a complex range of historical, structural and social factors impact on the higher rates of recorded sexual violence offending by Aboriginal and Torres Strait Islander people which may also help to explain differences in sentencing outcomes.

Other factors that may be relevant 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). In addition, access to legal representation and advice (communicated in a way the person can understand), can 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).[14]

We will be exploring the reasons for these differences and inviting feedback during the next stage of our review.

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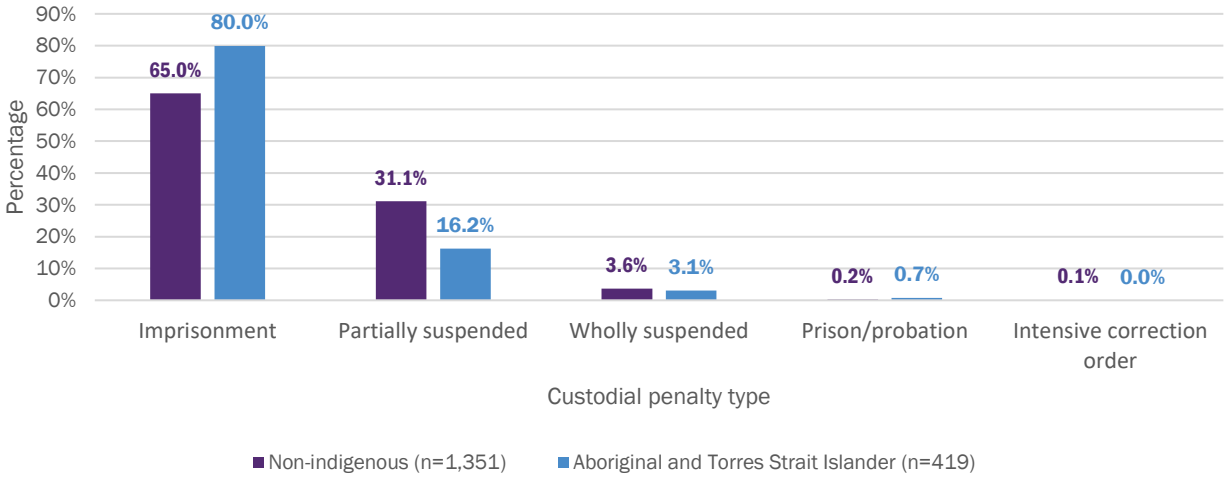
11 This meant when determining an appropriate sentence, the judge had to consider section 144 of the YJA (n 2). See section 6.7.5 for a further discussion.

12 The sentencing remarks were available for one of the people who received a sentence of convicted with no further punishment. This case involved a man sentenced for rape of his daughter while holidaying in Queensland. Before the sentence in Queensland, he was convicted in Victoria of several sexual offences against his daughter and sentenced to imprisonment for those offences. The Queensland offences were committed during the period of offending in Victoria. The Queensland sentence took into account the sentence he had already served.

13 Pearson's Chi-Square Test: $\chi 2(4) = 38.92$, $p < .0001$, V=0.15.

14 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) 31, 320, [10.3].

Figure 5: Custodial penalty type for rape (MSO) by Aboriginal and Torres Strait Islander status



Data notes: MSO, adults, higher courts, 2005–06 to 2022–23. 23 cases were excluded where Indigenous status was unknown.
Source: Queensland Government Statistician's Office, Queensland Treasury - Courts Database, extracted September 2023.

The average imprisonment length for rape (excluding prison/probation orders) was 6.6 years across all demographic subgroups, and there were no significant differences 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).

All cases involving combined prison and probation orders and ICOs were imposed on men, and they were imposed equally upon non-Indigenous and Aboriginal and Torres Strait Islander men. Combined prison and probation orders and ICOs were excluded from Table 10 due to small sample sizes.

Table 10: Summary of custodial sentence lengths for rape (MSO) by penalty type, gender and Aboriginal and Torres Strait Islander status

	N	Average	Median	Minimum	Maximum
Imprisonment (years)					
Female	12	6.3	6.0	2.5	10.0
Male	1,222	6.6	6.5	0.3	Life*
Aboriginal or Torres Strait Islander	335	6.7	6.5	1.0	20.0
Non-Indigenous	878	6.5	6.2	0.3	Life*
Partially suspended					
Sentence length (years)					
Female	4^	-	-	-	-
Male	486	3.4	3.0	1.0	5.0
Aboriginal or Torres Strait Islander	68	3.3	3.0	1.3	5.0
Non-Indigenous	420	3.4	3.0	1.0	5.0
Time to be served (months)					
Female	4^	-	-	-	-
Male	486	1.1	1.0	0.0	3.0
Aboriginal or Torres Strait Islander	68	1.0	1.0	0.1	3.0
Non-Indigenous	420	1.1	1.0	0.0	3.0
Wholly suspended (years)					
Female	2^	-	-	-	-
Male	60	2.5	2.3	0.5	5.0
Aboriginal or Torres Strait Islander	13	2.5	2.0	0.5	5.0
Non-Indigenous	49	2.6	2.5	0.8	5.0

Data notes: MSO, adults, all courts, 2005–06 to 2022–23. Intensive correction orders (n=1) and prison/probation orders (n=6) have not been presented. Cases where Aboriginal and Torres Strait Islander status was unknown have been excluded (n=23).
Source: Queensland Government Statistician's Office, Queensland Treasury - Courts Database, extracted September 2023.
*7 life sentences were imposed for rape which have not been included in the sentence length calculations for imprisonment.
^ summary statistics for sample sizes less than 10 have not been presented.

Children sentenced as an adult for rape offences

Discussed in section 6.7.5, if a person has committed an offence when they were a child (aged 10 years or over but under 18 years),[15] in some cases they can be sentenced as an adult. When sentencing a person in these circumstances, the court must take certain factors into account, such as the sentence that might have been imposed had they been sentenced as a child.[16]

Of the 1,817 adults sentenced in the higher courts for rape, 84 committed the offence when they were a child, and of those, all were male, and most (n=63) were non-Indigenous.

Most received a custodial penalty (75.0%, n=63). One-quarter (25.0%) received an imprisonment sentence (n=21), with a median duration of 3.0 years (average 3.7 years). This is around half of the length of imprisonment sentences for all adults sentenced for rape (median 6.5 years, average 6.6 years).

Roughly the same number of cases received a partially suspended sentence (n=23, 27.4%), with a median sentence length of 3.0 years (average 2.8 years). Almost 2 in 5 people received a wholly suspended sentence (n=16), with a median sentence length of 2.0 years (average 2.0 years). On average, sentence lengths for partially and wholly

15 Prior to February 2018 and the commencement of the *Youth Justice and Other Legislation (Inclusion of 17-year-olds Persons) Amendment Act 2016* (Qld), young offenders aged 17 were dealt with in the adult system.
16 YJA (n 2) s 144(2)(b).

suspended sentences were 6 months shorter for adults sentenced for rape as a child than for all adults sentenced for rape (see Table 9).

Two cases received a combined prison-probation order, and one case received an ICO. The remaining 21 cases received a non-custodial penalty, most receiving a probation order (n=16). Three received a community service order and two received a good behaviour order.

8.2.5 Sentences based on selected case characteristics

The Council is mindful that circumstances for rape can vary considerably. In preliminary submissions, stakeholders encouraged the Council to undertake qualitative analysis of sentencing remarks[17] to identify 3 key factors:

- the offence conduct involved (whether it was penile, digital/object or oral rape);
- the age of the victim (whether the victim survivor was an adult or child); and
- the relationship between the offender and the victim survivor (whether they were known to each other).

The Council requested sentencing remarks for all rape (MSO) cases sentenced between July 2022 and June 2023 where the person was sentenced as an adult to see whether these factors had an apparent impact on sentencing outcome.[18]

The 118 cases reviewed comprised 90.1 per cent of cases in the data period (n=131). This information was used to supplement the administrative data regarding sentencing outcomes, though is distinct from the sentencing remark analysis using a random sample of sentencing remarks over the last three years, as discussed in Chapter 1 and cited throughout this paper.

Counting rules and terminology

As some cases involved multiple types of conduct, if more than one type of conduct was present within the rape offending, the most serious conduct was counted for this analysis, with penile rape considered the most serious, followed by digital/object rape and then oral rape. Penile rape was conduct that involved the penetration of a vulva, vagina or anus by a penis.[19] Digital/object rape was conduct that involved the penetration of the victim survivor's vulva, vagina or anus by another person's fingers, hand or an object (such as a sex toy). Oral rape was conduct that involved the penetration of the victim survivor's mouth with a penis.

Where a case involved multiple counts of rape, only the MSO has been considered in this analysis.

A child was defined as a person aged under 18 years.

Victim-survivor demographics

In more than half of the rape cases, the victim survivor was a child aged under 18, (56.8%, n=67). Nearly all victim survivors were female (95.8%) with only 5 male victim survivors within this sample of cases.

The vast majority of victim survivors were raped by someone they know (87.3%), with 10.3 per cent offended against by a stranger (n=12).[20] When the victim survivor was a child, the proportion of cases where the victim survivor knew the offender was higher (92.5%), compared to when the victim survivor was an adult (80.4%).

Type of conduct

More than half of the cases reviewed involved penile rape (52.5%), while around one-third involved digital/object rape (37.3%), and 10.2 per cent involved oral rape.

Statistically significant differences were found in the proportion of the type of offending by whether the victim survivor was an adult or child.[21] Penile rape was more common in cases where the victim survivor was an adult (70.6%) than when the victim survivor was a child (38.8%). A significantly higher proportion of cases where the victim was a child involved digital/object rape, at 46.3 per cent, compared to 25.5 per cent of cases where the victim survivor was an adult. Significantly more child cases than adult cases involved oral rape (14.9% vs 3.9%).

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17 Preliminary submission 7 (Aboriginal and Torres Strait Islander Legal Service); Preliminary submission 10 (Queensland Indigenous Family Violence Legal Service); Preliminary submission 16 (Legal Aid Queensland); Preliminary submission 23 (Full Stop Australia).

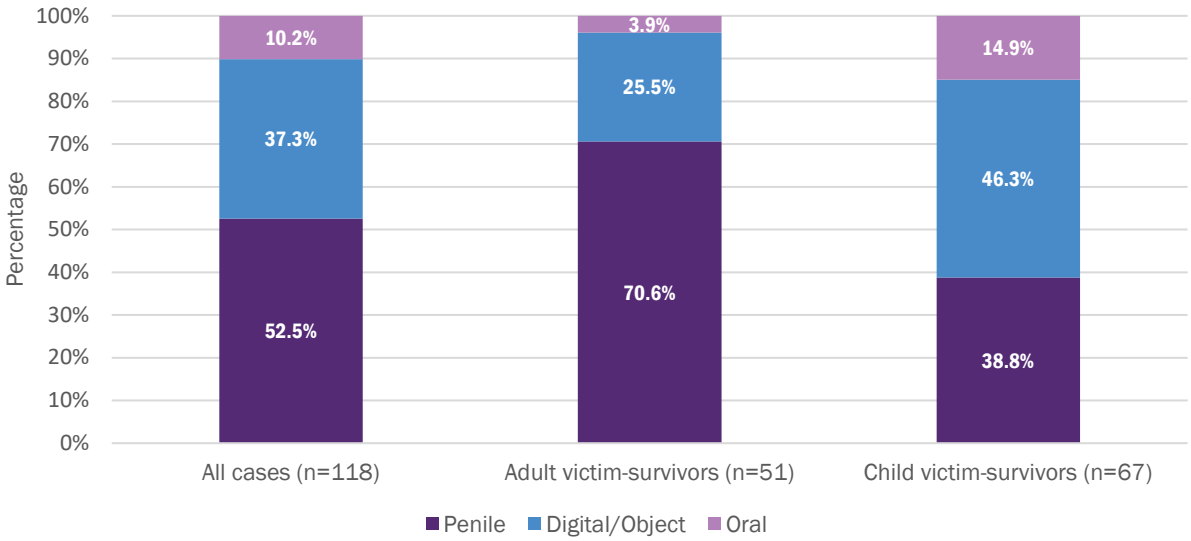
18 A similar analysis was also conducted using a smaller (n=73), random sample of sentencing remarks over the period of July 2020–June 2023, and similar findings were observed.

19 *Criminal Code* (Qld) (n 5) s 6.

20 For 3 cases the offender-perpetrator relationship was not stated in the sentencing remarks.

21 Pearson's Chi-Square Test$\chi 2(2) = 12.37$, $p < .01$, V=0.32.

Figure 6: Conduct involved in rape (MSO) by age of victim survivor, 2022–23



Data notes: 1) Rape (MSO), adults, higher courts, 2022–23 with available sentencing remarks.
2) A single case may involve multiple types of conduct. To avoid double-counting, the chart above reports each case according to the most serious conduct recorded for that matter.
Source: Queensland Government Statistician's Office, Queensland Treasury - Courts Database, extracted September 2023.
Victim type was manually coded from sentencing remarks received from Queensland Sentencing Information Service.

Sentencing outcome type by case characteristic

Of the 118 cases analysed, over half received an imprisonment sentence (56.8%) and one-third received a partially suspended sentence (35.6%). A wholly suspended sentence was imposed in 6 cases, prison/probation in 1 case, and a probation order in 2 cases. Due to the small number of non-custodial penalties in this data, detailed analysis has not been conducted.

Penalty outcome by victim-survivor type

A higher proportion of cases where the victim survivor was a child (aged under 18) received an imprisonment sentence (61.5%) and fewer cases received a suspended sentence (33.9%), compared to cases where the victim survivor was an adult (52.9% and 39.2% respectively), though this difference was not found to be statistically significant.

Across all custodial sentences, there was no apparent difference in custodial sentence length when the victim survivor was a child or an adult. The median custodial sentence when victim survivor was a child was 4.5 years (average 5.1 years) and 5.0 years (average 5.1 years) when the victim survivor was an adult, though these differences were not found to be statistically significant, nor were there significant differences in sentence length by custodial penalty type and victim survivor type.

The two cases that received probation involved offending against a child.[22]

22 In both cases the sentenced person committed the rape when he was a child.

Table 11: Custodial penalty type and summary statistics, by age of victim survivor, rape (MSO) 2022–23

Victim-survivor type	Penalty type	Proportion	Average (years)	Median (years)
Adult – aged 18 or over at (first) offence (n=51)	Imprisonment	52.9%	6.3	6.0
	Partially suspended sentence	39.2%	3.6	3.5
	Prison-probation	0.0%	-	-
	Wholly suspended sentence	7.8%	-	-
Child – aged under 18 at (first) offence (n=65)	Imprisonment	61.5%	6.2	6.0
	Partially suspended sentence	33.9%	3.6	3.6
	Prison-probation	1.5%	-	-
	Wholly suspended sentence	3.1%	-	-

Data notes: Custodial penalties for rape (MSO), adults, higher courts, 2022–23 with available sentencing remarks.
Source: Queensland Government Statistician's Office, Queensland Treasury - Courts Database, extracted September 2023.
Victim type was manually coded from sentencing remarks received from Queensland Sentencing Information Service.

Penalty outcome by relationship between victim survivor and perpetrator

While the sample size of cases where the perpetrator was not known to the victim survivor prior to the offence is small (n=12), they appear to have received a higher proportion of imprisonment sentences and a lower proportion of partially suspended sentences. Due to the small sample size, significance testing was not conducted.

The perpetrator was known to the victim survivor in both cases that received probation.

Table 12: Penalty type and summary statistics, by victim-perpetrator relationship, rape (MSO) 2022–23

Victim-offender relationship	Penalty type	Proportion	Average (years)	Median (years)
Victim was known to the perpetrator (n=103)	Imprisonment	54.5%	6.2	6.0
	Partially suspended sentence	39.6%	3.5	3.3
	Prison-probation	1.0%	-	-
	Wholly suspended sentence	5.0%	-	-
Victim was not known to the perpetrator (n=12)^	Imprisonment	75.0%	-	-
	Partially suspended sentence	16.7%	-	-
	Prison-probation	0.0%	-	-
	Wholly suspended sentence	8.3%	-	-

Data notes: Custodial penalty for rape (MSO), adults, higher courts, 2022–23 with available sentencing remarks. In 2.5% of cases (n=3) the relationship was not stated in the remarks.
Source: Queensland Government Statistician's Office, Queensland Treasury – Courts Database, extracted September 2023.
Victim-offender relationship was manually coded from sentencing remarks received from Queensland Sentencing Information Service.
^ This sample size is small. Caution should be used when interpreting these results.

Penalty outcome by conduct

Of the 116 rape cases analysed that received a custodial order,[23] just over half involved penile rape (51.7%), over a third involved digital/object rape (37.9%) and the remaining 10.3 per cent were oral rape.

The median custodial penalty length for penile rape was 6.0 years (average 6.6 years), compared to 3.0 years (average 3.4 years) for digital/object rape and 4 years (average 3.7 years) for oral rape.

Penile rape offences were significantly more likely to receive an imprisonment sentence than digital/object rape (71.7% vs 45.5%) as well as, on average, receiving a significantly longer sentence.[24] The median imprisonment sentence for penile rape was 7.0 years (average 7.4 years), compared to 3.3 years for digital rape (average 3.9 years).[25]

Digital/object rape offences were significantly more likely to receive a partially suspended sentence compared to penile rape (47.7% vs 25.0%).[26] However, when penile rape offences received a partially suspended sentence, the average sentence was significantly longer (4.5 years vs 2.9 years).[27]

Due to the small sample size for oral rape, this offence category was not included in any statistical tests.

Table 13: Custodial penalty type and summary statistics by offence type, rape (MSO) 2022–23

Offence conduct	Penalty type	Proportion	Average (years)	Median (years)
Penile rape (n=60)	Imprisonment	71.7%	7.4	7.0
	Partially suspended sentence	25.0%	4.5	5.0
	Wholly suspended sentence	3.3%	-	-
	All custodial sentences		6.6	6.0
Digital/object rape (n=44)	Imprisonment	45.5%	3.9	3.3
	Partially suspended sentence	47.7%	2.9	3.0
	Wholly suspended sentence	6.8%	-	-
	All custodial sentences		3.4	3.0
Oral rape (n=12)^	Imprisonment	33.3%	-	-
	Partially suspended sentence	50.0%	-	-
	Wholly suspended sentence	8.3%	-	-
	Partially suspended sentence	8.3%		
	All custodial sentences		3.7	3.0

Data notes: 1) Custodial penalty for rape (MSO), adults, higher courts, 2022–23 with available sentencing remarks.
2) A single case may involve multiple types of conduct. To avoid double-counting, the chart above reports each case according to the most serious conduct recorded for that matter.
Source: Queensland Government Statistician's Office, Queensland Treasury - Courts Database, extracted September 2023. Offence conduct was manually coded from sentencing remarks received from Queensland Sentencing Information Service.
^ This sample size is small. Caution should be used when interpreting these results.

Penalty outcome by victim-survivor relationship and conduct

Custodial penalties for penile rape of a child were significantly longer than when the victim survivor was an adult, with a median sentence length of 7.5 years (average 7.6 years) compared to 5.5 years (average 6.0 years).[28] Custodial sentences were also longer for digital/object rape when the victim survivor was a child (median 3.0 years, average 3.7 years), compared to when the victim survivor was an adult (median 2.5 years, average 2.8 years), however the difference was not statistically significant.

23 The 2 cases which received a non-custodial penalty involved penile rape.
24 Pearson's Chi-Square Test: $\chi 2(6) = 18.25$, $p < .01$, V=0.28.
25 Independent Groups T-Test: $t(61) = 7.78$, $p < 0.001$, two-tailed (equal variance assumed).
26 Pearson's Chi-Square Test: $\chi 2(6) = 18.25$, $p < .01$, V=0.28.
27 Independent Groups T-Test: $t(34) = 5.42$, $p < 0.001$, two-tailed (equal variance assumed).
28 Independent Groups T-Test: $t(58) = 3.57$, $p < 0.001$, two-tailed (equal variance assumed).

The longest sentence ordered in 2022–23 for each rape conduct was higher for cases involving a child victim survivor.

Table 14: Custodial penalty length, by victim survivor age and offence type, rape (MSO) 2022–23

Victim survivor age	Offence Conduct	Average (years)	Median (years)	Min (years)	Max (years)
Adult – aged 18 or over at (first) offence	Penile rape (n=36)	6.0	5.5	2.5	10.0
	Digital/object rape (n=13)	2.8	2.5	2.0	6.0
	Oral rape (n=2)	-	-		
Child – aged under 18 at (first) offence	Penile rape (n=24)	7.6	7.5	3.8	11.0
	Digital/object rape (n=31)	3.7	3.0	1.3	9.0
	Oral rape (n=10)^	3.7	4.0	1.0	5.0

Data notes: 1) Custodial penalty for rape (MSO), adults, higher courts, 2022–23 with available sentencing remarks.
2) A single case may involve multiple types of conduct. To avoid double-counting, the chart above reports each case according to the most serious conduct recorded for that matter.
^ This sample size is small. Caution should be used when interpreting these results.
Source: Queensland Government Statistician's Office, Queensland Treasury - Courts Database, extracted September 2023. Victim age and offence conduct was manually coded from sentencing remarks received from Queensland Sentencing Information Service.

8.2.6 Rape as a domestic violence offence

This section examines the volume of cases of rape (MSO) sentenced as domestic violence offences between July 2016 and June 2023.

From 1 December 2015, Queensland legislation was amended to enable a conviction for an offence committed in a domestic violence context to be recorded or entered in that person's criminal history as a domestic violence offence.[29] On 5 May 2016, PSA was amended to state that if an offence was committed in a domestic violence context, this is an aggravating factor, unless there are exceptional circumstances.[30]

Of the 901 rape (MSO) offences sentenced over the 11-year period, 35.5 per cent (n=320) were charged as domestic violence offences ('DV offence').

Table 15 shows the most common custodial sentence for both groups was a period of imprisonment, however a higher proportion of imprisonment sentences were imposed for DV rape offences. With 70.9 per cent compared to 63.2 per cent for non-DV rape offences, this difference was statistically significant.[31]. Imprisonment sentence lengths were slightly longer for DV rape, with a median length of 6.0 years (average 6.6 years)[32] than for non-DV rape (median 6.0 years, average 6.5 years) however this difference was not a statistically significant.[33]

29 Explanatory Notes, Criminal Law (Domestic Violence) Amendment Bill 2015 (Qld) 2. The amending Act was the *Criminal Law (Domestic Violence) Amendment Act 2015* (Qld).
30 *Penalties and Sentences Act 1992* (Qld) s 9(10A) ('PSA'). 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.
31 Pearson's Chi-Square Test: $\chi 2(2) = 18.62$, $p < .001$, V=0.11.
32 The average and median calculations exclude 2 life sentences (n=566)
33 The average and median calculations exclude 2 life sentences (n=314).

Table 15: Custodial penalty type and summary statistics for rape (MSO) by offence type

Offence type	Penalty type	Proportion	Average (years)	Median (years)
Rape (MSO) - not charged as a domestic violence offence (n=568)	Imprisonment	63.2%	6.5	6.0
	Partially suspended sentence	32.2%	3.3	3.0
	Wholly suspended sentence	5.6%	2.8	2.5
Rape (MSO) - charged as a domestic violence offence (n=316)	Imprisonment	70.9%	6.6	6.5
	Partially suspended sentence	26.3%	3.8	4.0
	Wholly suspended sentence^	1.6%	-	-

Data notes: 1) Custodial penalty types (MSO), adults, higher courts, 2016–17 to 2022–23.
2) Intensive correction orders (n=1) and prison/probation orders (n=3) have been included in the proportion calculations but have not been presented due to the small number of cases.
3) Life sentences have not been included (DV n=2. Non-DV n=2)
^ average and median sentence lengths for cases with a DV rape that received a wholly suspended sentence have not been presented due to the small sample size (n=5)
Source: Queensland Government Statistician's Office, Queensland Treasury - Courts Database, extracted September 2023.

When a DV rape offence received a partially suspended sentence, order lengths were significantly longer than for non-DV rape offences (median 4.0 years vs 3.0 years, average 3.8 years vs 3.3 years).[34] The time to serve before release on a partially suspended sentence was also slightly longer for DV rape offences as compared to non-DV rape offences (median 13 months vs 12 months, average 14 months vs 13 months).

There were 4 DV rape offences that received a non-custodial order – all of which were probation orders. Of the 13 non-DV rape offences that received a non-custodial penalty, the majority received a probation order (n=9). The remaining cases received a community service order (n=2), a good behaviour order (n=1) or a conviction with no further punishment (n=1).

8.2.7 Co-sentenced offences

A person can be sentenced for more than one offence in the same court event. This does not mean that the offences were committed as part of the same incident. The Council was keen to know how frequently other offences were sentenced together with rape, and when they are, whether there is any apparent difference in the sentence outcome for the rape offence by penalty type or duration. The Council also sought to understand the likelihood of a person receiving a suspended sentence for rape, and a supervised order for a co-sentenced offence.

Whilst there were 1,817 sentenced cases where rape was the MSO during the 18-year period, there were an additional 416 cases involving a charge of rape where rape was not the MSO. In these cases, at least one of the co-sentenced offences charged with rape received a penalty that was more serious than the penalty given for the rape offence. In these cases, the MSO was most commonly another serious sexual offence such as repeated sexual conduct with a child (82.9%),[35] or attempted rape (2.2%); or a serious violence offence such as torture (3.4%) or murder (2.9%).

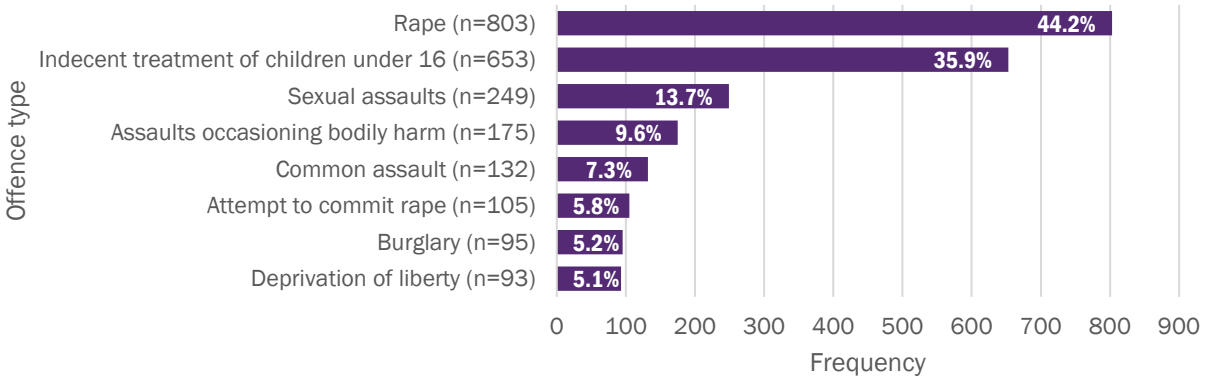
The remainder of this section discusses the 1,817 sentenced cases where rape was the MSO.

Nature of co-sentenced offences

Of the 1,817 sentenced rape cases (MSO), four in five (79.8%) were also sentenced for other offences in the same court event. Most commonly cases involved additional rape offences, with 44.2 per cent of cases having multiple rape offences sentenced. Over one-third of cases involved at least one indecent treatment of a child offence (35.9%).

34 Independent Groups T-Test: $t(258) = 3.33$, $p < 0.001$, two-tailed (equal variance not assumed).
35 During the 18-year data period this offence was named maintaining a sexual relationship with a child. It was renamed in 2023.

Figure 7: Most common 8 offences co-sentenced with rape (MSO)



Data notes: Non-MSO offences sentenced with a rape MSO, adults, higher courts, 2005–06 to 2022–23. A case may have more than one offence sentenced with a rape MSO, therefore totals may add to more than 100%.
Source: Queensland Government Statistician's Office, Queensland Treasury - Courts Database, extracted September 2023.

Co-sentenced offences and custodial penalties

As noted above (section 8.2.2), over the 18-year period, 1,793 cases sentenced for rape (MSO) received a custodial penalty - 1,240 received an imprisonment sentence (this includes 7 life sentences, and 6 prison/probation orders), 490 received a partially suspended sentence, 62 received a wholly suspended sentence, and one received an intensive correction order.

The Council found that co-sentenced offences were common across all custodial penalty types, though most frequent where an imprisonment sentence was ordered, and across all custodial order types, where there were co-sentenced offences, there was an apparent increase in sentence length.

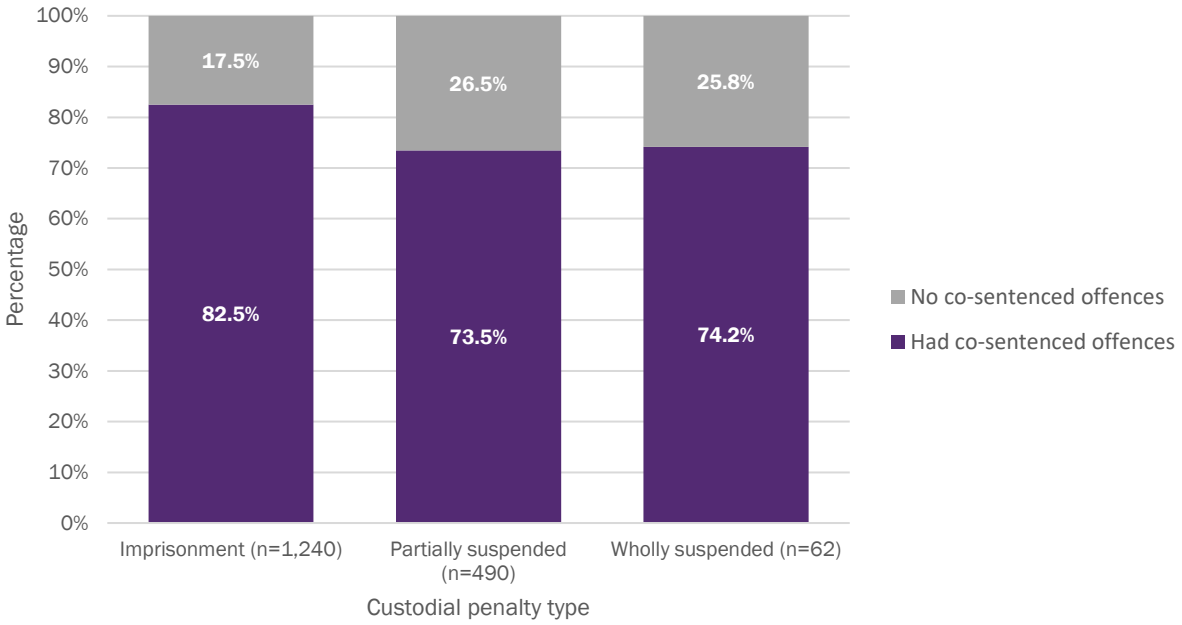
Of those that received an imprisonment sentence for the rape MSO, 82.5 per cent were also sentenced for other offences within the same court event - see Figure 8. The median imprisonment sentence where other offences were also sentenced was 7.0 years (average 6.8 years[36]), compared to 5.5 years (average 5.2 years) when no other offences were sentenced, with this difference being statistically significant.[37]

Of those that received a partially suspended sentence, nearly three-quarters (73.5%, n=360) were also sentenced for other offences within the same court event, though the median sentence duration was the same, at 3.0 years regardless of whether other offences were also sentenced (average 3.4 years with co-sentenced offences, compared to 3.2 years without).

A similar proportion of cases with a wholly suspended sentence for rape had co-sentenced offences (74.2%, n=46). The median wholly suspended sentence with co-sentenced offences was 2.5 years (average 2.7 years), which was slightly longer than when there were no co-sentenced offences, with a median sentence of 2.0 years (average 2.2 years).[38]

36 This calculation excludes life sentences (n=7).
37 Independent Groups T-Test: $t(433.64) = 9.36$, $p < 0.001$, two-tailed (equal variance not assumed).
38 Note small sample size, n=16

Figure 8: Proportion of cases sentenced to a custodial sentence for rape (MSO) that had co-sentenced offences.



Data notes: Imprisonment and suspended sentences (MSO), adults, higher courts, 2005–06 to 2022–23
Note: Imprisonment includes prison-probation orders.
Source: Queensland Government Statistician's Office, Queensland Treasury - Courts Database, extracted September 2023.

Suspended sentences and penalties for co-sentenced offences

The Council sought to understand the nature of the sentencing outcomes for co-sentenced offences, particularly where the defendant received a suspended sentence for rape as their MSO. The Council was keen to understand how frequently these orders were combined with a supervised parole order for a co-sentenced offence, and whether this differed for sexual offences compared to other offence types.

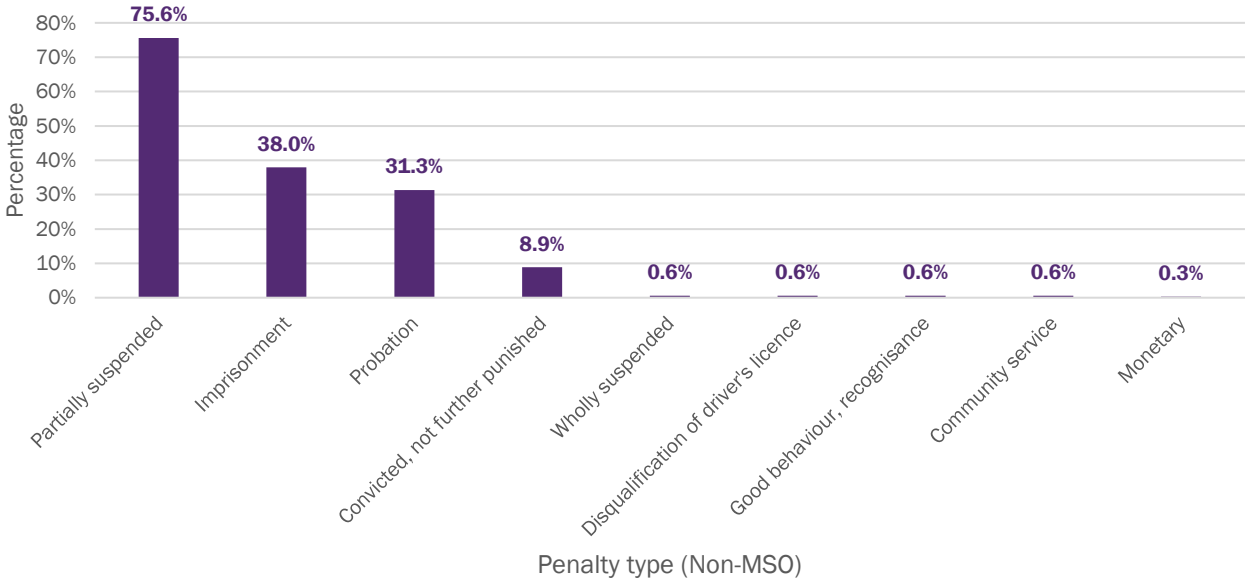
For rape offences (MSO) receiving a partially suspended sentence, the most common penalty order for co-sentenced offences was another partially suspended sentence - Figure 9. Of the 360 cases which received a partially suspended sentence for rape that were also sentenced for other offences in the same sentencing event, three-quarters of cases received at least one additional partially suspended sentence (75.6%), with a median sentence of 3.0 years (average 2.8 years).[39]

Over one-third of these cases received an imprisonment order with a sentence length less than or equal to the time required to be served before suspension for the rape offence (38.0%), with the median imprisonment sentence for an offence co-sentenced with a rape offence being 9.0 months[40] (average 10.4 months).

In just under one-third of all cases receiving a partially suspended sentence with a co-sentenced offence, a probation order was received (31.3%), and therefore providing for a defendant to be supervised on release. The median length of a probation order when co-sentenced with a partially suspended sentence for rape (MSO) was 3.0 years (average 2.6 years).[41]

39 Where more than 1 partially suspended sentenced was imposed within the case, only the longest sentence was included in these calculations.
40 Where more than 1 imprisonment order was imposed within the case, only the longest sentence was included in these calculations.
41 Where more than 1 probation order was sentenced within the case, only the longest probation sentence was included in these calculations.

Figure 9: Penalty type for co-sentenced offences with a partially suspended sentence for rape (MSO)

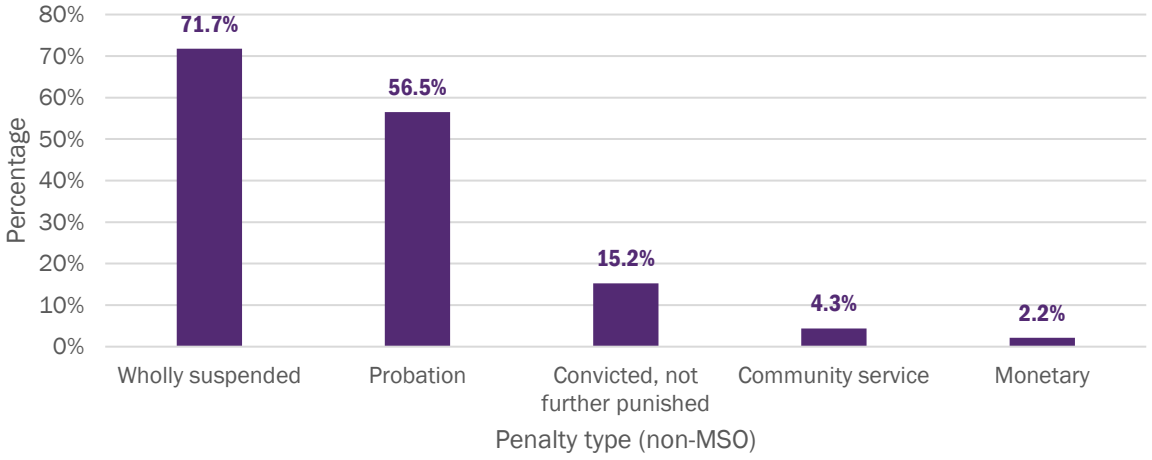


Data notes: Partially suspended sentence (MSO) with co-sentenced offence/s (n=360), adults, higher courts, 2005–06 to 2022–23, case count so a case may have more than one co-sentence penalty applied so totals will add to more than 100%.
Source: Queensland Government Statistician's Office, Queensland Treasury - Courts Database, extracted September 2023.

Similar to the partially suspended sentences, for cases which received a wholly suspended sentence for rape (MSO) that also had co-sentenced offences, the most common penalty imposed for a co-sentenced offence was an additional wholly suspended sentence. Of cases with co-sentenced offences nearly three-quarters received an additional wholly suspended sentence (71.1%) on a co-sentenced offence, and more than half received a supervised probation order (56.5%, n=26). No co-sentenced offences received imprisonment.

For offences that were co-sentenced with a wholly suspended sentence for rape (MSO), the median length of the additional wholly suspended sentence was 2.0 years (average 2.4 years)[42] and the median length of the probation orders were 3.0 years[43] (average 3.0 years).

Figure 10: Penalty type for co-sentenced offences with a wholly suspended sentence for rape (MSO)



Data notes: Wholly suspended sentence (MSO) with co-sentenced offence/s, adults (n=46), higher courts, 2005–06 to 2022–23. This is a case count so a case may have more than one co-sentenced penalty applied therefore totals will add to more than 100%.
Source: Queensland Government Statistician's Office, Queensland Treasury - Courts Database, extracted September 2023.

42 Where more than 1 wholly suspended sentence was imposed within the case, only the longest probation sentence was included in these calculations.

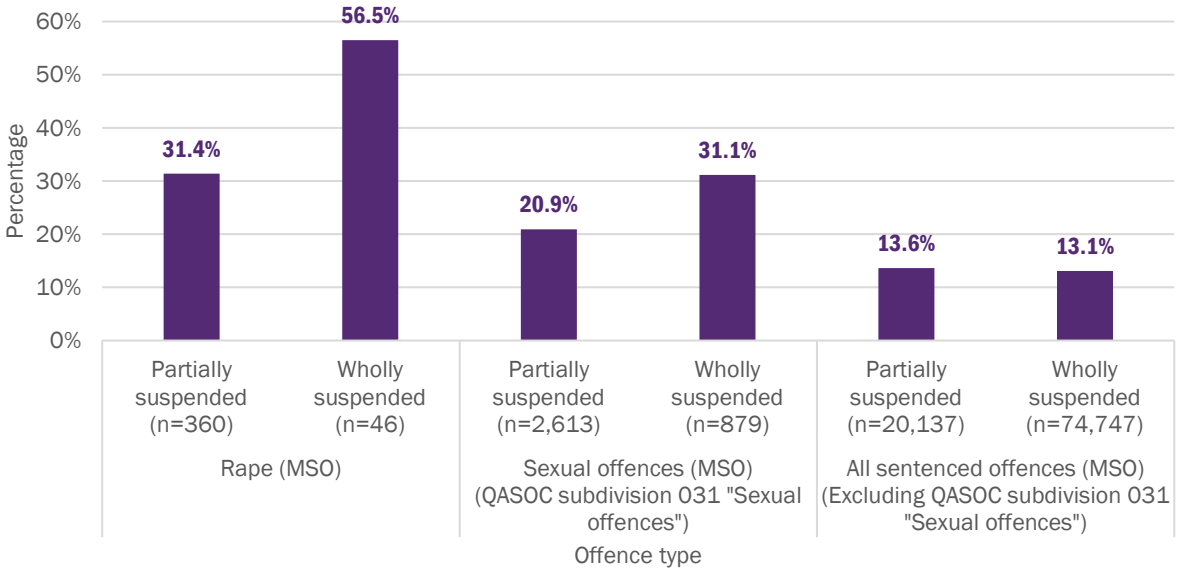
43 Where more than 1 probation order was sentenced within the case, only the longest probation sentence was included in these calculations.

Given the prevalence of combining a suspended sentence with a probation order, the Council was interested to know whether the proportion of cases that received a probation order in conjunction with a suspended sentence for an MSO offence differed for sexual offences compared to other offence types.

Figure 11 shows that combining probation orders with a suspended sentence (either partially or wholly) is more common where the MSO is a sexual offence compared to a non-sexual offence. Specifically, it is much more common within rape offences compared to other sexual offences and non-sexual offences, with more than half of all wholly suspended sentences also receiving a probation order on a co-sentenced offence during the 18-year period (56.5%).

This finding is not surprising given court ordered parole is not available to sexual offences and the court believes the person would benefit from some supervision in the community, whilst also being able to provide certainty of release.

Figure 11: Proportion of cases that received a probation order within the same court event as a suspended sentence, by offence type



Data notes: Suspended sentence (MSO) with co-sentenced offence/s, adults, Magistrates Courts and higher courts, 2005–06 to 2022–23
Source: Queensland Government Statistician's Office, Queensland Treasury - Courts Database, extracted September 2023.

8.2.8 Time served in custody for rape

An important part of understanding sentencing outcomes for rape and whether these are adequate or appropriate is understanding the minimum time that must be served in custody prior to the person's release from custody. In this section we explore this aspect of sentencing for rape (MSO). Due to the limitation of information available in the administrative data, this analysis only includes cases sentenced from July 2011 to June 2023.

As discussed in section 6.7.3, a court must take a person's guilty plea into account when sentencing and may reduce the sentence the court would have imposed had the person not pleaded guilty.[44] Courts have different ways of taking a person's plea into account. This includes a decision to set an earlier parole eligibility date (for a sentence of imprisonment) or an earlier release date (for a partially suspended sentence). For this reason, we present these outcomes based on plea.

Time in custody before being eligible for release on parole

Overall during the period, regardless of plea, the median time to be served in prison for rape, prior to being eligible for parole was 2.5 years (average 3.1 years).

Release on parole is not automatic and requires the person to make an application to the Parole Board Queensland. For more information about this process, see section 9.3.

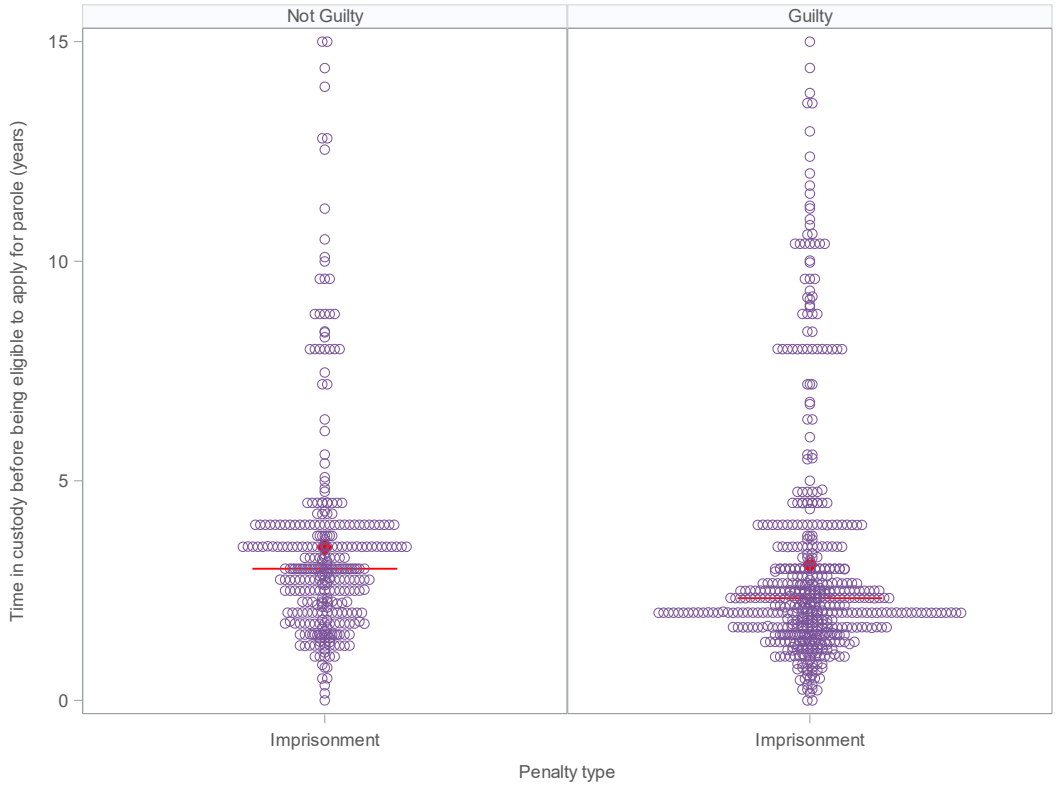
Generally, a guilty plea (along with other factors in mitigation) in Queensland is recognised by a court in the non-parole period being set at around the one-third mark (that is one-third of the head sentence). This compares to the situation when a person pleads not guilty and is convicted at trial, which often results in a court declining to set a

44 PSA (n 30) s 13. See Appendix 3.

parole eligibility date, meaning the person is eligible for parole after serving 50 per cent of their sentence by operation of statute.[45] There are exceptions to this if the person is declared convicted of a serious violent offence ('SVO'), in which case the person must serve 80 per cent of the sentence in custody or 15 years (whichever is less) before being eligible for parole. For more information about the SVO scheme, see section 6.10.1.

Figure 12 below shows there is a difference in the minimum time required to be served in custody on an imprisonment order, before becoming eligible for parole depending on whether a person pleaded guilty or went to trial. The red line indicates the median and the red diamond indicates the average. The Council found that the median time before parole eligibility was 2.3 years (average 3.1 years) for a person who pleaded guilty to rape (MSO), compared to 3.0 years (average 3.5 years) for a person who pleaded not guilty.

Figure 12: Time to serve in custody for rape (MSO) before being eligible for release on parole, by plea type, 2011–12 to 2022–23



	N	Average (years)	Median (years)	Minimum (years)	Maximum (years)
Not guilty	319	3.5	3.0	0.0	15.0
Guilty	535	3.1	2.3	0.0	15.0
TOTAL	869	3.2	2.5	0.0	15.0

Data notes: Imprisonment sentence (MSO), adults, higher courts, 2011–12 to 2022–23. Excludes cases where the expected parole eligibility date exceeds the length of the head sentence due to a longer parole eligibility date being applied to a different offence. Cases receiving a prison-probation order have also been excluded. Cases with no plea type entered (n=15) have been included in the total row of the table but not included in all other analysis.
Source: Queensland Government Statistician's Office, Queensland Treasury – Courts Database, extracted September 2023.

The difference a guilty plea made to the minimum proportion of time to be served is shown in Figure 13. While for the majority of people sentenced, regardless of plea, parole eligibility was fixed at 50 per cent or below, the breakdown is quite different when analysed by plea.

Of the 535 people who pleaded guilty to rape (MSO) between July 2011 and June 2023 and received an imprisonment order, three-quarters (74.4%) had parole eligibility set below the halfway mark, and 55.8 per cent had their parole eligibility date set at or below the one-third mark. For these cases, the average proportion of the head sentence to serve before parole eligibility was 39.8 per cent (median 33.4%).

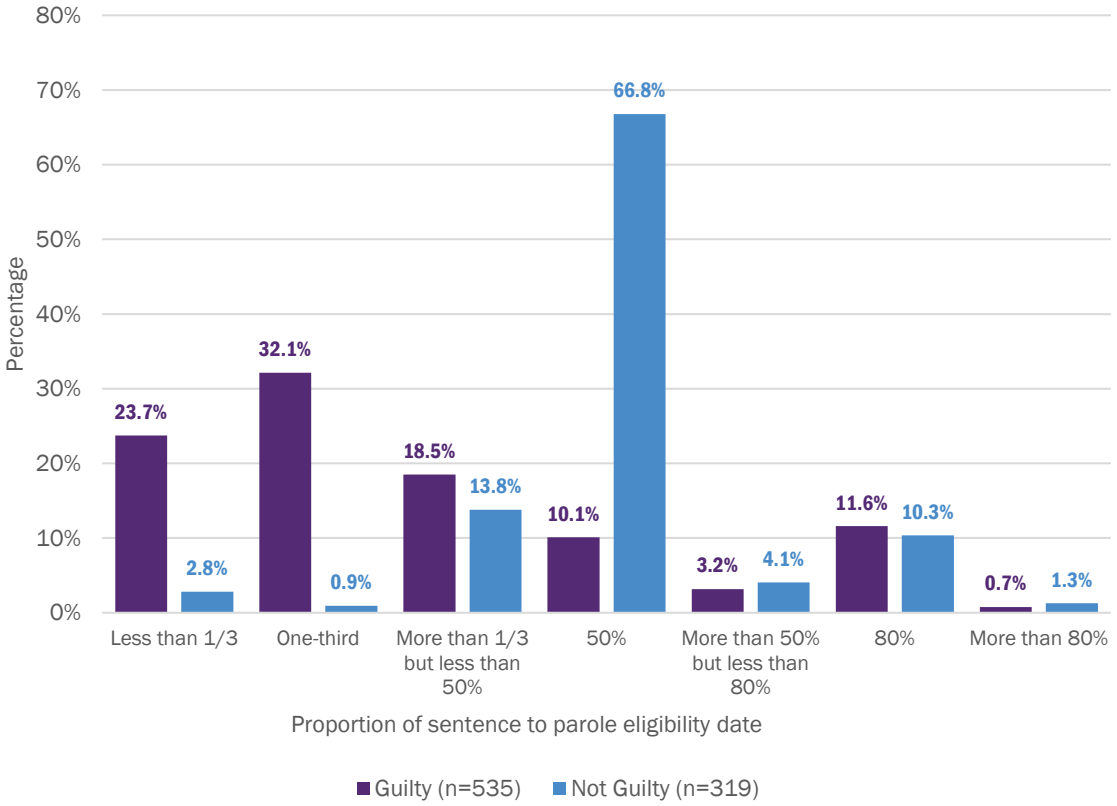
In contrast, of the 319 people who did not plead guilty, two-thirds (66.8%) were only eligible for parole after serving half of their head sentence and a much smaller proportion than for those who pleaded guilty (17.6%) had their parole eligibility date set below 50 per cent of the head sentence. Most commonly people were required to serve

45 *Corrective Services Act 2006* (Qld) s 184(2).

50.0 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 other sentencing considerations, such as specific factors in personal mitigation, were being applied to those set below the halfway mark.

Regardless of plea type, a small but noticeable proportion of people were eligible for release on parole after serving 80 per cent of their sentence, indicating the court had made a serious violent offence ('SVO') declaration. [46] Of the 15.7 per cent of people who pleaded not guilty and had parole set beyond the halfway mark, most clustered at the 80 per cent mark (10.3%, n=33). There were no noticeable differences based on plea status as to whether an SVO declaration was made by the court, meaning parole eligibility was fixed at 80 per cent suggesting a guilty plea in these matters is less important than the nature of the offending conduct itself.

Figure 13: Time before a person is eligible for release on parole as a proportion of the head sentence for rape (MSO), by plea type, 2011–12 to 2022–23



Plea type	N	Average proportion	Median proportion	Minimum proportion	Maximum proportion
Not guilty	319	51.1%	50.0%	0.0%	89.9%
Guilty	535	39.8%	33.4%	0.0%	90.0%
TOTAL	869	44.2%	44.3%	0.0%	90.0%

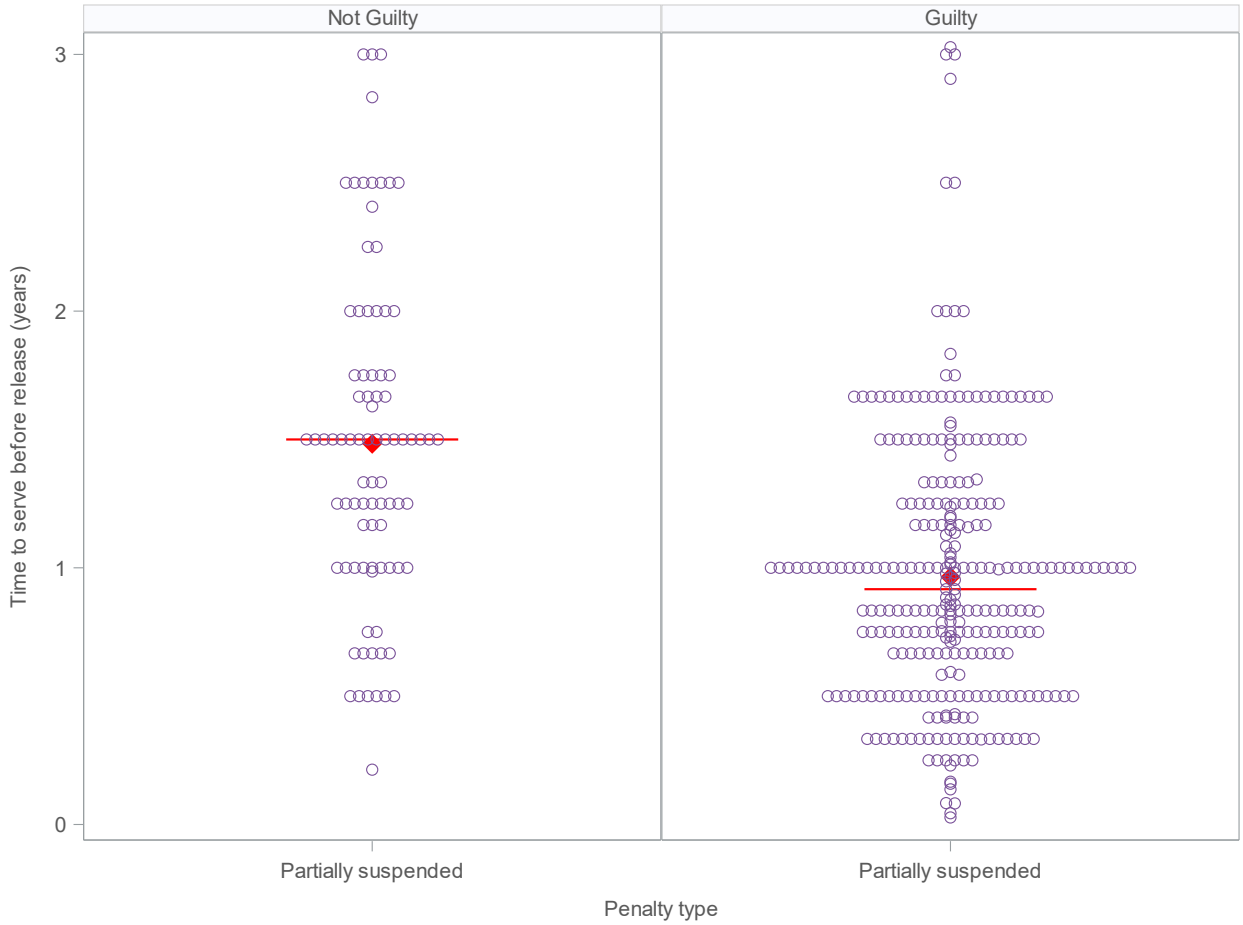
Data notes: Imprisonment sentence (MSO), adults, higher courts, 2011–12 to 2022–23.
Excludes cases where the expected parole eligibility date exceeds the length of the head sentence due to a longer parole eligibility date being applied to a different offence. Cases receiving a prison-probation order have also been excluded. Life sentences (n=6) have been excluded. Cases with no plea type entered (n=15) have been included in the total row of the table but not included in all other analysis.
Source: Queensland Government Statistician's Office, Queensland Treasury - Courts Database, extracted September 2023.

Time to serve before release for partially suspended sentences

Figure 14 shows the distribution of the time in custody before release for a partially suspended sentence for rape (MSO), by plea type. The red line indicates the median and the red diamond indicates the average. People who pleaded guilty spent a median of 0.9 years in custody before being released (average 1.0 years), compared to 1.5 years for those who pleaded not guilty (average 1.5 years). More people sentenced to a partially suspended sentence had pled guilty (n=290) than not guilty (n=85).

46 PSA (n 30) Part 9A.

Figure 14: Time to serve before release for partially suspended sentence for rape (MSO), by plea type, 2011–12 to 2022–23



Plea type	N	Average (years)	Median (years)	Minimum (years)	Maximum (years)
Not guilty	85	1.5	1.5	0.2	3.0
Guilty	290	1.0	0.9	0.0	3.0
TOTAL	379	1.1	1.0	0.0	3.0

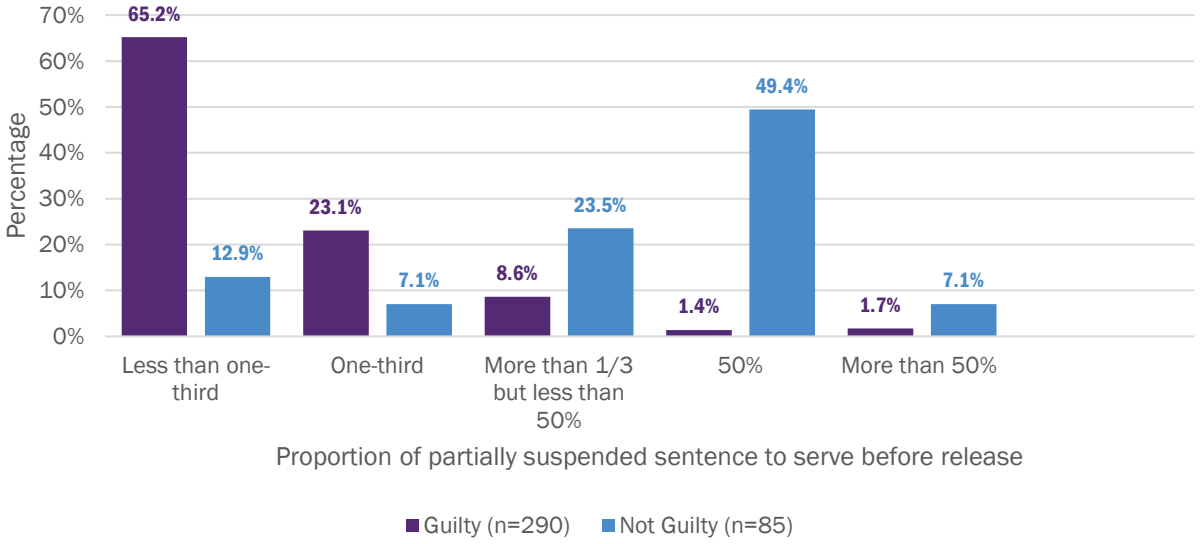
Data notes: Partially suspended sentence (MSO), adults, higher courts, 2011-12 to 2022–23. Cases with no plea type entered (n=4) have been included in the total row of the table but not included in all other analysis.
Source: Queensland Government Statistician's Office, Queensland Treasury - Courts Database, extracted September 2023.

Of those receiving a partially suspended sentence, half of people who did not plead guilty had their release date set at 50 per cent of their sentence (49.4%). A further 7.1 per cent of people who did not plead guilty had their release date set above 50 per cent. In contrast the majority (88.3%) of people who pleaded guilty had their release date set at one-third of the length of their sentence or less– see Figure 15.[47]

For those people who received a partially suspended sentence for rape and pleaded not guilty, the median proportion of their sentence they were required to serve in custody, prior to being released was 50 per cent (average 44.2%). In contrast, those who pleaded guilty were required to serve a median proportion of 27.8 per cent of their partially suspended sentence before being released (average 27.1%).

47 Four cases were excluded from this analysis because plea type was not available the data.

Figure 15: Proportion of a partially suspended sentenced to be served before release for rape (MSO), by plea type, 2011–12 to 2022–23



Plea type	N	Average proportion	Median proportion	Minimum proportion	Maximum proportion
Not guilty	85	44.2%	50.0%	7.1%	81.5%
Guilty	290	27.1%	27.8%	0.5%	75.7%
TOTAL	379	31.0%	30.0%	0.5%	81.5%

Data notes: Partially suspended sentence (MSO), adults, higher courts, 2011–12 to 2022–23.
Source: Queensland Government Statistician's Office, Queensland Treasury - Courts Database, extracted September 2023.

8.2.9 Sentencing and pre-sentence custody for rape

Of the 888 cases where an imprisonment sentence[48] was imposed for rape from July 2011 to June 2023,[49] approximately one-third had no declared time in pre-sentence custody (31.0%). Approximately two-thirds (68.7%) had pre-sentence time declared which was less than the sentenced amount, meaning that further time in custody was required. There were 3 cases (0.3%) that had time declared which equalled the imprisonment sentence length. These cases were all combined prison/probation orders, so they were released onto probation on their sentence date (see Figure 16).

The median declared time in pre-sentence custody for an imprisonment sentence was 313.0 days (average 325.4 days).

Where no pre-sentence custody was declared, the median (and average) imprisonment sentence for rape (MSO) was 5.5 years. This is compared to the median (and average) imprisonment sentence of 7.0 years where some pre-sentence custody was declared. This is a statistically significant difference.[50]

Just over half of partially suspended sentences imposed for rape (MSO) had no pre-sentence custody declared (54.9%). One-third had some time declared but still had additional time to serve in custody (32.7%). For the remaining 12.4 per cent (n=47), their declared pre-sentence time in custody was equal to the time required to serve before the sentence was suspended, meaning they were able to be released immediately after being sentenced.

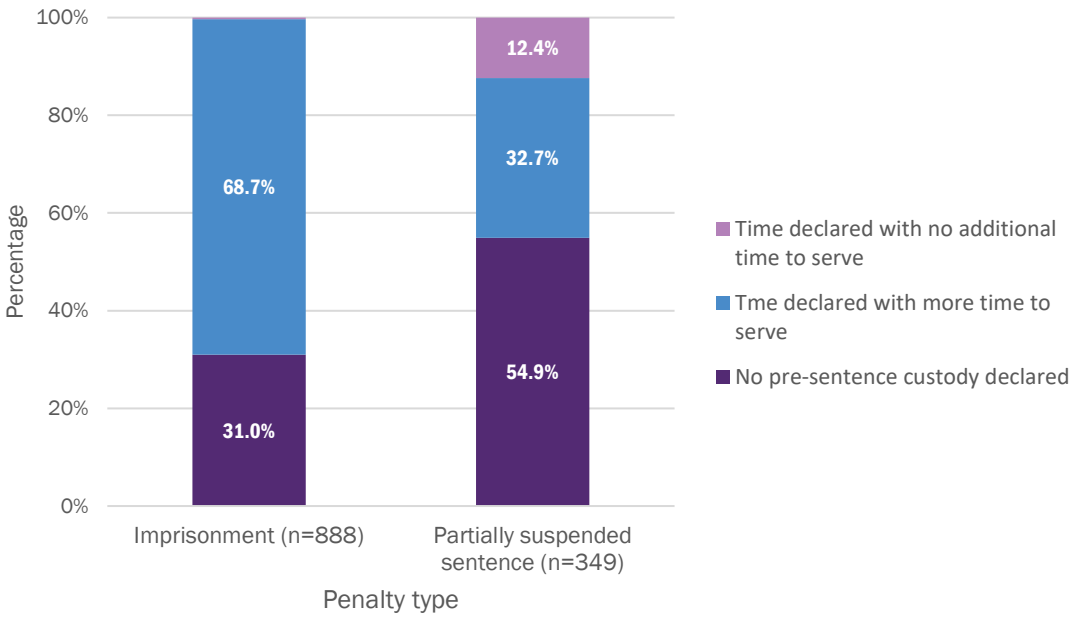
The median number of days declared as pre-sentence custody time for a partially suspended sentence was 189 days (average 216.9 days).

When pre-sentence time was declared, the median partially suspended sentence was of 3.5 years (average 3.6 years), which was longer than those with no-presentence custody, which had a median sentence length of 3.0 years (average 3.3 years).

48 This includes prison/probation orders (n=6) as there were too few of these to analyse separately.
49 Pre-sentence custody was recorded in the data from July 2011 onwards.
50 Independent Groups T-Test: $t(548.66) = 7.97$, $p < 0.001$, two-tailed (equal variance not assumed).

When pre-sentence custody was declared, the median time required to be served prior to release was 1.0 year (average 1.2 years) whilst for those with no declared pre-sentence custody, the median time to serve was also 1.0 year (average 1.0 year).[51]

Figure 16: Use of pre-sentence custody for rape (MSO), 2011–12 to 2022–23



Data notes: Imprisonment order (including combined prison-probation orders) and partially suspended sentence (MSO), adults, higher courts, 2011–12 to 2022–23.
Source: Queensland Government Statistician's Office, Queensland Treasury - Courts Database, extracted September 2023.

8.2.10 Appeals in rape cases

The Council was interested to understand how frequently rape matters are appealed, particularly on the basis of sentence, and if they are appealed, what the outcomes of those appeals was. With the assistance of Court Services Queensland, the Council examined all rape (MSO) cases sentenced during 2018–19 and reviewed Court of Appeal judgments for those cases. The year 2018–19 was chosen to provide sufficient time for any appeals to have been finalised. Appeals can be made against conviction, against sentence or for both reasons.

Of the 132 rape (MSO) cases sentenced in 2018–19, one-quarter appealed their case (25%). Two-thirds of those were appeals against conviction (66.7), with 21.2 per cent against sentence only, and the remaining 12.1 per cent appealed against both conviction and sentence.

In terms of outcomes, of all cases appealed, the majority were dismissed by the Court of Appeal (54.5%, n=18), with only 3 cases (9.1%) allowed by the Court. The remaining 12 cases (36.4%) were abandoned by the applicant.

Of the 3 appeals allowed by the Court of Appeal, 2 were against sentence and the court varied the sentence. In *R v WBK*[52] the Court of Appeal reduced the parole eligibility date, while in *R v GBD*, [53] the Court decreased the term of imprisonment from 4 months to 3. For the case appealed against conviction it was a little more complex. The Court of Appeal ordered a retrial,[54] which subsequently took place and all 4 defendants were convicted of rape (MSO). That case was appealed by 3 of the offenders[55] and in 2023 the Court of Appeal dismissed the appeal for 2 offenders and acquitted the third of all convictions of rape.[56]

51 Independent groups t-test: t(337) = 2.44, p <0.05, two-tailed (equal variance assumed).
52 [2020] QCA 60.
53 *R v GBD* [2018] QCA 340.
54 *R v Peter; R v Anau; R v Ingui; R v Banu* [2020] QCA 228.
55 The 4th offender discontinued his appeal.
56 *R v Peter; R v Banu; R v Ingui* [2023] QCA 1.

Table 16: Appeal status of rape (MSO) cases sentenced in 2018–19

	Conviction		Sentence		Conviction & Sentence		Total	
	N	%	N	%	N	%	N	%
Appeal allowed	1	4.5%	2	28.6%	0	0.0%	3	9.1%
Appeal abandoned	5	22.7%	3	42.9%	4	100.0%	12	36.4%
Appeal dismissed or refused	16	72.7%	2	28.6%	0	0.0%	18	54.5%
TOTAL	22	100.0%	7	100.0%	4	100.0%	33	100.0%

Data notes: Rape (MSO), adults, higher courts, sentenced 2018–19.
Source: A manual review of cases was conducted by Court Services Queensland.

8.3 Sentencing outcomes for sexual assault

Over the 18-year data period from July 2005 to June 2023, there were 2,543 cases involving an adult sentenced for a sexual assault offence. Of those, 1,904 had a sexual assault offence sentenced as the MSO.

The analysis below focuses on these sexual assault (MSO) cases.

8.3.1 Key data findings

SEXUAL ASSAULT

1 **Almost all sexual assaults are non-aggravated offences**.

95.4% of all sexual assaults were non-aggravated offences (10-year maximum penalty) and just over half 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.

2 **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 has increased over time while the use of imprisonment has decreased.

3 **Wholly suspended sentences were the most common penalty imposed for non-aggravated sexual assault in both the lower and higher courts.**

Wholly suspended sentences were ordered in just over half of all cases (52.1%) in the Magistrates Courts and in just under half of all sentences in the higher courts (46.9%). In both courts the median sentence length was 6 months.

4 **Almost all aggravated sexual assaults received custodial penalties.**

95.1% of sexual assault (aggravated) and 96.3% of sexual assault (life) cases received a custodial penalty. The most common penalties were partially suspended sentences and imprisonment.

5 **The median custodial sentence length for sexual assault offences was 12 months in the higher courts and 0.5 years in the Magistrates Courts.**

Approximately one-third of custodial penalties in the Magistrates Courts were sentences of imprisonment (31.8%), with an average length of 9.7 months (median 9.0 months).

Comparatively, just under 20% of custodial penalties for non-aggravated sexual assault dealt with in the higher courts were sentences of imprisonment (19.4%), and they were for an average of 1.8 years (median 1.3 years). The median imprisonment sentence for sexual assault (aggravated life) was 3.0 years.

5 **Almost all people sentenced committed the offence as an adult.**

In contrast to rape, only 13 cases involved the person committing the offence when they were a child.

6 **Very few sexual assaults were committed in a domestic and family violence context.**

Since 2016, only 7.2% of cases were sentenced as a domestic violence offence. Aggravated sexual assault offences were slightly more likely to be domestic violence offences.

7 **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 vast majority of Aboriginal and Torres Strait Islander people sentenced received a custodial penalty (81.8%) compared to under two-thirds of non-Indigenous people sentenced (60.2%).

8 **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. In those cases, the person was more likely to receive a longer head sentence for their sexual assault (MSO). It was more common to combine a suspended sentence with a probation order for sexual assault and other sexual offences, as compared to other offence types.

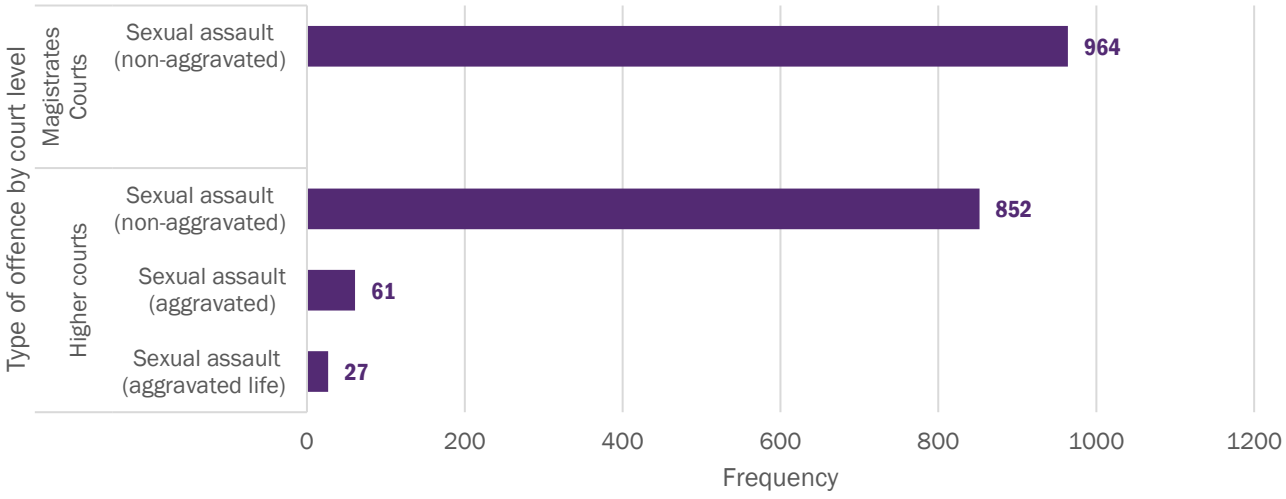
Sexual assault by maximum penalty

In Chapter 3, we discussed the different maximum penalties for sexual assault, depending on whether the offence involves circumstances of aggravation. Broadly those are:

- Sexual assault (non-aggravated) with a maximum penalty of 10 years' imprisonment;
- Sexual assault (aggravated) with a maximum penalty of 14 years' imprisonment; and
- Sexual assault (aggravated life) with a maximum penalty of life imprisonment.

We also discussed that a defendant may elect (choose) for an offence of sexual assault to be sentenced in the Magistrates Court if the person pleads guilty and the victim is 14 years of age or older.[57] However, a Magistrate has the ultimate discretion to not deal with the matter summarily if they form the view that the defendant may not be adequately punished in the summary jurisdiction, where the maximum sentence of imprisonment which can be imposed by a Magistrate is 3 years.[58] In these circumstances, the Magistrate may commit the matter to a higher court for sentence to ensure that the criminality is adequately reflected in the final sentence imposed.

Figure 17: Number of sexual assault cases (MSO) by circumstance of aggravation



Data notes: MSO, adults, Magistrates and higher courts, 2005–06 to 2022–23
Source: Queensland Government Statistician's Office, Queensland Treasury - Courts Database, extracted September 2023.
Note: a single case may involve multiple different circumstances of aggravation. To avoid double-counting, the chart above reports each case according to the most serious circumstance of aggravation recorded for that matter.

Non-aggravated sexual assault accounts for almost all of the sexual assault offences sentenced in the courts over the period of July 2005 to June 2023 (95.4%, n=1816), and of these, just over half of the adults sentenced for a non-aggravated sexual assault offence were sentenced in the Magistrates Courts (53.1%, n=964), with the remaining 46.9 per cent(n=852) of these cases sentenced in the higher courts.

By contrast, all of the cases involving circumstances of aggravation (n=88) were sentenced in the higher courts.

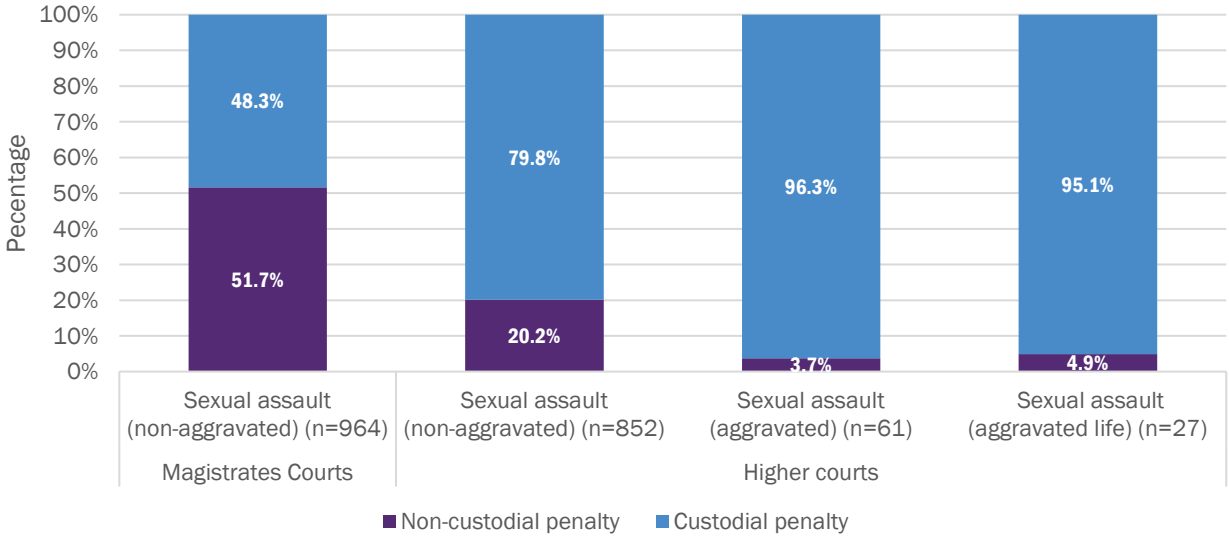
57 *Criminal Code* (Qld) (n 5) s552B(1)(a).
58 Ibid s 552H(1)(b).

This section will consider the penalties sentenced for all versions of the offence. Generally, the results presented aim to distinguish by both maximum penalty and court level, however due to the relatively small numbers of sexual assault offences involving circumstances of aggravation, this may not always be possible. Generally, the term 'circumstances of aggravation' will be used to refer to the sexual assault (aggravated) and sexual assault (aggravated life).

8.3.2 Custodial penalties

During 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), whilst in the higher courts, almost 80 per cent of non-aggravated sexual assault penalties involved custody. By comparison, sexual assault (aggravated) matters received custodial penalties in 96.3 per cent of cases, and sexual assault (aggravated life) matters received a custodial penalty in all but one case.

Figure 18: Penalty type for sexual assault (MSO) by court level and circumstances of aggravation



Data notes: MSO, adults, Magistrates Courts and higher courts, 2005–06 to 2022–23
Source: Queensland Government Statistician's Office, Queensland Treasury - Courts Database, extracted September 2023.

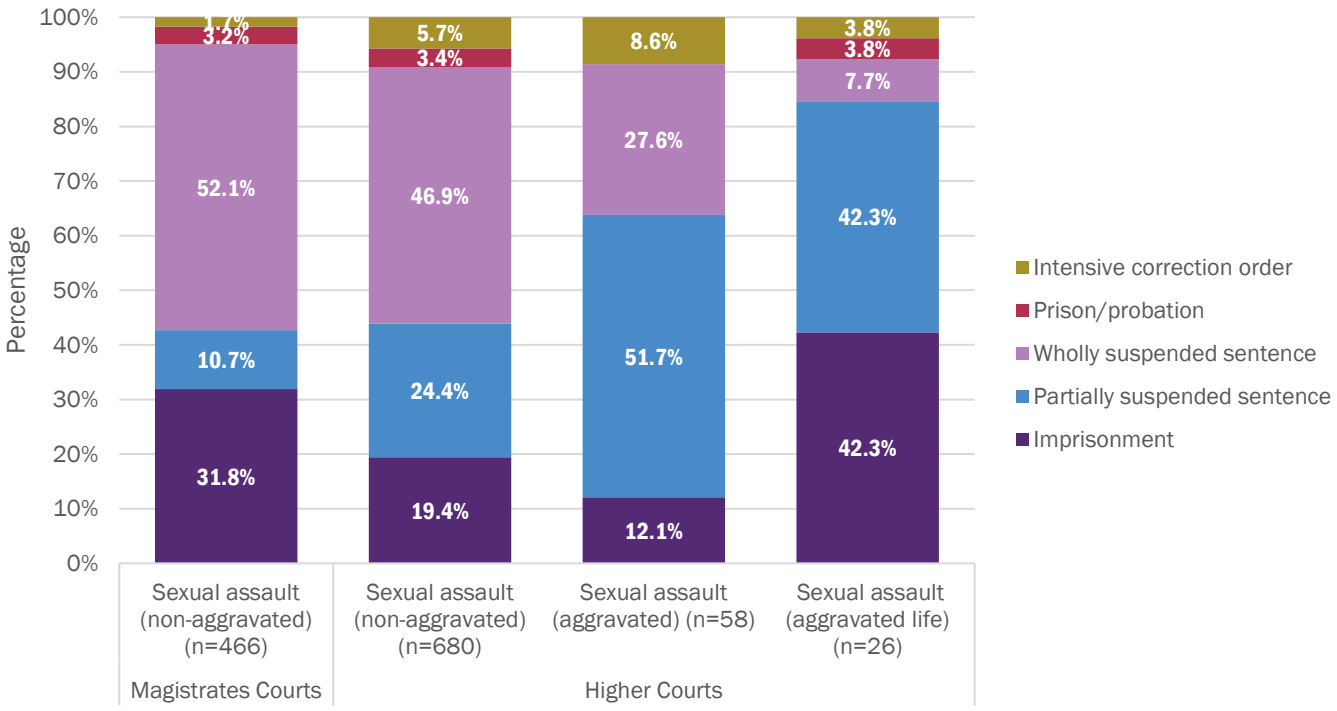
Type of custodial penalty

In the Magistrates Court, the most common custodial penalty imposed was a wholly suspended sentence, imposed in over half of these cases (52.1%). Approximately one-third of custodial penalties in the Magistrates Courts were sentences of imprisonment (31.8%).

Similarly, for non-aggravated sexual assault dealt with in the higher court, wholly suspended sentences were the most common penalty imposed, comprising almost half of sentences (46.9%). Just under 20% of custodial penalties for non-aggravated sexual assault offences dealt with in the higher courts involved sentences of imprisonment (19.4%).

However, in cases where circumstances of aggravation were present, a penalty which required the defendant to spend at least some time in prison was preferred, with partially suspended sentences and sentences of imprisonment comprising 63.8 per cent of sentences for matters with a maximum penalty of 14 years, and 84.6 per cent of sentences where the maximum penalty was life imprisonment.

Figure 19: Custodial penalty types sentenced for sexual assault (MSO), by court level and offence type



Data notes: MSO, adults, higher and lower courts, 2005–06 to 2022–23. Rising of the court was included in the calculations but not presented in the figure.
Source: Queensland Government Statistician's Office, Queensland Treasury - Courts Database, extracted September 2023.

Length of custodial penalty

When considering sentencing length for custodial penalties in the Magistrates Courts, the median imprisonment sentence for a non-aggravated sexual assault was 0.8 years (9.0 months), with an average of 0.8 years (9.7 months). The longest term of imprisonment ordered was 3 years, the maximum sentence able to be imposed in the Magistrates Courts.

The median partially suspended sentence in the Magistrates Court was 0.8 years (9.0 months) with an average of 0.8 years (10.0 months), and a median time to serve before release of 0.2 years (3.0 months) (average 0.3 years/3.2 months). The median wholly suspended sentence was 0.5 years (average 0.5 years).

For non-aggravated sexual assault dealt with in the higher courts, the median wholly suspended sentence was 0.8 years (average 0.8 years), while the median imprisonment sentence was 1.3 years (average 1.8 years). The median partially suspended sentence length as 1.3 years (average 1.4 years) with the median time to serve before release being 0.3 years (average 0.5 years).

The median partially suspended sentence (MSO) for sexual assault (aggravated) was 1.5 years (average 1.6 years), with a median of 0.3 years to serve before release (average 0.5 years). For wholly suspended sentences the median sentence length was 1.1 years (average 1.3 years).

The median imprisonment sentence for sexual assault (aggravated life) was 3.0 years (average 3.0 years). The median partially suspended sentence was 2.5 years (average 2.5 years), serving a median duration of 0.9 years before release (average 0.8 years).

Table 17: Summary of custodial sentence lengths by type of sexual assault (MSO) and custodial penalty type

Penalty type		N	Average (years)	Median (years)	Min (years)	Max (years)
Higher courts						
Sexual assault (aggravated life)						
Imprisonment		11	3.0	3.0	0.8	6.0
Partially suspended						
	Sentence length	11	2.5	2.5	1.5	4.5
	Time before suspension	11	0.8	0.9	0.3	1.5
Wholly suspended		2	-	-	-	-
Imprisonment with probation		1^	-	-	-	-
Intensive correction order		1^	-	-	-	-
All custodial penalties		**26**	**2.5**	**2.5**	**0.1**	**6.0**
Sexual assault (aggravated)						
Imprisonment		7^	-	-	-	-
Partially suspended (years)						
	Sentence length	30	1.6	1.5	0.8	3.0
	Time before suspension	30	0.5	0.3	0.0	1.5
Wholly suspended		16	1.3	1.1	0.7	2.0
Intensive correction order		5^	-	-	-	-
All custodial penalties		**58**	**1.6**	**1.5**	**0.5**	**3.8**
Sexual assault (non-aggravated)						
Imprisonment		155	1.6	1.0	0.0	7.0
Partially suspended						
	Sentence length	166	1.4	1.3	0.3	5.0
	Time before suspension	166	0.5	0.3	0.0	1.6
Wholly suspended		319	0.8	0.8	0.1	2.5
Imprisonment with probation						
	Imprisonment portion	23	0.5	0.5	0.1	1.0
	Probation portion	23	2.0	2.0	0.8	3.0
Intensive correction order		39	0.8	1.0	0.3	1.0
All custodial penalties		**680**	**1.1**	**1.0**	**0.0**	**7.0**
All custodial penalties for sexual assault offences sentenced in the higher courts		**764**	**1.2**	**1.0**	**0.0**	**7.0**
Magistrates Court						
Sexual assault (non-aggravated)						
Imprisonment		148	0.8	0.8	0.1	3.0
Partially suspended						
	Sentence length	50	0.8	0.8	0.3	1.8
	Time before suspension	50	0.3	0.2	0.0	0.8
Wholly suspended		243	0.5	0.5	0.1	1.5
Imprisonment with probation						
	Imprisonment portion	15	0.3	0.3	0.1	0.8
	Probation portion	15	1.7	1.5	0.8	3.0
Intensive correction order		8^	-	-	-	-
All custodial penalties		**466**	0.6	0.5	0.0	3.0
All non-aggravated sexual assault custodial penalties		**1,146**	**0.9**	**0.8**	**0.0**	**7.0**
All custodial penalties		**1,230**	**1.0**	**0.8**	**0.0**	**7.0**

Data notes: MSO, adults, Magistrates Courts and higher courts, 2005–06 to 2022–23. Rising of the court has not been presented in the figure.
^ summary statistics for sample sizes less than 10 have not been presented.
Source: Queensland Government Statistician's Office, Queensland Treasury - Courts Database, extracted September 2023

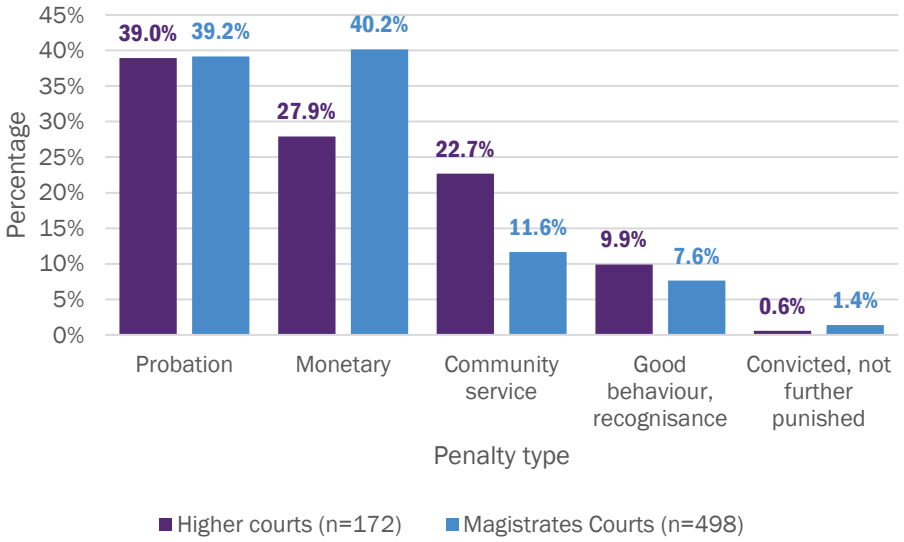
8.3.3 Non-custodial penalties

Overall, just over half of the penalties imposed in the Magistrates Courts for sexual assault were non-custodial penalties (51.7%). Of the 498 non-custodial penalties imposed, monetary penalties and probation orders were the most common (40.2% and 39.2% respectively). The median length of a probation order was 15 months (average 16.2 months). The median monetary amount ordered was $1,000.00 (average $1041.25).

Of those cases sentenced in the higher courts for non-aggravated sexual assault, 172 (20.2%) received a non-custodial penalty. Of these penalties the most common was a probation order (39.0%) followed by a monetary order (27.9%) and community service (22.7%). Only one case resulted in the perpetrator being convicted but not further punished. The median length of a probation order was 1.5 years (average 1.6 years). The median monetary amount ordered was $1,200.00 (average $1,939.58).

Only 4 cases of aggravated sexual assault (MSO) received a non-custodial penalty, with three receiving probation, and one case of aggravated life, receiving a recognisance order.

Figure 20: Non-custodial penalty types sentenced for non-aggravated sexual assault (MSO), by court type

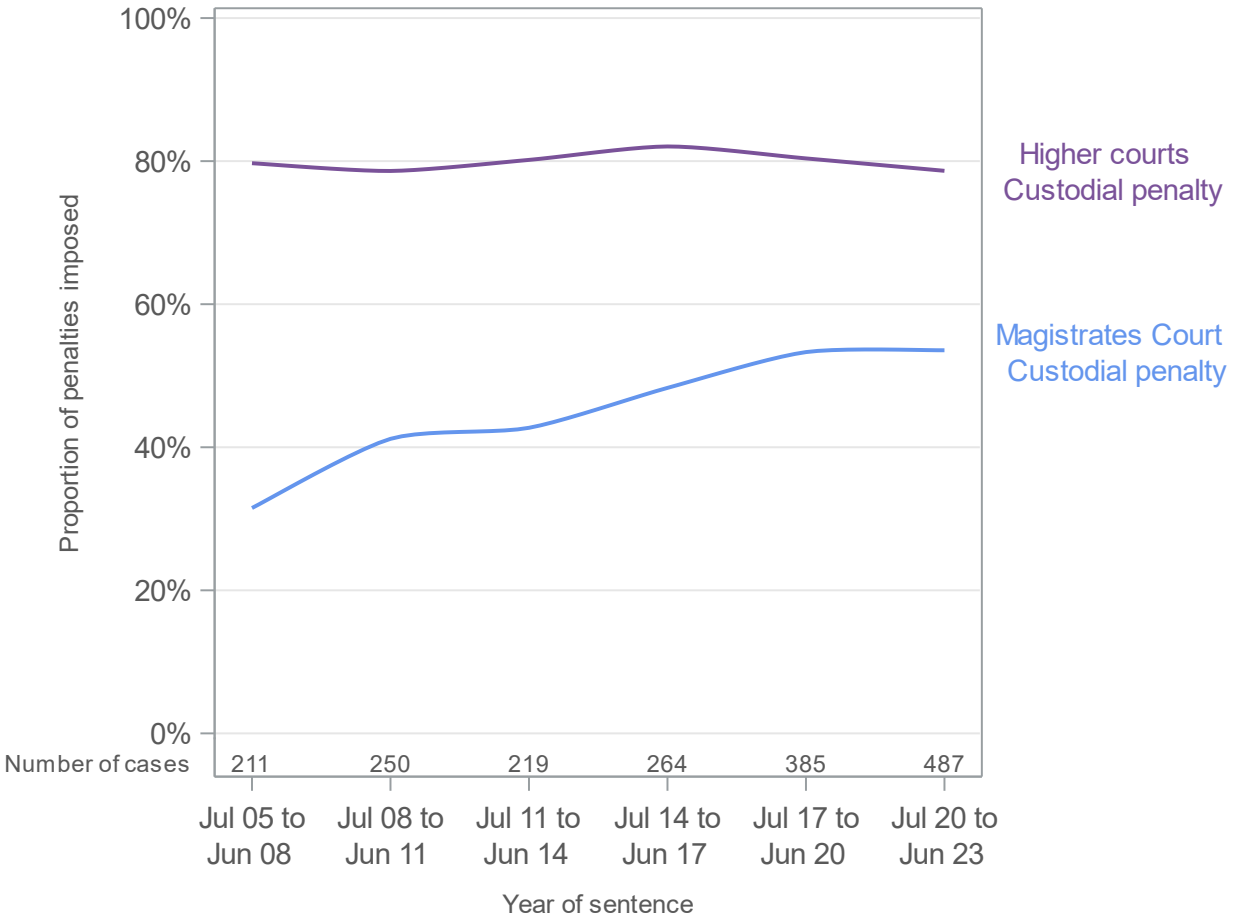


Data notes: MSO, adults, Magistrates Courts, 2005–06 to 2022–23
Source: Queensland Government Statistician's Office, Queensland Treasury - Courts Database, extracted September 2023.

8.3.4 Penalties over time

As depicted in Figure 21, the use of custodial penalties for non-aggravated sexual assault offences in the Magistrates Courts has shown an upward trend over the data period. By contrast, the use of custodial penalties for non-aggravated sexual assault in the higher courts has remained relatively stable over the data period.

Figure 21: Penalties for non-aggravated sexual assault (MSO) in the Magistrates Court, by year of sentence (grouped)



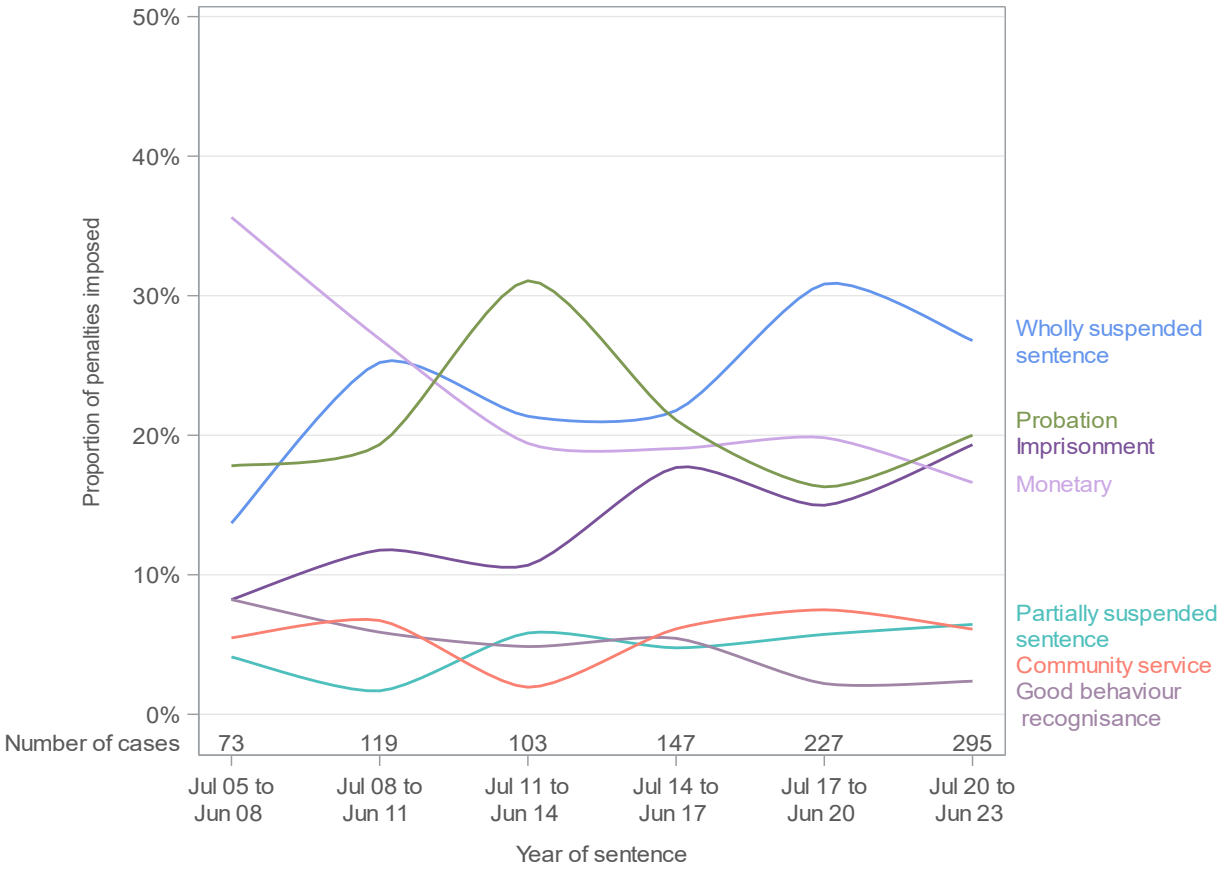
Data notes: MSO, adults, Magistrates Courts and higher courts, 2005–06 to 2022–23.
Source: Queensland Government Statistician's Office, Queensland Treasury - Courts Database, extracted September 2023.

Magistrates Court

Whilst the use of custodial penalties for non-aggravated sexual assault in the Magistrates Court increased over time, it was sentences of imprisonment and wholly suspended sentences that both increased over the data period. Conversely, the use of monetary orders decreased over the data period, whilst partially suspended sentences and community service orders remained stable (see Figure 22).

Given the changes over time, based on 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 22: 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 Table 29 in Appendix 4 for further detail.
Source: Queensland Government Statistician's Office, Queensland Treasury - Courts Database, extracted September 2023

The boxplot[59] shown in Figure 23 below shows the distribution of custodial sentences imposed for sexual assault (MSO) in the Magistrates Courts each year.

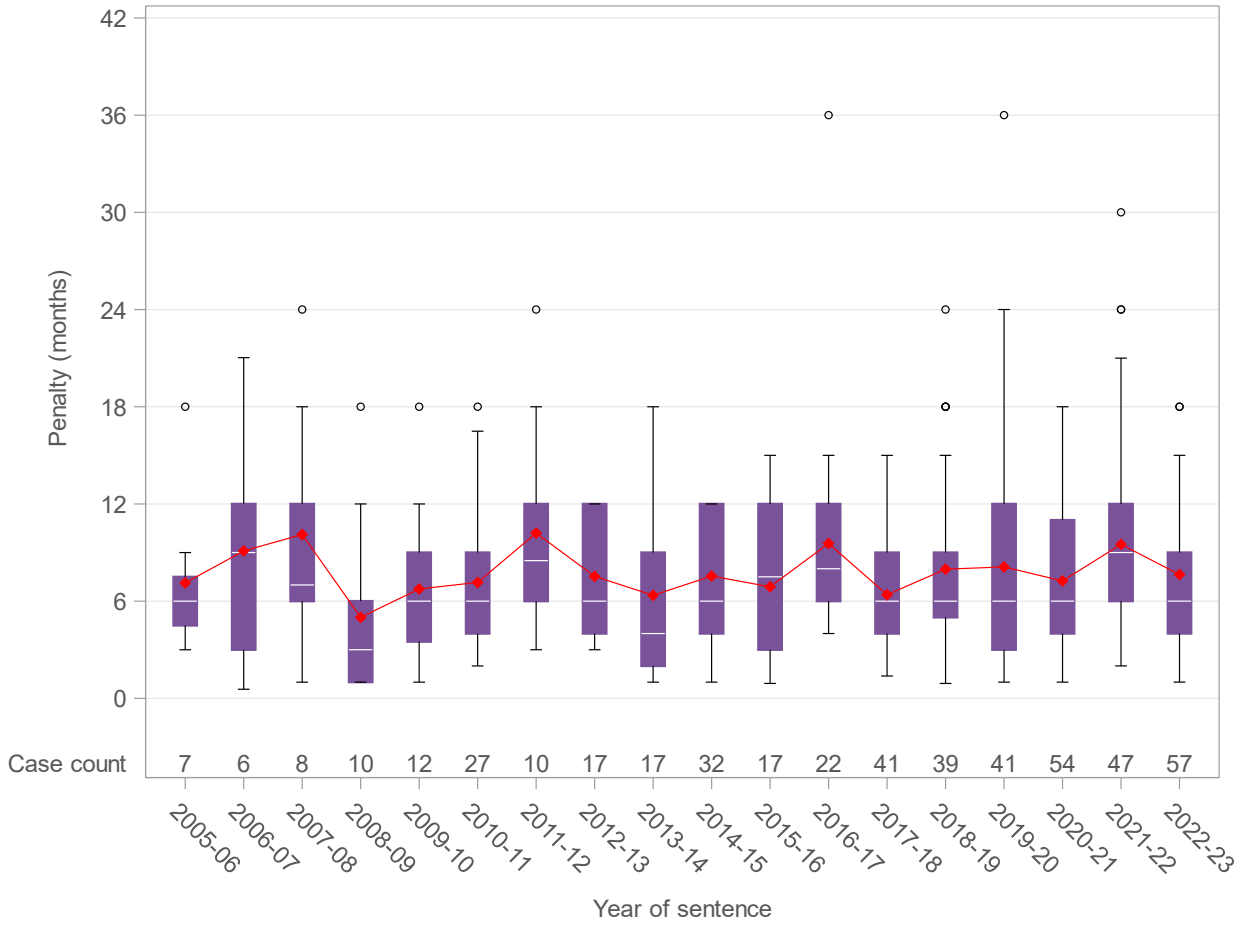
Overall, there has been little change in the median (represented by the white line) or average (represented by the red diamond) sentence length over the period, with only limited variation seen in the custodial sentence lengths imposed in the Magistrates Courts for sexual assault (MSO) each year.

The median sentence length has generally fluctuated around the 6-month mark, though peaked in 2021-22 at 9.0 months. Comparatively, the highest average custodial sentences were in 2007–08 at 10.5 months, however the number of custodial penalties that year was very small (n=8) so the average would be easily affected by an unusual sentence length and may not be reliable reflection of all custodial penalties imposed.

The sample sizes are more robust from 2017–18 onwards, where the median ranges from 6.0 months in 2017–18 (average 6.3 months) to 9.0 months (average 9.5 months) in 2021–22.

59 Interpreting the boxplot: The red diamond within each box shows the average sentence. The purple box is the interquartile range which shows how spread out the sentences are. The white line within the purple box shows the median, that is the centre of the dataset. The dots are the sentences that are outliers, that is a sentence that is 1.5 times higher/lower than the interquartile range.

Figure 23: Summary of custodial penalty length for non-aggravated sexual assault (MSO) imposed in the Magistrates Courts, by year of sentence



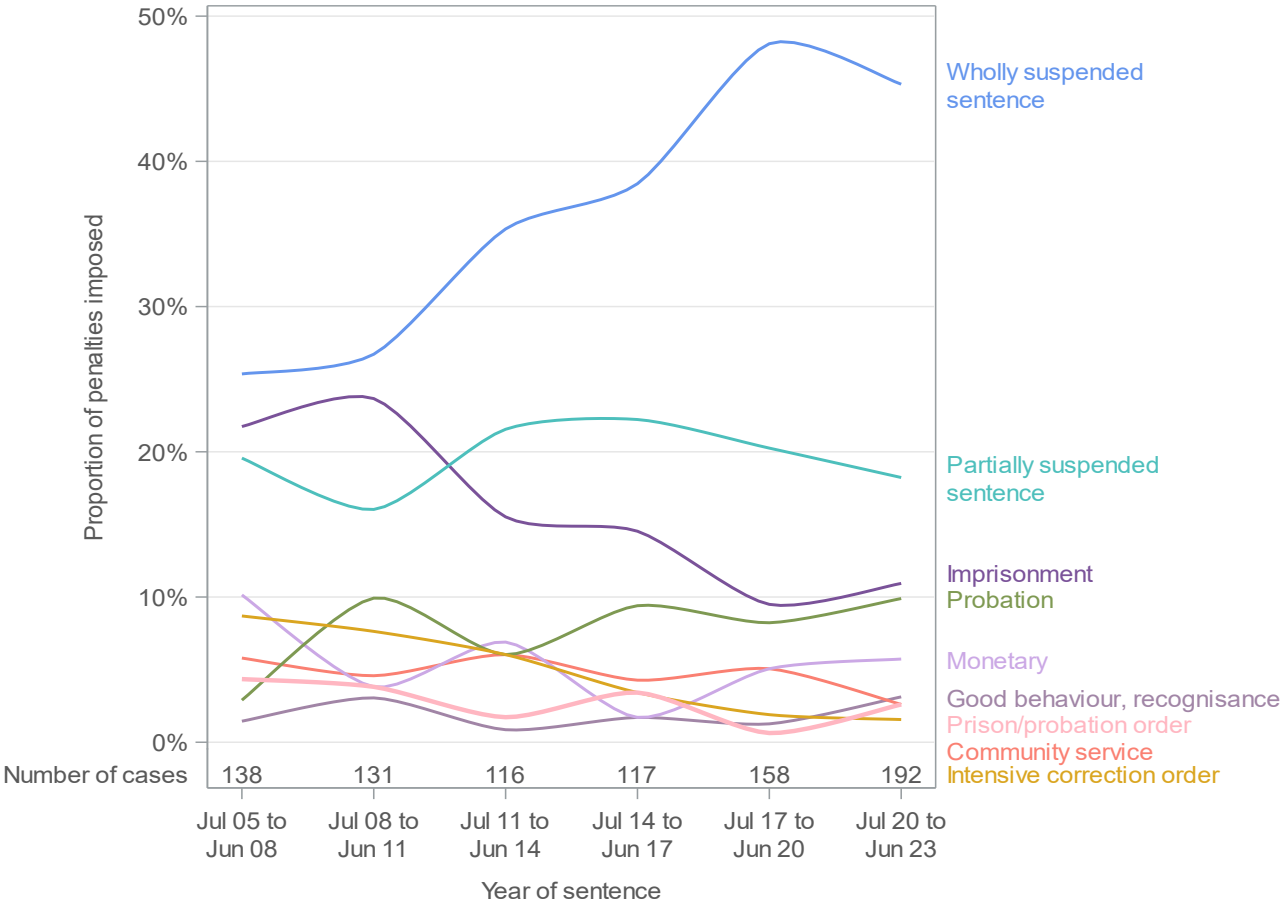
Data notes: MSO, adults, Magistrates Courts, 2005–06 to 2022–23. Rising of the court (n=1), was not included in these calculations. See Table 30 in Appendix 4 for more detail.
Source: Queensland Government Statistician's Office, Queensland Treasury - Courts Database, extracted September 2023

Higher courts

Wholly suspended penalties were the most common penalty imposed in the higher courts for sexual assault and the use of this penalty type increased over the data period. Partially suspended sentences were also commonly used and remained relatively stable over the data period. The use of imprisonment sentences decreased while probation orders fluctuated over time.

Given the changes over time, based on 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 higher courts was a wholly suspended sentence (45.3%), followed by partially suspended sentences (18.2%) and imprisonment (10.9%).

Figure 24: Penalties imposed for non-aggravated sexual assault (MSO) in the higher courts, by year of sentence (grouped)

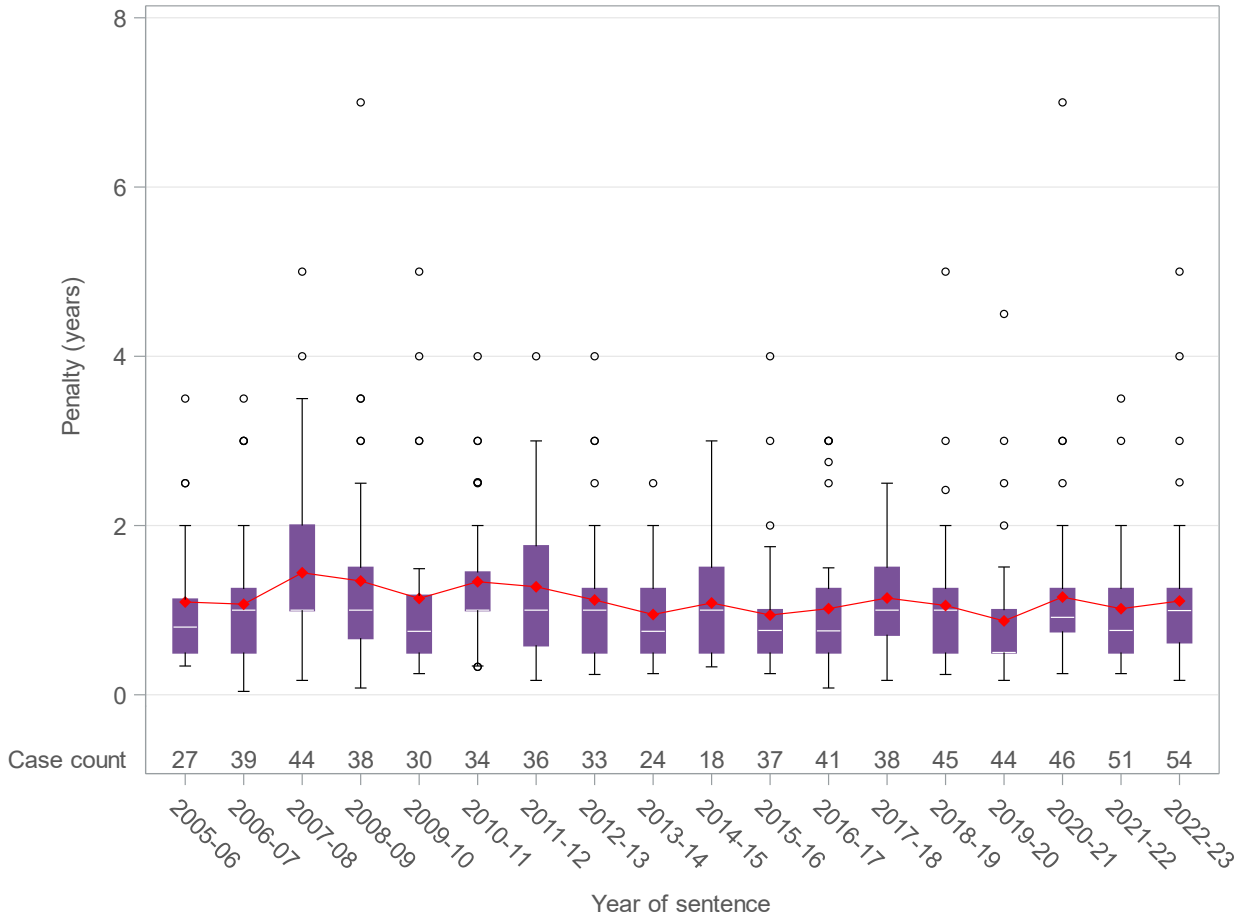


Data notes: Non-aggravated sexual assault (MSO), adults, higher courts, 2005–06 to 2022–23. Rising of the court (n=1) and convicted not further punished (n=1) were included in the calculations but have not been presented in the figure. See Table 31 in Appendix 4 for further detail.
Source: Queensland Government Statistician's Office, Queensland Treasury - Courts Database, extracted September 2023.

Figure 25 shows that for non-aggravated sexual assault sentenced in the higher courts (n=852), overall there has been little change in the median or average custodial sentence length over the period.

Generally, the median custodial sentence length has fluctuated at or below the 1 year mark, whilst the highest average custodial penalty length was in 2007–08 at 1.4 years (median 1.0 year), and the lowest average custodial penalty length being 0.9 years in both 2013-14 (median 0.8 years) and 2019–20 (median 0.5 years).

Figure 25: Summary of custodial penalty length for non-aggravated sexual assault (MSO) imposed in the higher courts, by year of sentence



Data notes: Non-aggravated sexual assault (MSO), adults, higher courts, 2005–06 to 2022–23. Rising of the court (n=1) was excluded from this analysis. See Table 32 in Appendix 4 for further detail.
Source: Queensland Government Statistician's Office, Queensland Treasury - Courts Database, extracted September 2023.

8.3.5 Penalties for specific cohorts

The following section focuses specifically on the sentencing outcomes for women, Aboriginal and Torres Strait Islanders, and children sentenced as adults.

Women sentenced for sexual assault

Over the 18-year data period, 29 women were sentenced for sexual assault, representing only 1.5 per cent of all cases sentenced for sexual assault. For these women, 19 were sentenced in the Magistrates Courts - all for non-aggravated sexual assault, and the remaining 10 women sentenced for sexual assault in the higher courts - all for non-aggravated sexual assault aside from one sexual assault (aggravated life) offence.

Nearly 60 per cent of all women sentenced obtained a non-custodial order (n=17, 58.6%), with the most common penalty being a probation order (n=11, 37.9%), and the most likely custodial penalty being a wholly suspended sentence (n=7, 24.1%).

In the Magistrates Court, nearly two-thirds received a non-custodial penalty (n=12), with the most common penalty being a probation order (36.8%). Comparatively in the higher courts, for those sentenced for non-aggravated sexual assault, 44.4 per cent received a custodial penalty (n=4).

Children sentenced as an adult for sexual assault

There were 13 cases where an adult was sentenced for sexual assault for offences they committed while they were a child (but were sentenced as an adult). In all but one of these cases the defendant pled guilty. Three of the thirteen cases were sentenced for aggravated sexual assault. Of the thirteen cases, 5 (38.5%) received a custodial penalty, and all of the cases of aggravated sexual assault received a custodial penalty. The remaining 8 (61.5%) people who committed sexual assault as children but were sentenced as adults received a non-custodial penalty.

Aboriginal and Torres Strait Islander people sentenced for sexual assault

Over the 18-year period, 200 cases sentenced in the Magistrates Court for non-aggravated sexual assault involved an Aboriginal and Torres Strait Islander, and 190 cases involving Aboriginal and Torres Strait Islander people were sentenced in the higher courts for sexual assault, with the vast majority of these cases being sentenced for non-aggravated sexual assault (90.5%, n=172).

A similar proportion of non-aggravated cases were seen for non-Indigenous people sentenced for sexual assault as compared to Aboriginal and Torres Strait Islander peoples across both the lower and higher courts, though a slightly higher proportion of Aboriginal and Torres Strait Islander people were sentenced for sexual assault (aggravated life), however it is not a statistically significant difference.

Table 18: Sexual assault offence type (MSO) by Aboriginal and Torres Strait Islander status

Offence type (MSO)	Non-Indigenous		Aboriginal and Torres Strait Islander		Total	
	n	%	n	%	n	%
Sexual assault (aggravated life)	18	1.2%	9	2.3%	27	1.4%
Sexual assault (aggravated)	52	3.5%	9	2.3%	61	3.2%
Sexual assault (non-aggravated) – higher courts	665	44.7%	172	44.1%	852	44.7%
Sexual assault (non-aggravated) – Magistrates Court	752	50.6%	200	51.2%	964	50.6%
Total	**1,487**	**100.0%**	**390**	**100.0%**	**1,904**	**100.0%**

Data notes: MSO, adults, higher courts and Magistrates Court, 2005–06 to 2022–23. Total includes cases were Aboriginal and Torres Strait Islander status was unknown (n=15).
Source: Queensland Government Statistician's Office, Queensland Treasury - Courts Database, extracted September 2023

Type of penalty

In regard to sentencing outcomes, across all sexual assault offences, Aboriginal and Torres Strait Islander people were more likely to receive a custodial penalty, with 81.8 per cent of Aboriginal and Torres Strait Islanders receiving a custodial penalty, compared to only 60.2 per cent of non-Indigenous people.[60] As discussed in section 8.2.4, are a complex range of reasons for the disproportionate representation of Aboriginal and Torres Strait Islander peoples in the criminal justice system.

Table 19 shows the proportion of penalties imposed by court level, offence type and Aboriginal and Torres Strait Islander status. The coloured text in each column indicates the penalty most commonly sentenced within that subgroup.

In the Magistrates court, 41.0 per cent of non-Indigenous people received a custodial penalty for non-aggravated sexual assault, significantly lower than 76.5 per cent of Aboriginal and Torres Strait Islander people.[61] In the higher courts 78.4 per cent of non-Indigenous people and 86.1 per cent of Aboriginal and Torres Strait Islander people received a custodial penalty for non-aggravated sexual assault.[62]

An imprisonment sentence was the most common sentence for Aboriginal and Torres Strait Islander people for sexual assault dealt with in the Magistrates Court (42.5%), followed by wholly suspended sentences which were imposed in 21.5 per cent of cases. By 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%).

Of the 466 custodial penalties imposed for sexual assault in the Magistrates Courts, one-third were imposed on Aboriginal and Torres Strait Islander people (32.8%, n=153).

60 Pearson's Chi-Square Test: $\chi 2(1) = 63.14$, $p < .001$, V=0.18.
61 Pearson's Chi-Square Test: $\chi 2(1) = 79.9$, $p < .001$, V=0.29
62 Pearson's Chi-Square Test: $\chi 2(1) = 5.05$, $p < .05$, V=0.08

In exploring the penalties imposed in the higher courts, Table 19 shows that for non-aggravated sexual assault, two in five non-Indigenous people received a wholly suspended sentence (42.1%) while this penalty is received for under one in five Aboriginal and Torres Strait Islander people (18.0%). The most common custodial penalty for Aboriginal and Torres Strait Islander people sentenced for non-aggravated sexual assault in the higher court was a period of imprisonment (33.7%).

For sexual assault (aggravated) a partially suspended sentence is the most common penalty, received by similar proportions of Aboriginal and Torres Strait Islander people and non-Indigenous people (55.6% and 48.1% respectively, noting the small sample size for Aboriginal and Torres Strait Islander people).

While the sample size is small for Aboriginal and Torres Strait Islander people sentenced for sexual assault (aggravated life), a partially suspended sentence was imposed in two-thirds of cases (66.7%), compared to just one-third of cases for non-Indigenous people (27.8%), who most commonly received a period of imprisonment (50.0%).

Table 19: Penalty type imposed for sexual assault (MSO), by Aboriginal and Torres Strait Islander status, court level and offence type

		Aboriginal and Torres Strait Islander people				Non-Indigenous people			
		Magistrates court	Higher courts			Magistrates court	Higher courts		
		Sexual assault (non-aggravated) (n=200)	Sexual assault (non-aggravated) (n=172)	Sexual assault (aggravated) (n=9*)	Sexual assault (aggravated life) (n=9*)	Sexual assault (non-aggravated) (n=752)	Sexual assault (non-aggravated) (n=665)	Sexual assault (aggravated) (n=52)	Sexual assault (aggravated life) (n=18)
Custodial penalty	Imprisonment	**42.5%**	**33.7%**	22.2%	22.2%	8.4%	11.1%	9.6%	**50.0%**
	Partially suspended	10.0%	25.0%	**55.6%**	**66.7%**	4.0%	18.0%	**48.1%**	27.8%
	Wholly suspended	21.5%	18.0%	22.2%	11.1%	**25.9%**	**42.1%**	26.9%	5.6%
	Intensive correction order	0.0%	4.1%	0.0%	0.0%	1.1%	4.8%	9.6%	5.6%
	Prison/ probation	2.5%	4.7%	0.0%	0.0%	1.3%	2.3%	0.0%	5.6%
Non-custodial penalty	Community service	3.5%	5.8%	0.0%	0.0%	6.5%	4.1%	0.0%	0.0%
	Probation	10.5%	4.7%	0.0%	0.0%	23.0%	8.9%	5.8%	0.0%
	Monetary	7.5%	1.2%	0.0%	0.0%	24.1%	6.6%	0.0%	0.0%
	Good behaviour, recognisance	1.0%	2.3%	0.0%	0.0%	4.8%	2.0%	0.0%	5.6%
	Convicted, not further punished	1.0%	0.0%	0.0%	0.0%	0.7%	0.2%	0.0%	0.0%

Data notes: MSO, adults, Magistrates Courts and higher courts, 2005–06 to 2022–23. Rising of the court (Aboriginal and Torres Strait Islander n=1, non-Indigenous n=2), was included in the calculations but not presented in the table.
Source: Queensland Government Statistician's Office, Queensland Treasury - Courts Database, extracted September 2023

Non-custodial orders were rarely imposed in the higher courts where a circumstance of aggravation was present for a sexual assault. There were 3 probation orders imposed for sexual assault (aggravated) and 1 good behaviour order for a sexual assault (aggravated life).

Non-custodial orders were more common in the higher courts for non-aggravated sexual assault, imposed in 20.2 per cent of cases (n =172). These are most commonly probation orders, monetary orders, or community service.

Length of custodial penalty

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.

The median imprisonment sentence for Aboriginal and Torres Strait Islander people was 0.7 years (average 0.8 years), as compared to 0.8 years (average 0.8 years) for non-Indigenous people. Similarly, the median partially suspended sentence for Aboriginal and Torres Strait Islander people was 1.0 years (average 0.9 years) as compared to 0.8 years (average 0.8 years) for non-Indigenous people.

As with matters sentenced in the Magistrates Court, there was also little difference in the average or median sentence for any custodial penalty type received in the higher court when Aboriginal and Torres Strait Islander status was considered.

The median imprisonment sentence for non-aggravated sexual assault dealt with in the higher courts was 1.3 years (average 1.8 years) for non-Indigenous people, very similar to that of Aboriginal and Torres Strait Islander people (median 1.3 years, average 1.7 years). The median partially suspended sentence was also similar, with a median of 1.3 years for Aboriginal and Torres Strait Islander people, as compared to 1.1 years for non-Indigenous people (average 1.4 years and 1.5 years respectively).

Refer to Figure 39 and Table 33 in Appendix 4 for detailed information on sentence type and length of custodial penalty for sexual assault by Aboriginal and Torres Strait Islander status.

8.3.6 Sentences based on specific case characteristics

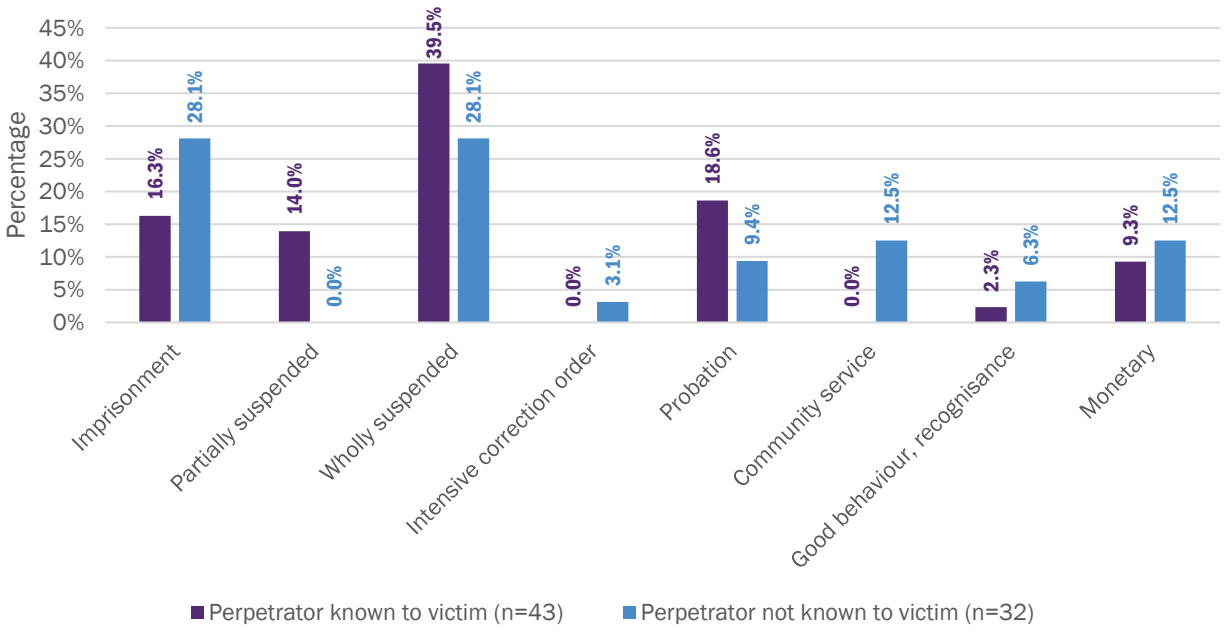
Unfortunately, the administrative data available to the Council was not able to provide detail in relation to the nature of the relationship between the victim survivor and the perpetrator, so a stratified representative random sample of 75 cases from all cases sentenced from July 2020 to June 2023 was analysed to determine whether there was any apparent difference in sentencing outcome as to whether the victim was known, or unknown, to the perpetrator.

In 57.3 per cent of sampled sexual assault cases the perpetrator was known to the victim survivor prior to the incident occurring. In the remaining 42.6 per cent of cases the perpetrator was unknown to the victim survivor prior to the sexual assault occurring.

For cases where the perpetrator was known to the victim survivor, the most common penalty was a wholly suspended sentence (39.5%) followed by probation (18.6%) and imprisonment (16.3%). For cases where the perpetrator was unknown to the victim survivor, imprisonment and a wholly suspended sentence were the most common penalties both at 28.1 per cent.

Cases involving a perpetrator who was unknown to the victim survivor were more likely to receive a sentence of imprisonment. However, of these, there was more variation in the penalties imposed upon these unknown perpetrators. More of the known perpetrators (69.8%) received a custodial penalty as compared to the perpetrators who were strangers (59.3%) although without information on the specific conduct that the person was being sentenced for it is difficult to explore this trend further. The Council hopes to explore this further in the later stages of this review.

Figure 26: Sentence outcome for sexual assault by relationship between victim survivor and perpetrator



Data notes: Sexual assault (MSO), adults, Magistrates Courts and higher courts, sample of cases sentenced from 2020–21 to 2022–23.
Source: Queensland Government Statistician's Office, Queensland Treasury - Courts Database, extracted September 2023. Victim-perpetrator relationship was manually coded from sentencing remarks received from Queensland Sentencing Information Service.

8.3.7 Sexual Assault as a domestic violence offence

This section examines the volume of cases of sexual assault (MSO) sentenced as domestic violence offences between July 2016 and June 2023.

Of the 1,009 sexual assault (MSO) cases sentenced over the period, 7.2 per cent (n=73) were charged as domestic violence offences. The proportion of cases sentenced as a domestic violence offence remained consistent over the past 7 years, and offences with aggravating circumstances were significantly more likely to be domestic violence offences.[63]

8.3.8 Co-sentenced offences

As with the exploration of rape offences, the Council was keen to know the likelihood of a defendant receiving a custodial penalty for sexual assault (MSO) and also having other offences sentenced at the same time, as well as examining the likelihood that they received a supervised order for a co-sentenced offence, where a defendant received a suspended sentence for sexual assault.

Whilst there were 1,904 cases sentenced for sexual assault (MSO) over the 18-year period, there were an additional 639 cases involving a charge of sexual assault where it was not the MSO. In these cases, at least one of the co-sentenced offences charged with the sexual assault received a penalty that was more serious than the penalty given for the sexual assault charge.

In these 639 cases, the MSO was most commonly a charge of rape (38.5%), indecent treatment of a child under 16 (11.3%), burglary (8.3%), repeated sexual conduct with a child (7.5%)[64] or assault occasioning bodily harm (6.6%).

The remainder of this section discusses only the 1,904 sentenced cases where sexual assault was the MSO and examines the Council's data findings for sexual assault (MSO) sentenced to a custodial penalty and where the person was also co-sentenced in the same event for one or more offences.

This analysis is not split by aggravating circumstances of the offence, though will be examined by court level.

63 Pearson's Chi-Square Test: $\chi 2$ (1) = 25.486, p<.0001
64 This offence was called maintaining an unlawful sexual relationship with a child during the 18-year data period. It changed names in 2023.

Co-sentenced offences and custodial penalties

Over the 18-year data period 1,230 cases sentenced for sexual assault (MSO) received a custodial penalty. Of those cases, just over half (55.2%, n=679) were also sentenced for another offence at the same sentencing event.

Of the 163 people who received an imprisonment sentence for sexual assault in the Magistrates Courts[65], 79.1 per cent (n=129) were also sentenced for other offences within the same court event - see Figure 27. The median imprisonment sentence where other offences were also sentenced was 2.0 years (average 2.0 years), compared to 0.8 years (average 0.9 years) when no other offences were sentenced.

Similarly, of the 174 people who received an imprisonment sentence for sexual assault [66] in the higher courts, 71.3 per cent (n=124) were also sentenced for other offences within the same court event - see Figure 27. The median imprisonment sentence where other offences were also sentenced was 0.8 years (average 0.8 years), compared to 0.5 years (average 0.5 years) when no other offences were sentenced.

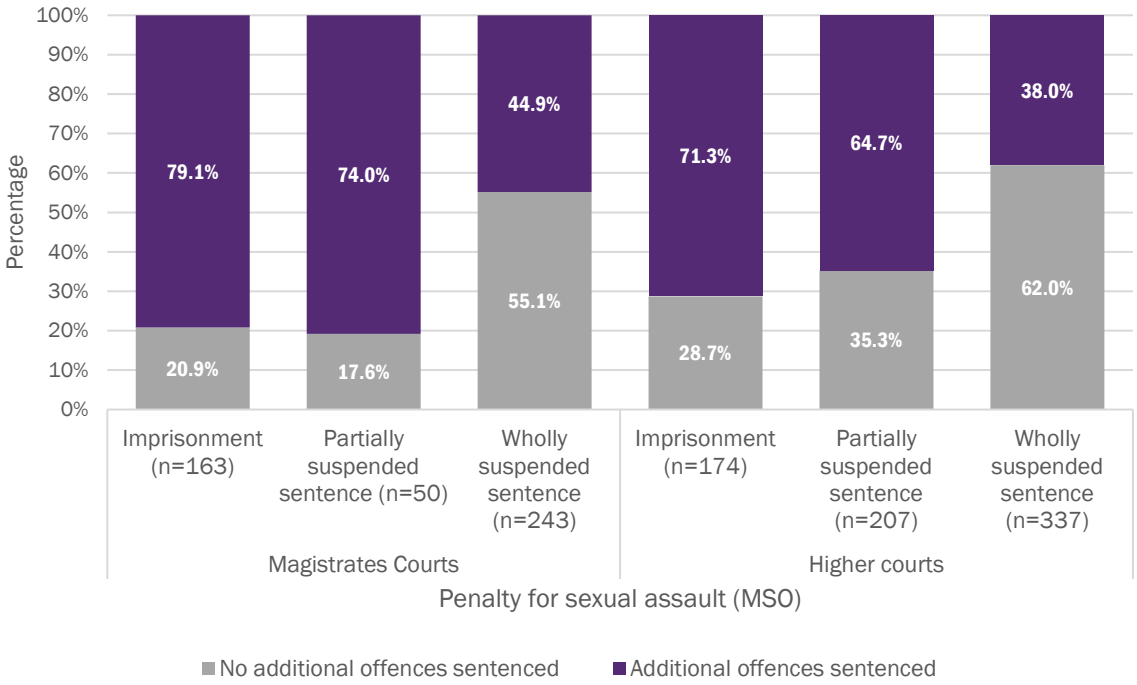
Of those that received a partially suspended sentence in the Magistrates Court, nearly three-quarters (74.0%, n=37) were also sentenced for other offences within the same court event. The median partially suspended sentenced where other offences were also sentenced was 1.0 years (average 0.9 years), compared to 0.8 years (average 0.7 years) when no other offences were sentenced.

By comparison, of those that received a partially suspended sentence (MSO) in the higher court, nearly two-thirds (64.7%, n=134) were also sentenced for other offences within the same court event. The median partially suspended sentenced where other offences were also sentenced was 1.5 years (average 1.7 years), compared to 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 Court had co-sentenced offences (44.9%, n=109). The median wholly suspended sentence with co-sentenced 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 (38.0%, n=128). 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).

Figure 27: Proportion of cases sentenced for sexual assault (MSO) that had co-sentenced offences, by custodial penalty type.



Data notes: Imprisonment (including prison-probation orders) and suspended sentences (MSO), adults, Magistrates Courts and higher courts, 2005–06 to 2022–23.
Source: Queensland Government Statistician's Office, Queensland Treasury - Courts Database, extracted September 2023.

65 This includes 148 imprisonment orders and 15 prison/probation orders.
66 This includes 150 imprisonment orders and 24 prison/probation orders.

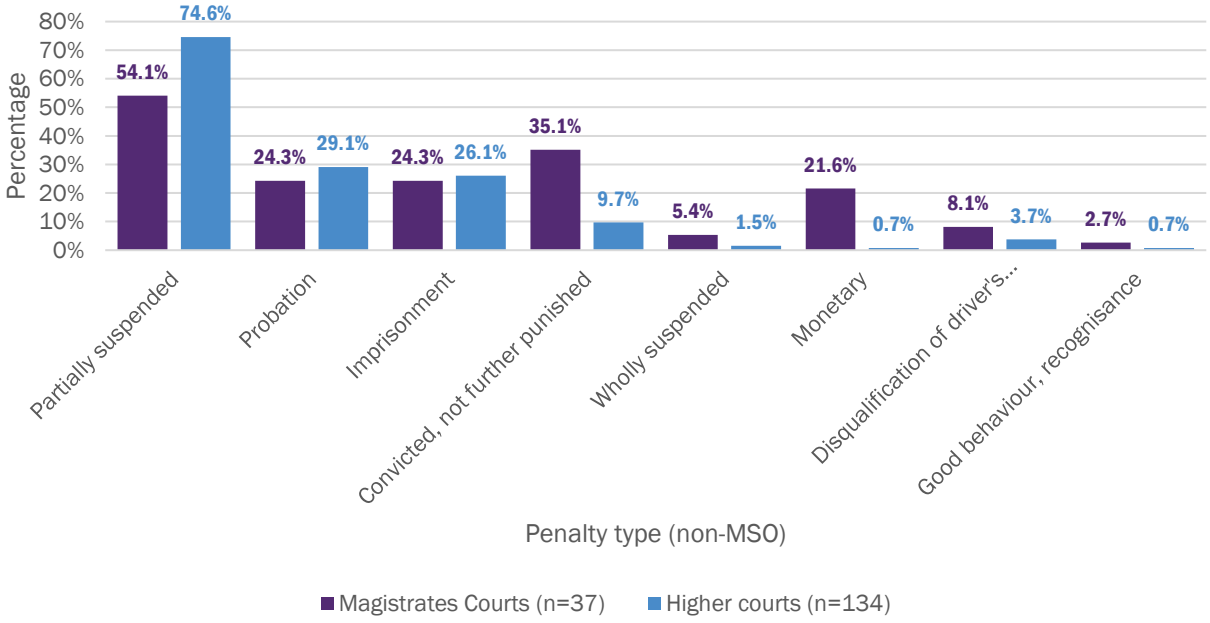
Suspended sentences and penalties for co-sentenced offences

As with our analysis of rape sentencing, the Council sought to understand the nature of the sentencing outcomes for co-sentenced offences, particularly where the defendant received a suspended sentence for sexual assault as their MSO.

In the Magistrates Courts, over half of the cases receiving a partially suspended sentence where there was a co-sentenced offence, received a further partially suspended sentence (54.1%) and approximately one-quarter received a probation order in addition to the partially suspended sentence MSO.

Of the 134 partially suspended sentences that were sentenced in the higher courts for more than one offence, most commonly they received additional partially suspended sentences (74.6%). Just over one-quarter of cases also received at least one probation order (29.1%) and a further one-quarter of cases received at least one imprisonment sentence (26.1%).

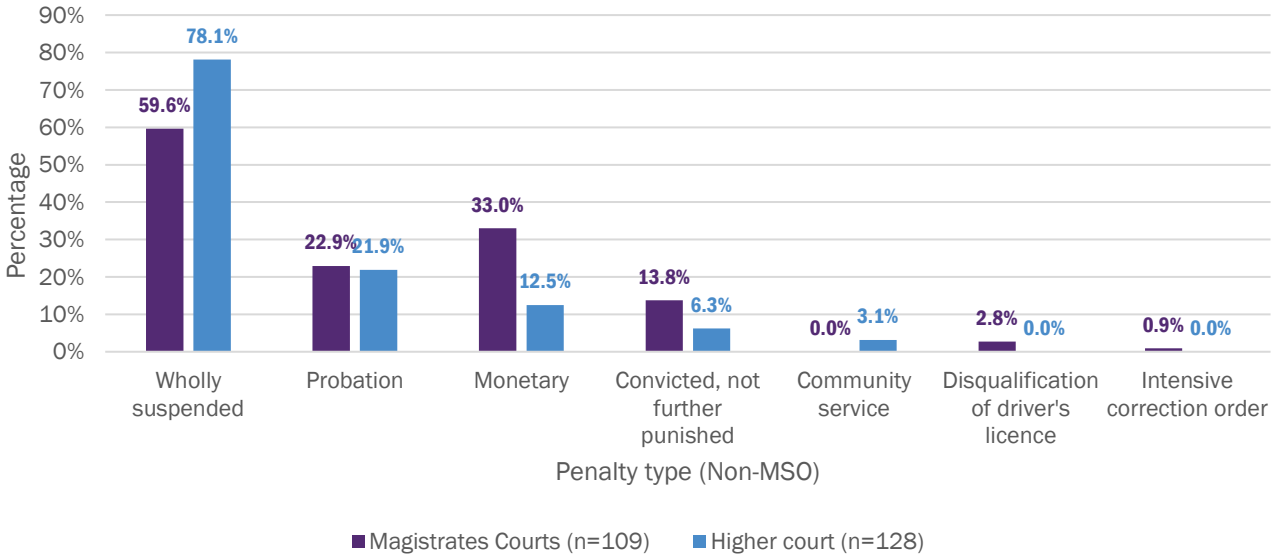
Figure 28: Penalty type for co-sentenced offences with a partially suspended sentence for sexual assault (MSO), by court level



Data notes: Partially suspended sentences (MSO), adults, Magistrates Courts and higher courts, 2005–06 to 2022–23. A case may have more than 1 offence sentenced with a rape (MSO), therefore totals may add to more than 100%.
Source: Queensland Government Statistician's Office, Queensland Treasury - Courts Database, extracted September 2023.

Of the 109 wholly suspended sentences that were sentenced in the Magistrates Court that involved more than one offence, most commonly they received an additional wholly suspended sentence (56.9% of cases). This was similar in the higher courts, with an additional wholly suspended sentence also being the most common penalty received in addition to a wholly suspended sentence for the sexual assault MSO (78.1%).

Figure 29: Penalty type for co-sentenced offences with a wholly suspended sentence for sexual assault (MSO), by court level

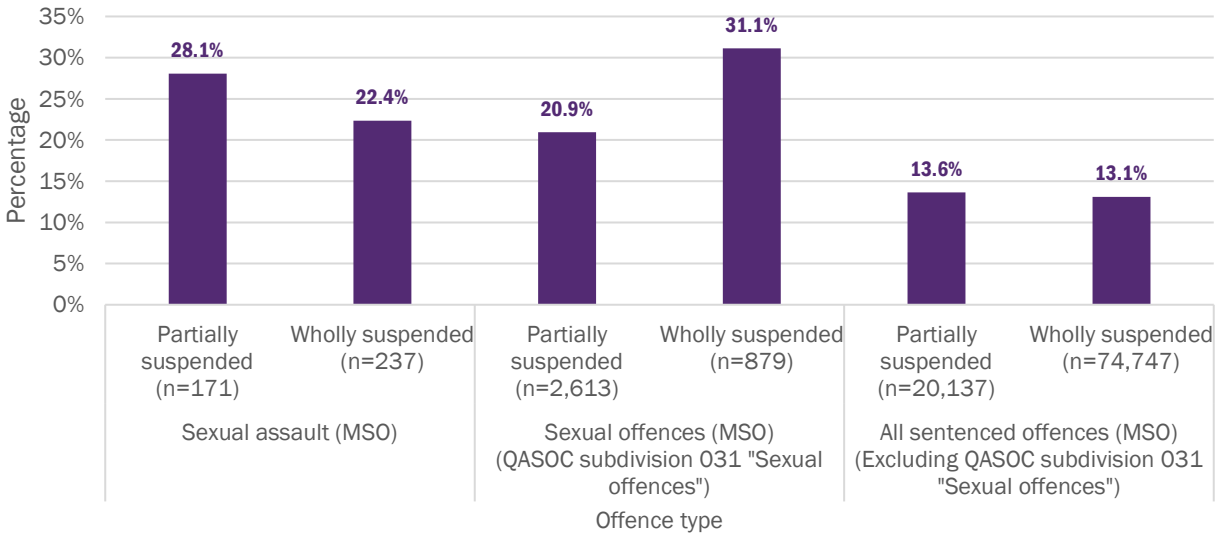


Data notes: Wholly suspended sentences (MSO), adults, Magistrates Courts and higher courts, 2005–06 to 2022–23. A case may have more than offence sentenced with a rape (MSO), therefore totals may add to more than 100%.
Source: Queensland Government Statistician's Office, Queensland Treasury - Courts Database, extracted September 2023.

Given the prevalence of combining a suspended sentence with a probation order, the Council was interested to know whether the proportion of cases that received a probation order in conjunction with a suspended sentence for sexual assault MSO offence differed compared to other sexual offences and all other offence types.

Figure 30 shows that combining probation orders with a partially suspended sentence is more common where the MSO is sexual assault, compared to both other sexual offences and non-sexual offences. Combining probation orders with a wholly suspended sentence is more common for sexual offences more broadly, than for sexual assault (MSO).

Figure 30: Proportion of cases that received a probation order within the same court event as a suspended sentence, by offence type



Data notes: Suspended sentence (MSO) with co-sentenced offence/s, adults, Magistrates Courts and higher courts, 2005–06 to 2022–23
Source: Queensland Government Statistician's Office, Queensland Treasury - Courts Database, extracted September 2023.

8.3.9 Time served in custody for sexual assault

The analysis in this section considers the time a person was required to serve in custody before being eligible for release parole if sentenced to imprisonment, or before being released if sentenced to a partially suspended sentence.

This analysis is not split by aggravating circumstances of the offence, though is examined by court level.

Time in custody before being eligible for release on parole

Since July 2011, regardless of plea or court level, the median imprisonment length to serve for a non-aggravated sexual assault before being eligible for release on parole is 0.3 years (approximately 4 months) with an average of 0.4 years (approximately 5 months). If circumstances of aggravation are present, the median time spent in custody is 1.1 years (average 1.1 years) – noting that the sample size for this subgroup is quite small (n=12).

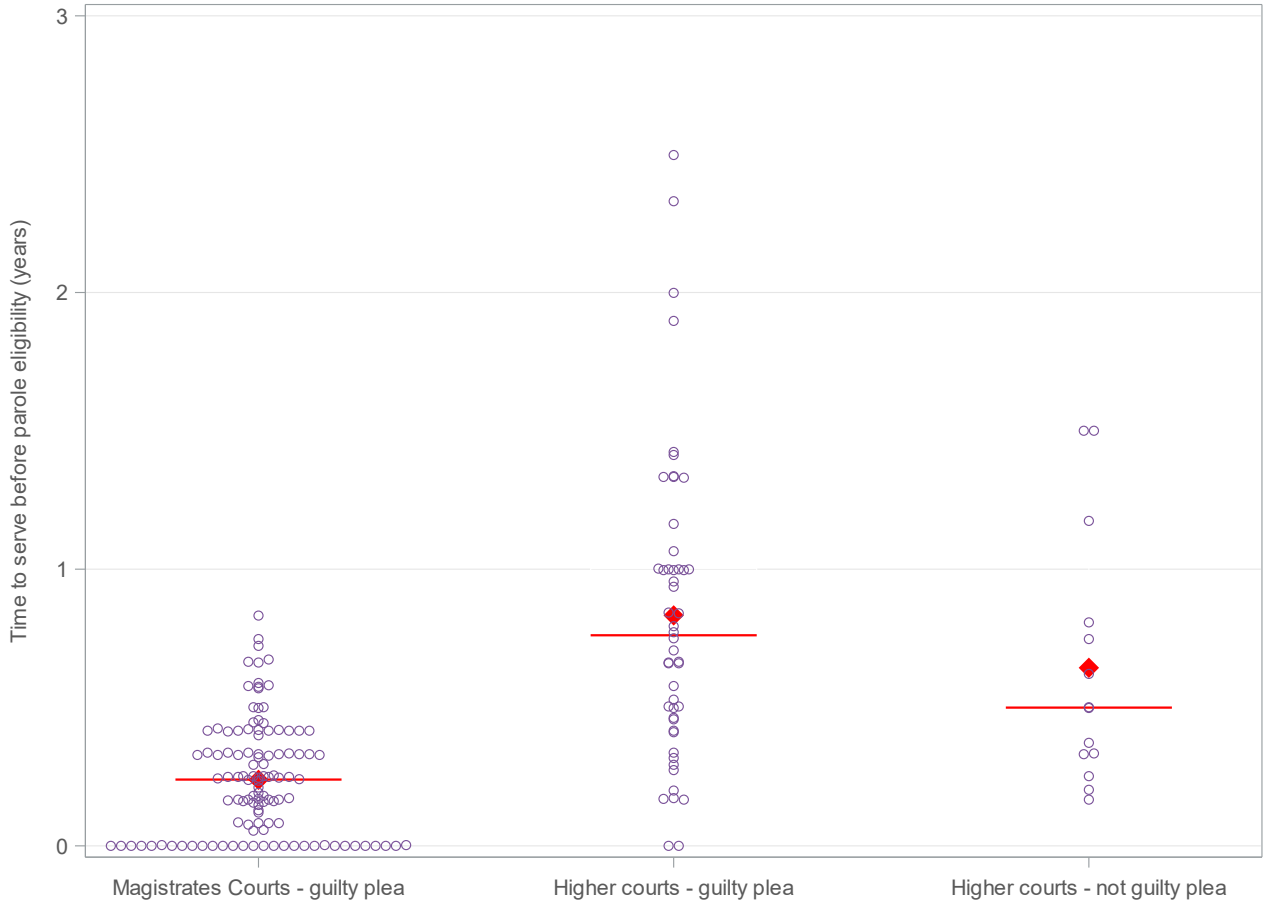
The total time to be served does however vary by both plea and court level.

The median imprisonment length to serve for non-aggravated sexual assault in the Magistrates Courts before being eligible for release on parole (after pleading guilty) was 0.2 years (approximately 2.5 months) (average 0.2 years). The red line in Figure 31 indicates the median and the red diamond indicates the average. Figure 31 shows a gathering of cases at 0 months. These are cases that only had to serve a short amount of time (under 1 month) or were able to apply for parole immediately, usually due to time served in pre-sentence custody.

In the higher courts, those that pleaded guilty are eligible for release on parole after serving a median sentence of 0.8 years (approximately 10 months) with an average of 0.8 years[67]. Those that did not plead guilty had to serve a median sentence of 0.5 years (approximately 6months) with an average of 0.6 years (approximately 7 months). However, the sample size of those who pleaded not guilty is quite small (n=14), while those that pleaded guilty is much larger (n=50).

67 Three cases were excluded from this analysis because plea type was not available.

Figure 31: Time to serve in custody for sexual assault (MSO) on an imprisonment order, before being eligible for release on parole, by plea type and court level, 2011–12 to 2022–23



Court level	Plea type	N	Average (years)	Median (years)	Minimum (years)	Maximum (years)
Magistrates Courts	Guilty	114	0.2	0.2	0.0	0.8
Higher courts	Guilty	50	0.8	0.8	0.0	2.5
	Not guilty	14	0.6	0.5	0.2	1.5
TOTAL	Combined	180	0.4	0.3	0.0	2.5

Data notes: Imprisonment (MSO), adults, Magistrates Courts and higher courts, 2011–12 to 2022–23. Higher courts cases include aggravated and non-aggravated forms of sexual assault due to small sample sizes.
Excludes cases where the expected parole eligibility date exceeds the length of the head sentence due to a longer parole eligibility date being applied to a different offence. Cases receiving a prison-probation order have also been excluded. Cases with no plea type entered in the higher courts (n=3) have been included in the total row of the table but excluded in all other analysis.
Source: Queensland Government Statistician's Office, Queensland Treasury - Courts Database, extracted September 2023.

Of sentences imposed in the Magistrates Court (guilty plea), the average sentence proportion served before parole eligibility was 27.1 per cent (median 31.7%). In the higher courts, for those that plead guilty, the average sentence proportion served before parole eligibility was 33.4 per cent (median 33.3%), compared to 47.6 per cent for those that did not plead guilty (median 49.9%). The sample size for not guilty pleas in the higher court is small (n= 14) and any findings therefore should be treated with caution.

Table 20: Summary statistics of time to serve in custody for sexual assault (MSO) on an imprisonment order, before being eligible for release on parole, by plea type and court level, 2011–12 to 2022–23

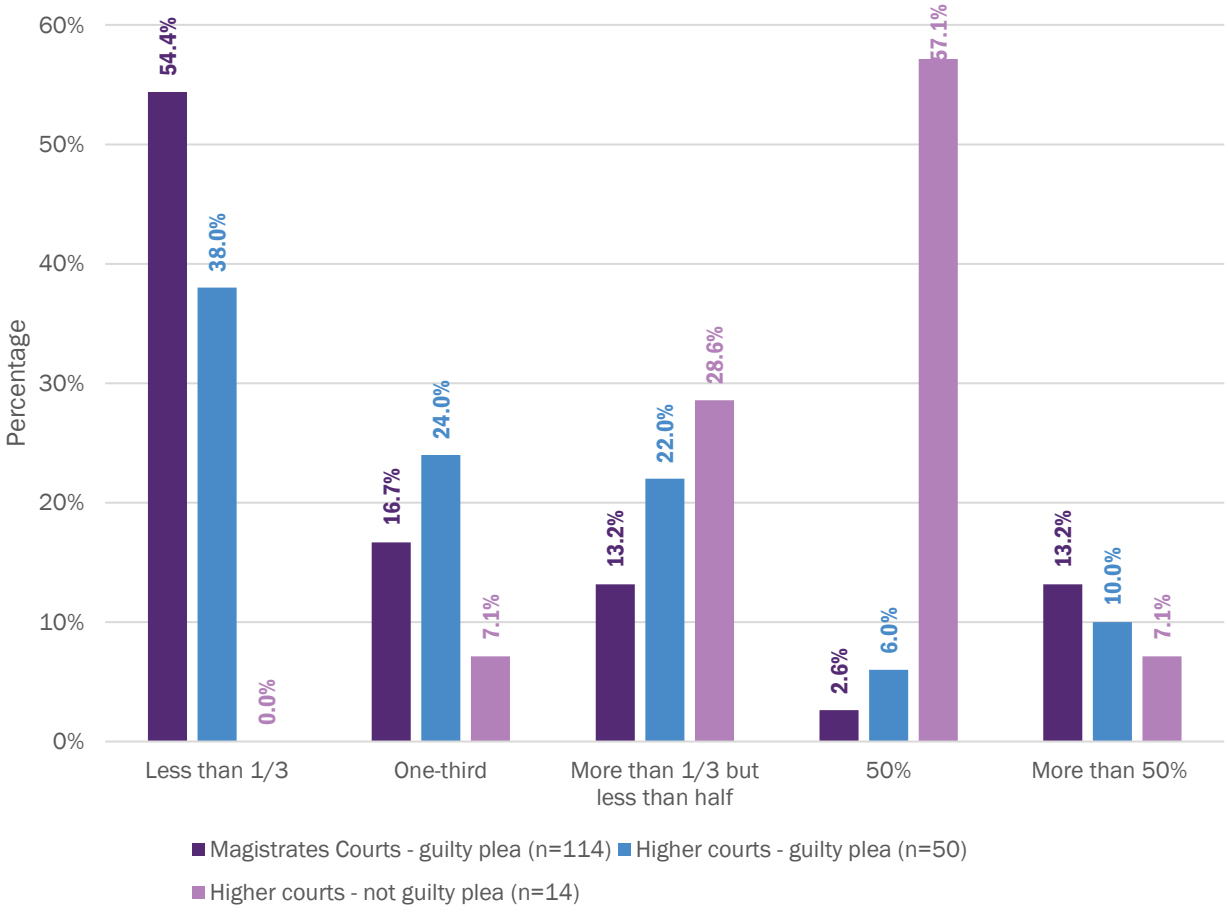
Court level	Plea type	N	Average proportion	Median proportion	Minimum proportion	Maximum proportion
Magistrates Courts	Guilty	114	27.1%	31.7%	0.0%	99.5%
Higher courts	Guilty	50	33.4%	33.3%	0.0%	99.7%
	Not guilty	14	47.6%	49.9%	33.2%	58.7%
TOTAL	Combined	180	30.5%	33.1%	0.0%	99.7%

Data notes: Imprisonment (MSO), adults, Magistrates Courts and higher courts, 2011–12 to 2022–23. Higher courts cases include aggravated and non-aggravated forms of sexual assault due to small sample sizes.
Excludes cases where the expected parole eligibility date exceeds the length of the head sentence due to a longer parole eligibility date being applied to a different offence. Cases receiving a prison-probation order have also been excluded. Cases with no plea type entered in the higher courts (n=3) have been included in the total row of the table but excluded in all other analysis.
Source: Queensland Government Statistician's Office, Queensland Treasury - Courts Database, extracted September 2023.

Of people who received an imprisonment sentence in the Magistrates Court (guilty plea) for sexual assault (MSO), more than two-thirds (71.1%) were eligible for release on parole after serving one-third or less of the head sentence.

In the higher courts, the vast majority of people who did not plead guilty had to serve half of their sentence before being eligible for parole (57.1%), compared to less than 10 per cent of people who pleaded guilty (6.0%). Over half of people who pleaded guilty were eligible for parole at or below one-third of their sentence (62.0%) compared to only 7.1 per cent of people who did not plead guilty (although this was only based on a very small sample size of 14 cases).

Figure 32: Proportion of imprisonment sentence to be served before being eligible for release on parole for sexual assault (MSO), by plea type, 2011–12 to 2022–23



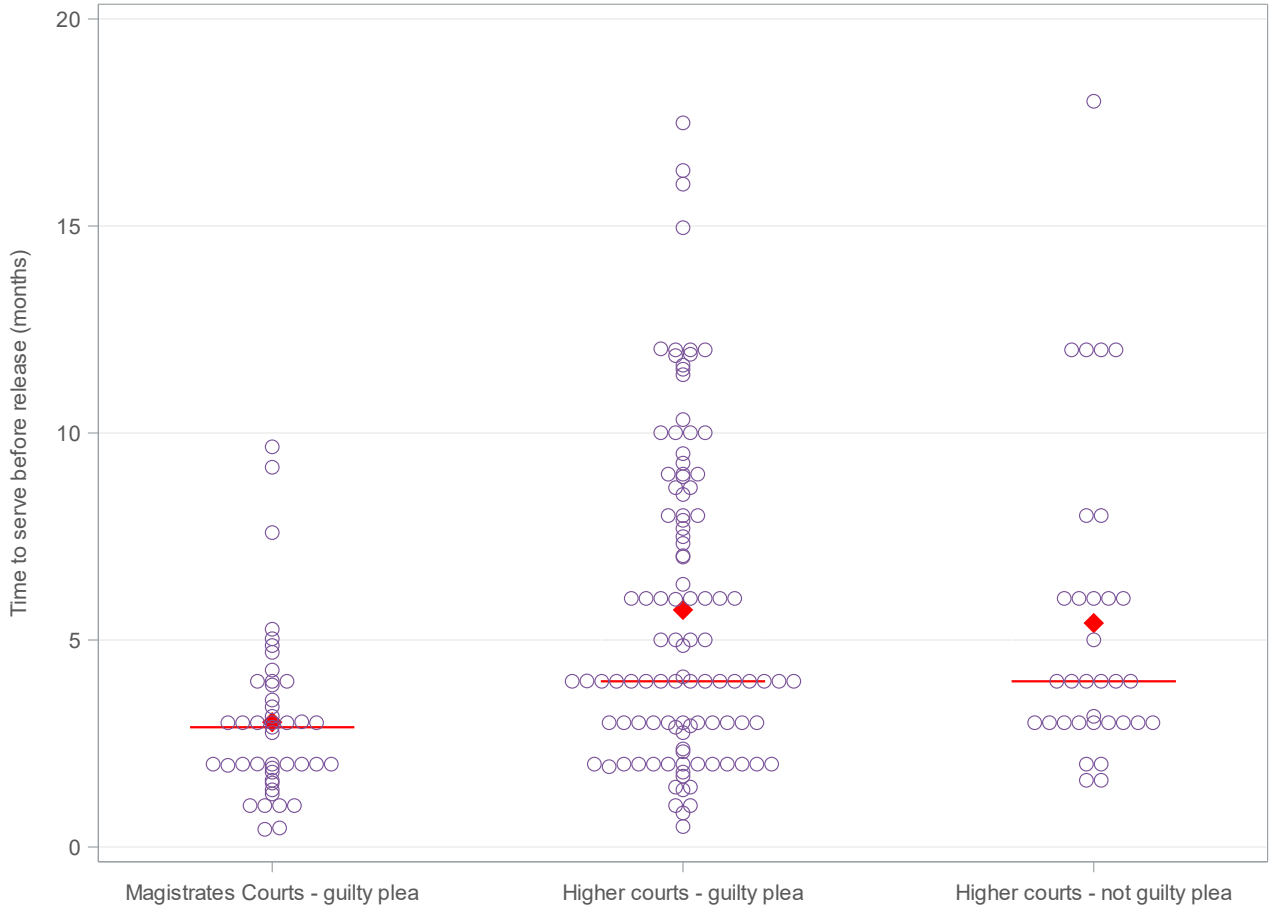
Data notes: Imprisonment (MSO), adults, Magistrates Courts and higher courts, 2011–12 to 2022–23. Higher courts cases include aggravated and non-aggravated forms of sexual assault due to small sample sizes.
Excludes cases where the expected parole eligibility date exceeds the length of the head sentence due to a longer parole eligibility date being applied to a different offence. Cases receiving a prison-probation order have also been excluded. Cases with no plea type entered in the higher courts (n=3) have been excluded.
Source: Queensland Government Statistician's Office, Queensland Treasury - Courts Database, extracted September 2023.

Time to serve before release for partially suspended sentences

Figure 33 shows that for those sentenced in the Magistrates Courts (only guilty pleas) to a partially suspended sentence for sexual assault, the median time to serve was 2.9 months (average 3.0 months), ranging from 0.4 to 9.7 months. The red line in Figure 33 indicates the median and the red diamond indicates the average.

In the higher courts,[68] a person sentenced to a partially suspended sentence after pleading guilty for sexual assault had to serve between 0.5 and 17.5 months before being released, with the median time to serve before release was 4.0 months (average 5.7 months). By comparison, the median time to serve was similar for those who did not plead guilty, with the median time to serve of 4.0 months (average 5.4 months) and ranging from 1.6 months to 18.0 months.

Figure 33: Time to serve before release for partially suspended sentence for sexual assault (MSO), by plea type and court level, 2011–12 to 2022–23



Court level	Plea type	N	Average (months)	Median (months)	Minimum (months)	Maximum (months)
Magistrates Courts	Guilty	45	3.0	2.9	0.4	9.7
Higher courts	Guilty	105	5.7	4.0	0.5	17.5
	Not guilty	33	5.4	4.0	1.6	18.0
TOTAL	Combined	189	5.0	4.0	0.4	18.0

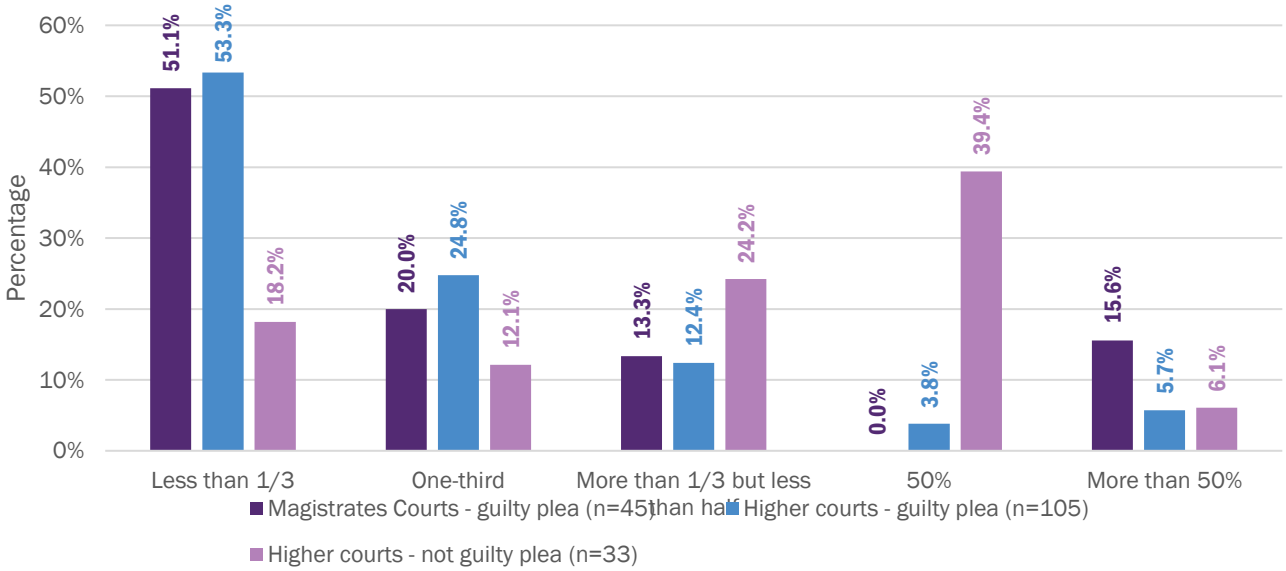
Data notes: Partially suspended sentence (MSO), adults, Magistrates Courts and higher courts, 2011-12 to 2022–23. Cases with no plea type entered in the higher courts (n=6) have been included in the total row of the table but excluded in all other analysis. Source: Queensland Government Statistician's Office, Queensland Treasury - Courts Database, extracted September 2023.

In the Magistrates Courts (guilty pleas only), nearly three-quarters of cases receiving a partially suspended sentence for sexual assault served one-third or less of the sentence before being released (71.1%).

68 Six cases were excluded from this analysis because plea type was not available.

Similarly, in the higher courts, over three-quarters of people who entered a guilty plea had to serve one-third or less of their suspended sentence before being released (78.1%), compared to approximately one-third of people who pleaded not guilty (30.3%). One-quarter of those with a not guilty plea had to serve 50 per cent of their sentence before being released (24.2%).

Figure 34: Proportion of partially suspended sentence to be served before release for sexual assault (MSO), by plea type, 2011–12 to 2022–23



Data notes: Partially suspended sentence (MSO), adults, Magistrates Courts and higher courts, 2011–12 to 2022–23. Cases with no plea type entered in the higher courts (n=6) have been excluded.
Source: Queensland Government Statistician's Office, Queensland Treasury - Courts Database, extracted September 2023.

8.3.10 Sentencing and pre-sentence custody for sexual assault

Across both court levels, of the 237 cases where an imprisonment sentence was imposed[69] for sexual assault (MSO) from July 2011 to June 2023,[70] two in five had no declared time in pre-sentence custody (41.8%). A similar proportion (42.6%) had pre-sentence time declared which was less than the sentence length, meaning that further time in custody was required before being eligible for parole. The remaining 15.6 per cent (n=37) had pre-sentence time declared which equalled the sentence length, meaning they were able to apply for parole immediately.

The median declared time in pre-sentence custody for an imprisonment sentence was 116 days (average 160.3 days).

The median imprisonment sentence for sexual assault where no pre-sentence custody was declared was 0.75 years (average 1.0 years), which is less than the median imprisonment sentence of 1.0 years (average 1.3 years) where pre-sentence custody was declared.[71]

More than half of partially suspended sentences imposed for sexual assault had no pre-sentence custody declared (51.3%). More than one-in-four had time declared which equalled the time to serve before release (28.6%). For the remaining 20.1 per cent (n=38), their declared pre-sentence time in custody was less than the time required to serve before the sentence was suspended, meaning they had further time to serve in custody before release.

The median days declared pre-sentence custody for a partially suspended sentence was 92.5 days (average 139.1 days).

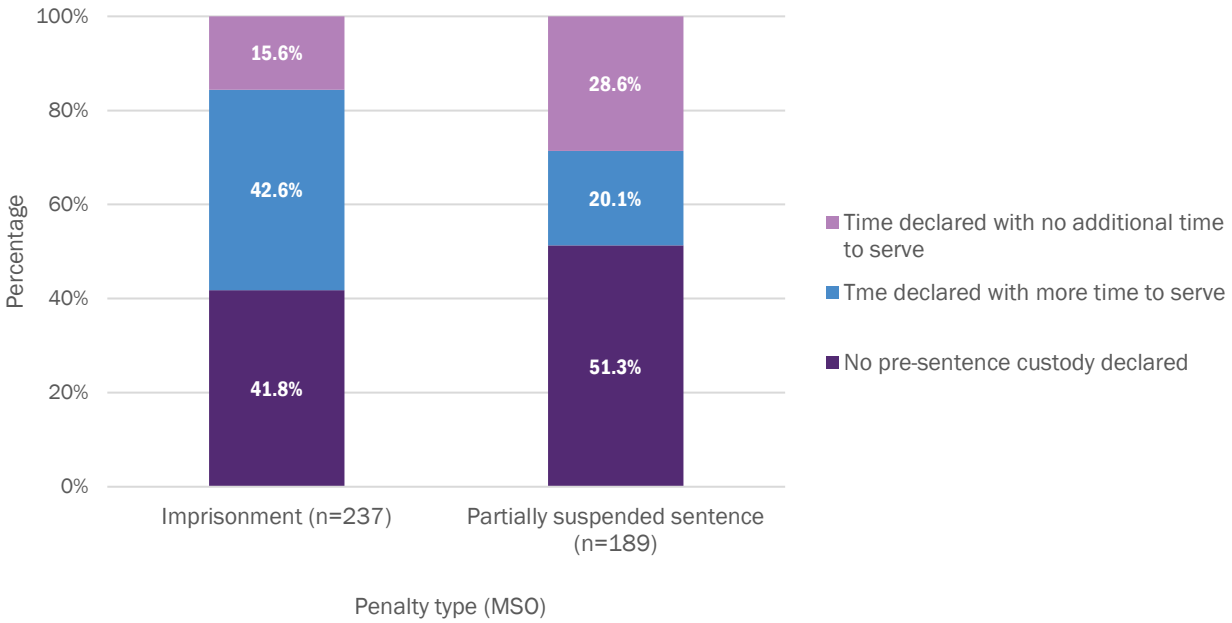
For partially suspended sentences, both the sentence length and the time to serve before release were significantly longer when there was declared pre-sentence custody compared to no declared time.[72]

The median partially suspended sentence where no time was declared was 1.0 year (average 1.2 years), with a median of 3.0 months (average of 4.2 months) to be served before release. By comparison, when pre-sentence

69 This includes prison/probation orders (n=25) as there were too few of these to analyse separately.
70 Pre-sentence custody was recorded in the data from July 2011 onwards.
71 Independent Groups T-Test: t(234.26) = 2.40, p <0.05, two-tailed (equal variance not assumed).
72 Independent Groups T-Test: t(154.12) = 2.67, p <0.01, two-tailed (equal variance not assumed), Independent groups t-test: t(167.45) = 3.13, p <0.01, two-tailed (equal variance not assumed).

custody was declared, the median sentence length was 1.3 years (average 1.5 years) and median time to serve before release was 4.9 months (average 5.9 months).

Figure 35: Use of pre-sentence custody for sexual assault (MSO), 2011–12 to 2022–23



Data notes: MSO, adults, higher and lower courts, 2011–12 to 2022–23.
Source: Queensland Government Statistician's Office, Queensland Treasury - Courts Database, extracted September 2023.

8.4 Sentencing outcomes for comparator offences

One way to assess the appropriateness of sentencing for rape and sexual assault is to compare the types of sentences received for different types of offences.

The data in this section is limited to cases sentenced in the past 3 years, from 2020–21 to 2022–23. This time period was selected to ensure the analysis reflects current sentencing practices.

8.4.1 Selection of comparator offences

The Council has selected a range of offences to be used as comparators. These offences vary in their level of seriousness, maximum penalties and whether they involve personal violence, property or drug related harms. Several offences were chosen because they align with offences selected by the University of the Sunshine Coast as part of its focus group research for this review, thereby allowing the Council to compare with their findings.

Common assault[73] was selected as an example of a violence offence that is less serious, resulting in no physical harm and has a maximum penalty of 3 years. The more serious offence of assault occasioning bodily harm ('AOBH')[74] was selected as an example of a violence offence resulting in bodily harm with a maximum penalty of 7 years. Where circumstances of aggravation are present, the maximum penalty increases to 10 years[75] – matching the maximum penalty for non-aggravated sexual assault.

Choking, suffocation or strangulation in a domestic setting ('strangulation')[76] is a serious violence offence with a maximum penalty of 7 years and is comparable to AOBH.

The offence of acts intended to cause grievous bodily harm ('GBH') [77] and other malicious acts ('malicious acts')[78] has a maximum penalty of life imprisonment. This is a serious violence offence involving an intentional act to maim, disfigure or disable a person or to cause them GBH.

73 *Criminal Code* (Qld) (n 5) s 335.
74 Ibid s 339(1).
75 Ibid s 339(2).
76 Ibid s 315A.
77 Grievous bodily harm means a) the loss of a distinct part or an organ of the body; or b) serious disfigurement; or c) any bodily injury of such a nature that, if left untreated, would endanger or be likely to endanger life, or cause or be likely to cause permanent injury to health; whether or not treatment is or could have been available: Ibid s 1
78 Ibid s 317.

Dangerous operation of a motor vehicle causing death or GBH ('dangerous driving causing death/GBH') is a serious offence that attracts a maximum penalty of 10 years,[79] increasing to 14 years where circumstances of aggravation are present.[80] The administrative data recorded by courts does not make it possible to separate offences that resulted in GBH from offences that resulted in death.

Burglary—the unlawful entry of a person's home—is a serious property offence with a maximum penalty of 14 years.[81] When circumstances of aggravation are present[82] or if the defendant commits an indictable offence during the course of the burglary[83] ('and commit') the maximum penalty is raised to life imprisonment – matching the maximum penalty for rape.

Fraud is a serious financial offence that does not involve violence with a maximum penalty of 5 years imprisonment.[84] Where circumstances of aggravation are present, the maximum penalty may increase to 14 years[85] or to 20 years.[86]

Trafficking in dangerous drugs is a serious drug offence that results in widespread harm across the community. The maximum penalty is life imprisonment.[87] The administrative data recorded by courts does not make it possible to determine the volume or types of drugs involved in cases.

No other sexual offences were included in this analysis at this time. We intend to explore differences in sentencing outcomes across other sexual offence types and with findings to be presented in our final report.

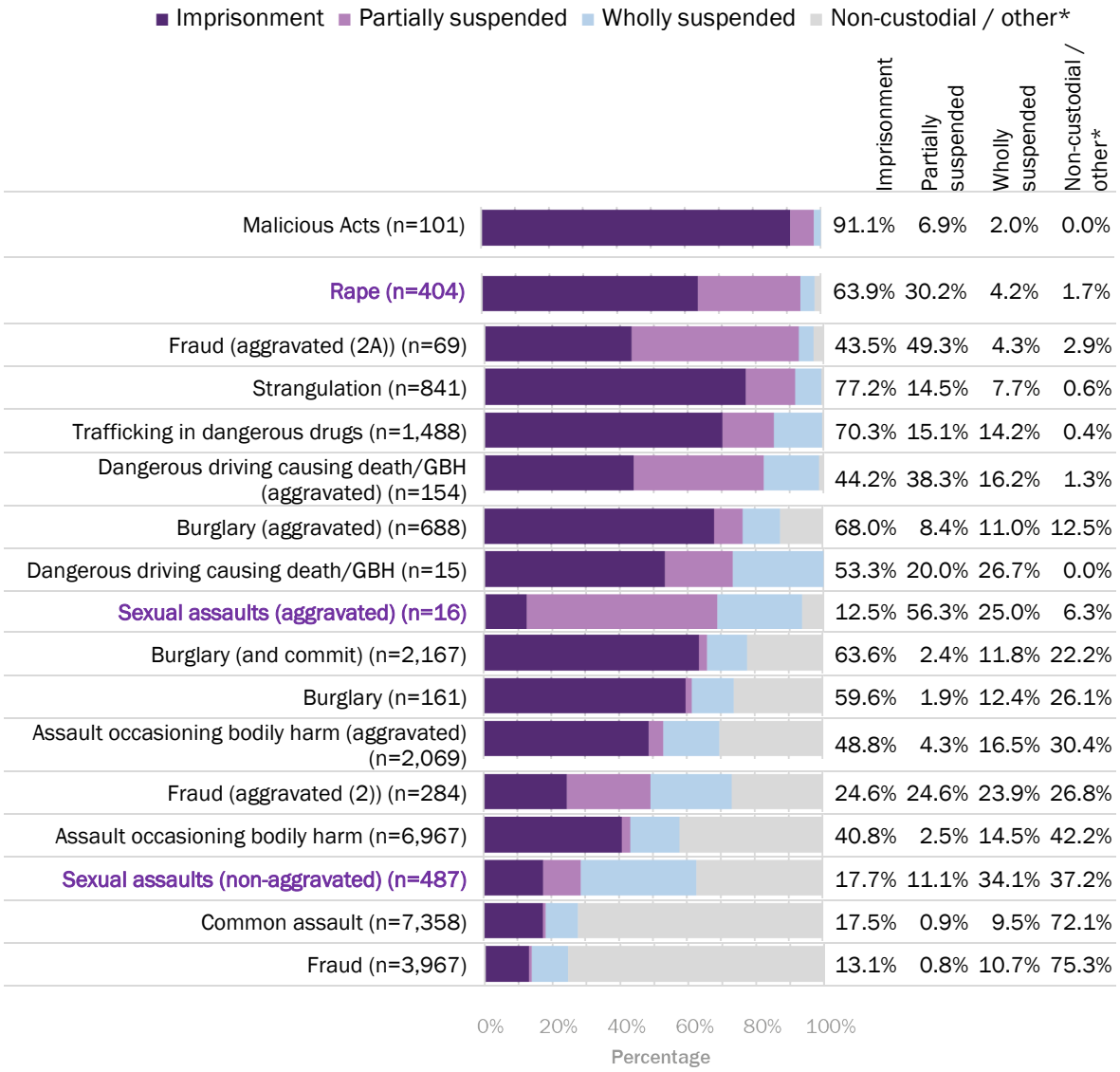
8.4.2 Use of imprisonment

In the 3-year data period, the offence of malicious acts had the highest use of imprisonment – with every case resulting in either a sentence of imprisonment (91.1%) or a suspended sentence (8.9%). Rape had the second highest use of imprisonment at 94.1 per cent, however this involved a larger proportion of suspended sentences compared to several other offences. For example, the offences of strangulation, trafficking in dangerous drugs and aggravated burglary all had higher proportions of imprisonment used compared to rape.

Dangerous driving causing death/GBH was the only offence during the 3 years which had only custodial penalties ordered.

79 Ibid s 328A(4)(a).
80 Ibid s 328A(4)(b).
81 Ibid s 417(1).
82 Ibid ss 417(2) and (3).
83 Ibid s 417(4).
84 Ibid s 408C(1).
85 Ibid s 408C(2).
86 Ibid s 408C(2A): where the value of the fraud was at least $100,000 or the offender caries on the business of committing fraud.
87 *Drugs Misuse Act 1986* (Qld) s 5. The maximum penalty was increased from 25 years to life imprisonment in May 2023.

Figure 36: 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.
* '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 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.

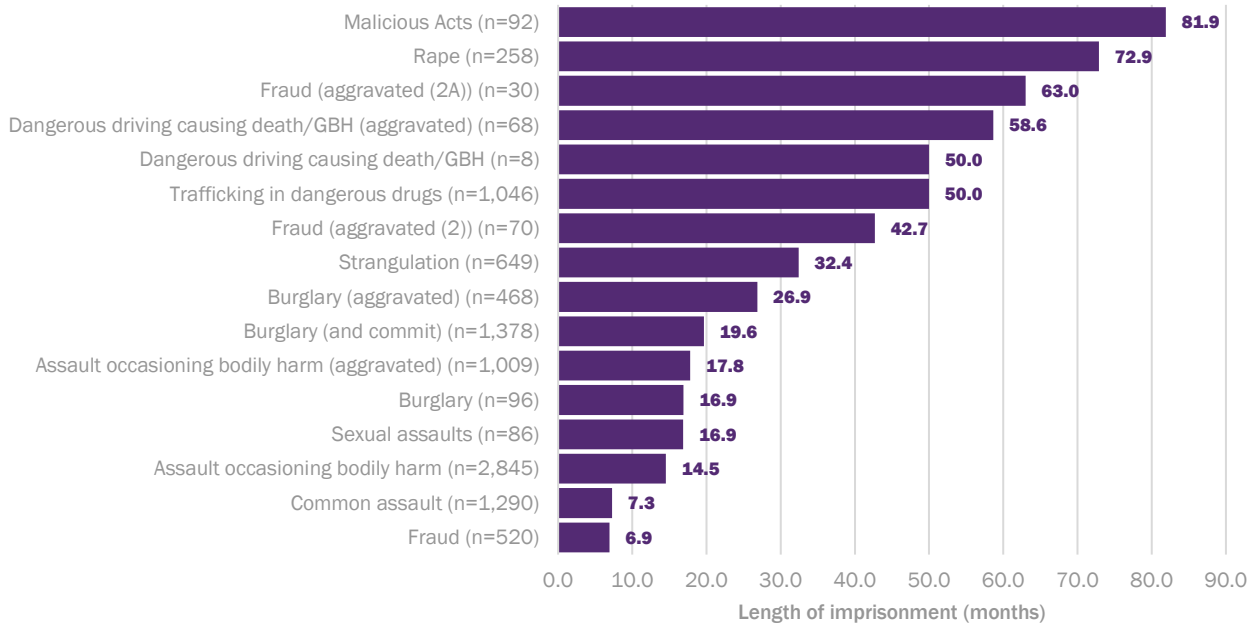
8.4.3 Length of imprisonment

Figure 37 shows the average length of imprisonment during the 3-year data period. On average, malicious acts had the longest periods of imprisonment at 81.9 months (6.8 years). This was followed by rape with an average length of 72.9 months (6.1 years).

Non-aggravated sexual assault had an average length of 16.9 months (1.4 years) – the same average length as burglary simpliciter. This was slightly longer than AOBH (14.5 months, 1.2 years), and slightly shortly than aggravated AOBH (17.8 months, 1.5 years).

There were not enough cases sentenced to imprisonment in the past 3 years to calculate an average for aggravated sexual assault (n=2).

Figure 37: Average length of imprisonment orders (MSO), comparator offences, 2020–21 to 2022–23



Data notes: includes cases (MSO) sentenced to imprisonment from 2020–21 to 2022–23. Excludes life sentences. Imprisonment includes combined prison-probation orders.
Source: Queensland Government Statistician's Office, Queensland Treasury - Courts Database, extracted September 2023.

8.4.4 Distribution of imprisonment sentences

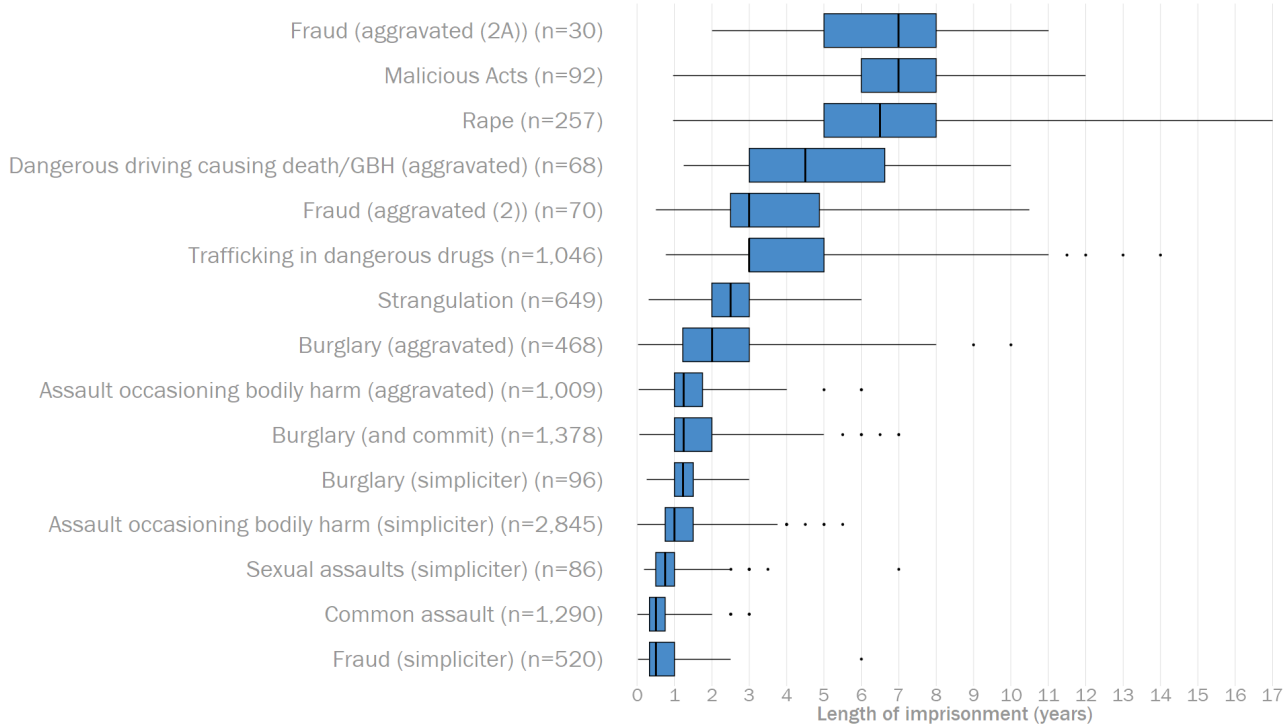
Figure 38 shows the distribution of imprisonment sentencing outcomes for each of the comparator offences. The offences are arranged from the longest to the shortest median sentence.

Aggravated fraud (with a maximum penalty of 20 years) and malicious acts both had the longest median sentence length 7 years, with sentences ranging from 2 to 11 years and 1 to 12 years, respectively.

The median imprisonment length for rape was 6.5 years, with the widest range of sentences from 1 to 17 years reflecting the range of circumstances involved with this offence and the high maximum penalty.

Non-aggravated sexual assault had a median sentence of imprisonment of 0.75 years (9 months). This was lower than non-aggravated AOBH and strangulation, which had medians of 1 year and 2.5 respectively. AOBH and strangulation both have 7-year maximum penalties. AOBH aggravated (maximum penalty 10 years) also had a higher median than non-aggravated sexual assault, of 1.25 years.

Figure 38: Distribution of length of imprisonment 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.
Source: Queensland Government Statistician's Office, Queensland Treasury - Courts Database, extracted September 2023.

Part C — How people sentenced for sexual assault and rape are managed in custody and in the community

Chapter 9: Management of people sentenced for sexual offences

Chapter 9 Management of people sentenced for sexual offences

9.1 Introduction

This chapter examines how people sentenced for sexual offences are managed in Queensland correctional centres, including risk and needs assessments and programs and interventions available to people in custody for sexual offending. The chapter also discusses how the Parole Board Queensland ('the Board') makes decisions to release a person into the community on parole and how sentenced persons are supervised in the community, as well as the operation of certain post-sentence orders and reporting requirements.

A change in sentencing options available to judges when dealing with sexual offences may impact the number of people under supervision in the community, the length of time they spend in custody or in the community, and the way they are managed by corrective services. Community views about the appropriateness of sentencing options may also be, in part, informed by the way offenders are managed in custody or in the community.

Terminology in this chapter

In this chapter, the term 'prisoner' is sometimes used, as this is the language used in the *Corrective Services Act 2006* (Qld) ('CSA'). A prisoner is a person who is in the chief executive's[1] custody and may also include a person who is released on parole.[2] This chapter does not consider the management of prisoners who are on remand, and awaiting a court outcome. A person who is on probation is not a 'prisoner' and is referred to as a person on probation in this chapter.

The Council notes that in 2016, Mr Walter Sofronoff KC undertook the *Queensland Parole System Review* ('QPSR') which involved an extensive review of the parole and broader correctional system. The QPSR made 91 recommendations for reform, with 89 recommendations supported or supported in principle.[3] The finalisation of the closure or completion of those 89 recommendations was completed in 2021-22.[4]

9.2 Management of people sentenced for sexual offences in custody

9.2.1 Custodial classification

The CSA prescribes security classifications of high or low for all people in custody. Some people in custody may also be subject to a maximum security order.

Table 21: Custodial classification

Security classification	Details
Maximum Security Order	This order is made with respect to a prisoner when 'it is determined that the risks a prisoner poses are so significant the prisoner cannot be effectively managed within the mainstream prisoner population'. People subject to maximum security orders will be placed in a maximum security unit.
High Security Classification	This classification 'will be assigned to those prisoners requiring high levels of supervision and highly structured routines to ensure centre security, appropriate behaviour and to maintain prisoner well-being'.
Low Security Classification	This classification 'will be assigned to prisoners requiring limited direct supervision, considered not to be an escape risk and assessed as a minimal risk of causing harm to the community'.

Source: Queensland Corrective Services, *Sentencing Management: Classification and Placement, Custodial Operations Practice Directive*, (03/08/2023: Public version).

1 The chief executive of Queensland Corrective Services, Commissioner Paul Stewart APM.
2 *Corrective Services Act 2006* (Qld) sch 4 ('CSA').
3 See Queensland Government, *Response to Queensland Parole System Review Recommendations* (2017).
4 Queensland Corrective Service, *Annual Report 2021-22* (Report, 2022) ('*QCS Annual Report 2021-22)* 10.

All people admitted to a correctional facility for detention must be classified into one of these two categories.[5] The classification level is a key consideration in determining which correctional facilities a person can be accommodated in, and their access to programs and interventions, such as treatment and work programs. Personal circumstances along with statutory criteria in sections 12(4) and 12(5) of the CSA must be taken into account when determining a person's security classification. These include:

a) The nature of the offence for which the person has been charged or convicted;

b) The risk of the person escaping, or attempting to escape, from custody;

c) The risk of the person committing a further offence and the impact the commission of the further offence is likely to have on the community;

d) The risk the person poses to himself or herself, or other prisoners, staff members and the security of the correctional services facility;

e) The length of time remaining to be served by the person under a sentence;

f) Information about the person, if any, received from a law enforcement agency;

g) The welfare or safe custody of the person or other people; and

h) The security or good order of the corrective services facility.

In addition to these statutory requirements for determining a security classification, QCS is also required to consider a range of other factors in deciding a person's placement.[6] Of those, several are particularly relevant to people convicted of a sexual offence:[7]

- the length of sentence the person has served to date and the proximity to their release dates (i.e., parole and full time discharge);
- any violence perpetrated by a person in custody or in the community, with consideration of the nature of the violence, such as the relationship to the victim (i.e., domestic and family violence or stranger violence), any patterns of violent offending and/or severity of violent behaviour;
- access to activities and interventions to achieve planned goals and activities;
- any medical conditions including mental health issues and external medical requirements;
- the person's safety including compatibility issues, associates, protection status and history of sexual assault in a correctional environment.

Prisoners convicted of sexual offences listed in Schedule 1 of the CSA, murder, or sentenced to life imprisonment, are not eligible to be accommodated in a low security facility,[8] but this does not preclude the prisoner from having a low security classification. Sexual assault and rape are Schedule 1 offences.

As a first option and where possible, women are considered for low security classification and placement.[9] Additional considerations also apply for Aboriginal and Torres Strait Islander people, including proximity to family (unless it poses an unacceptable safety risk).[10] A person's security classification may be reviewed at any time, including the risk sub-category of the person.[11]

9.2.2 Risk and needs assessment

To determine a sentenced person's general risk of recidivism, QCS initially assesses every person under their supervision using the 'Risk of Reoffending' (RoR) tool. There are two validated versions of this tool - the Risk of Reoffending – Prison Version (RoR-PV) and Risk of Reoffending – Probation and Parole Version (RoR-PPV).[12] The RoR tool allocates a score to a person, derived from an actuarial assessment of a few, mostly unchangeable, factors

5 CSA (n 22) s 12. Offenders on remand and not serving a term of imprisonment for another offence may only be classified to high or maximum: at s 12(1A).

6 See 'Placement Considerations' in Queensland Corrective Services, Sentence Management: Classification and Placement, *Custodial Operations Practice Directive* (03/08/2023: Public version) 8 ('*QCS Sentence Management*').

7 Ibid.

8 CSA (n 22) s 68A.

9 *QCS Sentence Management* (n 6) 4.

10 See ibid 10; *Corrective Services Regulation 2017* (Qld) s 3(1).

11 CSA (n 22) s 13.

12 Both tools were developed by Griffith University and validated on a sample of prisoners and offenders in Queensland. The RoR-PV is a validated tool for use with prisoners to assess the risk of general reoffending post release from prison, while the RoR-PPV is a validated tool that calculates the likely risk of general reoffending for those commencing community-based supervision. Neither version is specifically designed to 'assist with making assessments of parole eligibility, pre-sentencing decisions, or to provide assessments of dangerousness': Walter Sofronoff KC, *Queensland Parole System Review: Issues Paper* (Report, 2016) 17.

(such as age and criminal history).[13] The score provides an indication of the likelihood of a person to commit another offence as a proportion of a cohort of people with similar characteristics.[14]

The RoR tool is administered only once at the start of each new episode in the correctional system 'to determine a prisoner's general risk of reoffending.[15] Neither version is specifically designed to 'assist with making assessments of parole eligibility, pre-sentencing decisions, or to provide assessments of dangerousness'.[16] Further assessment tools are used post this initial screening assessment for particular cohorts to inform the level of offence specific risk and need and to determine the most appropriate treatment pathway.

The QPSR observed tools such as the RoR tool are valuable only for identifying high risk offenders. These tools do not provide guidance on which criminogenic risk factors require addressing at the individual level.[17]

After a RoR-PV is completed, a person serving a term of imprisonment of 12 months or greater undergoes a Rehabilitation Needs Assessment which informs the development of a Progression Plan. This ensures the person's needs and risks are progressed and supported where possible, as the Progression Plan outlines a person 's risks or needs, educational needs and the provision of clearly specified learning objectives, which then informs their case management.[18]

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.[19]

QCS has also initiated a new case management framework which includes the phased implementation of a new suite of validated assessment tools - see section 9.2.49.2.4 for further information. As a result of the QPSR, QCS has been able to enact long term, sustainable changes to the corrective services system to support community safety. Some significant milestones have included finalising and implementing phase two of the End-to-End Case Management Project, which included rolling out to all women's correctional centres in Queensland. This included the introduction of the Level of Service Inventory – Revised: Screening Tool (LSI-R:SV) as an initial screening assessment for eligible prisoners at these locations. Similar to the RoR score, 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.

9.2.3 Specialised risk assessment for people who commit sexual offences

QCS also uses 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)[20] 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 uses STABLE-2007 which measures sexual offending risk factors that can change over time.[21] 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.

Academic literature has drawn attention to the limitations of using specialised risk assessment tools that have not been 'developed and validated for Australian populations'.[22] These tools are 'particularly problematic' for assessing the risks posed by people who are Aboriginal or Torres Strait Islander because they may not adequately take into

13 Walter Sofronoff KC, *Queensland Parole System Review: Final Report* (Report, 2016) 529 ('*Queensland Parole System Review*').

14 The RoR-PPV score ranges from one to 20, and the RoR-PV score ranges from one to 22. The higher the score a person receives, the higher the predicted risk of reoffending, and the higher the service required by Queensland Corrective Services.

15 *QCS Sentence Management* (n 6) 3. This means a new RoR assessment will only be completed if an offender fully disengages from QCS supervision. Should an offender commit new offences while under supervision, a new RoR assessment will not be undertaken.

16 *Queensland Parole System Review* (n 13) 17.

17 Ibid 555.

18 Queensland Corrective Services, Sentence Management - Assessment and Planning, Custodial Operations Practice Directive (03/02/2023: Public version) 5.

19 *QCS Sentence Management* (n 6) 6.

20 Required as they are offences listed in Schedule 1 of the CSA (n 2). 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.

21 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.

22 Alfred Allan et al. Assessing the Risk of Australian Indigenous Sexual Offenders Reoffending: A Review of the Research Literature and Court Decisions, (2019) 26(2) *Psychiatry, Psychology and Law* 275.

account cultural differences or factors,[23] and 'static risk does not capture the complexity of needs that affect reoffending'.[24]

The challenges of assessing individual risk as this applies in sentencing is discussed in the *Consultation Paper: Issues and Questions*.

9.2.4 Case management

The *Case Management Custodial Operations Practice Directive* outlines QCS' approach to managing people in custody. That Directive 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'.[25]

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.[26]

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.[27]The E2E Offender Management Framework provides a single, evidence-based framework for all QCS officers across the state.[28] The framework encompasses five fundamental principles - risk and need, desistance, responsivity, evidence-based and 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.[29] Intensity of service delivery is scaled in accordance with sentence length, legal status and assessed risk and need.[30]

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23 Ibid 275 and Stephane Shepherd and Thalia Anthony, 'Popping the Cultural Bubble of Violence Risk Assessment Tools' (2018) 29(2) *The Journal of Forensic Psychiatry and Psychology* 211.

24 See also Faye Taxman and Michael Caudy, 'Risk Tells Us Who, But Not What or How; Empirical Assessment of the Complexity of Criminogenic Needs to Inform Correctional Programming' (2015) 14(1) *Criminology & Public Policy* 71, 98.

25 Queensland Corrective Services, *Daily Operations - Case Management, Custodial Operations Practice Directive* (03/02/2023: Public version) 6.

26 Ibid.

27 The approach aims to respond to various recommendations in the *Queensland Parole System Review* (n 13) 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.

28 QCS *Annual Report 2020-21* (Report, 2020-21) 31-32 ('QCS *Annual Report 2020-21*').

29 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

30 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.

The E2E pilot commenced at the Townsville Correctional Complex in December 2020 and was expanded to South East Queensland women's centres in 2022. E2E has also been utilised for all women admissions to community supervision since 2023.[31] Further rollout of this model continues to be evaluated.[32]

Sexual offending programs and interventions

As part of the case management of a person sentenced for a sexual offence, QCS delivers a range of targeted programs in correctional centres that aim to reduce sexual offending recidivism - see Table 22. 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 First Nations individuals 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' sexual offending programs for those who committed offences against children or adults, as all sexual offending programs are considered suitable for both cohorts.

Participation 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.[33] 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'.[34]

Research findings on the effectiveness of sexual offending programs, including the programs delivered by QCS, are discussed in section 9.6.

31 QCS, *Annual Report 2022-23* (Report, 2023) 11 ('*QCS Annual Report 2022-23*').
32 *QCS Annual Report 2020-21* (n 28) 33.
33 *QCS Annual Report 2022-23* (n 31) 21.
34 Ibid.

Table 22: 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.
Medium Intensity Sexual Offending Program (MISOP)	A 78-132-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)	16-to-24-hour program to build on and strengthen peoples' 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.

The Strong Solid Spirit program is individually tailored to the needs of each participant. An individual assessment is undertaken at the start of the program to identify which treatment modules and dosage hours are required to address specific criminogenic needs. It is also suitable for those 'who categorically deny their offending, as well as First Nations men who have cognitive difficulties or identify as transgender'.[35]

Violence programs and interventions

As noted earlier, some people serving a custodial sentence for a sexual violence offence may also need interventions which address violence offending. There are very few programs addressing violent offending offered by QCS - see Table 23.

Table 23: 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.

35 *QCS Annual Report 2021-22* (n 4) 17.

9.3 How the Parole Board decides whether a person should be released on parole

When a person approaches their parole eligibility date, they become eligible to make an application to the Parole Board to be released on parole.[36] A person's parole eligibility date does not create a right or entitlement for them to be granted parole and released into the community. There is always the potential that a person may serve their full sentence in prison. The Parole Board's function is to decide all parole applications (other than court ordered parole)[37] and it has the power to amend, suspend, or cancel a parole order.[38] People in prison on a partially suspended sentence are not assessed as to their suitability for release by the Parole Board prior to their release as the court in this case has made an order that suspends the remainder of their prison sentence after they have served a fixed period in custody.

The Parole Board must follow the *Ministerial Guidelines to Parole Board Queensland* ('Ministerial Guidelines') when making decisions about the granting or suspension of parole.[39] Community safety is the highest priority for the Parole Board's decision-making process on whether parole should be granted.[40] The Parole Board must assess community safety both in terms of whether a person poses an unacceptable risk to the community if released on parole, and whether the risk to the community would be greater if the person does not spend a period on parole under supervision before completing the full term of their sentence.[41]

The Parole Board makes decisions based on the evidence it has before it, which can include:

- a person's criminal history and patterns of offending;
- sentencing remarks;[42]
- a Parole Board Assessment Report;[43]
- advice to the Parole Board;
- program completion reports;
- Accommodation Risk Assessment;[44]
- submissions from the person and his/her family;
- letters of support from community-based organisations;
- victim submissions;
- medical reports;
- Psychiatric and Psychological Risk Assessments;
- Verdict and Judgment Records; and
- toxicology reports.

The Ministerial Guidelines set out factors the Parole Board should consider when determining the level of risk a person may pose to the community. One factor is whether the prisoner has been convicted of a sexual offence.[45]

People imprisoned for a serious sexual offence[46] are classified as a 'prescribed prisoner'. Under section 234 of the CSA, when the Parole Board meets to discuss 'prescribed prisoners', the Parole Board must have the following board

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36 A prisoner can apply for parole up to 180 days before their parole eligibility date: CSA (n 2) s 180.

37 Ibid s 217(a).

38 See ibid ss 205.

39 Section 242E of the CSA authorises the Minister to make guidelines about policies to assist the Parole Board in performing their functions.

40 Mark Ryan MP, Minister for Police, Fire and Emergency Services and Minister for Corrective Services, *Ministerial Guidelines to Parole Board Queensland* (at 30 May 2022) [1.2] ('*Guidelines to Parole Board*').

41 Ibid [1.3].

42 Subject to their quality, sentencing remarks provide the Parole Board with the facts of the person's offending and how the judge assessed their risk when determining the sentence. This may help the Parole Board in a variety of ways including, assessing eligibility and any further work the person may need to undertake to be granted parole e.g., completing specific programs. Sentencing remark excerpts may be included in correspondence from the Parole Board to a person to help them understand the Board's decision.

43 This report provides a summary of the prisoner, including their behaviour management in custody (e.g., incidents, drug tests etc.), participation in programs and education and outcomes of risk and needs assessments.

44 The Accommodation Risk Assessment includes 'Is the offender convicted of a current or historical sexual offence OR are subject to the Australian National Child offender Register?'. A 'yes' response to this criterion results in further assessment being required: Parole Board Queensland, *Parole Manual* (2019) 101-103.

45 *Guidelines to Parole Board* (n 40) [2.1].

46 A "serious sexual offence" means an offence of a sexual nature, whether committed in Queensland or outside Queensland involving violence (which includes intimidation or threats), or against a child, or against a person whom the prisoner believed to be a child under the age of 16 years: see *Dangerous Prisoners (Sexual Offenders) Act 2003* (Qld) sch 1 ('DPSOA').

members present — the President, Deputy President or professional board member, at least one community board member and at least one permanent board member.[47]

A person will not be eligible for parole where a court has set a hearing date for a Division 3 Order application[48] under the *Dangerous Prisoners (Sexual Offenders) Act 2003* ('DPSOA') and the application has not been discontinued or finally decided.[49] For people who have committed serious sexual offences who are not subject to a DPSOA application at the time of applying for parole, the Parole Board is required to consider the likelihood of an application being sought in the future, before making a decision to grant parole.[50] The Ministerial Guidelines recommend the Parole Board apply the same criteria used by the Attorney-General in these instances.[51] More detail about the DPSOA scheme is below at section 9.5.19.5.1.

9.4 Managing people sentenced for a sexual offence in the community

People sentenced for a sexual offence under the management of QCS in the community could be on:

- parole;
- an intensive correction order ('ICO');
- probation (a non-custodial order); or
- a community service order.

The Council's analysis of data from 2005–06 to 2022–23 of adults sentenced for sexual assault and rape found 54 received an ICO and 100 people received a community service order. In contrast, 1,532 adults received an order of imprisonment (with a parole eligibility date), 282 adults received a probation order, and 45 received a combined prison/probation order. Given the low numbers for ICOs and community service orders, this section will focus on parole and probation.

This section also does not consider people in the community who are serving a suspended sentence, as these people are not managed by QCS or subject to supervision in the community, unless the court also ordered a probation order on another offence sentenced at the same hearing. See section 6.8.3which explains suspended sentences and the consequences for failing to comply with this order and *Consultation Paper: Issues and Questions* for a consideration of the appropriateness of suspended sentences for sex offences.

9.4.1 Management of people on parole and probation

When a person serving a prison sentence has been granted parole and released from prison, they may be supported by a range of re-entry services,[52] and will be required to report to Community Corrections shortly after leaving custody. Similarly, a person who has been sentenced to probation will be required to report to Community Corrections shortly after being sentenced.

QCS applies a person-centric approach to supervision, with case management strategies and intervention tailored to the individual in accordance with evidence-based principles. The supervision of people as part of their sentence is designed to correspond to risk and manage the individual's treatment and intervention requirements. Following the Risk-Need-Responsivity (RNR) principles,[53] Community Corrections undertake front-end assessments (such as RoR-PPV, and STATIC-99R for those convicted of a sexual offences) to determine an individual's overall risk level and eligibility for further in-depth assessments, before then applying graduated levels of intervention and supervision based on assessment outcomes.

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47 This section was amended by the *Police Powers and Responsibilities and Other Legislation Amendment Act 2021* (Qld) s 26(1). Prior to this change when discussing 'prescribed prisoners' the Board was required to sit as 5 members and comprise (at minimum) of the President or Deputy President, a professional board member, a community board member, a public service representative and a policy representative.

48 An application must be made during the last 6 months of the prisoner's period of imprisonment, DPSOA (n 46) s 5.

49 Ibid s 8(1). *Guidelines to Parole Board* (n 40) [2.2].

50 Ibid [2.3].

51 Ibid.

52 In 2021-22, QCS delivered, through contracted non-government service providers, post-release re-entry services to 21,698 individuals: *QCS Annual Report 2021-22* (n 4) 22.

53 A widely used model for determining offender treatment and underlies many risk-needs offender assessment instruments. The risk principle is concerned with whom to target, the need principle is concerned with what to target and the responsivity principle identifies factors that could be a barrier to treatment or interfere with learning: *Queensland Parole System Review* (n 13) 109 [541]-[542].

Generally, people assessed as high risk who require a higher level of service receive more in-depth assessments to inform their management by experienced officers.[54] In depth assessments include the STABLE-2007, which help formulate a case management plan or can identify treatment and supervision targets. Community Corrections may also use the ACUTE-2007 tool which measures acute risk factors that can change in the short-term such as victim access, hostility, sexual pre-occupation, rejection of supervision, emotional collapse, social supports and substance abuse.

As noted in section 9.2.4, QCS is implementing the E2E Offender Management Framework, an evidence-based approach to the management of people under sentence, developed in response to the QPSR recommendations. E2E Case Management and practice guidelines have been applied to all women newly admitted to community supervision since March 2023.

Eligible persons in custody and supervised persons can also receive the new suite of assessments arising from the E2E Case Management framework.

9.4.2 Differences between supervision under parole and probation

While parole and probation both involve the supervision of a person in the community as part of their sentence, the type of supervision, conditions which can be ordered and the consequences for failing to follow an order differ. Table 24 provides a comparison of the types of conditions or directions that may be imposed on a person on parole and probation and the consequences for failing to comply with the order.

54 Ibid 17.

Table 24: Comparison of parole and probation conditions

Parole[55]	Probation[56]
Description	
The conditional release of a person after they serve part of their sentence in a prison. The CSA sets out the requirements of parole.	A community-based order that enables a person to address their offending and individual needs through case management and supervision. The *Penalties and Sentences Act 1992* (Qld) ('PSA') sets out the requirements of probation.
Nature of conditions and directions that may be imposed	
Standard conditions	
Be under the chief executive's supervision until the end of the person's period of imprisonment	Be under an authorised corrective services officer's supervision for the period of probation
Carry out the chief executive's lawful instructions	
Give a test sample if required to do so by the chief executive per s 41 of the CSA	
Report, and receive visits, as directed by the chief executive	Report, and receive visits from, an authorised corrective services officer as directed by the officer
Notify the chief executive within 48 hours of any change in the person's address or employment during the parole period	Notify an authorised corrective services officer within 2 business days of every change of the offender's address or employment
Not commit an offence	Not commit an offence
	Comply with every reasonable direction of an authorised corrective services officer
	Not leave or stay out of Queensland without the permission of an authorised corrective services officer
	Take part in counselling and satisfactorily attend other programs as directed by the court or an authorised corrective services officer during the period of the order
Additional conditions	
Any other conditions the board reasonably considers necessary: • to ensure the person's good conduct or • stop the prisoner committing an offence (such as a condition about the person 's place of residence, employment or participation in a particular program, curfew or requirement to give test samples)	Any other conditions the court considers necessary: • to cause the person to behave in a way that is acceptable to the community or • stop the person from committing the same offence or • stop the person from committing other offences
Comply with directions under s 200A: remain at a stated place for stated periods; or to wear a stated device; or to permit the installation of any device or equipment at a stated place, including for example, the place where the person resides. A corrective services officer may also give other reasonable directions to the person that are necessary for the proper administration of these directions.	Submit to medical, psychiatric or psychological treatment
Amendments to order	
The chief executive may amend a parole order for up to 28 days if the chief executive reasonably believe a person has: • failed to comply with the parole order, • poses a serious risk of harm to someone else, poses an unacceptable risk of committing an offence.[57] Longer amendments can be sought from the Parole Board.[58]	Amendments can be made by a Magistrate, and generally relate to substance testing and attendance to specific programs/interventions.[59]
Consequences of failure to comply	
The Parole Board may amend, cancel or suspend a parole order if the Parole Board reasonably believes a person has: • failed to comply with the parole order, • poses a serious risk of harm to someone else, • poses an unacceptable risk of committing an offence or is preparing to leave Queensland without a written order granting the prisoner leave.[60]	It is an offence to contravene a requirement of a community based order: s 123 PSA. The maximum penalty for this offence is 10 penalty units. A Court may allow the order to continue, even after being convicted of this offence.
If a person is charged with committing an offence, the Parole Board may amend or suspend the parole order.[61]	If the court is satisfied the offender is no longer willing to comply with an order, the court may amend (with the offender's consent) or revoke the order.[62] In these circumstances, the offender may need to be re-sentenced. A probation order is terminated if the person is sentenced or further sentenced for the offence for which the order was made.[63]
A person 's parole order is automatically cancelled if they are sentenced to another period of imprisonment for an offence committed (in Queensland or elsewhere) during the period of the person 's parole order.[64]	

9.4.3 Sexual offending programs in the community

As noted in section 9.4.2, a person on probation or on parole may be required to participate in programs while under supervision in the community.

QCS delivers a range of internal group-based programs focused on sexual offending including preparatory, treatment and maintenance programs at select Community Corrections locations - see Table 25. Parolees who completed a program in custody for people convicted of a sexual offence (see Table 22) may be required to attend maintenance programs in the community. Maintenance programs reinforce skills the person developed in custody and aims to help them practice them.

QCS also partners with highly experienced non-government organisations to deliver a range of group-based, cognitive-behavioural substance misuse programs and individual counselling to people across Community Corrections regions. Those on supervised orders can also be referred to appropriate community organisations to address broader needs identified in assessments[65] and to QCS funded individual treatment delivered by suitably experienced psychologists or social workers.[66] Those sentenced persons who are in the community will work with their case manager to identify and be referred to the most appropriate programs and or service that suits their needs.

Where a person is living will affect access to, and availability and frequency of relevant programs. The length of time remaining on a person's order will also affect their eligibility to participate in programs. QCS program teams in Community Corrections are currently limited to Far Northern, Northern (2 FTE only), Brisbane (4 FTE), Southern (2.5 FTE) and South Coast (2.5 FTE) regions. Where program teams are not in place, a moderate to high-risk person may be referred to individual interventions.[67] Each Community Corrections region manages their own waiting list for offending behaviour programs.

Table 25 outlines the current sexual violence offending programs delivered in the community by QCS. As noted earlier, non-government organisations also deliver a range of programs for supervised people. These programs are not included in this table.

Table 25: QCS community-based sexual violence offending programs

Program name	Details
Getting Started Preparatory Program (GSSP)	A 24-hour introductory, motivational program designed to assist persons 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 Far Northern (Cairns), Brisbane, Southern and South Coast.
Medium Intensity Sexual Offending Program (MISOP)	A 78 to 132-hour program, for males who have been assessed as having low-medium risk of re-offending. CBT based program to target cognitive drivers of sexual offending and provides participants with cognitive, emotional and behavioural skills to live an offence free life. Available in Far Northern (Cairns), Brisbane and South Coast.
Sexual Offending Maintenance Program (SOMP)	A 16 to 24-hour program. Designed to build on and strengthen cognitive, emotional and behavioural skills to live offence free. Can be completed more than once for ongoing maintenance. Available at Far Northern (Cairns), Northern (Townsville), Brisbane and South Coast.

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.

Other services may deliver programs or counselling for offending-related risks. For example, the Parole Board previously commented in its submission to the Council for the SVO review that 'many external services are currently offering counselling to prisoners who are victims of child sexual abuse'.[68]

55 See CSA (n 22) ss 200-200A.
56 See *Penalties and Sentences Act 1992* (Qld) Div 1 ('PSA').
57 CSA (n 22) s 201.
58 Ibid s 205.
59 PSA (n 5656) s 95.
60 CSA (n 2 2) s 205(2)(a)
61 Ibid s 205(2)(c).
62 PSA (n 5656) s 120(1)(c).
63 Ibid s 99.
64 CSA (n 22) s 209.
65 Correspondence from Queensland Corrective Services to Queensland Sentencing Advisory Council, 3 November 2023.
66 Ibid.
67 Ibid.
68 Parole Board Queensland, Submission 14 to the Queensland Sentencing Advisory Council, *The '80 per cent Rule': The Serious Violent Offences Scheme in the Penalties and Sentences Act 1992 (Qld)* (2022) 3.

9.5 Post-sentence detention supervision and reporting schemes

In some instances, people who have committed certain offences, including rape or sexual assault, may be subject to additional post-sentence detention supervision or monitoring schemes, including those under the *Dangerous Prisoner (Sexual Offenders) Act 2003* (Qld) ('DPSOA') and the *Child Protection (Offender Reporting and Offender Prohibition Order) Act 2004* (Qld) ('CPOROPO Act').

As noted in Chapter 1, a detailed summary of the operation of these schemes is out of scope for this review because they are post-sentence schemes. However, this section will consider the extent to which they are relevant to the management of sexual offenders.

9.5.1 *Dangerous Prisoner (Sexual Offenders) Act 2003* (Qld)

The DPSOA is aimed at protecting the community by ensuring that sexual offenders who pose a serious danger[69] because of their risk of re-offending, are either detained in custody or supervised in the community after the completion of their period of imprisonment.

The Attorney-General may only make an application for an order in the last 6 months of a prisoner's period of imprisonment.[70] The Supreme Court, once satisfied that a person who is imprisoned for a serious sexual offence (an offence of a sexual nature involving violence or against children)[71] poses a serious danger, may order either post-sentence preventive detention (continuing detention order) or supervision (supervision order).

A continuing detention order may be for an indefinite term for control, care or treatment. This is reviewable by the Supreme Court within two years of the first order, and annually thereafter.[72]

In contrast, the court must fix the duration of the supervision order. A supervision order cannot be less than 5 years.[73]

A supervision order or interim supervision order must contain certain requirements. For example, the person must:

- report to corrective services;
- provide personal details including their name and address;
- receive visits from corrective services;
- advise corrective services of any change in name, residence or employment;
- comply with curfew, monitoring or any other reasonable direction provided by corrective services;
- not leave Queensland without the permission of corrective services; and

not commit any further offences of a sexual nature during the period of the order.[74]

A corrective services officer may also give directions about the person's accommodation, rehabilitation or care or treatment, and drug or alcohol use.[75]

The court may also make any other requirement that they consider appropriate, to ensure adequate protection of the community or for the person's rehabilitation or care or treatment.[76]

When sentencing a person for a sexual offence, a sentencing judge must not have regard to whether or not the person may become subject to a DPSOA application or any order because of that application.[77]

Whilst subject to the DPSOA, a person's reporting requirements under the *Child Protection (Offender Reporting and Offender Prohibition Order) Act 2004* (Qld) and the associated police powers available for this category of person are suspended for the period of the person's DPSOA order.[78]

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69 DPSOA (n 4649) s 13. Serious danger is defined within the legislation to mean that there is an unacceptable risk that the prisoner will commit a serious sexual offence (a) if the prisoner is released from custody; or (b) if the prisoner is released from custody without a supervision order being made.
70 Ibid s 5(2)(c).
71 Ibid sch 1.
72 Ibid s 27.
73 Ibid s 13A: 'The period can not end before 5 years after the making of the order or the end of the prisoner's period of imprisonment, whichever is the later.'
74 Ibid s 16.
75 Ibid s 16B.
76 Ibid s 16A(2).
77 PSA (n 56) s 9(9).
78 *Child Protection (Offender Reporting and Offender Prohibition Order) Act 2004* (Qld) s 4 ('CPOROPO Act').

9.5.2 *Child Protection (Offender Reporting and Offender Prohibition Order) Act 2004* (Qld)

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. This aims to 'reduce the likelihood that they will re-offend', and to 'facilitate the investigation and prosecution of any future offences'.[79]

The CPOROPO Act applies to 2 categories of people: a "relevant sexual offender" and a "reportable offender".

A 'relevant sexual offender' is a person who:

- is not subject to a supervision order or interim supervision order under the DPSOA or a forensic order;[80]
- is a current reportable offender;[81]
- Is a former reportable offender (because their reporting period has ended);[82] or
- Is a person who would have been a reportable offender if their sentence for a prescribed offence had not ended before the commencement of the Act in January 2005 (i.e., a person whose total sentence pre-dates the scheme).[83]

A relevant sexual offender who is not a current reportable offender can become a current reportable offender under the CPOROPO Act if a court makes an Offender Prohibition Order.[84]

"Reportable offenders" are a category of relevant sexual offenders.[85] There are several ways a person can become a reportable offender, but the most common way involves 3 criteria:

The person has been convicted of at least one "prescribed offence", as listed in Schedule 1 of the Act (e.g., a range of sexual offences committed against a child, including rape and sexual assault)[86]

- Where the prescribed offence was committed against an identified victim, the victim was a child;
- That person's conviction was formally recorded in their criminal history.

Not all sentenced persons who meet the above criteria will become a reportable offender. One example is where a person convicted of a single prescribed offence who is not sentenced to a term of imprisonment or a supervised order.[87] For the purposes of our review, this could include a person convicted of rape or sexual assault and sentenced to a non-custodial order that does not involve supervision by QCS e.g., a fine or a good behaviour bond.

At a reportable offender's sentence, the court may make an order that an offender comply with reporting obligations (an offender reporting order).[88] The duration of reporting obligations varies from 2.5 years[89] to life,[90] depending on a variety of circumstances. These include the person's age when they committed the offence that made them a reportable offender,[91] whether they committed more prescribed offences while they were a reportable offender, and whether or not the person is a post-DPSOA reportable offender.[92] The post-DPSOA reportable offender category of reportable offender has a lifetime reporting period.[93] Reporting obligations commence when a reportable offender is released from custody[94], but will be suspended should a reportable offender be returned to custody.[95]

Schedule 2 of the CPOROPO Act sets out the relevant personal details that a reportable offender must provide to police, including: the offender's personal details; residential details; employment details; internet use details; email addresses and user names; car registration details; any affiliations with clubs or organisations; and details of any child with whom the reportable offender has contact. A reportable offender must provide these personal details in

79 Ibid s 3.
80 Ibid sch 5.
81 Ibid s 6.
82 Ibid s 8(d).
83 Ibid s 36(3). Crime and Corruption Commission, *Protecting the lives and sexual safety of children: Review into the operation of the Child Protection (Offender Reporting and Offender Prohibition Order) Act 2004 (Qld)* (Report, June 2023), 17.
84 CPOROPO Act (n 78) 8.
85 Ibid s 5.
86 Ibid s 9, sch 1.
87 Ibid s 5(2)(b).
88 Ibid s 13.
89 Ibid ss 37, 39A.
90 However, this will increase to 10 years on a date to be fixed by proclamation per the *Child Protection (Offender Reporting and Offender Prohibition Order) and Other Legislation Amendment Act 2023* (Qld).
91 For example, child reportable offenders have a shorter reporting period than adult reportable offenders.
92 CPOROPO Act (n 7878) Act s 36.
93 Ibid s 36. The reporting periods were recently amended from 8 years to 10 years and 15 years to 20 years by the *Police Powers and Responsibilities and Other Legislation Amendment Act (No. 1) 2023*.
94 CPOROPO Act (n 7878) s 35(1)(b)(iii).
95 Ibid s 34(1)(a).

an initial report to police, make periodic reports and report any changes in the reportable offender's personal details within timeframes as set out by the CPOROPO Act.[96]

Section 7.5 discussed how the Court of Appeal has taken the CPOROPO Act into account.

9.6 Effectiveness of treatment and other interventions to reduce recidivism

Global and domestic research findings suggest 'engagement in sex offending treatment programs ('SOTP') can produce appreciable reductions in sexual and non-sexual recidivism'.[97] The University of Melbourne literature review commissioned in relation to the Council's previous Terms of Reference on the SVO reported that:

> [T]here is a large 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…[P]rogrammes such as these are only effective when they are implemented in certain ways …[but] even then, the effect sizes suggest that they only have a limited impact on reoffending.[98]

A 2019 review of treatment SOTPs delivered by QCS found engaging in these programs 'appears to be effective in reducing sexual and non-sexual recidivism'.[99] Researchers reviewed a sample of 2,407 men who had served a term of custody in Queensland for a sexual offence and were discharged between 1 January 2010 and 31 December 2017. They found 'non-Indigenous and older offenders had lower return to custody rates overall, with youthful and Aboriginal and Torres Strait Islander perpetrators 'more likely to return to custody for a new offence' (any offence that is).[100] They found 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.[101]

The study found that youthful and Aboriginal and Torres Strait Islander males were 'least likely to complete programs', suggesting possible difficulties engaging with the QCS programs available at the review period.[102]

Researchers also assessed QCS's SOTPs finding they involve 'several best practice features' identified from global literature but would benefit from being updated to reflect 'best practice evidence in the past decade'.[103] It was noted that available time to complete programs is particularly important and that 'shorter sentences may therefore limit important intervention opportunities, including whether an offender is given the change to complete all intervention components'.[104] The study also interviewed QCS staff who suggested 'the right group mix (i.e., child sexual offenders and rape offenders) and program flexibility were also essential ingredients to produce intended effects'.[105]

With respect to other forms of interventions designed to increase public protection, such as registration scheme, community notification schemes and residence restrictions, the University of Melbourne literature review concluded 'the evidence base supporting their effectiveness is, at best, limited'.[106]

The authors of this literature review also considered reintegration and post-release support, finding: 'studies that have examined the outcomes of programmes offered to people leaving prison have … generally produced disappointing results when assessed against the objective of reducing reoffending',[107] also finding:

> more effective programmes were those that provided continuity of care (beginning in the prison and continuing once prisoners were released into the community), had higher levels of integrity, targeted those assessed at high-risk and addressed their criminogenic needs, and employed therapeutic community approaches. The

96 See ibid pt 4.
97 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) 9, Key finding 1.
98 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).
99 Ibid 87.
100 Ibid.
101 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.
102 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 Council notes the Strong Solid Spirit has commenced since then.
103 McKillop et al. (n 97) 47 and 91.
104 Ibid 48.
105 McKillop et al. (n 97) 61.
106 Day, Ross and McLachlan (n 98) 21.
107 Ibid 20.

> quality of the relationship formed with the parole/community correction officer does appear to be a significant indicator of success on parole, as does interagency collaboration.[108]

The findings of the 2019 Queensland review of treatment SOTPs were consistent with the University of Melbourne findings, with this earlier review suggesting success is improved when programs are delivered both in custody and in the community, with programs 'linked to community-based reintegration programs … likely to be more effective' than those which are not.[109] This research also emphasised the importance of addressing the needs of particular cohorts in any reintegration program, including culturally sensitive program delivery and recruitment of Aboriginal and Torres Strait Islander staff.

9.7 Stakeholder views

While there was minimal reference made to interventions or supervision in preliminary submissions, those submissions which did consider this issue called for the need to address the gendered nature of the violence within intervention or treatment programs.[110] During initial consultation, the Council heard views about the importance of understanding the program effectiveness, especially when delivered at scale. Some stakeholders also expressed support for early intervention programs. Stakeholders emphasised the importance of programs being targeted to treatment needs, for example making sure that programs are age appropriate.[111]

108 Ibid 20–21.
109 McKillop et al. (n 102102) 195.
110 Preliminary submission 23 (Relationships Australia Queensland) 1.
111 Preliminary submission 17 (Legal Aid Queensland) 2.

Part D — Alternative models

Chapter 10: The approach in other jurisdictions

Chapter 11: Review principles

Chapter 10 The approach in other jurisdictions

10.1 Introduction

The Terms of Reference ask the Council to consider the approach in other jurisdictions, including to 'examine relevant offence, penalty, and sentencing provisions in other Australian and international jurisdictions to address offending behaviour relating to sexual assault and rape' and to consider 'any evidence of the impact of any reforms on sentencing practices'.[1]

This chapter provides a high-level overview of offences and sentencing provisions in other Australian states and territories, as well as legislative models in four other common law jurisdictions: Canada, England and Wales, New Zealand and Scotland. We also examine alternative responses in other jurisdictions of interest.

10.2 Offences and maximum penalties

10.2.1 Australian jurisdictions

There is no uniform approach across Australia to criminal laws applying to sexual offending.

All jurisdictions have offences that criminalise acts of sexual penetration without consent and acts of sexual assault. There are also specific offences that apply when the victim of these acts is a child, a mentally impaired person or where the person who has committed the act is a close relative.[2]

Sexual intercourse without consent (Rape)

Sexual intercourse without consent falls under the offence of rape in Queensland, South Australia, Tasmania, and Victoria.[3] In the Australian Capital Territory ('ACT') and the Northern Territory it is described as sexual intercourse without consent,[4] while in Western Australia it is called sexual penetration without consent.[5] In New South Wales ('NSW') the conduct of sexual intercourse without consent falls within the offence of sexual assault.[6]

Some jurisdictions either include compelling a person to have sexual intercourse with a third person without their consent within the offence of rape,[7] or have established separate offences of compelling sexual penetration involving the victim and the offender or a third person, with some variation in how these offences are framed.[8]

The maximum penalties for sexual penetration without consent offences vary across different states and territories being:

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1 Attorney-General and Minister for Justice, 'Terms of Reference – Sentencing for Sexual Violence Offences and Aggravating Factor for Domestic and Family Violence Offences' (issued 17 May 2023) 1, 2 – see Appendix 3.

2 LexisNexis, *Halsbury's Laws of Australia*, (at 3 May 2023) 130 Criminal Law, '2 Assault and Related Offences', [130–2000].

3 *Criminal Code Act 1899* (Qld) sch 1, s 349 ('*Criminal Code* (Qld)'); *Criminal Law Consolidation Act 1935* (SA) s 48; *Criminal Code Act 1924* (Tas) sch 1, s 185; *Crimes Act 1958* (Vic) s 38.

4 *Crimes Act 1900* (ACT) s 54 (Sexual intercourse without consent); *Crimes Act 1900* (NSW) ss 61I (Sexual assault), 61J (Aggravated sexual assault), 61JA (Aggravated sexual assault in company); *Criminal Code Act 1983* (NT) sch 1, s 192 (Sexual intercourse … without consent).

5 *Criminal Code Act Compilation Act 1913* (WA) sch, ss 325–6 ('*Criminal Code* (WA)').

6 *Crimes Act 1900* (NSW) ss 61I (sexual assault), 61J (aggravated sexual assault) and 61JA (aggravated sexual assault in company).

7 See *Criminal Law Consolidation Act 1935* (SA) s 48(2)(a). There is also an offence of compelling a person to engage in an act of sexual manipulation of the offender or a third person where sexual manipulation means the manipulation of the victim of the anus or genitals of another person and may involve sexual penetration: s 48A (compelled sexual manipulation), see LexisNexis (n 2222) [130–2005].

8 *Crimes Act 1958* (Vic) s 39 (rape by compelling sexual penetration); *Criminal Code* (WA) (n 5) s 327(1) 'compels a person to engage in sexual behaviour'. 'Sexual behaviour' includes the sexual penetration of another person: s 319(4)(a).

- life imprisonment in the Northern Territory,[9] Queensland[10], South Australia[11] and NSW (for aggravated sexual assault in company),[12]
- 25 years in Victoria;[13]
- 21 years in Tasmania;[14]
- 20 years in NSW (for aggravated sexual assault)[15] and in Western Australia (for aggravated sexual penetration without consent);[16]
- 18 years in the ACT for an aggravated offence (involving family violence) committed in company;[17]
- 15 years in the ACT for an aggravated offence (involving family violence);[18]
- 14 years in the ACT for an offence committed in company,[19] and in Western Australia for a non-aggravated offence;[20]
- 12 years in the ACT for a non-aggravated offence.[21]

How 'sexual intercourse' and 'penetration' are defined varies by jurisdiction.[22]

Indecent assault and acts of gross indecency (Sexual assault)

The framing of what constitutes the offence of sexual assault or indecent assault, the terminology adopted and the penalties that apply also differs greatly across jurisdictions.

Offences involving conduct relating to non-penetrative acts of indecent assault, as well as procuring another person without their consent to commit or witness an act of gross indecency, with their associated maximum penalties (excluding special offences, or aggravated forms of offences that apply to victims who are children) include:

- ACT:
  - act of indecency - simpliciter: 7 years;[23]
  - aggravated (offence involves family violence): 9 years;[24]
  - aggravated (committed in company): 9 years;[25]
  - aggravated (committed in company and involves family violence): 11 years.[26]
- New South Wales
  - sexual touching - simpliciter: 5 years;[27]
  - sexual touching - aggravated: 7 years[28]
  - sexual act - simpliciter: 18 months;[29]

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9 *Criminal Code Act 1983* (NT) sch 1, s 192(3) ('*Criminal Code* (NT)').
10 *Criminal Code* (Qld) (n 3) s 349(1).
11 *Criminal Law Consolidation Act 1935* (SA) s 48.
12 *Crimes Act 1900* (NSW) s 61JA(1).
13 *Crimes Act 1958* (Vic) s 38(2).
14 *Criminal Code Act 1924* (Tas) sch1, s 389(3). This penalty applies to all crimes, with the exception of murder (s 158) and treason (s 56).
15 *Crimes Act 1900* (NSW) s 61J.
16 *Criminal Code* (WA) (n 5) s 326(1). Circumstances of aggravation are set out in s 319(1) being: at, or immediately before or after the commission offence, the offender is armed (or pretends to be), is in company, does bodily harm to any person, does an act 'which is likely seriously and substantially to degrade or humiliate the victim', the offender threatens to kill the victim or the victim is of or over the age of 13 years and under the age of 16 years.
17 *Crimes Act 1900* (ACT) s 54(4). Aggravated offences are defined in s 72AA as one of several listed offences if it involves family violence.
18 *Crimes Act 1900* (ACT) s 54(2).
19 Ibid ss 54(2)–(3).
20 *Criminal Code* (WA) (n 5) s 325(1).
21 *Crimes Act 1900* (ACT) s 54(1).
22 For example, acts of cunnilingus committed without consent fall within the definition of 'sexual intercourse' in the Australian Capital Territory, Northern Territory, and South Australia irrespective of whether any actual penetration is proven: *Crimes Act 1900* (ACT) s 50; *Criminal Code* (NT) (n 9) s 1; *Criminal Law Consolidation Act 1935* (SA) s 48(1). The same conduct fall within the definition of 'to sexually penetrate' in Western Australia: *Criminal Code* (WA) (n 5) s 319.
23 *Crimes Act 1900* (ACT) s 60(1). Note, an act of indecency does not require that there be an assault.
24 Ibid s 60(2).
25 Ibid s 60(3).
26 Ibid s 60(4).
27 *Crimes Act 1900* (NSW) ss 61KC–61KD.
28 Ibid. Circumstances of aggravation are those in which: the accused person is in company, or the complainant is under the authority of the accused person, has a serious physical disability or a cognitive impairment: s 61KD(2).
29 *Crimes Act 1900* (NSW) s 61KE.

  - sexual act - aggravated: 3 years.[30]
- Northern Territory:
  - common assault (indecent assault) - simpliciter: 5 years;[31]
  - act of gross indecency: 14 years;[32]
  - coerced sexual manipulation: 17 years.[33]
- Queensland:
  - sexual assault (indecent assault) - simpliciter: 10 years;[34]
  - sexual assault (gross indecency) - simpliciter: 10 years;[35]
  - aggravated: bringing mouth into contact with genitalia or anus: 14 years;[36]
  - aggravated: while armed/pretending to be armed or in company; or person assaulted penetrates offender's vagina, vulva, anus with thing/body part (not a penis): life imprisonment.[37]
- South Australia:
  - indecent assault - basic offence: 8 years;
  - indecent assault - aggravated: 10 years;[38]
  - compelled sexual manipulation - basic offence: 10 years
  - compelled sexual manipulation - aggravated: 15 years[39]
- Tasmania:
  - indecent assault: 21 years[40];
  - aggravated assault (assault with indecent intent): 50 penalty units, or 2 years.[41]
- Victoria:
  - Sexual assault (non-consensual sexual touching): 10 years.[42]
  - Sexual assault by compelling sexual touching: 10 years.[43]
- Western Australia:
  - Indecent assault - simpliciter: 5 years (summary conviction, 2 years imprisonment and a fine of $24,000);[44]
  - aggravated: 7 years;[45]

in the ACT, a person who commits an act of indecency on, or in the presence of, another person without their consent commits an offence (maximum penalty: 7 years, or 9 years if aggravated (involved domestic violence) or committed in company, or 11 years if both in company and aggravated).[46]

Many jurisdictions have more serious offences, or forms of offences, that apply if the victim is a child.[47]

30 Ibid s 61KF. The aggravated form of this offence is if the accused was in company, the complainant is under the authority of the accused person, or has a serious physical disability or cognitive impairment: s 61KF(2).
31 *Criminal Code* (NT) (n 9) s 188(2)(k).
32 Ibid s 192(4). This falls under the offence of sexual intercourse and gross indecency without consent.
33 *Criminal Code* (NT) (n 9) s 192B. Involves the insertion into the vagina or anus of a person, of an object manipulated by that person in circumstances where the person is coerced to do so.
34 *Criminal Code* (Qld) (n 3) s 352(1)(a).
35 Ibid s 352(1)(b).
36 Ibid s 352(2).
37 Ibid ss 352(3)(a)–(b). See discussion below regarding offences involving a person procuring another person with their consent to commit or witness and act of gross indecency, for which there are also simpliciter and aggravated forms.
38 *Criminal Law Consolidation Act 1935* (SA) s 56(1). Aggravated offences are defined in s 5AA and include: offence committed in the course of deliberately and systematically inflicting severe pain on the victim; use/threatened use of offensive weapon; victim aged 60 years or over; victim was in a relationship or formerly in relationship with offender; offender n company; offender abused a position of authority or trust; victim in a position of particular vulnerability due to physical disability or cognitive impairment or nature of occupation or employment.
39 Ibid s 48A.
40 *Criminal Code Act 1924* (Tas) sch 1, s 127(1).
41 *Police Offences Act 1935* (Tas) s 35(3).
42 *Crimes Act 1958* (Vic) s 40.
43 Ibid s 41.
44 *Criminal Code* (WA) (n 5) s 323.
45 Ibid s 324.
46 *Crimes Act 1900* (ACT) s 60. Higher penalties apply if this occurs in the presence of a child under 10 years or 16 years: s 61.
47 LexisNexis (n 222) 2[130–2075].

10.2.2 International jurisdictions

The Council examined the approach taken in Canada, England and Wales, New Zealand and Scotland in relation to criminal laws applying to sexual offending. All jurisdictions have offences which criminalise acts of sexual penetration without consent and acts of sexual assault. Scotland, England and Wales also have specific offences that apply when the victim of these acts is a child.[48]

Sexual intercourse without consent (Rape)

The offence of sexual intercourse without consent is called rape in Scotland and England and Wales[49]

In Canada, sexual intercourse without consent and other acts involving sexual penetration fall within the offence of sexual assault with the offence encompassing both penetrative and non-penetrative sexual assaults without consent.[50] There are 3 tiers of sexual assault offences depending on the circumstances of the offence. For example, sexual assault with a weapon, threats to a third party or causing bodily harm is the mid-tier offence and includes where the offender chokes, suffocates or strangles the complainant, as well as being a party to the offence.[51] The most serious offence, aggravated sexual assault, is when the sexual assault 'wounds, maims, disfigures or endangers the life of the complainant'.[52]

In New Zealand the offence is called sexual violation[53] and comprises rape[54] or unlawful sexual connection with another person without consent.[55] Rape involves penetration of a person's genitalia by another person's penis without the first person's consent, whereas unlawful sexual connection involves a person having unlawful sexual connection with another person without their consent.[56]

England and Wales have separate offences of assault by penetration,[57] causing a person to engage in sexual activity without consent[58] and sexual conduct with consent induced by certain threats.[59]

The maximum penalties for rape and equivalent offences vary across international jurisdictions, being:

- Life imprisonment in England and Wales,[60] Scotland[61] and Canada (aggravated sexual assault and sexual assault with a weapon, threats to a third party or causing bodily harm where complainant is under 16 years);[62]
- 20 years in New Zealand;[63]
- 14 years in Canada (sexual assault with a weapon, threats to a third party or causing bodily harm64 and sexual assault when complainant is under 16 years);[65]
- 10 years in Canada if the circumstances mentioned above do not apply and the offence is dealt with on indictment;[66] and
- 18 months[67] to 2 years[68] in Canada in other cases (summary conviction).

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48 *Sexual Offences (Scotland) Act 2009* (Scot) s 18 (Rape of a young child) and s 19 (Sexual assault of a young child by penetration); *Sexual Offences Act 2003* (UK) s 5 (Rape of a child under 13) and s 6 (Assault of a child under 13 by penetration).

49 *Sexual Offences (Scotland) Act 2009* (Scot) s 1; *Sexual Offences Act 2003* (UK) s 1.

50 *Criminal Code*, RSC 1985 c C-46, ss 271–3, 273.1 (meaning of consent).

51 Ibid s 272.

52 Ibid s 273(1).

53 *Crimes Act 1961* (NZ) s 128.

54 Ibid s 128(a).

55 Ibid s 128(b).

56 The lead judgment, *R v AM* [2010] NZCA 114 sets out the 'bands' for sexual violation, including the behaviour which constitutes sexual connection. Sexual connection conduct includes penile penetration of a victim's mouth, and digital and oral penetration of a victim's genitalia.

57 *Sexual Offences Act 2003* (UK) s 2; the Scottish equivalent offence is called sexual assault by penetration, *Sexual Offences (Scotland) Act 2009* (Scot) s 2.

58 *Sexual Offences Act 2003* (UK) s 4(4).

59 *Crimes Act 1961* (NZ) s 129A(1).

60 *Sexual Offences Act 2003* (UK) ss 1–2, 4(4).

61 *Sexual Offences (Scotland) Act 2009* (Scot) sch 2 (same penalty applies to the offence of sexual assault by penetration).

62 *Criminal Code*, RSC 1985, c C-46, ss 272(a.2), 273(2), 273(3) and 273(4). Aggravated sexual assault involves wounding, maiming, disfiguring or endangering the life of the complainant.

63 *Crimes Act 1961* (NZ), s 129B(1)

64 *Criminal Code*, RSC 1985, c C-46, ss 272(2)–(4).

65 Ibid s 271(a).

66 Ibid.

67 Maximum penalty of 18 months where sexual assault is a summary conviction: Ibid s 271(b).

68 Maximum penalty of 2 years when complainant is under the age of 16: Ibid.

Canada has mandatory minimum penalties for sexual assault for both indictable and summary offences. The minimum period varies depending on the charge/conviction,[69] as well as a range of offence and offender specific factors including that the offence was a subsequent offence,[70] involved the use of a firearm[71] or the victim was under 16 years.

Indecent assault and acts of gross indecency

Similar to the Australian jurisdictions, the framing of what constitutes (non-penetrative) sexual assault, the terminology and the penalties that apply differs across international jurisdictions.

These offences with their maximum penalties include:

- England and Wales:
  - Sexual assault: 10 years (on indictment)[72] or 6 months or a fine not exceeding the statutory maximum or both (summarily);[73]
  - Causing a person to engage in sexual activity without consent: 10 years (on indictment)[74] or 6 months or a fine not exceeding the statutory maximum or both (summarily)[75]
- Scotland:
  - Sexual assault: Life imprisonment or a fine (or both) (on indictment)[76] or 12 months or a fine not exceeding the statutory maximum (or both) (summarily);[77]
  - Sexual coercion: 12 months or a fine not exceeding the statutory maximum (or both);[78]
  - Coercing a person into being present during a sexual activity: 10 years or a fine (or both) (on indictment)[79] or 12 months or a fine not exceeding the statutory maximum (or both) (summarily).[80]
- New Zealand:
  - Unlawful sexual connection: 20 years;[81]
  - Indecent assault: 7 years;[82]
  - Sexual conduct with consent induced by certain threats. 5 years[83]

Discussed above, Canada's sexual assault offence provisions do not distinguish between penetrative and non-penetrative forms of sexual assault. The same maximum penalties and mandatory minimum penalties apply, depending on the circumstances of the offence.

10.3 General forms of statutory sentencing guidance

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. For example:

69 1 year where an indictable offence or the complainant is under the age of 16: *Criminal Code*, RSC 1985, c C-46, s 271(a) and 6 months where the offence is summary conviction: s 271(b).
70 Subsequent offences are prescribed and include sexual assault, causing bodily harm with intent - air gun or pistol: *Criminal Code*, RSC 1985, c C-46, s 244.1, manslaughter: s 236; and attempted murder: s 239. An earlier offence shall not be taken into account if 10 years have elapsed since an earlier offence shall not be taken into account if 10 years have elapsed since the dates of convictions: ss 272(3), 273(3).
71 For example, in the case of aggravated sexual assault where a firearm is used the mandatory minimum period will be 4 years, unless the offence was committed for the benefit of, at the direction of, or in association with, a criminal organisation it will be 5 years (first time offence) or 7 years (second or subsequent offence).
72 *Sexual Offences Act 2003* (UK) s 3(4)(b).
73 Ibid s 3(4)(a).
74 Ibid s 4(5)(b)
75 Ibid s 4(5)(a).
76 *Sexual Offences (Scotland) Act 2009* (Scot) sch 2.
77 Ibid.
78 Ibid.
79 Ibid.
80 Ibid.
81 *Crimes Act 1961* (NZ) s 128B. The framing of the offence of 'sexual violation' is quite broad and includes acts of unlawful sexual connection that would fall within the offence of sexual assault in Queensland. E.g. the offender bringing their mouth in contact with the victim's genitalia.
82 Ibid s 135.
83 Ibid s 129A.

- In NSW, the *Crimes (Sentencing Procedure) Act 1999* sets out the purposes of sentencing, aggravating, mitigating and other sentencing factors, the types of sentencing orders a court can make. This Act also establishes a standard non-parole period scheme, discussed in section 10.4.7;
- In Victoria, the *Sentencing Act 1991* sets out a list of similar purposes and factors to Queensland and NSW, but also establishes several sentencing schemes that must be applied when sentencing for serious offences (including standard sentences, category 1 and 2 offences, minimum terms of imprisonment and non-parole periods, and a serious offenders scheme);

New Zealand's *Sentencing Act 2002* includes a list of purposes and principles of sentencing, as well as a non-exhaustive list of aggravating and mitigating factors which apply generally to courts in sentencing;[84] The purposes of sentencing or otherwise dealing with a person who has committed an offence include denunciation, deterrence, community protection and rehabilitation, but also include:

- 'to hold the offender accountable for harm done to the victim and the community by the offending' and 'to promote in the offender a sense of responsibility for, and an acknowledgment of, that harm'; or
- 'to provide for the interests of the victim of the offence'; or
- 'to provide reparation for harm done by the offending'.[85]

England and Wales' Sentencing Code[86] identifies statutory sentencing purposes and matters relevant to sentence, including aggravating and mitigating factors, and also provides that every court, in sentencing an offender, must follow any guidelines (developed by the Sentencing Council for England and Wales), unless satisfied that it would be contrary to the interests of justice.[87] The function of sentencing guidelines are discussed in section 10.6.3. Providing reparations for harm done to a victim (or the community) is also established as a general sentencing purpose in England and Wales' Sentencing Code.[88]

While there are many similarities, there are also differences in the types of sentencing orders available and, in the case of imprisonment, the type of statutory guidance (if any) provided to courts regarding the setting of a non-parole period.

The level of discretion (choice) a court may exercise in an individual case generally varies depending on the type of offence committed and any special or additional requirements or principles that must or may be applied under statute or by operation of the common law (case law).

10.4 Special forms of statutory sentencing guidance and schemes

Historically, legislative responses to those convicted of sexual offences were introduced as part of a broader response to offenders classed as being dangerous, including recidivist and violent offenders.[89]

In the early 2000s, many governments introduced special legislative measures to respond to sexual offending.[90]

Sentencing reforms have taken various forms, although they generally have been concerned with strengthening sentencing responses and ensuring a stronger focus in sentencing on acknowledging the harm caused to victims and the need for denunciation, community protection and deterrence.[91]

Many schemes provide guidance to courts in sentencing while retaining broad judicial discretion, while others have been more prescriptive limiting either the type of sentence that can be imposed and/or prescribing minimum sentences or non-parole periods.

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84 *Sentencing Act 2002* (NZ) ss 7–9.

85 *Sentencing Act 2002* (NZ) ss 7(1)(a)–(d). The concept of holding the offender accountable for their actions is also a sentencing purpose in some other Australian jurisdictions, see, e.g., *Crimes (Sentencing) Act 2005* (ACT) s 7(1)(e); *Crimes (Sentencing Procedure) Act 1999* (NSW) s 3A(e); *Sentencing Act 2017* (SA) s 4(1)(a)(ii).

86 *Sentencing Act 2020* (UK) pts 2–13, constitute the 'Sentencing Code': s 1.

87 Ibid s 59(1).

88 *Sentencing Act 2020* (UK) s 57(2)(e). This is also a sentencing purpose in Canada: *Criminal Code*, RSC 1985, c C-46, s 718(e).

89 Arie Freiberg, Hugh Donnelly and Karen Gelb, *Sentencing for Child Sexual Abuse in Institutional Contexts* (Report for the Royal Commission into Institutional Responses to Child Sexual Abuse, 2015) 15.

90 Ibid 16 citing Bronwyn McSherry and Patrick Keyzer, *Sex Offenders and Preventive Detention: Politics, Policy, and Practice* (The Federation Press, Sydney, 2009).

91 See, e.g, the justification provided in Queensland for the introduction of ss 9(5)–(6) of the *Penalties and Sentences Act 1992* (Qld) by the *Sexual Offences (Protection of Children) Amendment Act 2002* (Qld): Queensland Parliament, *Parliamentary Debates*, Legislative Assembly, 6 November 2022, 4443 (Rod Welford, Attorney-General and Minister for Justice).

10.4.1 Special purposes, principles and factors

Some jurisdictions have amended their sentencing legislation to require certain general sentencing factors and principles be applied in a modified form in the case of sexual offending.

Examples of forms of special guidance include those summarised in Table 26.

Table 26: Examples of special purposes, principles and factors in sentencing sexual offences – select jurisdictions

Jurisdiction	Relevant section	What it applies to	Special purposes/factors
Northern Territory	*Sentencing Act 1995*, s 5(2)(ba)	sexual offences[92]	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') [93] for a 'relevant offence'[94]	Where imprisonment is justified, when deciding the sentence length, court must treat the protection of the community as the principal sentencing purpose.[95]
Cth	*Crimes Act 1914,* s 16A(2AAA)	Commonwealth child sex offences[96]	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.

92 Sexual offences are defined in s 3 of the *Sentencing Act 1995* (NT) to mean offences set out in sch 3.

93 *Sentencing Act 1991* (Vic) s 6B defines what is meant by a 'serious offender', including a 'serious sexual offender'. This scheme is discussed further in section 10.4.6.

94 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.

95 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.

96 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.

Jurisdiction	Relevant section	What it applies to	Special purposes/factors
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;
		Any offence	• deliberate concealment of the offending from authorities. 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.

10.4.2 Sentencing standards for historical sexual abuse offences

In response to a recommendation made by the Royal Commission into Institutional Responses to Child Sexual Abuse in 2017,[97] several Australian jurisdictions, including Queensland, amended their sentencing legislation to provide that courts in sentencing people for child sexual abuse offences are to sentence a person having regard to sentencing patterns and practices that apply at the time of sentencing rather than at the time of the offence.[98]

This change does not affect the statutory maximum penalties that apply, which remain as at the time the offence was committed.

State and territory parliaments have chosen to reflect this recommendation in legislation differently as to the wording used and relevant victim age.[99]

97 Royal Commission into Institutional Responses to Child Sexual Abuse, *Final Report Recommendations* (2017) 113, rec 76.

98 For a discussion of the position in New South Wales and Queensland prior to this legislative change, see Hugh Donnelly, 'Sentencing According to Current and Past Practices', Paper presented at the Sentencing: New Challenges Conference, National Judicial College of Australia, 29 February 2020.

99 E.g the Queensland section applies when a court is sentencing a person for an offence of a sexual nature committed in relation to a child under 16 years or a child exploitation material offence: *Penalties and Sentences Act 1992* (Qld) ss 9(6A), (7AA). The South Australian equivalent applies to a sexual offence committed in relation to a person under the age of 18 years: *Sentencing Act 2017* (SA) s 68. In Tasmania, changes introduced in 2019 require courts to 'take into account the sentencing patterns and practices at the time of sentencing' when determining sentence for a person convicted of a child sexual offence, which applies to a sexual offence committed in relation to a person aged under 17 years: *Sentencing Act 1997* (Tas) s 11A(3) inserted by *Criminal Code and Related Legislation Amendment (Child Abuse) Act 2019* (Tas) s 22. The ACT provision introduced in 2017 is in slightly stronger terms as it requires a court when sentencing a person for a sexual offence against a child to 'sentence the person in accordance with sentencing practice,

Changes introduced in NSW initially applied only to child sexual offences,[100] but were later extended to all offences to require a court to sentence an offender in accordance with the sentencing patterns and practices at the time of sentencing.[101] Only in very limited circumstances, is a court permitted to sentence the person in accordance with the sentencing patterns and practices at the time the offence was committed.[102] In sentencing a person for a child sexual offence, a court must also 'have regard to the trauma of sexual abuse on children as understood at the time of sentencing'.[103] This may include with reference to 'recent psychological research or the common experience of courts'.[104]

This issue is further discussed in *Consultation Paper: Issues and Questions*, section 3.3.8.

10.4.3 Mandatory sentencing provisions

Forms of mandatory imprisonment, minimum sentences and minimum non-parole periods

The most prescriptive legislative response to the sentencing of sexual offences has been the introduction of mandatory sentences. These schemes remove a court's discretion to impose a different type of sentence. They are most often justified on the basis of deterrence,[105] and ensuring offenders spend a sufficient period of time and proportion of their sentence in prison.[106]

Mandatory sentencing provisions take various forms, but include:

- a requirement for courts to impose a sentence of actual imprisonment;
- the setting of minimum sentences of imprisonment; and
- specifying minimum non-parole periods that must be served prior to eligibility for release on parole.

Examples of different mandatory sentencing provisions that apply to sexual offences in other jurisdictions are outlined below, along with a discussion of their impact. Mandatory sentencing provisions that apply to sexual offences in Queensland are discussed in section 6.10.

Northern Territory

In the **Northern Territory**, a requirement for courts to record a conviction and impose either a term of actual imprisonment or a partly suspended sentence when sentencing an offender for a sexual offence.[107] In addition, a minimum non-parole period of 70 per cent of the head sentence,[108] applies to offenders sentenced to imprisonment for 12 months or more for specified sexual offences (including sexual intercourse without consent (rape))[109] and listed sexual offences where committed against a child under 16 by a person who was an adult.[110]

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including sentencing patterns, at the time of sentencing': *Crimes (Sentencing) Act 2005* (ACT) s 34A inserted by *Royal Commission Criminal Justice Legislation Amendment Act 2018* (ACT) s 8. The definition of a 'child' is a person aged under 18 years: *Legislation Act 2001* (ACT) dictionary definition of a 'child'.

100 *Crimes (Sentencing Procedure) Act 1999* (NSW) ('CSPA') s 25AA(1). This section was inserted in 2018 by the *Criminal Legislation Amendment (Child Sexual Abuse) Act 2018* (NSW).

101 CSPA (n 100) s 21B. This applies to proceedings commenced on or after 18 October 2022. However, the standard non-parole period for an offence is the standard non-parole period, if any, that applied at the time the offence was committed, not at the time of sentencing: s 21B(2).

102 These apply if: (a) the offence is not a child sexual offence; and (b) the person being sentenced establishes there are exceptional circumstances: Ibid 100s 21B(3).

103 Ibid s 25AA(3).

104 Ibid.

105 Freiberg, Donnelly and Gelb (n 8990) 189.

106 See, e.g., the justification by the NT Government for introducing the 70 per cent minimum NPP for the offence of rape: Northern Territory, *Parliamentary Debates*, Legislative Assembly, 18 May 1995, 3388 (Attorney-General, Fred Finch).

107 *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 s 188(2)(k) (indecent assault) and s 192 of the (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.

108 A court may set a higher NPP than the minimum specified, and may also decline to set an NPP if it considers that the fixing of such a period is inappropriate taking into account the nature of the offence, the past history of the offender or the circumstances of the particular case: *Sentencing Act 1995* (NT) ss 55(2), 55A(2), 53(1).

109 Ibid s 55. In addition to this offence, it also applies to drug offences falling within the definition in this section of a 'specified offence': s 55(3).

110 Ibid s 55A. Sexual offences this applies to under the Criminal Code (NT) are: sexual intercourse or gross indecency involving a child under 15 years (s 127), sexual intercourse or gross indecency by provider of services to mentally ill or handicapped person attempts to procure child under 16 (s 131), sexual relationship with a child (s 131A), indecent dealing with a child under 16 (s 132), incest (s 134) and gross indecency without consent (s 192(4)).

In 2021, the NT Law Reform Committee examined mandatory sentencing and community-based sentencing options. With respect to the requirement to impose an actual term of imprisonment, it reported:

> [i]n 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.[111]

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'.[112]

In considering the effectiveness of the mandatory sentencing laws in deterring sexual violence offending, it pointed to the low rates of reporting, prosecution and convictions as providing evidence such reform had had little, if any, impact.[113]

The conclusion reached by the Committee was that these provisions should be repealed.[114]

The NT Parliament has passed legislation that will limit the operation of section 55 to the offence of sexual intercourse without consent under s 192(3) of the Criminal Code[115] and also confine the operation of section 55A by reducing the offences to which it applies.[116] These changes are due to come into force on a date to be fixed, or 9 October 2024 if not commenced prior to this.[117] No changes have yet been made to the requirement to impose an actual term of imprisonment or partially suspended sentence.

Victoria

In **Victoria**, mandatory imprisonment (which must not be imposed in addition to making a community correction order)[118] applies to 23 'Category 1 offences' (including rape, aggravated forms of rape, and child sexual abuse),[119] providing it was committed by a person aged 18 years or more at the time the offence was committed.[120]

In 2021, VSAC reported on the impact of three reforms on sentencing for sexual offences, including the classification of certain offences as Category 1 offences if committed and sentenced on or after 20 March 2017.[121] As rape already attracted very few non-custodial sentences prior to the introduction of Category 1 offences, the Council concluded 'the reform did not have any discernible influence on sentencing outcomes', although in all 27 cases of rape sentenced after the Category 1 classification was introduced, a sentence of imprisonment was imposed.[122] It suggested that a review of available sentencing remarks for 33 rape cases sentenced prior to these reforms involving a non-custodial sentence being imposed, were either as a direct result of the Court of Appeal's guideline judgment in *Boulton v The Queen*[123] or involved a finding there were exceptional circumstances justifying this outcome.[124] 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'.[125]

Legal commentators have been critical of these and other Victorian sentencing reforms, arguing they have not achieved their objective of greater deterrence and community protection.[126] In support of this conclusion, statistics are cited that show despite imprisonment rates having reached their highest levels since 1985 in Victoria, 4 out of 10 prisoners in Victoria return to prison within 2 years of their release.[127]

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111 Northern Territory Law Reform Committee, *Mandatory Sentencing and Community-based Sentencing Options: Final Report* (Report No 47, 2021) 56.
112 Ibid.
113 Ibid 57.
114 Ibid 59, recs 4-4, 4-5.
115 *Sentencing and Other Legislation Amendment Act 2022* (NT) s 18.
116 Ibid s 19 - omitting the reference to ss 181, 186, 186B, 188, but retaining the reference to s 184 (Endangering the life of child by exposure).
117 Ibid s 2.
118 *Sentencing Act 1991* (Vic) s 5(2G). There are some limited exceptions to this: see ss 5(2GA), 10A.
119 Ibid s 3(1) (definition of 'Category 1 offence').
120 Ibid.
121 Victorian Sentencing Advisory Council, *Sentencing Sex Offences in Victoria: An Analysis of Three Sentencing Reforms* (June 2021).
122 Ibid 18 [3.6].
123 (2014) 46 VR 308. Guideline judgments are discussed in section 10.6.2 of this chapter.
124 Victorian Sentencing Advisory Council (n 121) 19–20 [3.8]–[3.9].
125 Ibid xi.
126 Michael D Stanton, 'Instruments of Injustice: The Emergence of Mandatory Sentencing in Victoria' (2022) 48(2) *Monash University Law Review* 1.
127 Ibid 3, referencing comments made by the former Chief Magistrate, Ian Gray and former Supreme Court Judge, the Honourable Kevin Bell.

South Australia

In **South Australia**, the Government has committed to introducing a Bill in March 2024 to it mandatory that a person jailed for a second time for a serious child sex offenders will be sentenced to indefinite detention.[128] The proposed amendments include that for a person to be considered for release they will need to demonstrate they can control their sexual instincts and would face electronic monitoring if they are released. Two psychological reports by experts chose by the courts stating the person is willing and able to control their sexual instincts will be required to inform a decision of release.

Canada

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.[129] Higher minimum sentences apply to more serious forms of sexual assault.[130]

Research into the impacts of mandatory minimum sentences in Canada.[131], including for child sex offences, found evidence of matters taking longer to be finalised post introduction of these reforms.[132] There were also large increases in the use of custodial sentences as compared to non-custodial sentences (such as probation) following the introduction of these provisions as well as in sentence lengths that well exceeded the mandatory minimum levels set by law.[133] A separate study found evidence that some judges were substituting a short minimum sentence of imprisonment, sometimes followed by probation, for what would otherwise have attracted a longer conditional sentence of imprisonment (a form of custodial sentence served in the community, which can include home detention).[134]

In 2022, 14 of the then 57 minimum sentence provisions in the Criminal Code were repealed, while the minimum sentences relating to sexual assault were retained.[135] The basis for repeal of these provisions was that minimum penalties, together with restrictions on the use of conditional sentences (a sentence of imprisonment served in the community) had made the Canadian criminal justice system 'less fair' and had had a disproportionate impact on Indigenous people, African Canadians and members of marginalised groups.[136] Criticisms included that these provisions restricted judicial discretion, made it difficult for courts to apply principles of individualised justice, discouraged the early resolution of cases thereby eroding public confidence in the administration of justice,[137] and had no deterrent effect.[138]

The reasons for retaining the minimum sentences as they apply to sexual assault were not directly addressed at the time of the Bill's introduction, although there was some reference by other members of Parliament about the need to take into account the impact of such offences on victims – including taking into account that a disproportionate number of victims are Indigenous and from other racial backgrounds.[139]

England and Wales

In **England and Wales**, since 1 April 2020, offenders subject to a standard determinate sentence of 7 years or more, for an offence that attracts a maximum life sentence, are required to serve two-thirds of that sentence in custody before release on licence for the remainder of the sentence.[140] This requirement was extended in April

128 Olivia Mason and Leah MacLennan, ABC News, *Repeat child sex offenders to face life imprisonment and electronic monitoring under new SA laws* (Webpage, 24 January 2024) <https://www.abc.net.au/news/2024-01-23/sa-to-fast-track-tougher-child-sex-offence-laws/103378538>.

129 *Criminal Code,* RSC 1985 c C-46, s 271.

130 Ibid s 273(2).

131 See Ibid ss 272(2), 273(2).

132 This may partly be due to Crown elections to have matters dealt with summarily resulting in more complex cases being dealt with in this way, but it is not possible to measure the impact: Mary Allen, *Mandatory Minimum Penalties: An Analysis of Criminal Justice System Outcomes for Selected Offences* (Statistics Canada, 2017) 5, 20.

133 Ibid 19–20.

134 Janine Benedet, 'Sentencing for Sexual Offences Against Children and Youth: mandatory Minimums, Proportionality and Unintended Consequences' (2019) 44(2) *Queen's Law Journal* 284.

135 The repeal of these provisions primarily related to mandatory minimum sentences applying to offences involving firearms and weapons offences and drug offences. For more information, see Canada, Parliamentary Information, Education and Research Services, *Bill C-5: An Act to Amend the Criminal Code and the Controlled Drugs and Substances Act* (Publication No 44-1-C5-E, 2022).

136 Canada, *Parliamentary Debates*, House of Commons, 13 December 2021, 1049 (Frank Caputo, Member for Kamloops–Thompson–Cariboo).

137 Ibid.

138 Ibid 1305 (Ryan Turnball, Member for Whitby).

139 Ibid 1100 (Gary Anandasangaree, Parliamentary Secretary to the Minister of Justice and Attorney General of Canada).

140 *Release of Prisoners (Alteration of Relevant Proportion of Sentence) Order 2020* (UK) art 3. This states the reference to 'one-half' in s 244(3) of the *Criminal Justice Act 2003* (UK) is to be read as 'two-thirds'.

2022 to now apply to offenders sentenced to an adult standard determinate sentence of between 4 and 7 years for certain serious violent and sexual offences (provided these carry a maximum penalty of life imprisonment).[141]

As part of its review of the serious violent offences scheme, the Council commissioned the University of Melbourne to undertake a review of evidence of the effectiveness of minimum non-parole period ('MNPP') schemes for serious violent, sexual and drug offenders.[142]

The review authors found that: 'given that MNPPs have been found to result in longer periods of imprisonment, they can be considered to achieve the sentencing purposes of punishment and denunciation' with 'some evidence that sentencing outcomes are more consistent when MNPPs are in place, at least in terms of sentence length'.[143] However, based on the evidence, they considered it likely that providing for longer periods of supervision in the community would prove more effective than limiting the availability of and time on parole in enhancing longer-term community safety.[144]

The authors point to measures such as discretionary sentencing, informed parole decision making and effective parole supervision as well as rehabilitative and post-release (re-entry) support interventions as necessary parts of any effective strategy aimed at reducing the risk, dangerousness and harms caused by those subject to schemes such as the SVO scheme.[145] They conclude that tailored and individualised responses are required, including to meet the needs of specific groups of people who have committed serious offences - which they suggest is best supported by high levels of discretion in judicial decision making rather than by MNPP schemes.[146]

10.4.4 Presumptive imprisonment and/or supervision

Forms of presumptive sentences for sexual offences

A less prescriptive model taken to guide the courts in sentencing of sexual offences has been to introduce a statutory presumption in favour of imprisonment and/or supervised forms of orders while allowing a court to impose a different type of sentence if certain criteria are met.

An example of this in Queensland is section 9(4)(c) of the PSA which requires a court in sentencing an offender for any offence of a sexual nature committed in relation to a child under 16 years or a child exploitation material offence, that the offender must serve an actual term of imprisonment, unless there are exceptional circumstances.

The same types of criticisms made of mandatory sentencing schemes are often made of presumptive schemes regarding the limiting of judicial discretion.[147]

Examples in other jurisdictions, along with their impact are noted below.

New South Wales

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),[148] for a court to impose either a sentence of full-

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141 *Police, Crime, Sentencing and Courts Act 2022* (UK) s 144. At the same time, amendments were made to allow the Secretary of State to refer an offender to the Parole Board if they believe on reasonable grounds that the prisoner would, if released, pose a significant risk to members of the public of serious harm of committing listed offences. This means that these prisoners are not subject to automatic release at their parole date before the end of their sentence. They must instead be assessed by the Parole Board who will determine if they can be safely released on licence.

142 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).

143 Ibid.

144 Ibid 24.

145 Ibid.

146 Ibid 19.

147 See, for example, Stanton (n 126) 5, which identifies the dangers of presumptive sentencing alongside mandatory sentencing but without making distinctions between the two apart from presumptive sentencing restricting discretion as distinct from removing it.

148 A 'domestic violence offence' for this purpose has the same meaning as in the *Crimes (Domestic and Personal Violence) Act 2007* (NSW) ('CDPV Act'): CSPA (n 100) 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).

time detention or a supervised order (meaning an intensive correction order ('ICO'), a community condition correction order ('CCO') or a conditional release order ('CRO') that includes a supervision condition),[149]unless satisfied that a different sentencing option is more appropriate in the circumstances.[150] The main purpose of this legislative change was to ensure more domestic violence offenders would be subject to supervision for the whole period of the order rather than receiving unsupervised orders.[151]

The 2018 NSW domestic violence sentencing reforms 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 community orders, and a reduction in the proportion of offenders sentenced to an unsupervised order, fine or other penalty.[152]

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.[153] The percentage 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.[154]

A subsequent evaluation by BOCSAR in 2022 found the increased use of supervised community sentences, including for domestic violence offenders, had not appeared to have translated into reduced short-term reoffending rates. The study concludes that the 'abundance of evidence to support the effectiveness of community supervision in reducing recidivism suggests that further research into the extent and quality of supervision following the sentencing reforms may be worth pursuing'.[155]

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,[156] contributing to the Government's broader aim of reducing reoffending by 5 per cent by 2023.[157]

New Zealand

In **New Zealand**, there is a presumption of imprisonment in circumstances where a person is convicted of sexual violation by unlawful sexual connection or rape.[158] 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.[159] This is not limited to offences committed in relation to children.

In a 2015 report on the justice response to victims of sexual violence, the NZ Law Commission reported a general view among those consulted that the custodial presumption, in conjunction with the high sentencing tariffs attached to sexual violence offences (discussed in section 10.6.2 of this chapter), were a contributing factor to underreporting of these offences.[160] It considered these factors meant that perpetrators had a 'strong incentive to aggressively defend a charge rather than to admit it'.[161] While outside the scope of its review, the Commission suggested that a 'review of these factors could be warranted in the future in order to address these issues'.[162]

149 CSPA (n 100) s 4A(1), s 4A(3).
150 CSPA (n 100) s 4A(2).
151 New South Wales, *Parliamentary Debates*, Legislative Assembly, 11 October 2017, 274, 276 (Mark Speakman, Attorney-General).
152 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* (Bureau Brief No 148, 2020) 8.
153 Ibid 14.
154 Ibid. The use of supervised orders, unsupervised orders, fines and other penalties also declined.
155 Ibid 20.
156 NSW Government, 'Investing in Community Supervision and Safety', *Communities and Justice*, (Media Release, 22 June 2021) < https://dcj.nsw.gov.au/news-and-media/media-releases-archive/2021/investing-in-community-supervision-and-safety.html>.
157 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>.
158 *Crimes Act 1961* (NZ) s 128B(2). 'Sexual violation' for these purposes is defined in s 128.
159 Ibid ss 128B(2)–(3).
160 NZ Law Commission, *The Justice Response to Victims of Sexual Violence: Criminal Trial and Alternative Processes* (2015) 22
161 Ibid 23.
162 Ibid.

Tasmania

In **Tasmania**, the Government has introduced a Bill that, if passed, will require courts to impose a term of imprisonment of at least the minimum term specified for certain sexual offences against children under 18 years if there were one or more aggravating circumstances present.[163] The minimum periods specified range from 2 years (for penetrative sexual abuse of a child under 17 years, or 18 years if committed by a person in a position of authority) up to 4 years (for rape and persistent sexual abuse of a child under 17 if one of the acts involved is rape). Under this proposal, the court may refuse to do so if the person being sentenced was under 18 years at the time they committed the offence or has impaired mental functioning linked to the commission of the offence, or where, in the court's view, the imposition of the sentence would be unjust when considering the circumstances of the offence or the person being sentenced.[164]

The Tasmania reforms, while not yet enacted, have similarly been criticised by some child sexual abuse advocates on the basis they could lead to injustice in individual cases and result in fewer guilty pleas thereby exposing victim survivors to the trauma of being involved in a trial and subject to cross-examination.[165] The Law Society of Tasmania raised similar concerns, in addition to the ineffectiveness of mandatory sentences in deterring child sexual offending.[166]

10.4.5 Presumptive minimum non-parole period schemes

Various forms of presumptive minimum non-parole periods apply in other Australian jurisdictions,[167] and many apply to serious sexual offences:

In **Victoria**, a court when sentencing a person for a standard sentence offence must fix an NPP of at least: (a) 60 per cent if the relevant term is a term of less than 20 years; (b) 70 per cent if the relevant term is a term of 20 years or more; and (c) 30 years, if the relevant term is a term of life imprisonment; unless the court considers that it is in the interests of justice not to do so.[168] The operation of the standard sentencing scheme is discussed in section 10.4.7 below.

In **South Australia**, courts in sentencing offenders as serious repeat offenders under Part 3, Division 4 of the *Sentencing Act 2017* (SA)[169] must ensure that any NPP fixed in relation to the sentence must be at least four-fifths (80%) the length of the sentence.[170] A court may declare that this requirement does not apply if the person satisfies the court by evidence on oath[171] that their personal circumstances are so exceptional as to outweigh the paramount consideration of protecting the safety of the community and personal and general deterrence, and that it is, in all the circumstances, not appropriate that they be sentenced as a serious repeat offender.[172] The defendant must satisfy both requirements before the exception to being sentenced as a serious repeat offender operates.[173]

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163 *Sentencing Amendment (Presumption of Mandatory Sentencing) Bill 2023* (Tas) cl 4 inserting a new s 16B into the *Sentencing Act 1997* (Tas). Under this proposal, 'aggravating circumstances' would have the same meaning as under s 11A of the *Sentencing Act 1997* (Tas).

164 Ibid.

165 Lucy MacDonald and Adam Langenberg, ABC News, *Tasmanian Labor Flips to Support Mandatory Minimum Sentencing for Child Abusers, as Grace Tame Warns of Unintended Consequences* (Webpage, 15 November 2023) <https://www.abc.net.au/news/2023-11-15/tas-labor-support-liberals-mandatory-sentencing-child-sex-abuse/103105094>.

166 Matt Malone, 'Tasmania on Path to Introduce Mandatory Child Sex Abuse Sentences', *The Examiner*, (Web page 15 November 2023 <https://www.examiner.com.au/story/8424007/tasmania-on-path-to-introduce-mandatory-child-sex-abuse-sentences/>.

167 The Council highlighted differences between these schemes and the parole provisions that apply in Queensland in its report on the serious violent offences scheme: 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* (2022).

168 *Sentencing Act 1991* (Vic) s 11A. The 'relevant term' is defined for the purposes of this calculation as the sentence imposed for the standard sentence offence, or the total effective sentence imposed in respect of 2 or more sentences, at least one of which is for a standard sentence offence: s 11A(5).

169 For more information about this scheme, see Queensland Sentencing Advisory Council, *Background Paper 2: Minimum non-parole period schemes for serious violent offences in Australia and select international jurisdictions* (September 2021).

170 *Sentencing Act 2017* (SA) s 54(1).

171 The requirement for evidence on oath does not require a defendant to themselves give evidence — see for example *R v Douglass* [2019] SASCFC 67 where the only evidence given on oath was by a forensic psychologist who had assessed the defendant.

172 *Sentencing Act 2017* (SA) s 54(2). For detailed consideration by the South Australian Court of Criminal Appeal of *the* meaning of 'exceptional circumstances' see *Knight v The Queen* [2021] SASCFC 12.

173 *Knight v The Queen* [2021] SASCFC 12 [62]–[63]. See also *R v Karnage* [2019] SASCFC 82. For an example of a case where a declaration was made under s 54(2), see *R v Douglass* [2019] SASCFC 67. The sentencing judge made the declaration for a first-time sentenced defendant who had a significant intellectual disability and this was not set aside on appeal.

While the schemes discussed above, to the Council's knowledge, have not been evaluated, in its review of the serious violent offences scheme, the Council acknowledged that particular problems can arise with mandatory or presumptive non-parole periods being set at a very high level.[174] Problems identified included that these schemes can exert downward pressure on head sentences meaning the person's overall sentence length is reduced, and they may result in the person sentenced spending very limited time under supervision on parole (assuming they apply for parole at all) which is contrary to the objective of long-term community safety.

10.4.6 Presumption in favour of sentence cumulation

Another response to serious offending, including sexual offending, has been to introduce a presumption in favour of sentences of imprisonment being ordered to be served cumulatively on other sentences imposed. This effectively serves as a mechanism designed to increase sentence lengths.[175]

One example is the **Victorian** serious offender scheme established under Part 2A of the *Sentencing Act 1991* (Vic). Every term of imprisonment imposed on a serious offender for a relevant offence must be served cumulatively on any uncompleted sentence of imprisonment, unless the court orders otherwise.[176] A 'serious offender' includes[177] a 'serious sexual offender'.[178] The serious offender provisions do not apply to the sentencing of young offenders, that is, someone under the age of 21.[179]

The Victorian Court of Appeal has observed that the serious offender scheme creates tension between the requirement of cumulation and the principle of totality that 'is difficult to reconcile'. [180] However, as the objective seriousness of the total offending increases, so will the degree of cumulation, thereby producing a total effective sentence that 'still more closely corresponds with both the legislative policy underlying s 6E [creating the presumption in favour of cumulation] and the principle of totality'.[181]

The High Court has observed that 'the need for judges not to compress sentences was especially important where the accused person is a "serious sexual offender"'.[182] The High Court has said that the objective of section 6E (cumulating unserved sentences) 'would be compromised and probably defeated in most cases' if sentencing judges determined the level of cumulation and concurrency according to 'the ordinary application of the totality principle'.[183]

The Victorian Court of Appeal has commented that the effect is that '[t]otality is not obliterated …; it simply has more limited scope for operation'.[184] In this case, '[i]ts impact on the total effective sentence is moderated.'[185]

In practice, in balancing the principles of proportionality, totality and the protection of the community, the approach of Victorian courts generally has been to order no cumulation or partial cumulation.[186]

174 See Queensland Sentencing Advisory Council (n 167167) 253.
175 Frieberg, Donnelly and Gelb (n 8990) 193–4.
176 *Sentencing Act 1991* (Vic) s 6E.
177 The 'serious offender' offences are set out in schedule 1 of the *Sentencing Act 1991* (Vic).
178 A 'serious sexual offender' is person convicted of: (a) two or more sexual offences; (b) persistent sexual abuse of a child under 16; (c) committing the incidents of a sexual offence included in a course of conduct charge (as defined in clause 4A of Schedule 1 of the *Criminal Procedure Act 2009* (Vic); or (d) at least one sexual offence and at least one violent offence arising out of the same course of conduct: s 6B(2).
179 *Sentencing Act 1991* (Vic) ss 3(1), 6B(2).
180 *Gordon v The Queen* [2013] VSCA 343 (13 December 2013) [74] (Redlich JA).
181 Ibid.
182 *McL v The Queen* (2000) 203 CLR 452 [76] (McHugh, Gummow and Hayne JJ).
183 Ibid.
184 *Director of Public Prosecutions (Victoria) v Avalos (a pseudonym)* [2023] VSCA 117 [46] (Ferguson CJ, Priest AP and T Forrest JA).
185 Ibid.
186 *McL v The Queen* (2000) 203 CLR 452, 476–77 [76] (McHugh, Gummow and Hayne JJ).

10.4.7 Standard non-parole periods and standard sentences schemes

Another type of special scheme introduced to increase guidance to court in sentencing are 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[187] and applies to a range of serious offences, including several sexual offences.[188] The scheme's introduction was justified on the basis it would provide judges with 'a further important reference point' when sentencing offenders for SNPP offences.[189]

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 the offence.[190] The SNPP operates as a 'legislative guidepost' in sentencing, along with the maximum penalty.[191] When sentencing an offence to which an SNPP applies, the court must also consider other legislated and common law sentencing considerations.[192]

The offences to which the scheme applies and associated SNPPs are set out in a Table to Part 4, Division 1A of the *Crimes (Sentencing Procedure) Act 1999* (NSW). As originally introduced, the scheme applied to more than 20 categories of serious indictable offences including a range of violent, sexual and drug offences. The number of offences captured 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'.[193]

The SNPPs are expressed as a number of years. For example, the SNPP for aggravated sexual assault in company is 15 years, 10 years for aggravated sexual assault and 7 years for sexual assault simpliciter. The offences of relevance to this review included in the SNPP scheme and their corresponding SNPPs relative to the maximum penalty are set out in Appendix 4. The SNPP provisions do not apply in some cases, including if the matters is dealt with summarily.[194]

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'.[195] The SNPP is based on the seriousness of the offence, the maximum penalty and sentencing trends for the offence.[196]

The court must give reasons for setting a NPP that is longer or shorter than the SNPP and each factor that was taken into account when making this determination.[197] When determining an aggregate sentence of imprisonment, the court must state in writing which offences the SNPP applies to and the NPP that would have been set for each offence to which the aggregate sentencing relates, had each offence received a separate sentence of imprisonment.[198]

The Judicial Commission of New South Wales reviewed the impact of the SNPP scheme on sentencing patterns in 2010.[199] It concluded that the scheme:

> has 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.[200]

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187 Part 4, Division 1A of the CSPA (n 100) was inserted by the *Crimes (Sentencing Procedure) Amendment (Standard Minimum Sentencing) Act 2002* (NSW).
188 CSPA (n 100) ss 54A–54D.
189 NSW Law Reform Commission, *Sentencing: Interim Report on Standard Non-parole Periods* (Report 134, 2012) [1.14].
190 Ibid s 54A(2).
191 *Muldrock v The Queen* (2011) 244 CLR 120, [27] (French CJ, Gummow, Hayne, Heydon, Crennan, Kiefel and Bell JJ).
192 CSPA (n 100) s 54B(2).
193 NSW Law Reform Commission (n 189) [1.21].
194 SNPPs do not apply where an offender is: (a) sentenced to life imprisonment or for any other indeterminate period (and is therefore ineligible for parole): (b) sentenced to detention under the *Mental Health and Cognitive Impairment Forensic Provisions Act 2020* (NSW); (c) dealt with summarily; or (d) under 18 years at the time the offence was committed: CSPA (n 100) s 54D.
195 NSW Law Reform Commission (n 189) [1.16].
196 NSW Sentencing Council, *Standard Non-parole Periods: Final Report* (2013) 3 citing the Second Reading speech in the NSW Parliament on 23 October 2002.
197 Ibid s 54B(3).
198 Ibid s 54B(4).
199 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).
200 Ibid 60.

This evaluation occurred prior to the High Court's decision in *Muldrock v The Queen*[201] which clarified that courts are not to give the SNPP 'primary, let alone determinative significance'.[202]

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',[203] 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'.[204]

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.[205] 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'.[206]

Both bodies recommended retaining the scheme,[207] along with recommending changes to provide more structure to the scheme.

Victorian standard sentencing scheme

The standard sentencing scheme is established in Victoria under sections 5A and 5B of the *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*.[208] VSAC was asked for advice on legislative mechanisms for sentencing guidance in Victoria, and specifically to provide an alternative to the baseline sentencing provisions,[209] which the Victorian Court of Appeal had found to be 'incapable of being given any practical operation'.[210]

The Council was asked 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'.[211] The Government's expectations at the time of its introduction was that sentences would increase for standard sentence offences, 'bringing sentencing for the most serious offences in line with community expectations',[212] and also sending 'a strong message to perpetrators that they can expect longer terms of imprisonment if they commit serious offences'.[213]

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 or older who commits a prescribed offence on or after 1 February 2018 is subject to the standard sentencing scheme.[214] 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',[215] 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.[216] In determining the objective factors a court must consider only the nature of the

201 (2011) 244 CLR 120.
202 Ibid [26].
203 NSW Law Reform Commission (n 189) [2.5], [2.34].
204 Ibid [2.34].
205 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.
206 Ibid [2.11]–[2.13].
207 Ibid xi-xiii. The NSW Government adopted the recommendation made by the NSWLRC in this report.
208 Sentencing Advisory Council (Victoria), *Sentencing Guidance in Victoria* (Report, 2016).
209 A 2014 scheme introduced to set median prison sentence lengths for certain serious offences. It was repealed and replaced with the standard sentence scheme.
210 *DPP v Walters (a Pseudonym)* [2015] VSCA 303 (17 November 2015).
211 Parliament of Victoria, *Parliamentary Debates*, Legislative Assembly, 25 May 2017, 1508 (Martin Pakula, Attorney-General).
212 Ibid 1509.
213 Ibid.
214 *Sentencing Act 1991* (Vic) ss 5A, 5B.
215 *Brown v The Queen* (2019) 59 VR 462, 464–5 [4] ('*Brown*').
216 *Sentencing Act 1991* (Vic) s 5A(1)(b).

offence and not the personal circumstances of the offender.[217] 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.[218]

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.[219] Nor is it 'a mandatory sentence' or a 'starting point from which to add or subtract time'.[220]

Courts must only have regard to sentences previously imposed for the offence if the standard sentence offence scheme applied to them.[221]

As discussed above, presumptive non-parole periods apply to standard sentence offences.

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)'.[222]

In 2021, the Victorian Sentencing Advisory Council ('VSAC') reported on the impact of 3 sentencing reforms to sentences imposed from 2010 to 2019. [223] 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)as the standard sentence scheme for relevant offences committed and sentenced on or after 1 February 2018, and (3) call to uplift sentencing practices for incest offences in the *Dalgliesh* decisions by the High Court[224] and the Victorian Court of Appeal.[225]

VSAC reported that the standard sentencing scheme appeared to 'have had a tangible effect on the length of prison sentences imposed, as intended'.[226] 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'.[227] 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.[228]

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).[229]

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).[230]

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'.[231]

While it found that each of the reforms appeared to have influenced sentencing practices for sexual offences, and 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.[232]

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217 Ibid s 5A(3).
218 Ibid ss 5B(4)–(5).
219 *Brown* (n 215) [4], [44], [106].
220 *DPP v Hermann* [2019] VSC 694 (29 October 2019) [104].
221 *Sentencing Act 1991* (Vic) ss 5B(2)(b).
222 *Lockyer (a pseudonym) v The Queen* [2020] VSCA 321, [67] (Priest and Weinberg JJA).
223 Victorian Sentencing Advisory Council, *Sentencing Sex Offences in Victoria: An Analysis of Three Sentencing Reforms* (June 2021).
224 *DPP v Dalgliesh (A Pseudonym)* (2017) 262 CLR 428.
225 *DPP v Dalgliesh (A Pseudonym)* [2016] VSCA 148 (29 June 2016); *DPP v Dalgliesh (A Pseudonym)* [2017] VSCA 360 (7 December 2017).
226 Victorian Sentencing Advisory Council (n 223) xii.
227 Ibid.
228 Ibid 78 [9.6].
229 Ibid 22.
230 Ibid xi.
231 Ibid 78 [9.7].
232 Ibid xii.

10.5 Legislative restrictions on the availability of orders other than immediate imprisonment

In addition to the schemes described above, some jurisdictions have placed restrictions on the availability of non-imprisonment orders.

Examples of different provisions that apply to sexual offences in other jurisdictions are outlined below.

In **South Australia,** a suspended sentence of imprisonment on the person entering into a good behaviour bond cannot be ordered if the person is being sentenced for a 'serious sexual offence' ;[233] and a court Is prevented from making a home detention order where it has ordered a term of imprisonment but considers the sentence should not be suspended and that the person is a suitable person to serve the sentence on home detention.[234] In this case, a court must not make such as order when sentencing an adult for serious sexual offence unless it meets certain criteria.[235]

In **NSW**, an intensive correction order (ICO) cannot be made for a prescribed sexual offence,[236] which includes any sexual offence where the victim is under 16 years, or the victim is any age and elements of the offence include sexual intercourse.[237] ICOs may be ordered for the offences of sexual touching[238] and sexual act[239] committed against an adult victim.[240] Additional requirements must be met before making an ICO for a domestic violence offence.[241] In deciding whether to make an ICO, court must treat community safety as the paramount consideration.[242] Suspended sentences and home detention were abolished in September 2018, although a home detention condition can be a condition of an ICO.[243]

In the **Northern Territory**, a community-based order or a community custody order (an order that a person serve a sentence of imprisonment of not more than 12 months in the community) cannot be made for a sexual offence.[244] This restriction also applies to those convicted of a violent offence, aggravated common assault or another offence prescribed by regulation.[245]

The restriction of these orders in the case of sexual offences applies to offences defined as sexual offences in section 3 of the *Sexual Offences (Evidence and Procedure) Act 1983*, including indictable offences involving sexual intercourse or sexual penetration, a sexual relationship, sexual abuse, indecent touching or an indecent assault, or any other indecent act directed against a person or committed in the presence of a child.

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233 *Sentencing Act 2017* (SA) s 96(3)(ba). A 'serious sexual offence is defined as one of a number of listed offence where the maximum penalty is 5 years or more including rape, compelled sexual manipulation, persistent sexual abuse of a child and incest. This definition also includes offences such as unlawful sexual intercourse, indecent assault and gross indecency provided these were not committed in prescribed circumstances: ss 96(9)–(10).

234 Ibid ss 71(1)–(2)(b)(ii).

235 These are that: (a) the offence is a prescribed serious sexual offence (the definition of which includes unlawful sexual intercourse, indecent assault and gross indecency, but not rape or other more serious offences) that occurred in prescribed circumstances (adopting the same definition as for the suspended sentence provisions); or (b) the court is satisfied that special reasons exist for the making of a home detention order, in which case the court must also be satisfied that: (i) the defendant's advanced age or permanent infirmity means that the defendant no longer presents an appreciable risk to the safety of the community (whether as individuals or in general); and (ii) the interest of the community as a whole would be better served by the defendant serving the sentence on home detention rather than in custody: ibid s 71.

236 CSPA (n 100) s 67(1)(b).

237 Ibid. Sexual intercourse is defined as the penetration of a person's genitalia or anus by a penis or object, the introduction of any part of the genitalia of a person to the mouth of another person and the application of the mouth or tongue on female genitalia: *Crimes Act 1900* (NSW) s 61H.

238 *Crimes Act 1900* (NSW) ss 61KC, 61KD.

239 Ibid ss 61KE and 61KF.

240 'Sexual act' is defined as an act (other than sexual touching) carried out in circumstances where a reasonable person would consider the act to be sexual: Ibid s 61HC.

241 In this case, a court must also be satisfied that the victim of the domestic violence offence and any person with whom the offender is likely to live, will be adequately protected before making an ICO: CSPA (n 100) s 4B(1). See n 148148 as to the definition of a 'domestic violence offence' in NSW.

242 CSPA (n 100) ss 66(1)–(2). For a discussion of relevant case law on the approach to be taken and principles to be applied when making this assessment, see: Judicial Commission of NSW, *Sentencing Bench Book* (last reviewed May 2023) [3–362] 'Mandatory considerations when determining whether to impose ICO'.

243 CSPA (n 100) s 73A(2)(a).

244 *Sentencing Act 1995* (NT) ss 39A(1)(a), 48A(1)(a)(i).

245 Ibid ss 39A(1)(b)–(d), 48A(1)(a)(ii)–(iv).

10.6 Non-legislative forms of guidance

10.6.1 Case law guidance

Appellate court 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 inferior courts to apply legislation in a consistent way, but also in understanding the broader approach to be taken in sentencing.

The appellate courts in other Australian jurisdictions, as in Queensland (refer 0), provide guidance to sentencing courts regarding particular matters of relevance in sentencing for rape and sexual assault in the context of appeals against sentence. This form of guidance generally does not extend to setting sentencing standards to be followed by sentencing courts, but is generally limited to the identification by appellate courts of whether a sentence imposed was manifestly excessive or inadequate.[246] This approach reflects appellate courts' understanding of the nature of the judicial sentencing exercise and their proper role when hearing appeals against sentence.[247]

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',[248] 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.'[249]

The type of guidance appellate courts provide varies, but often involves the court identifying sentencing considerations that either are or are not relevant in a given case and clarifying matters of principle or statutory interpretation.[250]

The High Court plays a similar role in its appellate jurisdiction in providing guidance to lower courts regarding issues of principle and the proper application of the law. For example, relevant to the current review, the High Court in *R v Kilic*[251] in discussing the rationale for the legislative requirement in Victoria for courts to consider 'current sentencing practices' in sentencing, noted that this 'recognises that sentencing practices for a particular offence or type of offence may change over time reflecting changes in community attitudes to some form of offending.[252] By way of example, the Court commented 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' and that practices for domestic violence might also depart from past practices 'because of changes in societal attitudes to domestic relations'.[253]

In the later decision of *The Director of Public Prosecutions v Dalgliesh (a pseudonym)*,[254] the High Court determined that the Victorian Court of Appeal erred in not increasing a sentence for incest on finding that incest sentences were too low and treating this as the determinative factor.[255] In drawing this conclusion, the Court commented on the limited role played by comparative cases in the sentencing exercise:

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246 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.

247 Ibid. This is referred to by Krasnostein and Freiberg in the context of a broader discussion of the concept of individualised justice, or individualism, and the tension that arises in seeking to also meet the objective of sentencing consistency.

248 *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].

249 *R v Osenkowski* (1982) 30 SASR 212 at 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].

250 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: whether the offence was premeditated; whether the offender acted alone or in company; how long the attack lasted and whether the victim was raped more than once; whether the offending involved violence or threats of violence; whether a weapon was used; whether the victim was injured in the course of the rape; whether the victim was humiliated or degraded; whether the offender used a condom; whether the victim was particularly vulnerable; and whether the offender ignored warnings or protests by the victim. In *Marrah v The Queen* [2014] VSCA 119 [25] (Redlich and Tate JJA), the Victorian Court of Appeal referred to relevant sentencing considerations for an offence of rape and other offences committed in a domestic violence context – in particular, the important role of denunciation, with the court commenting: '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'.

251 (2016) 259 CLR 256,

252 *R v Kilic* (2016) 259 CLR 256, 266–7 [21] (Bell, Gageler, Keane, Nettle and Gordon JJ).

253 Ibid.

254 (2017) 262 CLR 428.

255 *DPP (Vic) v Dalgliesh (a Pseudonym)* (2017) 262 CLR 428.

> Sentences are not binding precedents, but are merely "historical statements of what has happened in the past". As was said in *Hili v The Queen*, "[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" … Examination of sentences imposed in comparable cases may inform the task of sentencing but such examination goes beyond its rationale when it is used to fix boundaries that, as a matter of practical reality, bind the court.[256]

10.6.2 Guideline judgments

A special form of judgment known as a guideline judgment, has been issued by appellate courts in some jurisdictions as a means of providing courts with structured guidance in the exercise of their sentencing discretion with the broader objective of promoting consistency in sentencing and public confidence in the criminal justice process.[257]

Australia

While several jurisdictions in Australia, including Queensland, have legislated to authorise the use of guideline judgments, in practice, following the High Court's decisions in *Wong v The Queen*[258] and *Markarian v The Queen*,[259] very few have been issued.[260] This has been attributed to the number of concerns raised in those decisions, including regarding their intended prospective nature and, for those of a quantitative nature, that they move from what is properly viewed as a judicial function into one which is legislative nature.[261] The concern particularly for guidelines of a quantitative nature is that they 'single out' only some of the circumstances of the offence and offender, and to 'attribute specific numerical or proportionate value to some features' is to act contrary to the 'instinctive synthesis' approach in a way that 'distorts the already difficult balancing exercise which the judge must perform'.[262]

England

Guideline judgments were first issued with the English Court of Appeal in the 1970s, pioneered by Lawton LJ, with the first cited example setting down sentencing levels being the judgment of *R v Willis*,[263] a case involving sodomy and indecent assault, which identified a particular sentencing band of 3 to 5 years for cases without any aggravating or mitigating factors, with examples provided in that judgment. The Court issued a similar guideline judgment in *R v Taylor*,[264] which involved a case of unlawful sexual intercourse with a girl under the age of 16 years. This form of guidance continued with new guidelines issued into the early 1980s, but became infrequent,[265]

The development of these guidelines was the catalyst for the establishment of a Sentencing Advisory Panel to provide advice to the Court of Appeal in 1998,[266] with a Sentencing Guidelines Council established in 2003 as the body with the authority to issue guidelines after receiving advice from the panel. In 2010, these two bodies were replaced with the Sentencing Council of England and Wales. The Council's role in issuing guidelines is discussed in section 10.6.3 below.

256 Ibid 454 [83] (emphasis in original, footnotes omitted).
257 Arie Freiberg, Fox and Freiberg's *Sentencing: State and Federal Law in Victoria* (Law Book Co, 3rd ed, 2014) 976–7 [17.15]; 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, 280–1.
258 (2001) 207 CLR 584.
259 (2005) 228 CLR 357.
260 See, eg, *Boulton v The Queen* (2014) 46 VR 308.
261 Freiberg (n 257) 979 [17.15].
262 *Wong v The Queen* (2001) 207 CLR 584, 611–12.
263 *R v Willis* (1974) 60 Cr App R 146.
264 *R v Taylor, Roberts and Simons* (1977) 64 Cr App R 182.
265 Andrew Ashworth and Julian V Roberts, 'The Origins and Nature of the Sentencing Guidelines in England and Wales' in Andrew Ashworth and Julian V Roberts (eds) *Sentencing Guidelines: Exploring the English Model* (Oxford: Oxford University Press, 2013) 3.
266 For a discussion of the events leading to this, see ibid.

New Zealand

The New Zealand Court of Appeal was influenced by developments in England and began issuing guideline judgments regarding tariffs.[267] Early examples were *R v Pawa*[268] and *R v Pui*[269] which involved appeals against sentences for rape which were reduced with reference to 'the existing pattern of sentencing for sexual offences'.[270] Several such guideline judgments have since been issued.

One of the Court of Appeal's longstanding and well-established guideline judgment is *R v AM*[271] that applies to the sentencing of sexual violation charges. This guideline judgment sets out tariffs and sentencing bands. There are four 'bands' for sexual violation by rape, penile penetration of the mouth or anus or violation involving objects ('the rape bands'), and three 'bands' for sexual violation by unlawful sexual connection (excluding the forms of unlawful sexual connection covered by the rape bands) ('the USC bands'). The rape bands range from 6–20 years whereas the USC bands range from 2–18 years.

In addition to these bands, recent Court of Appeal judgments have identified an additional band for offending that is below the lowest examples of offending set out in *AM*.[272] The Court of Appeal has also recently commented on its intention to review the guidelines for sexual violation sentencing, but to date an appropriate case for such a review has not come before it.[273]

The Court of Appeal has cautioned that even with guideline judgments in place, sentencing still involves an important 'evaluative exercise involving the exercise of judgement rather than a formulaic categorisation of criteria'.[274] Guidelines judgments therefore 'must not be applied in a mechanistic way',[275] and may 'be departed from where the circumstances dictate a more or less severe response'.[276]

There has been some criticism by commentators that although in issuing the guideline in *AM*, the court endeavoured to avoid 'entrenching rape myths', some were inherent within the factors listed and 'certain aspects of the offence are treated as more important than others'.[277] An example given is the inclusion of a mistaken and unreasonable belief in consent (which was recognised by the court as not mitigating, but still relevant), as well as prior consensual sexual activity (where the preceding activity was genuinely similar and close enough in time), as factors that may reduce culpability.

10.6.3 Sentencing council guidelines

Another form of guidance is that provided through a formal system of sentencing guidelines issued by sentencing councils and commissions.

The growth in the establishment of sentencing councils and commissions developing formal sentencing guidelines has been traced back to the publication of a book in 1972 by Judge Marvin Frankel of the US District Court for the Southern District of New York.[278] Judge Frankel put forward three solutions to the problems he had identified with the then approach to sentencing being the establishment of a permanent independent commission on sentencing, the articulation of policies or guidelines for sentencing judges to follow, and a process of meaningful appellate court review.[279]

Since this time, several jurisdictions have introduced sentencing commissions and councils and established formal guidelines. In this chapter we review the model adopted in England and Wales given their similarities in adopting a similar common law model of sentencing as exists in Australia. We also discuss a proposal to establish a Victorian Sentencing Guidelines Council.

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267 On the early history of guideline judgments, see *R v AM* [2009] NZCA 27.
268 [1978] 2 NZLR 190.
269 [1978] 2 NZLR 193.
270 *R v AM* [2010] NZCA 114; [2010] 2 NZLR 750; [9].
271 Ibid.
272 *Crump v The Queen* [2020] NZCA 287 [98].
273 Ibid [99].
274 *R v Taueki* [2005] NZCA 174; [2005] 3 NZLR 372 [30], [35].
275 *Orchard v R* [2019] NZCA 529; [202] 2 NZLR 37, [28]. See also *Zhang v R* [2019] NZCA 507; [2019] 3 NZLR 648 [48]; and *Shramka v R* [2022] NZCA 299 [44].
276 *R v Mako* [2000] NZCA 407; [2000] 2 NZLR 170 [25]. See also *Orchard* (n 275) [28].
277 Anna Chalton, 'Rape Myths and Invisible Crime: The Use of Actuarial Tools to Predict Sexual Recidivism' (2015) 2 *Public Interest Law Journal of New Zealand* 19, 23–4.
278 Arie Freiberg and Julian V Roberts, 'Sentencing Commissions and Guidelines: A Case Study in Policy Transfer' (2023) 34 *Criminal Law Forum* 87 referring to the publication of *Criminal Sentences: Law Without Order* (New York: Hill and Wang, 1973).
279 Ibid.

England and Wales

The United Kingdom has established a formal scheme of sentencing guidelines for the judiciary, developed by the Sentencing Council for England and Wales through a formal consultation process. Courts are bound to follow guidelines developed by the Sentencing Council unless satisfied it would be contrary to the interests of justice to do so.[280]

The current Sentencing Council was established in 2010 under the *Coroners and Justice Act 2009* as an independent body.[281] 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.

The guidelines developed by the Sentencing Council provide a much more structured approach than in Australian jurisdictions for courts in determining the appropriate sentencing range.

There are two steps involved in this process.

- Step one: To determine seriousness of the offence category (the seriousness of the offence) based on the person's culpability for the offending and the harm caused or intended. The factors identified in each guideline are tailored to the type of offence and based on the main factual elements of the offence.

Step two: To decide, with reference to the starting point and category of range for each offence category, and the non-exhaustive lists of aggravating and mitigating factors relevant to the offence and the offender, whether there should be an upward or downward adjustment from the starting point or if it is appropriate to move outside the identified category range when setting what is known as the provision sentence.[282]

Once a provisional sentence is decided, there are further steps set out in the guideline depending on the type of offence such as:

- a reduction for assistance provided to the prosecution;
- a reduction for guilty pleas;
- where a person is being sentenced for multiple offence, the court's assessment of the totality of the offending;
- compensation orders and/or ancillary orders;

providing reasons for the sentence and explaining the effect.[283]

The Council has developed a Definitive Guideline on Sexual Offences, which provides sentencing guidelines for rape, rape of a child under 13, sexual assault, and sexual assault of a child under 13 which are all offences under the *Sexual Offences Act 2003*, as well as principles to be applied in sentencing historical sexual offences under the Sexual Offences Act *1956*.

The starting points and sentencing ranges that apply under the guideline for rape are set out in the guideline.[284]

Starting points apply to all offenders regardless of plea or previous convictions. An upward adjustment may be made taking into account the presence of aggravating factors. The rape sentencing guideline lists a non-exhaustive list of both aggravating and mitigating factors.

The same usual further steps then apply regarding considerations such as assistance to the prosecution, a guilty plea and issues of totality, but in this case, the court must also separately consider the issue of dangerousness. This includes whether it would be appropriate to impose a life sentence or extended sentence (discussed in section 10.7.3), taking into account criteria set out in the *Sentencing Code* (UK) that apply to offender classed as 'dangerous offenders'.[285]

For the offences of rape or assault by penetration of a child under 13, if a court does not make either a life sentence or an extended sentence, but imposes a sentence of imprisonment, the court must order a special sentence for offenders of particular concern (discussed in section 10.7.4).

The Council's Definitive Guideline on Sexual Offences was evaluated in 2018.

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280 *Coroners and Justice Act 2009* (UK) s 125(1).

281 This concept was first proposed by Andrew Ashworth in 1982: Andrew Ashworth, 'Reducing the Prison Population in the 1980s: The Need for Sentencing Reform', in *A Prison System for the Eighties and Beyond* (London, NACRO, 1982).

282 Sentencing Council (UK) 'Using Sentencing Council guidelines' (Web Page) <https://www.sentencingcouncil.org.uk/explanatory-material/magistrates-court/item/using-the-mcsg/using-sentencing-council-guidelines/>.

283 Ibid.

284 Sentencing Council (UK), 'Rape', *Sentencing Guidelines* (Web page) <https://www.sentencingcouncil.org.uk/offences/crown-court/item/rape/>.

285 See *Sentencing Act 2020* (UK) ch 6 pt 10.

The authors of that report concluded that sentencing severity for sexual offences to which the guideline applied had continued to increase since the guideline came into force, but:

> These increases were mostly within the confidence limits which represent the range, based on historic trends, that sentencing severity might have taken in the absence of the guideline, which suggests that the guideline has not had an impact on average sentencing severity. The exception was for the offence of sexual assault, where increases in sentencing were at the upper limits of expectations, which may be due to the sentencing guideline.[286]

Many judges interviewed also considered there had been an upward trend in sentences which was attributed to the new guideline.

Rather than necessarily sentencing levels, the real benefit seemed to be in the approach to be taken in sentencing, with the evaluation noting there was support by judges for the new guideline who considered it provided 'substantial assistance when sentencing, and to have brought consistency'. [287]

Scotland

Scotland has also established a Scottish Sentencing Council whose functions include the development of sentencing guidelines, comprising judicial and non-judicial members.[288] The Council's role is similar to the Sentencing Council for England and Wales, although any guidelines the Scottish Council develops must be submitted to the High Court for approval.[289] For this reason, the Scottish Council performs more of an advisory role. There is also more flexibility under the Scottish model than under the England and Wales model to depart from the guidelines, as courts in Scotland are 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.[290]

There are 3 sentencing guidelines which apply to all offences: the principles and purposes of sentencing, the sentencing process and sentencing young people (which applies to all offences where the person is under the age of 25 at the time of conviction). The Scottish Council is in the process of developing sentencing guidelines for rape.[291] In the absence of a guideline on rape, the sentencing guideline applicable in England and Wales may be referred to, although the Scottish High Court has cautioned it 'should be used as a cross check and should not be the subject of direct and unthinking application'.[292]

Victoria

In May 2017, the Victorian Government announced its intention to establish a Sentencing Guidelines Council in Victoria with a similar role to the UK Council.[293] This followed the delivery of the Victorian Sentencing Advisory Council's report on Sentencing Guidance in Victoria. In its report, the Council suggested that guidelines developed by a judicially led sentencing council could address the sentencing problems identified in its report (including a lack of public confidence and inconsistency of approach in sentencing for certain offences), and also resolve issues with other forms of sentencing guidance.[294]

The Victorian Attorney-General asked the Victorian Sentencing Advisory Council's advice on what form this council should take. The Victorian Sentencing Advisory Council released its report in 2018; the report made 22 recommendations about the most appropriate features of a Sentencing Guidelines Council for Victoria and the sentencing guidelines such a council would create.[295] Under the model recommended, the Guidelines Council would consist of up to four retired judicial officers, up to seven community members, a person with experience in policing, and a prosecution and defence lawyer.[296] The development of sentencing guidelines would be on the Council's own motion or at the request of the Attorney-General.[297] Courts would be required to follow any sentencing guidelines issued by the council unless 'it would be contrary to the interests of justice'.[298] In many respects, the guidelines

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286 Anna Carline et al, *Assessing the Implementation of the Sentencing Council's Sexual Offences Definitive Guideline* (Sentencing Council for England and Wales, 2018) 10.
287 Ibid.
288 *Criminal Justice and Licensing (Scotland) Act 2010* (Scot).
289 Ibid s 3.
290 Ibid ss 6(1)–(2).
291 Correspondence from Sottish Sentencing Council to Queensland Sentencing Advisory Council Policy Team, 30 September 2023.
292 *HRA v MG* [2023] HCJAC 3.
293 Premier of Victoria, 'Victorian Community to Have Its Say on Sentencing' (Media Release, 25 May 2017) <https://www.premier.vic.gov.au/victorian-community-to-have-its-say-on-sentencing/>.
294 Sentencing Advisory Council (Victoria) (n 208) xxxiii.
295 Sentencing Advisory Council (Victoria), *A Sentencing Guidelines Council for Victoria, Report* (2018).
296 Ibid rec 3.
297 Ibid rec 5.
298 Ibid rec 12.

model proposed is similar to that operating in the UK although a distinguishing feature would be that no members of the council would be sitting judicial officers.[299]

In its 2022 report on its inquiry into Victoria's criminal justice system, the Legislative Council Legal and Social Issues Committee recommended that the Victoria Government introduce legislation to establish a sentencing guidelines council taking into account the previous recommendations made by the Sentencing Advisory Council in its report.[300]

The Victorian Government in its response to this report advised that the Committee's recommendations were under review and would be considered as part of the Government's justice work program.[301]

10.7 Special forms of sentencing orders

10.7.1 Introduction

As discussed in section 10.5, some jurisdictions have legislated to restrict the availability of certain types of sentencing orders such as suspended sentences, intensive correction orders and other sentences served in the community.

Yet another approach has been to establish special forms of custodial orders structured differently to standard sentences of imprisonment with a view to reducing the risks of offending for certain (generally high risk) individuals convicted of sexual violence offences and serious offences.

In this section we discuss three examples of these special types of sentences: indefinite sentences, extended sentences and sentences for offenders of particular concern.

10.7.2 Indefinite sentences

Indefinite sentences and variants of this were introduced in several jurisdictions in their current form from the early to mid-1990s aimed at protecting the community from offenders who posed a danger based on previous serious violent, sexual or drug offending.[302] They remain in force in Queensland, Victoria, Western Australia and the Northern Territory. These sentences operate as a form of preventative detention.

Very few of these orders have ever been made, and number of criticisms that have been made of these orders.[303]

In the mid-2000s, governments in Queensland, New South Wales, Victoria and Western Australia introduced post-sentence detention and supervision schemes. Given these orders are also preventative in nature, they perform much the same function as indefinite sentences were intended to serve.

10.7.3 Extended sentences

In England and Wales and Scotland, courts may order extended periods of community supervision on licence (parole) for certain specified violent, sexual and terrorism offences.[304] Rape and sexual assault are specified sexual offences.[305] While the schemes are similar, they operate under separate legislation.

Extended sentences are different to post-sentence orders, such as exist in Queensland under the *Dangerous Prisoners (Sexual Offenders) Act 2003* or civil registration schemes as they are made by way of sentence.

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299 The recommendation that retired judicial officers rather than sitting judicial officers be appointed was in response to a submission by the Supreme Court of Victoria which indicated that, even if judicial participation in the sentencing guidelines council were constitutionally permissible, any such participation by sitting judicial officers would be inappropriate: ibid 50–1 [2.18], 80 [4.23].

300 Legislative Council Legal and Social Issues Committee, Parliament of Victoria, *Inquiry into Victoria's Criminal Justice System* (Parliamentary Paper No 326, 24 March 2022) 568–9, rec 72.

301 Victorian Government Response, *Legislative Council Legal and Social Issues Committee Inquiry into Victoria's Criminal Justice System* (3 August 2022).

302 Freiberg, Donnelly and Gelb (n 89) 16.

303 See, eg, Sentencing Council (NSW), *Penalties Relating to Sexual Assault Offences in New South Wales* (2008) vol 3, 12–16.

304 *Sentencing Act 2020* (UK) ss 254–7 (offenders aged under 18 years), 266–8 where offenders are adults aged 18-21 years and ss 279–82 where offenders are aged 21 years and older; *Criminal Procedure (Scotland) Act 1995* (Scot) s 210A

305 *Sentencing Act 2020* (UK) s 306; sch 18, pt 2; *Criminal Procedure (Scotland) Act 1995* (Scot) s 210A(10).

An extended sentence of imprisonment is a sentence of imprisonment the term of which is equal to the aggregate of:

- the appropriate custodial term; and
- a further period (the 'extension period') for which the offender is to be subject to a licence (meaning they are supervised in the community.[306]

A person convicted of a sexual offence and sentenced to imprisonment may receive an extended sentence where the court 'considers that the period (if any) for which the offender would…be subject to a licence would not be adequate for the purpose of protecting the public from serious harm from the offender'.[307]

In England and Wales, the extension period must be at least 1 year and for a specified sexual offence, must not exceed 8 years.[308] In Scotland the extension part cannot be longer than 10 years for sexual offences.[309] In both jurisdictions, the extended sentence term must not exceed the maximum term of imprisonment available for the specified offence.[310]

When a court issues an extended sentence, it will state the sentence both as a whole and the individual parts. For example, in October 2023 the Edinburgh High Court issued an extended sentence order of 28 years, comprising of a 20-year custodial term and 8 years on extended licence.[311]

Data produced by the UK Minister of Justice indicates that 260 of these sentences were imposed on adult offenders for a sexual offence in 2022 in England and Wales, and 405 in 2021.[312] This compares to 3,102 standard determinate sentences imposed for sexual offences in 2022 and 2, 837 in 2021.[313]

10.7.4 Special sentence for offenders of particular concern

In 2014, England and Wales introduced an additional form of sentencing order– sentences for offenders of particular concern (SOPC) which comprise a custodial term[314] and a mandatory year of licence to be served at the end of that custodial term.[315] These reforms aimed to discontinue the practice of automatically releasing offenders convicted of serious child sex and terrorism offences at the half-way point, with these offenders instead only being eligible for parole after serving at least half their sentence (now increased to two-thirds[316]) if parole is granted by the Parole Board (now increased to two-thirds of the sentence).[317] The 12 months additional mandatory licence period was intended to ensure that where an offender was not released prior to the end of their custodial term, then they would not be released without supervision.[318]

The provisions apply where the court imposes a sentence of imprisonment for an offence where—

- the offence is listed in Schedule 13 of the Sentencing Code;
- the court does not impose an extended sentence, a life sentence and/or a serious terrorism sentence.[319]

If these criteria are met, a court must, when imposing a term of imprisonment on an offender, make this form of order — and must also ensure that the total term of the sentence does not exceed the maximum term of imprisonment with which the offence is punishable.[320]

306 *Sentencing Act 2020* (UK) s 279.
307 *Criminal Procedure (Scotland) Act 1995* (Scot),s 210A(1)(b). A similar statement is in section 256(3) of the *Sentencing Act 2020* (UK).
308 *Sentencing Act 2020* (UK) ss 281(3)–(4).
309 *Criminal Procedure (Scotland) Act 1995* (Scot) s 210A(3).
310 *Sentencing Act 2020* (UK) s 281(5), *Criminal Procedure (Scotland) Act 1995* (Scot) s 210A(5).
311 *HMA v Andrew Miller* [2023] Sentencing Statement: The judge ordered a headline custodial part tariff of 22 years. <https://judiciary.scot/home/sentences-judgments/sentences-and-opinions/2023/10/18/hma-v-andrew-miller>.
312 United Kingdom, Ministry for Justice, 'Criminal Justice System Statistics publication: Outcomes by Offence 2010 to 2022: Pivot Table Analytical Tool for England and Wales' *Sentencing outcomes* (2022) <https://assets.publishing.service.gov.uk/media/65bccf12704282000d7520fd/crown-court-tool-2022-revised.xlsx>.
313 Ibid. A small number of life sentences (33 in 2022 and 19 in 2021) were also imposed.
314 This is the appropriate custodial term that 'in the opinion of the court, ensures that the sentence is appropriate': *Sentencing Act 2020* (UK) s 278(3).
315 Ibid s 278(2). The total term must not exceed the maximum term of imprisonment for which the offence is punishable.
316 *Release of Prisoners (Alteration of Relevant Proportion of Sentence) Order 2020* (UK) art 3. This states the reference to 'one-half' in s 244(3) of the *Criminal Justice Act 2003* (UK) is to be read as 'two-thirds'.
317 See Explanatory Notes, Criminal Justice and Courts Bill (UK) 3.
318 Ibid.
319 *Sentencing Act 2020* (UK) s 278(1). 'Serious terrorism offence' is defined under *Sentencing Act 2020* (UK) s 282A.
320 Ibid s 278(2).

The offences listed in Schedule 13 are much more limited than those that support the making of an extended sentence. They primarily consist of offences with an established terrorist connection, but also include two sexual offences against children: the rape of a child under 13[321] and the assault of a child under 13 by penetration.[322]

This requirement to impose a SOPC does not apply if the person was aged under 18 years at the time of offence if either: the offence was committed before the day on which new terrorism provisions came into force, or is an offence listed in Part 2 of Schedule 13 of the Sentencing Code.[323]

According to data produced by the Minister of Justice, 60 of these sentences were imposed on adult offenders in 2022, and 46 in 2021.[324] Over half (39 in 2022 and 28 in 2021) were imposed for a sexual offence.

10.8 Restorative justice – An alternative and complementary justice response to sexual violence offending

10.8.1 About restorative justice

Restorative justice is described as: a philosophical and practical approach to addressing crime that focuses on repairing the harm caused to individuals, relationships, and communities rather than solely punishing the offender.'[325] While the processes used vary,[326] they 'generally involve an offender admitting that they have caused the harm and then engaging 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'.[327]

Successful restorative justice processes have been identified as involving certain elements including:

- a highly skilled facilitator or convenor;
- careful preparation;
- participant screening;
- the flexibility to respond to the circumstances of each case;

variable formats, such as face-to-face or an exchange of letters.[328]

Restorative justice processes were first introduced as an alternative to traditional criminal justice options for young offenders — mostly in relation to minor, non-violent offences. However, there has been an increasing range of restorative approaches targeting adult offenders and victims of more serious types of crimes,[329] and growing evidence of positive outcomes for offences including sexual assault and family violence.[330]

Some restorative justice schemes are government-led responses intended to operate in conjunction with traditional justice processes, while others are community-led initiatives that operate independently of the justice system.[331]

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321 *Sexual Offences Act 2003* (UK) s 5.
322 Ibid s 6.
323 *Sentencing Act 2020* (UK) s 278(1A).
324 United Kingdom (n 312).
325 Francis T Cullen and Cheryl Lero Jonson, *Correctional Theory: Context and Consequences* (Sage Publications Inc, 2nd ed, 2012) as cited in Lacey Schaefer et al, *Report: Sentencing Practices for Sexual Assault and Rape Offences* (prepared for the Queensland Sentencing Advisory Council, September 2023, unpublished) 66.
326 Models include restorative justice conferences, victim impact panels (which can involve a person who has experienced or witnessed harm sharing their story and details about the crime's impact with people convicted of the same type of offences or community members) and facilitated discussions between the person who is harmed and the person who has harmed them: Victorian Law Reform Commission, *Sexual Offences: Restorative and Alternative Justice Models* (Issues Paper G, October 2020).
327 Royal Commission into Institutional Responses to Child Sexual Abuse, *Criminal Justice Report: Executive summary and Parts I and II* (2017) 183 citing J Bolitho and K Freeman, *The use and effectiveness of restorative justice in criminal justice systems following child sexual abuse or comparable harms* (Royal Commission into Institutional Responses to Child Sexual Abuse, 2016) 12.
328 Victorian Law Reform Commission, *Sexual Offences: Restorative and Alternative Justice Models* (Issues Paper G, 2020).
329 Ibid.
330 See, eg, Jacqueline Joudo Larsen, 'Restorative justice in the Australian criminal justice system' (Research and Public Policy Series No 127, Australian Institute of Criminology, 2014) as cited in in Lacey Schaefer et al, *Report: Sentencing Practices for Sexual Assault and Rape Offences* (prepared for the Queensland Sentencing Advisory Council, September 2023, unpublished).
331 See, eg, Transforming Justice Australia auspiced by Community Restorative Centre which runs restorative processes for victim survivors of sexual violence: Transforming Justice Australia, 'Home' (Webpage) <https://www.transformingjustice.org.au/>. South Eastern Centre Against Sexual Assault and Family Violence (SECASA), Victoria program referred to in Victorian Law Reform Commission, Sexual Offences: Restorative and Alternative Justice Models (Issues Paper G, October 2020) 3.

Several bodies undertaking reviews and inquiries into the justice system's response to sexual violence have recommended the introduction of restorative justice for sexual violence cases, including in Queensland.[332] This is discussed further in Chapter 8 of *Consultation Paper: Issues and Questions*.

10.8.2 Use of restorative justice for sexual offences in other jurisdictions

In Australia, RJ processes are available for adults convicted or charged with a sexual offence in the Australian Capital Territory,[333] New South Wales (after the person has been convicted while serving their sentence)[334] and Queensland (although in practice its use for sexual violence offences has been limited).

The Victorian Law Reform Commission in considering the use of restorative justice in this context reported that restorative justice for sexual offending by adults is in use in several European countries, including Belgium, Demark and Norway, and is also available in England and Wales, Ireland, Canada and New Zealand.[335]

In this section we discuss the legislative models in operation in the ACT and New Zealand as illustrative of how these models operate in practice.

While not within scope of the Council's review, many jurisdictions also have specialist restorative conferencing models which apply to children.[336]

Australian Capital Territory

The Australian Capital Territory RJ scheme was established in legislation in 2004 with the passage and commencement of the *Crimes (Restorative Justice) Act 2004*.

Since 2016, these conferences, which were initially limited to juveniles, were extended to adults and to include more serious offences. Sexual harm and family violence offences were included in 2018.[337]

To be eligible for RJ, an offender must:

- accept responsibility for the commission of the offence (of if the offender is a young offender and the offence is a 'less serious offence', they must not deny responsibility for the commission of the offence);
- have been at least 10 years old when the offence was committed or allegedly committed; and

agree to take part.[338]

The entities that can refer an offence for RJ and the stage at which an offence can be referred are set out in the Act.[339] This allows for multiple referral points involving several referring entities, including police, the Victims of Crime Commissioner, the Director of Public Prosecutions, the Magistrates Court and Supreme Court, corrective services, and the Sentence Administration Board (parole board).

In the most serious cases (including for a 'serious sexual offence'[340]), restorative justice can only occur after the person responsible has been charged and pleaded guilty or been found guilty.[341]

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332 See Women's Safety and Justice Taskforce, *Hear Her Voice, Report Two: Women and Girls' Experiences Across the Criminal Justice System* (2022) vol 1, 25, recs 90–3.

333 See *Crimes (Restorative Justice) Act 2004* (ACT).

334 Victorian Law Reform Commission, *Improving the Justice System Responses to Sexual Offences* (Report, 2021) [9.12].

335 Ibid [9.15].

336 For an in-depth study on one of these programs operating in South Australia, see Kathleen Daly and Danielle Wade, *South Australia Juvenile Justice and Criminal Justice Research on Conferencing and Sentencing* (SAJJ-CJ Technical Report No 5, December 2012).

337 *Crimes (Restorative Justice) Phase 3 Declaration 2018* (NI2018–601) extending the scheme to these offences commenced on 1 November 2018. Significant amendments were also made to the Act by the *Crimes (Restorative Justice) Amendment Act 2018* (ACT).

338 *Crimes (Restorative Justice) Act 2004* (ACT) s 19(1)(b). Just because an offender has accepted responsibility for the offence does not prevent them from pleading not guilty: s 20(1).

339 Ibid s 22, table 22.

340 The *Crimes (Restorative Justice) Act 2004* (ACT) s 12 defines a 'serious sexual offence' to mean 'an offence under the *Crimes Act 1900*, part 3 that is punishable by a term of imprisonment of more than 10 years'. This includes sexual assault offences and sexual intercourse without consent (rape). Acts charged under s 60 of the *Crimes Act 1900* (Act of indecency without consent) generally carry a maximum penalty of 9 years or less, with the exception of an offence committed in company with an aggravating factor of domestic violence which carries a maximum sentence of 11 years. Offences under part 3 of the *Crimes Act 1900* punishable by a term of imprisonment of 10 years or less are defined under s 12 of the RJ Act as 'less serious sexual offences' and the requirement that the offender must have pleaded or been found guilty prior to referral to a RJ process does not apply.

341 *Crimes (Restorative Justice) Act 2004* (ACT) s 16(3).

For less serious sexual offences that proceed to charge, a court is only allowed to make a referral order before the person pleads guilty or is found guilty if it considers there are exceptional circumstances that justify the referral.[342] The director-general must also be satisfied there are exceptional circumstances for the calling of a RJ conference in this case.[343]

In deciding how the offender should be sentenced (if at all), the *Crimes (Sentencing) Act 2005* (ACT) requires a court to consider the fact of whether they have accepted responsibility for the offence under the RJ Act.[344] However, a court may not increase the severity of the sentence because the offender chose not to take part, or to continue to take part, in restorative justice.[345] Restorative justice can also be ordered at the time of sentence.[346]

Detailed guidelines support the procedures that apply to the management of restorative justice for sexual and family violence offences.[347] Similar to the administrative arrangements in Queensland, the Restorative Justice Unit which delivers this program is located within the ACT Department of Justice.

The ACT Sexual Assault Prevention and Response Steering Committee in 2021, recommended that the ACT Government 'research and pilot additional mechanisms to hold perpetrators to account including by: a. expanding restorative justice processes for victim survivors; and b. alternative civil justice regimes.'[348] This recommendation was made in the context of the current statutory program only allowing referrals where a victim survivor has made a formal report to police.[349] The ACT Government has agreed in principle with this recommendation and committed to 'further research and to consider expanding restorative justice processes for victim survivors' in response to this recommendation.[350]

New Zealand

In New Zealand, the use of restorative justice processes for adult offenders commenced in the 1990s and given statutory recognition through the passage of the *Sentencing Act 2002*, *Parole Act 2002* and the *Victims' Rights Act 2002*.[351]

The use of restorative justice in New Zealand can occur at various stages in the criminal justice process, and result in diversion from the criminal justice system or the person's participation being taken into account in sentencing[352] or in the making of decisions regarding parole.[353]

The Ministry of Justice contracts service providers throughout New Zealand to delivery restorative justice processes on behalf of the courts.[354] There is a single national specialist provider, Project Restore, which provides services in sexual assault cases.[355] Project Restore accepts court referrals, community referrals, self-referrals and police referrals.[356]

Court referrals can be made under s 24A of the *Sentencing Act 2002*, which provides that restorative justice conferencing may be used in any case where an offender pleads guilty to a charge that has an identifiable victim. The Court must enable enquiries to be made as to whether restorative justice is appropriate. A restorative justice process can only be held with the consent of both the defendant and victim.

In 2013, new Restorative Justice Standards for Sexual Violence Cases were published to recognise 'the additional safeguards and processes needed when dealing with sexual offending cases'.[357] Two new principles were developed to underpin the operation of these standards:

- 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.

342 Ibid s 27(5).
343 Ibid s 33(2).
344 *Crimes (Sentencing) Act 2005* (ACT) s 33(1)(y).
345 Ibid s 34(1)(h).
346 This is referred to as a 'sentence-related order': ibid s 13.
347 Crimes (Restorative Justice) Sexual and Family Violence Offences Guidelines 2018.
348 ACT, Sexual Assault Prevention and Response Steering Committee, *Listen. Take Action to Prevent. Believe and Heal.* (Report presented to the ACT Government, December 2021) 63, rec 13.
349 Ibid.
350 ACT Government, *Government Response to the Listen. Take Action to Prevent. Believe and Heal. Report* (2022) 12
351 Ministry of Justice, *Restorative Justice Standards for Sexual Offending Cases* (July 2013) 8.
352 See *Sentencing Act 2002* (NZ) s 8(j).
353 Ibid.
354 NZ Ministry of Justice, *Restorative Justice Review: Findings Report* (July 2023) 5.
355 Ibid.
356 Project Restore, 'Is restorative justice right for me?' *Information & Services* (Web Page) <https://www.projectrestore.nz/restorative-justice/>.
357 NZ Ministry of Justice (n 354) 4.

- 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.[358]

In the case of sexual offending against children and young people, the standards allow for the child victim to be represented at these conferences by victim advocates or appropriate family or whanau[359] members.

While available in cases of sexual offending, sexual offending cases currently represent a small proportion (3%) of all cases proceeding to conference.[360]

10.8.3 Evaluations of restorative justice in the context of sexual offending

While evaluations of restorative justice for people who have committed sexual violence offences as an adult are limited and generally are based on only a small number of participants, the findings of these evaluations have been promising.

For example, a 2018 evaluation of the NZ scheme reported that 4 out of 6 victims in sexual offending cases surveyed reported feeling more positive about the criminal justice system after their participation.[361]

A 2019 evaluation of the ACT RJ scheme following the inclusion of domestic and family violence and sexual violence offences. The study found that persons harmed who had participated in the scheme reported outcomes aligned with victim justice interests, including feeling safer, helping the recovery journey, reparing relationships with family members and improving understanding of the violence.[362] There was also some evidence suggesting persons responsible could benefit meaningfully from RJ involvement.[363]

A separate review of 15 programs attached to the criminal justice system targeting the harm caused by sexual offending or a comparable harm (including 5 targeting adult sexual abuse)[364] concluded that restorative justice could be effective for sexual abuse provided particular conditions were met.[365] These conditions included the involvement of specialist and experienced facilitators, strict screening criteria relating to both eligibility and suitability, the use of experts in sexual offending and the dynamics of violence throughout the process, the program being flexible and responsive to participant needs, timing the meeting based on victim survivor readiness, and participation by those who had perpetrated the harm in targeted sex offender treatment programs.[366]

358 Ibid 20.

359 A 'whanau' is a form of Maori connection group. For more information, see Tai Walker, 'Whānau – Māori and Family', *Te Ara - The Encyclopedia of New Zealand* (Web Page, 1 June 2017) <https://teara.govt.nz/en/whanau-maori-and-family/print>.

360 NZ Ministry of Justice (n 354) 11.

361 Gravitas Research and Strategy Ltd*, Ministry of Justice—Restorative Justice Survey* (Victim Satisfaction Survey 2018, Ministry of Justice (NZ), September 2018) 26, 40 <https://www.justice.govt.nz/assets/Restorative-Justice-Victim-Satisfaction-Survey-Report-Final-TK-206840.pdf> cited in Victorian Law Reform Commission, (n 328) 190 [9.22].

362 Siobhan Lawler et.al, *Restorative justice conferencing for domestic and family violence and sexual violence: Evaluation of Phase Three of the ACT Restorative Justice Scheme* (Australian Institute of Criminology for the ACT Government November 2023) 10. Only 2 victim survivors of sexual violence participated in the study.

363 Ibid.

364 Jane Bolitho and Karen Freeman, *The Use and Effectiveness of Restorative Justice in Criminal Justice Systems Following Child Sexual Abuse or Comparable Harms* (Report, Royal Commission into Institutional Responses to Child Sexual Abuse, 2016) <http://www.childabuseroyalcommission.gov.au/getattachment/9f328928-a343-4c65-b98e-94e3185894c7/Restorative-justice-following-child-sexual-abuse-o>.

365 Ibid 8.

366 Ibid.

10.8.4 Community restorative justice programs providing support

Other jurisdictions have also trialled approaches based on restorative justice principles that work with offenders to reduce reoffending.[367] The aim of these programs is generally to: (1) support perpetrators not to offend by increasing insight into the harm caused and using planning to support them not to commit another offence; (2) to meet victim survivors' justice needs; and (3) to improve victim survivors' access to justice by offering a different avenue to address the harm.[368]

One model which is reported to have consistently positive results in helping those who have used sexual violence not to reoffend is the Circles of Support and Accountability ('CoSA').[369] CoSA involves trained community volunteers (working in conjunction with professionals such as probation and parole officers, therapists, police and community support workers) providing support to individuals convicted of sexual offences in the community.[370]

Some studies of CoSA have reported significant reductions in sexual and violent recidivism compared to individuals who have committed the same type of offences with the same of risk of reoffending but did not participate in a CoSA.[371] CoSA is currently being trialled in South Australia and a framework established to document the program's outcomes.[372]

10.9 Trauma-informed practice

10.9.1 About trauma-informed and culturally responsive practice

An important aspect to criminal justice responses is ensuring that those who come into contact with victim survivors have a basic understanding of complex trauma and how it impacts people who have experienced sexual assault. Trauma-informed practice is increasingly being recognised as important to achieving more effective and compassionate responses to those who have been victimised. 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.[373]

Trauma-informed 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'.[374]

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.[375]

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367 Ibid.

368 Ibid.

369 Ibid 57 based on models operating in the US, Canada and the UK.

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

371 See Bolitho and Freeman (n 364); and Richards, Death and Ronken (n 370).

372 Lacey Schaefer et al, *Report: Sentencing Practices for Sexual Assault and Rape Offences* (prepared for the Queensland Sentencing Advisory Council, September 2023, unpublished) 71–2.

373 See, eg, 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) 221; Legislative Council Legal and Social Issues Committee, *Inquiry into Victoria's Criminal Justice System* (Report, Vol 1, Parliament of Victoria, 2022) Finding 72, 760; Sir John Gillen, *Gillen Review: Report into the Law and Procedures in Serious Sexual Offences in Northern Ireland* (Report, Part 1, 2019) 209; Royal Commission into Institutional Responses to Child Sexual Abuse, *Criminal Justice Report: Executive Summary and Parts I to II* (2017) recommendation 3, 20.

374 Dr Cathy Kezelman, 'Trauma informed practice', *Mental Health Australia* (Blog post, 4 February 2021) <https://mhaustralia.org/general/trauma-informed-practice>.

375 Queensland Centre For Domestic and Family Violence Research, *Trauma-informed Responses to Sexual Assault: Research to Practice Paper*, 3 < https://noviolence.org.au/wp-content/uploads/2020/05/Trauma-Practice-Paper-FINAL-002.pdf>

Being trauma-informed for those involved in the sentencing process involves having 'an understanding of trauma and an awareness of the impact it can have across settings, services and populations'.[376] Adopting this perspective helps courts and others involved in the sentencing process to understand the impacts of particular types of offending behaviour, including sexual assault and rape, on victims, as well as its impacts on defendants.[377] The objective of responding in a trauma-informed way is to reduce, and ideally avoid, further trauma.

As a separate but closely related issue, 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.[378] 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.

The Australian Law Reform Commission ('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.[379] The ALRC is due to report by 22 January 2025.

10.9.2 The Women's Safety and Justice Taskforce findings and recommendations

The Women's Safety and Justice Taskforce ('WSJ Taskforce') found it is 'widely accepted that judicial officers benefit from ongoing learning'.[380] In discussing responses to domestic and family violence, the Taskforce suggested that judicial officers would benefit from training in trauma-informed approaches, further noting that lawyers were 'not consistently using trauma-informed practice when providing services to victims of domestic and family violence'.[381] The Taskforce also observed there was 'no mechanism to evaluate whether there is sufficient training for magistrates or judicial officers and how effective that training is'.[382]

The Taskforce's Reports 1 and 2 made several recommendations relating to training for legal practitioners, including that:

- the Queensland Government consult with key legal professional bodies with a view to establishing an independent Queensland Judicial Commission based on the model of the NSW Judicial College, whose role includes providing professional development for judicial officers;[383]
- a trauma-informed practice framework be developed for Queensland legal practitioners;[384]
- the Department of Justice and Attorney-General ('DJAG') develop a consistent evidence-based and trauma-informed framework to support training and education across all parts of the domestic and family violence and justice system with a focus on domestic and family violence;[385]
- the Supreme and District Courts of Queensland consider developing a sexual assault benchbook to support judicial officers and lawyers in sexual violence cases;[386]
- the Director of Public Prosecutions ('DPP') consider the development of a new operating model for the prosecution of sexual violence cases which should include professional development for staff and lawyers at the DPP, including to support trauma-informed responses to victims of sexual violence;[387]
- judicial officers consider participating in professional development about gendered issues and trauma-informed practice relevant to experiences of women and girls as accused.[388]

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376 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.

377 See McLachlan (n 376).

378 Legislative Council Legal and Social Issues Committee, *Inquiry into Victoria's criminal justice system* (Report, Vol 1, Parliament of Victoria, 2022) Finding 72, 760; *Hear Her Voice Report 2* (n 332) 284.

379 See <https://www.alrc.gov.au/inquiry/justice-responses-to-sexual-violence/>.

380 *Hear Her Voice Report Two* (n 332) 281.

381 Women's Safety and Justice Taskforce, *Hear Her Voice – Report One: Addressing Coercive Control and Domestic and Family Violence in Queensland* (2021) vol 2, 225 ('*Hear Her Voice Report 1*').

382 Ibid 215.

383 Ibid rec 3 and *Hear Her Voice Report 2* (n 332) rec 68.

384 *Hear Her Voice Report 1* (n 381) rec 47 and *Hear Her Voice Report 2* (n 332) rec 66.

385 Ibid Recommendation 23.

386 *Hear Her Voice Report 2* (n 332) rec 73.

387 Ibid rec 74.

388 Ibid rec 119. This recommendation also reaffirmed recommendations 3 and 48 of its earlier report concerning the establishment of a Queensland Judicial Commission and a requirement for courts to report on information about judicial

The Queensland Government accepted the WSJ Taskforce's recommendations and significant work is underway to implement these recommendations.

The Office of the Independent Implementation Supervisor (OIIS) is charged with independent oversight and reporting on the progress and implementation of the Government Response to the Taskforce's recommendations. The OIIS reports biannually on the progress of this implementation.[389]

10.9.3 Training, resources and national standards

Judicial officers

Queensland judicial officers access a range of different training options, depending on the court they preside in. For example, Magistrates must attend the annual Domestic and Family Violence Conference and higher court judges may attend seminars on vicarious trauma,[390] trauma-informed approaches[391] as well as holding annual conferences. Court.[392]

There are also national standards and bench books for judicial officers which apply to all jurisdictions. **The National Standard for Professional Development for Australian Judicial Officers** requires judicial officers to do 'at least five days each calendar year' of professional development'.[393] It has been endorsed by all relevant professional associations of the Australian judiciary.

The following bodies also support professional development across Australia for judicial officers:

- **The National Judicial College of Australia:** delivers a range of judicial education programs for Australian judicial officers, including a new judicial education program which will 'deliver an understanding of the nature and impact of sexual assault, including First Nations peoples' experiences of sexual assault, and the importance of adopting a trauma-informed approach to practice'.[394]
- **The Australasian Institute of Judicial Administration:** delivers judicial education programs and produces several relevant publications, including the *Family Violence Bench Book* and a recent report on specialist approaches to managing sexual assault proceedings.[395]
- **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.*[396] The benchbook provides general guidance for all criminal offences, including about cultural assumptions, stereotypes and subconscious bias.

Examples of judicial education and publications related to sexual violence, trauma-informed practice and cultural competence from across Australia include:

- **New South Wales:** The Judicial Commission of NSW provides a continuing education and training program for NSW judicial officers, which includes the Ngara Yura Program which aims to increase awareness about contemporary Aboriginal social and cultural issues.[397] The Judicial Commission also has published a *Sexual Assault Trials Handbook*[398] and *Trauma-informed Courts: Guidance for Trauma-informed Judicial*

officer training and development activities taking place during the reporting period where these were publicly funded in their annual reports.

389 Progress reports are available on the Office of the Independent Implementation Supervisor web page <https://www.oiis.qld.gov.au/>

390 District court judges attended Vicarious Trauma Awareness and Creating Respectful Workplaces training in 2022: District Court of Queensland, *Annual Report 2021–22* (Annual Report, 2022) 28.

391 Some Supreme court judges attended a presentation on 'A trauma-responsive court approach for domestic and family violence victims' in 2022: Supreme Court of Queensland, *Annual Report 2021–22* (Annual Report, 2022) 10.

392 Both the District and Supreme courts had their annual conferences cancelled in 2021 due to COVID-19: District Court of Queensland (n 390) and Ibid.

393 National Judicial College of Australia, *National Standard for Professional Development for Australian Judicial Officers*.

394 National Judicial College of Australia, *Justice Sector Education Program - Education and Training for the Justice Sector on Family, Domestic and Sexual Violence* (Web Page) https://www.njca.com.au/judicial-commission-of-nsw/.

395 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).

396 Judicial Council on Diversity and Inclusion, *Recommended National Standards for Working with Interpreters in Courts and Tribunals* (Second Edition, March 2022).

397 National Judicial College of Australia, *Ngara Yura Program* (Web Page) <https://www.judcom.nsw.gov.au/education/ngara-yura-program/>

398 Judicial Commission of New South Wales, Sexual Assault Trials Handbook (2007) - last updated November 2023

Practices, which discusses trauma, its impact on particular groups and practical considerations for embedding trauma-informed practice.[399]

- **Victoria:** The Judicial College of Victoria hosts various educational seminars and events, including on understanding personality disorders and complex trauma, managing sexual offence cases, First Nations cultural awareness, and enhancing communication (both written and oral).[400] It also maintains the Victorian *Criminal Charge Book* and *Victorian Sentencing Manual*, both of which include dedicated sections on sexual offences,[401] and has 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 sexual offences and victims who are Aboriginal and Torres Strait Islander or from CALD backgrounds.[402]
- **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.[403] The bench book includes a chapter on sentencing.

Legal practitioners

In Queensland, barristers[404] and legal practitioners[405] are required to undertake continuing professional development ('CPD'), with a certain number of CPD points required per year. The mandatory CPD core areas are practical legal ethics, practice management and business skills, and professional skills.[406] CPD programs delivered by different legal stakeholders for barristers and legal practitioners.[407]

Government legal officers and prosecutors working at the DPP and police prosecutors are not required to undertake CPD,[408] however DJAG strongly recommends government legal officers comply with CPD requirements.

Legal practitioners can also access other resources such as the *With You Toolkit: Empowering Trauma-Informed Rights-Based Organisation*. Developed by La Trobe University, the toolkit provides 'guidance on implementing trauma-informed practices, ensuring that organisational bodies, procedures and interactions with clients are sensitive, responsive and supportive'.[409]

Another widely accessed resource is the *Bugmy Bar Book* hosted on the NSW Public Defenders' website.[410] While the primary focus of this resource is on supporting legal practitioners to prepare and present evidence in support of sentencing principles articulated in the High Court decision of *Bugmy v The Queen*,[411] it is of broader relevance in promoting greater understanding of issues impacting on Aboriginal and Torres Strait Islander persons and other people who have experienced disadvantage. This resource includes individual chapters on a broad range of factors, including the impacts of cultural dispossession, social exclusion and childhood sexual abuse as well as challenges faced by people from a refugee background.

399 Judicial Commission of New South Wales, *Trauma-Informed Courts: Guidance for Trauma-Informed Judicial Practices* (November 2023).
400 Judicial College of Victoria, *2024 Education Prospectus* (Document) <https://www.judicialcollege.vic.edu.au/resources/2024-education-prospectus>
401 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>.
402 Judicial College of Victoria, *Victims in the Courtroom: A Guide for Judicial Officers* (2019).
403 Stephanie Fryer Smith, *Aboriginal Benchbook for Western Australia Courts* (AIJA, 2nd ed, 2008).
404 Bar Association of Queensland, *Administration Rules of the Bar Association of Queensland* (Current as at 14 September 2020).
405 Queensland Law Society, *Queensland Law Society Administration Rule 2005* (Version 5.1)
406 Queensland Law Society, *CPD Guide: Guidelines on CPD Compliance for Queensland Solicitors* (April 2023), 3
407 For example, Queensland Law Society, the Bar Association Queensland and Legal Aid Queensland (noting participation is subject to meeting eligibility criteria).
408 *Legal Profession Act 2007* (Qld) s 44(2).
409 Chris Maylea at al. *With You Toolkit: Empowering Trauma-Informed Rights-Based Organisations* (La Trobe University, 2023).
410 NSW Public Defenders, *The Bugmy Bar Book* (Web Page, 3 May 2023) <https://www.publicdefenders.nsw.gov.au/barbook>.
411 (2013) 249 CLR 571.

Chapter 11 Review principles

11.1 Introduction

The Council has adopted 11 fundamental principles to help guide its work and help frame the questions posed in this Consultation Paper. Together with feedback received in response to this Consultation Paper, these principles will help shape the Council's advice and final recommendations.

The Council has drawn these principles from a range of sources including the Terms of Reference,[1] principles that have guided the Council in undertaking previous reviews,[2] the Women's Safety and Justice Taskforce's *Hear Her Voice, Report Two: Women and Girls' Experiences Across the Criminal Justice System* ('WSJ Taskforce Report 2')[3] and submissions made to that review, as well as views expressed by stakeholders during preliminary consultation.

The 11 principles for the Council's review are:

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

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).

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.

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

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

Principle 6: Any reforms should take into account likely impacts on the disproportionate representation of Aboriginal and Torres Strait Islander people in the criminal justice system.

Principle 7: The circumstances of each person being sentenced and offence are varied. Judicial discretion in the sentencing process is fundamentally important.

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.

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

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.

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

1 See Terms of Reference, Appendix 3.

2 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*').

3 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 2*')

11.2 Principles

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

The Council takes an evidence-based approach to reform and draws on many sources of evidence to inform its work, including reports of other law reform bodies, analysis of data, consultation with stakeholders and academic research.

The need for evidence-based reform to adequately understand the penalty and sentencing framework for the review offences and to promote public confidence was highlighted by some stakeholders in their preliminary submissions.[4] For example, 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 undue/insufficient weight or have been disregarded, or that irrelevant factors have been considered' which 'has led to an unjust sentence being imposed.'[5] 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.[6]

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.[7]

The Council commissioned a separate review of the research literature to provide insights into offence, penalty and sentencing frameworks, sentencing practices, evidence-based approaches to sentencing, and community and victim perceptions of sentencing for sexual assault and rape offences.

The Council has also drawn on other sources of evidence, including its own analysis of administrative data and sentencing remarks and sentencing submissions for the offences of sexual assault and rape. Additional analysis will be undertaken to inform the development of the Council's advice and recommendations.

The Council has commissioned research on community views about the relative seriousness of the offences of sexual assault and rape. That research is currently underway and findings will be presented in our Final Report.

The availability of proper evidence about how well current sentencing and parole responses in Queensland are meeting the various purposes of sentencing for sexual assault and rape offences (in particular, punishment, denunciation and community protection)[8] is of direct relevance to the Council in determining if current sentencing responses are appropriate or in need of reform.

The Council has drawn on literature reviews commissioned by the Council for previous reviews, in addition to the literature review prepared for the current review to help inform this this aspect of the reference, in particular:

a cross-jurisdictional review of literature and evaluations prepared for the Council's review of community-based sentencing orders, imprisonment and parole options;[9] and

a review of research on community perceptions of seriousness, risk and harm, the effectiveness of mandatory or minimum non-parole period schemes and evidence-based approaches to achieving the sentencing purposes of community protection, deterrence and rehabilitation which was undertaken as part of the Council's review of the serious violent offences scheme.[10]

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4 Preliminary Submissions 7 (Aboriginal and Torres Strait Islander Legal Service) 2–3; 17 (Legal Aid Queensland); 29 (Sisters Inside Inc.) 3.

5 Preliminary Submission 7 (Aboriginal and Torres Strait Islander Legal Service) 2–3.

6 Preliminary Submission 17 (Legal Aid Queensland) 1–2.

7 Preliminary Submission 22 (Women's Legal Service Queensland). See also Preliminary submission 21 (North Queensland Women's Legal Service), 10 (Queensland Indigenous Family Violence Legal Service).

8 See Terms of Reference, Appendix 3, which expressly refers to these three sentencing purposes.

9 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).

10 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*').

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 the sentencing decisions under any Queensland sentencing scheme are consistent with the purposes of sentencing, and provide sufficient scope to take these purposes into account.

The purposes of sentencing, set out in section 9 of the *Penalties and Sentences Act 1992 (Qld)* ('PSA') are:

(a) **Punishment:** to punish the offender to an extent or in a way that is just in all the circumstances;

(b) **Rehabilitation:** to provide conditions in the court's order that the court considers will help the offender to be rehabilitated;

(c) **Deterrence (specific and general):** to deter the offender or other persons from committing the same or a similar offence;

(d) **Denunciation:** to make it clear that the community, acting through the court, denounces the sort of conduct in which the offender was involved;

(e) **Community protection:** to protect the Queensland community from the offender; or

(f) A **combination** of 2 or more of the purposes listed above.

All sentencing decisions must be made in accordance with the purposes of sentencing. The sentencing purposes guide judicial officers in their determination of a just sentence and are critical to considering whether sentences for sexual assault and rape are appropriate.

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.

A just sentence is critical to holding people who use sexual violence to account and to protect victims from sexual violence.

Ensuring that sentences imposed properly reflect the seriousness of the offences committed and the harm caused to victims is a legitimate concern of any legal system. It is embedded within the common law principle of proportionality — which is reflected in the legislative sentencing purpose in Queensland of 'just punishment'. The assessment of offence seriousness includes not just an assessment of the person's culpability for the offence, but also the harm caused to a victim by their offending.[11]

Proportionality sets outer limits on the sentence to be imposed, and requires that a sentence should not exceed that level which can be justified as appropriate or proportionate to the gravity of the offence assessed in light of its objective circumstances.[12] This principle operates as a general prohibition against increasing a sentence of imprisonment beyond a level which is proportionate to extend the period of protection of the community from the person by way of preventative detention.[13]

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.[14] In the case of offences involving physical harm caused to another person, or that 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'.[15] The impact of the offence on a child victim is also a primary sentencing consideration for rape committed in relation to a child under 16 years.[16]

The Council acknowledges the significant and long-lasting emotional, physical, psychological and financial trauma caused to victim survivors and the wider community by sexual assault and rape offences. 'Rape is an intensely personal crime' which effects victim survivors not just from the 'physical invasion of their person and security but also from the more intangible loss of their rights and freedoms'.[17]

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11 *Veen v The Queen* [No 2] (1988) 164 CLR 465 ('*Veen*').

12 Ibid 472 (Mason CJ, Brennan, Dawson and Toohey JJ), 484–6 (Wilson J), 490–1 (Deane J), 496 (Gaudron J). See also *Hoare v The Queen* (1989) 167 CLR 348, 354.

13 *Veen* (n 11) 472, 484–6, 490–1, 496.

14 *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.

15 Ibid s 9(3)(c).

16 Ibid s 9(6)(a). Applies to all sexual offences where the victim is a child.

17 Judicial College of Victoria, *Victorian Sentencing Manual* (Judicial College of Victoria, 4th ed, 2023) 335, citing *R v Mason* [2001] VSCA 62 [8].

The High Court of Australia has recognised 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'.[18]

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

The *Queensland Parole System Review* ('QPSR') recognised parole as being primarily a 'method that has been developed in an attempt to prevent reoffending',[19] and pointed to evidence suggesting that parole 'has a beneficial impact on recidivism, at least in the short term' and perhaps modestly.[20] Paroled prisoners are less likely to reoffend than prisoners released without parole.[21] The QPSR also found 'it is more risky to have a short period of parole' than a longer one.[22]

The QPSR report noted an anomaly: the absence of a power to order a parole release date for people convicted of a sexual offence, even where the sentence is under 3 years, is inconsistent with the option to wholly suspend their imprisonment. Where imprisonment with release before the full term is warranted, the likely outcome is a suspended sentence even though 'court-ordered parole, if available, would instead have to be ordered'.[23]

In its preliminary submission to the current review, Queensland Corrective Services ('QCS') referred to the Council's 2019 report, *Community-based sentencing orders, imprisonment and parole options*, on the exclusion of court ordered parole to people convicted of a sexual offence. QCS noted this restriction 'results in courts using alternative sentencing options to fix a release from custody including suspended sentences and prison/probation orders'.[24]

The Council's concern that people who are convicted of a sexual offence be appropriately supervised in the community was a key consideration in *Community-based sentencing orders, imprisonment and parole options* review. The Council recommended court ordered parole should be extended to sexual offences because it would give courts:

- the option to set a release date;
- be safe in the knowledge that this is a supervised form of order; and

the Parole Board could swiftly respond to any escalation in risk levels by returning person to custody or adjusting the conditions of their release. [25]

In that same review, the Council proposed reforms to suspended sentences that would permit courts to combine a suspended sentence with a community-based order, including supervision as a component, when sentencing a person for a single offence.[26] Together, those reforms recommended aimed to ensure that more people convicted of a sexual offence are subject to active supervision as a condition of their order.

A literature review completed for the Council for the SVO Terms of Reference reached a similar conclusion to the QPSR. Namely, '[m]ore 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.[27] Research published by the NSW Bureau of Crime Statistics and Research similarly found that parolees are substantially less likely to re-offend than prisoners released unconditionally — and this is particularly the case for those assessed as being at higher risk of reoffending.[28]

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18 *R v Kilic* (2016) 259 CLR 256, 266–7 [21] (Bell, Gageler, Keane, Nettle and Gordon JJ).

19 Walter Sofronoff KC, *Queensland Parole System Review: Final Report* (Report, 2016) 2 [8] ('*Queensland Parole System Review*').

20 Ibid 38 [140], 2 [11], 38 [139].

21 Ibid 1 [7] citing Wan Wai-Yin et al, 'Parole Supervision and Reoffending' (2014) 485 *Trends and Issues in Crime and Criminal Justice* 1.

22 *Queensland Parole System Review* (n 19) 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.

23 Ibid 6 [39].

24 Preliminary Submission 26 (Queensland Corrective Service) 1.

25 Recommendations 47 and 48 of the *Community-Based Sentencing Orders, Imprisonment and Parole Options* (n 2) xxxii.

26 Ibid recs 37–9: ibid.

27 *University of Melbourne Literature Review* (n 10) 13–14, 22.

28 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 re-conviction within 12 months of release by 10.0 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 24.0 per cent); and reduces the likelihood of being re-imprisoned within 12 months of release by 5.0 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.

The Council's data analysis in the SVO review for parole outcomes over a 23-year period found the time prisoners with an SVO served in custody varied considerably based on the offence the prisoner was convicted of. Prisoners sentenced for rape served the longest time in custody beyond their parole eligibility date prior to their release (a median of 8.1 months). This means prisoners released on parole for rape with an SVO declaration were under supervision for a very short time, meaning they were potentially at higher risk of reoffending following a lengthy period of incarceration.[29]

While up to 20 per cent of a person's sentence for an SVO-declared offence can be spent on parole, some those subject to an SVO declaration (up to 14% for sexual violence offences) did not apply for parole at all meaning after serving their sentence, they would be released without the benefit of supervision on parole.[30]

Many stakeholders during that earlier review recognised that parole is important to reducing re-offending and that supporting reintegration promotes community safety.[31] At the same time, there was concern that 'any focus on the benefits of parole should not be used as a substitute for, nor should it detract from, the need for substantial investment in rehabilitation programs while in custody'.[32]

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'.[33]

The Council has identified the benefits to be gained in removing anomalies and minimising the complexity of sentencing and parole laws in undertaking previous reviews, including promoting greater certainty and clarity about how the law is to be applied, reducing the risk of error (and any appeals required to correct such errors), and reducing the length of sentencing proceedings.[34] Such an approach also supports the fair and consistent application of the law, and ensures courts are not unnecessarily constrained by legislation in making orders that respond to the individual circumstances of the case.[35]

During the initial stages of this review, the Council has identified several examples of potential inconsistencies, anomalies and complexities with the sentencing of sexual assault and rape. These include:

The exclusion of court ordered parole for sexual violence offences has resulted in the increased use of suspended sentences by courts as they provide certainty of release date, meaning some people sentenced for sexual offences are not supervised while in the community;[36]

A view by some stakeholders that sentencing for sexual assault and rape offences does not sufficiently acknowledge the impact of this offending on victim survivors, particularly where the victim is a child;[37]

Concerns about how courts take into account a person's prior good character, the weight this is given and whether references provided by defence are relevant at sentencing;[38]

- Consistent with the finding of the Council's previous review of this scheme, the SVO scheme continues to:
  - result in inconsistent sentencing outcomes - in particular between offences attracting a 10-year sentence and those falling just below this threshold;
  - have a 'distorting effect'[39] on sentencing because it restricts judicial discretion, thereby exerting downward pressure on head sentences to ensure the imposition of a sentence that is 'just in all the circumstances'; and
  - have potential to impact on victim survivor satisfaction with sentencing outcomes when a declaration is not made.

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

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29 *The '80 per cent Rule'* (n 2) 113.
30 Some prisoners who do not apply for parole may also be subject to a continuing detention order or supervision order under *the Dangerous Prisoners (Sexual Offenders) Act 2003* (Qld) and/or reporting obligations under the *Child Protection (Offender Reporting and Offender Prohibition Order) Act 2004* (Qld).
31 *The '80 per cent Rule'* (n 2) 201.
32 Ibid 201
33 Terms of Reference, Appendix 3, 2.
34 *The '80 per cent Rule'* (n 2); *Community-Based Sentencing Orders, Imprisonment and Parole Options* (n 2).
35 Ibid.
36 Preliminary Submissions 17 (Legal Aid Queensland); 26 (Queensland Corrective Service).
37 Preliminary Submissions 1 (name withheld); 5 (Queensland Sexual Assault Network); 6 (BRISSC Collective); 18 (Fighters Against Child Abuse Australia); 21 (North Queensland Women's Legal Service); 24 (Full Stop Australia).
38 Preliminary submission 24 (Full Stop Australia)
39 *R v Sprott; Ex parte A-G (Qld)* [2019] QCA 116 [41] (Sofronoff P, Gotterson JA and Henry J agreeing).

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.

The Terms of Reference state that the Council will 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 of its research includes socio-demographic findings and publishes targeted research on disproportionate representation.

In Queensland, Aboriginal and Torres Strait Islander peoples are disproportionately represented in all areas 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 continue to impact on the lives of Aboriginal and Torres Strait Islander peoples. 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.[40]

The Council's data analysis for this review found Aboriginal and Torres Strait Islanders were disproportionately represented in both offences. Although Aboriginal and Torres Strait Islander peoples represent approximately 4.6 per cent of Queensland's population (aged 10 and over), they accounted for almost a quarter of people sentenced for sexual assault (20.5%) and rape (23.3%) during the 18-year data period.[41]

These findings align with the Council's previous analysis of the cases with an SVO over a 9-year data period (2011–12 to 2019–20), which found that of the 437 SVO cases, 20.1 per cent of sentenced cases involved an Aboriginal and Torres Strait Islander offender (n=88). Of those cases, the highest proportion of disproportionate representation was for non-sexual violence offences (24.6%), followed closely by sexual violence offences (20.7%).[42]

The Council recognises that Aboriginal and Torres Strait Islander peoples are not only disproportionately represented among those who receive an SVO declaration but are also disproportionately represented as the victims and survivors of sexual violence offences and non-sexual violent offences.

For sexual assault offences recorded by police in 2022, Aboriginal and Torres Strait Islander persons were 2.6 times more likely to be recorded as the victim of a sexual assault in Queensland when compared to all persons (a rate of 365.2 per 100,000 compared to 139.5 for all persons).[43] The rate of victimisation for Aboriginal and Torres Strait women is likely to be even higher given that women are more than 6 times likely than men to be the victims of a reported sexual assault (238.8 per 100,000 compared to 38.4 per 100,000).[44] Data on rape offences reported to Queensland police in 2022–23 found Aboriginal and Torres Strait Islander females were 2.5 times more likely to be victims of rape than non-Indigenous females, and Aboriginal and Torres Strait Islander males were more than 4 times more likely to be victims of rape than non-Indigenous males.[45]

In 2022, 923 victims identified as being Aboriginal and Torres Strait Islander, representing 12.4 per cent of all victims of sexual assault in Queensland (just under 1 in 8 victims).[46] This was disproportionate to Queensland's overall population where approximately one in every 22 residents identified as Aboriginal and Torres Strait Islander (4.6% at August 2021).[47] The majority of Aboriginal and Torres Strait Islander victims were female (70–93%) and less than a third to almost half were aged between 10 and 17 years when the offence occurred (30–45%).[48] 'Residential' was most common location for sexual assault in Queensland.

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40 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, 2021) 22–4.

41 This data relates to adults sentenced only. For this reason, it is different to the information contained in our *Sentencing Spotlights*.

42 See *The '80 per cent Rule'* (n 2) 96–7.

43 Australian Bureau of Statistics, *Recorded Crime - Victims*, 2022 ('*Recorded Crime - Victims*'), Aboriginal and Torres Strait Islander victims of crime, Sexual assault. Sexual assault is a subdivision of the Australian and New Zealand Standard Offence Classification (ANZSOC) and includes sexual assault and rape, as well as other sexual violence offences.

44 Ibid.

45 Email from Kathryn Boersma, Principal Statistician, Crime Statistics Branch, Queensland Government Statistician's Office to April Chrzanowski, 17 January 2024 with supplementary Queensland Government Statistician's Office analysis of Queensland Police Service unpublished data, extracted in September 2023.

46 Ibid

47 Queensland Government Statistician's Office, Queensland Treasury, *Crime Report, Queensland, 2021–22*, (Report, 2023) 77.

48 *Recorded Crime - Victims* (n 43).

Principle 7: The circumstances of each person being sentenced and offence are varied. Judicial discretion in the sentencing process is fundamentally important.

The Terms of Reference explicitly recognise 'the importance of judicial discretion in the sentencing process'.[49]

The Council recognises that the circumstances of each offender and offence are 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.[50]

In previous reports, the Council has 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.[51] 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.[52] 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 will seek to balance many competing interests and views when developing its recommendations. The importance of preserving judicial discretion to ensure sentences under the reformed scheme are just in all the circumstances[53] will continue to be central to the Council's decision-making. At the same time, the Council is concerned to ensure that the impact of serious offences on victims and survivors is given appropriate recognition and that the provisions governing parole eligibility in these cases acknowledge their particular seriousness, thereby promoting community confidence.

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 so as to satisfy the intended purposes of each order and facilitate a fair and just sentencing regime that protects community safety.[54]

Both the Queensland Productivity Commission in its inquiry into imprisonment and recidivism[55] and the QPSR[56] 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 a an adequately resourced body to evaluate risk assessments, training and interventions used by 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

49 Terms of Reference, Appendix 3, 1.
50 See University of Melbourne Literature Review (n 10) 12–13.
51 See, for example *'The '80 per cent Rule'* (n 2).
52 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 but 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.
53 The Court of Appeal has recognised that this purpose is 'the paramount objective of sentencing': *R v Randall* [2019] QCA 25 [37].
54 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)
55 Queensland Productivity Commission, *Inquiry into Imprisonment* (Report, 2019).
56 *Queensland Parole System Review* (n 19).

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 people (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, sustainably 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.[57]

In relation to treatment programs specifically targeted at sex offenders, the QCS *Annual Report 2021–22*, stated that during that financial year:

> QCS delivered sexual offending programs in certain correctional centres including a high-intensity sexual offender treatment program, a moderate-intensity sexual offender program, a sexual offender program for prisoners with a cognitive impairment, a culturally adapted First Nations sexual offender program, a preparatory program and a maintenance program. Some of these programs were also delivered in community locations.[58]

The Annual Report also states that in '2021–22, there were 294 completions of sexual offending programs in custody and community'.[59]

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'.[60] The QPSR found that assessment for sexual offending risk and treatment need[61] was only administered to prisoners who were 'sentenced to a period of custody in excess of 12 months'.[62]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.

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) and that allow the court to satisfy all the relevant purposes of sentencing. These 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 about where a person's parole eligibility date is set and the time that might be required under supervision to reduce these risks.

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57 Queensland Corrective Service, *Annual Report 2021–22*, (2022) 1.
58 Ibid 19.
59 Ibid.
60 Karen Gelb, *Recidivism of Sex Offenders Research Paper* for the Victorian Sentencing Advisory Council (January 2007) vii.
61 Three actuarial assessment tools are used to do this, the Static-99R, STABLE-2007 and ACUTE-2007.
62 *Queensland Parole System Review* (n 19) 120 [603].

While the Council considers it important that a sentencing court has access to the best available information, including about any risks a person might pose to specific individuals, classes of people or the broader community, we acknowledge the assessment of risk is problematic.[63] In particular, we are aware that there are ongoing issues with the suitability of risk and treatment instruments when used for Aboriginal and Torres Strait Islander peoples or minority groups in custody such as women.[64]

The Council further notes assessing risk levels posed by different types of sex offenders requires considering the seriousness of the offence (the harm to victim and culpability of the offender), as well as the offender's personal history and antecedents. However, 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. The Council notes the PSA includes a provision for cultural reports for Aboriginal and Torres Strait Islander people to be provided to the court for sentencing.[65] These reports may include information about the 'offender's relationship to the offender's community' and 'any cultural considerations', which a court must consider.[66]

As noted by the Council in earlier reviews, there is often limited information available to a court at sentencing about the future risk level an offender poses to the community at the time of sentence. Typically, a court is reliant on expert reports on the level of risk a person poses that are prepared and submitted by the defendant's legal representatives. Although a court may order a pre-sentence report ('PSR') be prepared by QCS,[67] this is less common.[68]

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.'[69] The Queensland Government has indicated its support in principle for this recommendation,[70] and work on this expansion of these services has commenced.[71]

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

63 For a discussion of these problems, see University of Melbourne Literature Review (n 10)27; 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].

64 Karen Heseltine, Rick Sarre and Andrew Day, Prison-based correctional rehabilitation: An overview of intensive interventions for moderate to high-risk offenders, *Trends and Issues in Crime and Criminal Justice*, Australian Institute of Criminology (2011) 30–2.

65 PSA (n 14) s 9(2)(p).

66 Ibid ss 9(2)(p)(i)–(ii).

67 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). See Terms of Reference, Appendix 3.

68 See Queensland Corrective Services ('QCS') Submission No 11 to *Community-Based Sentencing Orders, Imprisonment and Parole Options* (n 2) 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 state-wide court advisory service.

69 *Hear Her Voice Report 2* (n 3) rec 130.

70 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 ('Qld Government Response to Taskforce') 40.

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

- 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);
- 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'.[72] The Queensland Government supported this recommendation.[73]

Sentencing schemes applying to sexual assault and rape, such as the SVO scheme and the repeat serious child sex offences scheme were introduced prior to the operation of the HRA. Consequently, specific consideration was not given to whether any limitations the scheme placed on human rights were reasonable and justified.

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.

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 regards 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;[74]
- The Legal Affairs and Safety Committee's Inquiry into Support provided to Victims of Crime[75]
- The Queensland Sentencing Advisory Council's final reports:
    a. *The '80 per cent Rule': The Serious Violent Offences Scheme in the Penalties and Sentences Act 1992 (Qld);*[76]
    b. *Community-based sentencing orders, imprisonment and parole options*.[77]

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

During its most recent, and relevant review of the SVO scheme, the Council determined there are categories of offences which 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. The offences of sexual assault and rape were regarded by the Council as such offences.[78]

The Council recommended retaining and reforming the SVO scheme. Those reforms included:

- replacing the current split mandatory/discretionary scheme with a wholly presumptive model;[79]

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72 Legal Affairs and Safety Committee, *Inquiry into Support provided to Victims of Crime* (Report No. 48, 57th Parliament, May 2023), rec 3 ('*Inquiry on Support to Victims*').

73 Queensland Government, *Legal Affairs and Safety Committee Report No. 48, 57th Parliament, Inquiry into support provided to victims of crime, Queensland Government Response* (2023) 4 (response to rec 3).

74 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 2* (n 3).

75 *Inquiry on Support to Victims* (n 72).

76 *The '80 per cent Rule'* (n 2).

77 *Community-Based Sentencing Orders, Imprisonment and Parole Options* (n 2).

78 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 2).

79 *The '80 per cent Rule'* (n 2) rec 1.

- the scheme would apply to a person convicted of a serious offence with a sentence of imprisonment of greater than 5 years for a single charge for a listed offence;[80]
- upon making a declaration, the court would have discretion to set a parole eligibility date within a specified range of 50 to 80 per cent of the head sentence;[81] and
- the new scheme should apply to the offences of sexual assault with a circumstance of aggravation[82] and rape.[83]

The Queensland Government has not yet issued a formal response to these recommendations.

80 Ibid rec 5. For a serious drug offence a 10-year threshold applies (rec 8).
81 the court should be permitted to decline to make a recommendation where the court is satisfied this is 'in the interests of justice' (ibid, rec 10).
82 *Criminal Code Act 1899* (Qld) sch 1, ss 352(2)–(3).
83 *The '80 per cent Rule'* (n 2): rec 15.

Appendix 1 – Council members and contributors

Queensland Sentencing Advisory Council

Chair	The Honourable Ann Lyons (from 30 October 2023)
	John Robertson (until 8 August 2023)
Deputy Chair	Professor Elena Marchetti (Acting Chair 8 August – 30 October 2023)
Council members	Jo Bryant
	Julie Dick SC
	Matt Jackson
	Debbie Kilroy OAM
	Boneta-Marie Mabo*(until 6 February 2024)
	Philip McCarthy KC
	Katarina Prskalo KC
	Dan Rogers
	Brett Schafferius (from 30 October 2023)
	Warren Strange
Director	April Chrzanowski

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	April Chrzanowski (Senior Supplier)
	Julie Dick SC (Senior User)
	Matthew Jackson (Senior User)
	Debbie Kilroy OAM (Senior User)
	Boneta-Marie Mabo* (Senior User) (until 6 February 2024)
	Jo Bryant (Senior User) (from 8 February 2024)

* Chair, Aboriginal and Torres Strait Islander Advisory Panel.

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.

Appendix 2 – Acknowledgments

The Council's inquiries are informed by the knowledge and expertise of its members, research and policy analysis undertaken by staff, and the contributions by key criminal justice agencies, other stakeholders and community members.

The Council would like to acknowledge the contributions of those who made preliminary submissions during the initial phase of the review and provided information and participated in meetings relating to the review.

To assist us to better understand current sentencing practice for rape and sexual assault, the Council held 26 Subject Matter Expert interviews. We would like to thank all interview participants for giving so generously of their time and sharing their extensive knowledge and experience of current law and practice with us. We thank the Supreme, District and Magistrates Courts, the Aboriginal and Torres Strait Islander Service, the Bar Association of Queensland, Legal Aid Queensland, the Office of the Director of Public Prosecutions, the Queensland Law Society, and the Queensland Police Service for supporting this project and for their assistance in identifying participants.

The Council also thanks Court Services Queensland (Department of Justice and Attorney-General), the Dispute Resolution Branch (Department of Justice and Attorney-General), the Office of the Director of Public Prosecutions, the Parole Board Queensland, Queensland Corrective Services, the Queensland Government Statistician's Office (Queensland Treasury), Queensland Police Service and the Supreme Court Library for their assistance in providing data and other information during the preparation of this paper. Without this assistance, much of the analysis in this paper would not have been possible.

The Council sought advice from key contacts in Australia and internationally, from departments of justice and Attorneys-General, prosecution services, legal aid commissions and sentencing councils. These agencies were asked to respond to a series of questions regarding the sentencing of sexual assault and rape offences in their respective jurisdictions and relevant case law. The Council was greatly assisted by information provided by:

- Criminal Law Branch, Legislation, Policy & Programs, Justice and Community Safety Directorate, ACT Government
- New Zealand Law Society
- Northern Territory Legal Aid Commission
- NSW Department of Communities and Justice (Secretariat of the New South Wales Law Reform Commission and Sentencing Council and the Policy, Reform and Legislation Branch)
- Scottish Sentencing Advisory Council
- South Australia Office of the Department of Public Prosecutions
- Victorian Sentencing Advisory Council

It is the Council's practice to establish a Project Board for every review. The Council acknowledges the significant contributions of Project Board members, Professor Elena Marchetti (Project Sponsor), Julie Dick SC, Matt Jackson, Debbie Kilroy OAM, Boneta-Marie Mabo and Jo Bryant. We thank Board members for generously giving their time during the early stages of the review and helping to guide the questions asked in this Consultation Paper.

Appendix 3 – Terms of Reference

TERMS OF REFERENCE

QUEENSLAND SENTENCING ADVISORY COUNCIL

SENTENCING FOR SEXUAL VIOLENCE OFFENCES AND AGGRAVATING FACTOR FOR DOMESTIC AND FAMILY VIOLENCE OFFENCES

I, Shannon Fentiman, Attorney-General and Minister for Justice, Minister for Women and Minister for the Prevention of Domestic and Family Violence, having regard to:

- the report of the Special Taskforce on Domestic and Family Violence *Not Now, Not Ever: Putting an end to domestic and family violence in Queensland*;
- amendments made in the *Criminal Law (Domestic Violence) Amendment Act 2015* to the *Domestic and Family Violence Protection Act 2012* to increase the maximum penalties for contravening a domestic violence order and to the *Penalties and Sentences Act 1992* to provide for notations to indicate the domestic and family violence context of criminal offending;
- further amendments made in the *Criminal Law (Domestic Violence) Amendment Act 2016* to the *Penalties and Sentences Act 1992* making domestic and family violence an aggravating factor on sentence;
- the Queensland Sentencing Advisory Council research brief No.1, May 2021, *The impact of domestic violence as an aggravating factor on sentencing outcomes;*
- the report of Women's Safety and Justice Taskforce, *Hear her voice: Report one,* including recommendation 73 of that report;
- the report of Women's Safety and Justice Taskforce, *Hear her voice: Report two;*
- commentary expressing that penalties currently imposed on sentences for sexual assault and rape offences may not always meet the Queensland community's expectations;
- the maximum penalties provided in the Criminal Code for sexual assault and rape offences;
- the general expectation of the Queensland community that penalties imposed on offenders convicted of domestic and family violence offences and sexual assault and rape offences are appropriately reflective of the nature and seriousness of domestic and family violence and sexual violence;
- 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;
- the sentencing principles and purposes of sentencing as outlined in the *Penalties and Sentences Act 1992*
- 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.

refer to the Queensland Sentencing Advisory Council, pursuant to section 199(1) of the *Penalties and Sentences Act 1992*, a review of sentencing practices for sexual assault and rape offences and the operation and efficacy of section 9(10A) of the *Penalties and Sentences Act 1992*.

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Scope

In undertaking this reference, the Queensland Sentencing Advisory Council will:

- review national and international research, reports and publications relevant to sentencing practices for sexual assault and rape offences and in sentencing adult offenders for domestic violence offences;

i. *Sentencing practices for sexual assault and rape offences*

- examine the penalties currently imposed on sentences under the *Penalties and Sentences Act 1992* for sexual assault and rape offences and review sentencing practices for these offences including the types of sentencing orders, duration and (any) time ordered to be served in custody prior to the offender being released into the community or being eligible for release on parole;
- determine whether penalties currently imposed on sentence under the *Penalties and Sentences Act 1992* 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;
- identify any trends or anomalies that occur in sentencing for sexual assault and rape offences;
- assess whether the existing sentencing purposes and factors set out in the *Penalties and Sentences Act 1992* are adequate for the purposes of sentencing sexual assault and rape offenders and identify if any additional legislative guidance is required;
- identify and report on any legislative or other changes required to ensure the imposition of appropriate sentences for sexual assault and rape offences;
- advise on options for reform to the current penalty and sentencing framework to ensure it provides an appropriate response to this type of offending;
- 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;

i. Operation and efficacy of section 9(10A) of the Penalties and Sentences Act 1992 and impact of increase in maximum penalties for contravention of a domestic violence order

- review sentencing practices for domestic violence related offences following changes to the *Penalties and Sentences Act 1992* by the *Criminal Law (Domestic Violence) Amendment Act 2016* to make the fact a person is convicted of a domestic violence offence an aggravating factor for the purposes of sentencing, except if it is not reasonable because of the exceptional circumstances of the case;
- advise on the impact of the operation of the aggravating factor in section 9(10A) of the *Penalties and Sentences Act 1992* on sentencing outcomes for all domestic violence related offences including for charges involving non-physical violence and coercive control;
- identify any trends or anomalies that occur in application of the aggravating factor in section 9(10A) of the *Penalties and Sentences Act 1992* or in sentencing for domestic violence-related conduct generally that create inconsistency or constrain the sentencing process;
- examine whether section 9(10A) of the *Penalties and Sentences Act 1992* is impacting victims' satisfaction with the sentencing process and if so, in what way;
- consider how sentencing trends and outcomes for contravention of a domestic violence order may have changed following the 2015 increase in the maximum penalties following amendments by the *Criminal Law (Domestic Violence) Amendment Act 2015* (Qld);

Consultation

- consult with key stakeholders, including but not limited to the judiciary, victims/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);

Impact of recommendations and other matters

- advise on the impact of any recommendation on the disproportionate representation of Aboriginal and Torres Strait Islander people in the criminal justice system;
- advise whether the legislative provisions that the Queensland Sentencing Advisory Council reviews in the *Penalties and Sentences Act 1992,* and any recommendations are compatible with rights protected under the *Human Rights Act 2019*; and
- advise on any other matters relevant to this reference.

The Queensland Sentencing Advisory Council is to provide to the Attorney-General and Minister for Justice, Minister for Women, and Minister for the Prevention of Domestic and Family Violence a report on its examination of:

(i) sentencing practices for sexual assault and rape offences by **16 September 2024**; and
(ii) the operation and efficacy of section 9(10A) of the *Penalties and Sentences Act 1992* and impact of increase in maximum penalties for contravention of a domestic violence order by **30 September 2025**

Dated the 17th day of May 2023

SHANNON FENTIMAN MP
Attorney-General and Minister for Justice, Minister for Women, and Minister for the Prevention of Domestic and Family Violence

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Appendix 4 – Data tables

Table 27: Rape (MSO) custodial penalties over time (supplementary to Figure 3)

	Imprisonment		Partially suspended sentence		Wholly suspended sentence		Prison/ probation		Intensive correction order		Total
	N	%	N	%	N	%	N	%	N	%	N
2005–06	62	78.5%	16	20.3%	0	0.0%	1	1.3%	0	0.0%	79
2006–07	51	70.8%	19	26.4%	2	2.8%	0	0.0%	0	0.0%	72
2007–08	72	75.8%	19	20.0%	4	4.2%	0	0.0%	0	0.0%	95
2008–09	54	74.0%	16	21.9%	3	4.1%	0	0.0%	0	0.0%	73
2009–10	50	78.1%	13	20.3%	1	1.6%	0	0.0%	0	0.0%	64
2010–11	62	66.0%	28	29.8%	4	4.3%	0	0.0%	0	0.0%	94
2011–12	58	71.6%	22	27.2%	1	1.2%	0	0.0%	0	0.0%	81
2012–13	59	68.6%	23	26.7%	4	4.7%	0	0.0%	0	0.0%	86
2013–14	51	72.9%	17	24.3%	1	1.4%	1	1.4%	0	0.0%	70
2014–15	63	70.8%	25	28.1%	1	1.1%	0	0.0%	0	0.0%	89
2015–16	69	65.1%	32	30.2%	4	3.8%	1	0.9%	0	0.0%	106
2016–17	74	67.9%	27	24.8%	6	5.5%	1	0.9%	1	0.9%	109
2017–18	76	63.3%	35	29.2%	9	7.5%	0	0.0%	0	0.0%	120
2018–19	88	67.2%	39	29.8%	3	2.3%	1	0.8%	0	0.0%	131
2019–20	88	69.3%	37	29.1%	2	1.6%	0	0.0%	0	0.0%	127
2020–21	104	75.4%	29	21.0%	5	3.6%	0	0.0%	0	0.0%	138
2021–22	80	60.6%	47	35.6%	5	3.8%	0	0.0%	0	0.0%	132
2022–23	73	57.5%	46	36.2%	7	5.5%	1	0.8%	0	0.0%	127

Data notes: Rape (MSO), adults, higher courts, 2005–06 to 2022–23.
Source: Queensland Government Statistician's Office, Queensland Treasury - Courts Database, extracted September 2023.

Table 28: Summary of custodial penalty length for rape (MSO) by year of sentence (supplementary to Figure 4)

Financial year	N	Average (years)	Median (years)	Minimum (years)	Maximum (years)
2005–06	79	5.5	5.0	1.0	15.5
2006–07	71	5.7	5.0	1.0	16.0*
2007–08	95	5.8	5.0	0.5	20.0
2008–09	73	5.6	6.0	2.0	12.0
2009–10	64	6.3	5.0	2.0	25.0
2010–11	94	5.4	5.0	1.5	16.0
2011–12	80	5.7	5.0	2.0	18.0*
2012–13	86	5.6	5.0	1.0	20.0
2013–14	70	5.5	5.0	0.8	16.0
2014–15	89	5.7	5.5	1.0	13.0
2015–16	105	5.3	5.0	0.3	18.5*
2016–17	108	5.3	5.0	0.2	12.0*
2017–18	120	5.3	5.0	1.0	20.0
2018–19	131	5.7	5.5	0.3	17.0
2019–20	125	5.4	5.0	1.5	17.0**
2020–21	138	5.8	6.0	1.2	17.0
2021–22	131	5.6	5.0	2.0	13.0*
2022–23	127	5.1	5.0	1.0	11.0

Data notes: Rape (MSO), adults, higher courts, 2005–06 to 2022–23.
Source: Queensland Government Statistician's Office, Queensland Treasury - Courts Database, extracted September 2023.
* indicates a life sentence was imposed that year. Life sentences are not included in the calculation of summary statistics.

Table 29: Penalties sentenced for non-aggravated sexual assault (MSO) in the Magistrates Courts, over time (supplementary to Figure 22)

	July 2005 to June 2008		July 2008 to June 2011		July 2011 to June 2014		July 2014 to June 2017		July 2017 to June 2020		July 2020 to June 2023	
	N	%	N	%	N	%	N	%	N	%	N	%
Imprisonment	6	8.2%	14	11.8%	11	10.7%	26	17.7%	34	15.0%	57	19.3%
Partially suspended	3	4.1%	2	1.7%	6	5.8%	7	4.8%	13	5.7%	19	6.4%
Wholly suspended	10	13.7%	30	25.2%	22	21.4%	32	21.8%	70	30.8%	79	26.8%
Prison/probation	1	1.4%	1	0.8%	3	2.9%	3	2.0%	4	1.8%	3	1.0%
Intensive correction order	1	1.4%	2	1.7%	2	1.9%	3	2.0%	0	0.0%	0	0.0%
Rising of the court	2	2.7%	0	0.0%	0	0.0%	0	0.0%	0	0.0%	0	0.0%
Community service	4	5.5%	8	6.7%	2	1.9%	9	6.1%	17	7.5%	18	6.1%
Probation	13	17.8%	23	19.3%	32	31.1%	31	21.1%	37	16.3%	59	20.0%
Monetary	26	35.6%	32	26.9%	20	19.4%	28	19.1%	45	19.8%	49	16.6%
Good behaviour, recognisance	6	8.2%	7	5.9%	5	4.9%	8	5.4%	5	2.2%	7	2.4%
Convicted, not further punished	1	1.4%	0	0.0%	0	0.0%	0	0.0%	2	0.9%	4	1.4%
Total	73	100.0%	119	100.0%	103	100.0%	147	100.0%	227	100.0%	295	100.0%

Data notes: Non-aggravated sexual assault (MSO), adults, Magistrates Courts, 2005–06 to 2022–23.
Source: Queensland Government Statistician's Office, Queensland Treasury - Courts Database, extracted September 2023.

Table 30: Summary of custodial penalty length for non-aggravated sexual assault (MSO) imposed in the Magistrates Courts, by year of sentence (supplementary to Figure 23)

Financial year	N	Average (months)	Median (months)	Minimum (months)	Maximum (months)
2005–06	7	7.3	6.0	3.0	18.0
2006–07	6	9.1	9.0	0.6	21.0
2007–08	8	10.5	9.5	1.0	24.0
2008–09	10	5.2	3.0	1.0	18.0
2009–10	12	6.8	6.0	1.0	18.0
2010–11	27	7.0	6.0	2.0	18.0
2011–12	10	10.2	8.5	3.0	24.0
2012–13	17	7.5	6.0	3.0	12.0
2013–14	17	6.5	4.0	1.0	18.0
2014–15	32	7.5	6.0	1.0	12.0
2015–16	17	7.1	9.0	0.9	15.0
2016–17	22	9.6	8.5	4.0	36.0
2017–18	41	6.3	6.0	1.4	15.0
2018–19	39	7.7	6.0	0.9	24.0
2019–20	41	8.1	6.0	1.0	36.0
2020–21	54	7.2	6.0	1.0	18.0
2021–22	47	9.5	9.0	2.0	30.0
2022–23	57	7.6	6.0	1.0	18.0

Data notes: Non-aggravated sexual assault (MSO), adults, Magistrates Courts, 2005–06 to 2022–23.
Source: Queensland Government Statistician's Office, Queensland Treasury - Courts Database, extracted September 2023.

Table 31: Non-aggravated sexual assault (MSO) all penalties sentenced in the higher courts, over time (supplementary to Figure 24)

	July 2005 to June 2008		July 2008 to June 2011		July 2011 to June 2014		July 2014 to June 2017		July 2017 to June 2020		July 2020 to June 2023	
	N	%	N	%	N	%	N	%	N	%	N	%
Imprisonment	30	21.7%	31	23.7%	18	15.5%	17	14.5%	15	9.5%	21	10.9%
Partially suspended	27	19.6%	21	16.0%	25	21.6%	26	22.2%	32	20.3%	35	18.2%
Wholly suspended	35	25.4%	35	26.7%	41	35.3%	45	38.5%	76	48.1%	87	45.3%
Prison/probation	6	4.4%	5	3.8%	2	1.7%	4	3.4%	1	0.6%	5	2.6%
Intensive correction order	12	8.7%	10	7.6%	7	6.0%	4	3.4%	3	1.9%	3	1.6%
Rising of the court	0	0.0%	1	0.8%	0	0.0%	0	0.0%	0	0.0%	0	0.0%
Community service	8	5.8%	6	4.6%	7	6.0%	5	4.3%	8	5.1%	5	2.6%
Probation	4	2.9%	13	9.9%	7	6.0%	11	9.4%	13	8.2%	19	9.9%
Monetary	14	10.1%	5	3.8%	8	6.9%	2	1.7%	8	5.1%	11	5.7%
Good behaviour, recognisance	2	1.5%	4	3.1%	1	0.9%	2	1.7%	2	1.3%	6	3.1%
Convicted, not further punished	0	0.0%	0	0.0%	0	0.0%	1	0.9%	0	0.0%	0	0.0%
Total	138	100.0%	131	100.0%	116	100.0%	117	100.0%	158	100.0%	192	100.0%

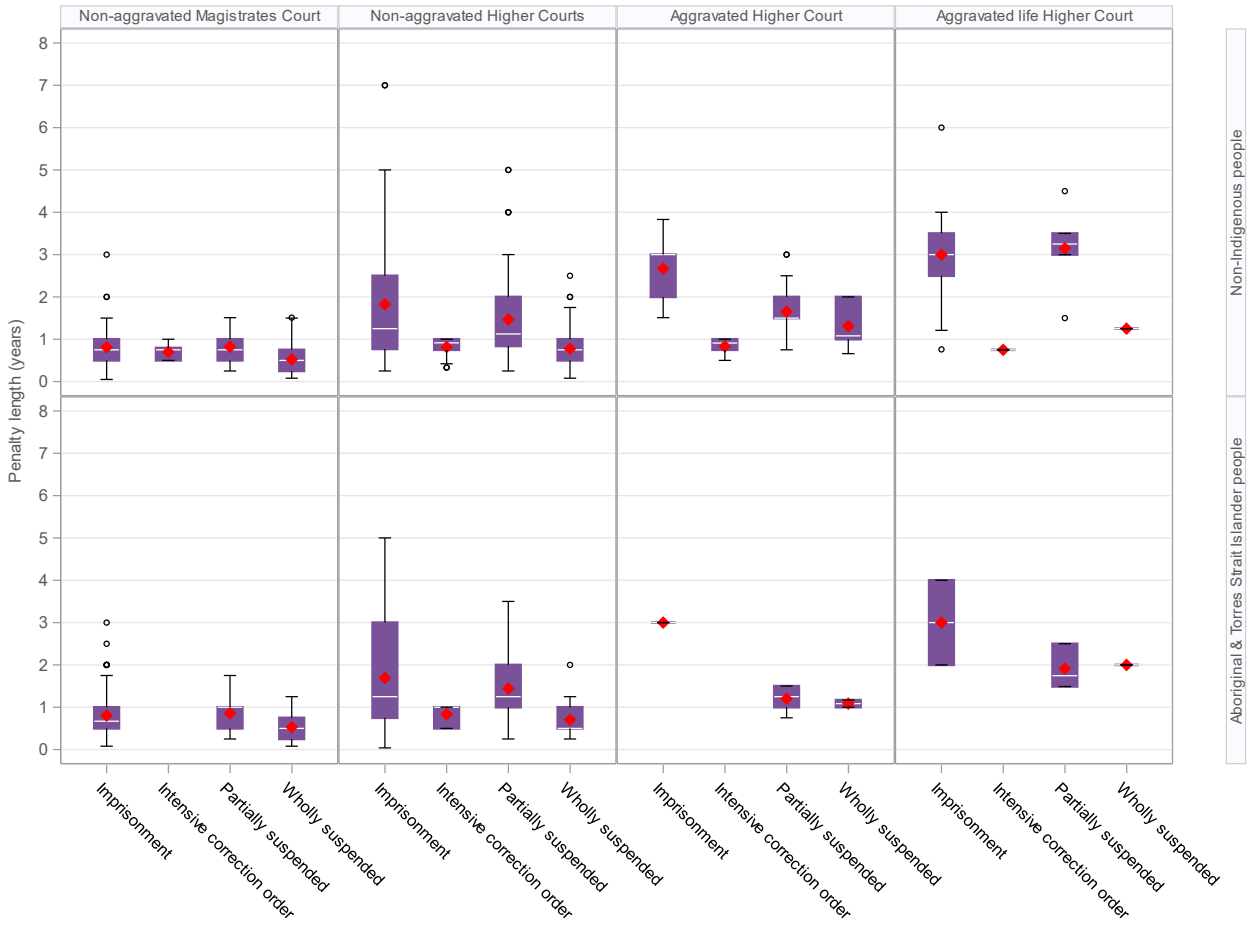
Data notes: Sexual assault (MSO), adults, higher courts, 2005–06 to 2022–23.
Source: Queensland Government Statistician's Office, Queensland Treasury - Courts Database, extracted September 2023.

Table 32: Summary of custodial penalty length for non-aggravated sexual assault (MSO) imposed in the higher courts, by year of sentence (supplementary to Figure 25)

Financial year	N	Average (years)	Median (years)	Minimum (years)	Maximum (years)
2005–06	27	1.1	0.8	0.3	3.5
2006–07	39	1.0	1.0	0.0	3.5
2007–08	44	1.4	1.0	0.2	5.0
2008–09	38	1.4	1.0	0.1	7.0
2009–10	30	1.1	0.8	0.3	5.0
2010–11	34	1.3	1.0	0.3	4.0
2011–12	36	1.3	1.0	0.2	4.0
2012–13	33	1.1	1.0	0.2	4.0
2013–14	24	0.9	0.8	0.3	2.5
2014–15	18	1.1	1.0	0.3	3.0
2015–16	37	1.0	0.8	0.3	4.0
2016–17	41	1.0	0.8	0.1	3.0
2017–18	38	1.2	1.0	0.2	2.5
2018–19	45	1.1	1.0	0.2	5.0
2019–20	44	0.9	0.5	0.2	4.5
2020–21	46	1.2	0.9	0.3	7.0
2021–22	51	1.0	0.8	0.3	3.5
2022–23	54	1.1	1.0	0.2	5.0

Data notes: Non-aggravated sexual assault (MSO), adults, higher courts, 2005–06 to 2022–23. Rising of the court has not been included.
Source: Queensland Government Statistician's Office, Queensland Treasury - Courts Database, extracted September 2023.

Figure 39: Summary of custodial penalty length for sexual assault (MSO) by offence type and Aboriginal and Torres Strait Islanders status (supplementary to Table 19)



Data notes: Data notes: MSO, adults, custodial penalties, higher courts, 2005–06 to 2022–23. Excludes cases were Aboriginal and Torres Strait Islander status was unknown (n=15). Rising of the court and prison/probation orders have not been presented here due to small sample sizes across all groups.

Table 33: Summary of custodial penalty lengths imposed for sexual assault (MSO), by Aboriginal and Torres Strait Islander status and offence type

	Aboriginal and Torres Strait Islander people					Non-Indigenous people				
Penalty type	**N**	**Average (years)**	**Median (years)**	**Min (years)**	**Max (years)**	**N**	**Average (years)**	**Median (years)**	**Min (years)**	**Max (years)**
Sexual assault (non-aggravated) – Magistrates Court										
Imprisonment	85	0.8	0.7	0.1	3.0	63	0.8	0.8	0.1	3.0
Partially suspended										
Sentence length	20	0.9	1.0	0.3	1.8	30	0.8	0.8	0.3	1.5
Time to serve before release	20	0.3	0.2	0.1	0.8	30	0.3	0.2	0.0	0.8
Wholly suspended	43	0.5	0.5	0.1	1.3	195	0.5	0.5	0.1	1.5
Prison/probation	5^	-	-	-	-	10	0.4	0.3	0.1	0.8
Intensive correction order	0	-	-	-	-	8^	-	-	-	-
All custodial orders	**153**	**0.7**	**0.5**	**0.1**	**3.0**	308	**0.6**	**0.5**	**0.0**	**3.0**
Sexual assault (non-aggravated) – Higher courts										
Imprisonment	58	1.7	1.3	0.0	5.0	74	1.8	1.3	0.3	7.0
Partially suspended										
Sentence length	43	1.4	1.3	0.3	3.5	120	1.5	1.1	0.3	5.0
Time to serve before release	43	0.5	0.4	0.1	1.2	120	0.5	0.3	0.0	1.6
Wholly suspended	31	0.7	0.5	0.3	2.0	280	0.8	0.8	0.1	2.5
Prison/probation	8^	-	-	-	-	15	0.5	0.5	0.1	0.9
Intensive correction order	7^	-	-	-	-	32	0.8	0.9	0.3	1.0
All custodial orders	**1489**	**1.3**	**1.0**	**0.0**	**5.0**	**521**	**1.1**	**1.0**	**0.1**	**7.0**
Sexual assault (Aggravated) – Higher courts										
Imprisonment	2	-	-	-	-	5	-	-	-	-
Partially suspended										
Sentence length	5	-	-	-	-	25	1.7	1.5	0.8	3.0
Time to serve before release	5	-	-	-	-	25	0.5	0.3	0.0	1.5
Wholly suspended	2	-	-	-	-	14	1.3	1.1	0.7	2.0
Prison/probation	0	-	-	-	-					
Intensive correction order	0	-	-	-	-	5	-	-	-	-
All custodial orders	**9**	-	-	-	-	**49**	**1.6**	**1.5**	**0.5**	**3.8**
Sexual assault (Aggravated life) – Higher courts										
Imprisonment	9	-	-	-	-	9	-	-	-	-
Partially suspended										
Sentence length	5	-	-	-	-	5	-	-	-	-
Time to serve before release	5	-	-	-	-	5	-	-	-	-
Wholly suspended	1	-	-	-	-	1	-	-	-	-
Prison/probation	1	-	-	-	-	1	-	-	-	-
Intensive correction order	1	-	-	-	-	1	-	-	-	-
All custodial orders	**9**	**-**	**-**	**-**	**-**	**17**	**2.6**	**3.0**	**0.1**	**6.0**

Data notes: MSO, adults, Magistrates Courts and higher courts, 2005–06 to 2022–23. Rising of the court (n=1) was included in the 'all custodial orders' calculations but not presented separately in the table.

^ Summary statistics for sample sizes less than 10 have not been presented.

Source: Queensland Government Statistician's Office, Queensland Treasury - Courts Database, extracted September 2023

Appendix 5 - Sentencing purposes, principles and factors

Penalties and Sentences Act 1992 (Qld): ss 9, 11, 13 & 15

Part 2 Governing principles

9 Sentencing guidelines

(1) The only purposes for which sentences may be imposed on an offender 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).

(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—

(i) 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; and

(ii) 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; and

(e) any damage, injury or loss caused by the offender; and

(f) the offender's character, age and intellectual capacity; and

(g) the presence of any aggravating or mitigating factor concerning the offender; and

(ga) without limiting paragraph (g), whether the offender was a participant in a criminal organisation—

(i) at the time the offence was committed; or

(ii) at any time during the course of the commission of the offence; and

(gb) without limiting paragraph (g), the following—

(i) whether the offender is a victim of domestic violence;

(ii) whether the commission of the offence is wholly or partly attributable to the effect of the domestic violence on the offender; 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) sentences imposed on, and served by, the offender in another State or a Territory for an offence committed at, or about the same time, as the offence with which the court is dealing; and

(l) sentences already imposed on the offender that have not been served; and

(m) sentences that the offender is liable to serve because of the revocation of orders made under this or another Act for contraventions of conditions by the offender; and

(n) if the offender is the subject of a community based order—the offender's compliance with the order as disclosed in an oral or written report given by an authorised corrective services officer; 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

(p) if the offender is an Aboriginal or Torres Strait Islander person—any submissions made by a representative of the community justice group in the offender's community that are relevant to sentencing the offender, including, for example—

(i) the offender's relationship to the offender's community; or

(ii) any cultural considerations; or

(iii) any considerations relating to programs and services established for offenders in which the community justice group participates; and

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(pa) the principle that the court should not refuse to make a community based order for the offender merely because of—

(i) a physical, intellectual or psychiatric disability of the offender; or

(ii) the offender's sex, educational level or religious beliefs; and

(q) anything else prescribed by this Act to which the court must have regard; and

(r) any other relevant circumstance.

(2A) However, the principles mentioned in subsection (2)(a) do not apply to the sentencing of an offender for any offence—

(a) that involved the use of, or counselling or procuring the use of, or attempting or conspiring to use, violence against another person; or

(b) that resulted in physical harm to another person.

(3) In sentencing an offender to whom subsection (2A) applies, the court must have regard primarily to the following—

(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.

(4) Also, in sentencing an offender for any offence of a sexual nature committed in relation to a child under 16 years or a child exploitation material offence—

(a) 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; and

(b) the principles mentioned in subsection (2)(a) do not apply; and

(c) the offender must serve an actual term of imprisonment, unless there are exceptional circumstances.

(5) For subsection (4)(c), in deciding whether there are exceptional circumstances, a court may have regard to the closeness in age between the offender and the child.

(6) In sentencing an offender to whom subsection (4) applies, the court must have regard primarily to—

(a) the effect of the offence on the child; and

(b) the age of the child; and

(c) the nature of the offence, including, for example, any physical harm or the threat of physical harm to the child or another; and

(d) the need to protect the child, or other children, from the risk of the offender reoffending; and

(e) any relationship between the offender and the child; and

(f) the need to deter similar behaviour by other offenders to protect children; and

(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; and

(h) the offender's antecedents, age and character; and

(i) any remorse or lack of remorse of the offender; and

(j) any medical, psychiatric, prison or other relevant report relating to the offender; and

(k) anything else about the safety of children under 16 the sentencing court considers relevant.

(6A) However, for subsection (6)(h), the court must not have regard to the offender's good character if it assisted the offender in committing the offence.

(7) In sentencing an offender for a child exploitation material offence, the court must have regard primarily to—

(a) for an offence other than an offence against the Criminal Code, section 228I or 228J—the nature of any material describing or depicting a child that the offence involved, including the apparent age of the child and any activity shown; and

(aa) for an offence against the Criminal Code, section 228I or 228J—the nature of the doll, robot or other object representing or portraying a child that the offence involved, including the apparent age of the child; and

(ab) the offender's conduct or behaviour in relation to the material, doll, robot or other object that the offence involved; and

(ac) any relationship between the offender and the child the subject of the material, or represented or portrayed by the doll, robot or other object, that the offence involved; and

(b) the need to deter similar behaviour by other offenders to protect children; and

(c) 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; and

(d) the offender's antecedents, age and character; and

(e) any remorse or lack of remorse of the offender; and

(f) any medical, psychiatric, prison or other relevant report relating to the offender; and

(g) anything else about the safety of children under 16 the sentencing court considers relevant.

(7AA) However, for subsection (7)(d), the court must not have regard to the offender's good character if it assisted the offender in committing the offence.

(7A) Also, the principles mentioned in subsection (2)(a) do not apply to the sentencing of an offender under part 9D, division 2.

(8) If required by the court for subsection (2)(p), the representative must advise the court whether—

(a) any member of the community justice group that is responsible for the submission is related to the offender or the victim; or

(b) there are any circumstances that give rise to a conflict of interest between any member of the community justice group that is responsible for the submission and the offender or victim.

(9) In sentencing an offender, a court must not have regard to the following—

(a) the offender levy imposed under section 179C;

(b) whether or not the offender—

(i) may become, or is, the subject of a dangerous prisoners application; or

(ii) may become subject to an order because of a dangerous prisoners application.

(9A) Voluntary intoxication of an offender by alcohol or drugs is not a mitigating factor for a court to have regard to in sentencing the offender.

(9B) In determining the appropriate sentence for an offender convicted of the manslaughter of a child under 12 years, the court must treat the child's defencelessness and vulnerability, having regard to the child's age, as an aggravating factor.

(9C) In determining the appropriate sentence for an offender convicted of a relevant serious offence committed in relation to a pregnant person that resulted in destroying the life of the person's unborn child, the court must treat the destruction of the unborn child's life as an aggravating factor, unless the court considers it is not reasonable because of the exceptional circumstances of the case.

(10) In determining the appropriate sentence for an offender who has 1 or more previous convictions, the court must treat each previous conviction as an aggravating factor if the court considers that it can reasonably be treated as such having regard to—

(a) the nature of the previous conviction and its relevance to the current offence; and

(b) the time that has elapsed since the conviction.

(10A) In 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.

Examples of exceptional circumstances—

1 the victim of the offence has previously committed an act of serious domestic violence, or several acts of domestic violence, against the offender

2 the offence is manslaughter under the Criminal Code, section 304B

(10B) In determining the appropriate sentence for an offender who 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 the court considers 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 the commission of the offence is attributable to the effect of the violence.

(11) Despite subsection (10), the sentence imposed must not be disproportionate to the gravity of the current offence.

(12) In this section—

actual term of imprisonment means a term of imprisonment served wholly or partly in a corrective services facility.

child exploitation material offence means any of the following offences—

(a) an offence against the *Classification of Computer Games and Images Act 1995*, section 28 if the objectionable computer game is a child abuse computer game under the Act;

(b) an offence against any of the following provisions of the *Classification of Films Act 1991*—

(i) section 41(3) or 42(3) or (4);

(ii) section 43 if the offence involves a child abuse publication under the Act;

(c) an offence against the Criminal Code, section 228A, 228B, 228C, 228D, 228DA, 228DB, 228DC, 228I or 228J.

domestic violence see the *Domestic and Family Violence Protection Act 2012*, section 8.

relevant serious offence means an offence against—

(a) the following provisions of the Criminal Code—

(i) sections 302 and 305;

(ii) sections 303 and 310;

(iii) section 320;

(iv) section 323;

(v) section 328A;

(vi) section 339; and

(b) the *Transport Operations (Road Use Management) Act 1995*, section 83.

11 Matters to be considered in determining offender's character

(1) In determining the character of an offender, a court may consider—

(a) the number, seriousness, date, relevance and nature of any previous convictions of the offender; and

(b) the history of domestic violence orders made or issued against the offender, other than orders made or issued when the offender was a child; and

(c) any significant contributions made to the community by the offender; and

(d) such other matters as the court considers are relevant.

(2) If oral submissions are to be made to, or evidence is to be brought before, the court about the history of domestic violence orders made or issued against the offender, the sentencing judge or magistrate may close the court for that purpose.

(3) In this section—

domestic violence order means—

(a) any of the following under the *Domestic and Family Violence Protection Act 2012*—

(i) a domestic violence order;

(ii) a police protection notice;

(iii) an interstate order;

(iv) an order that corresponds to an interstate order made under a repealed law of another State;

(v) a New Zealand order; or

(b) a domestic violence order under the repealed *Domestic and Family Violence Protection Act 1989*.

13 Guilty plea to be taken into account

(1) In imposing a sentence on an offender who has pleaded guilty to an offence, a court—

(a) must take the guilty plea into account; and

(b) may reduce the sentence that it would have imposed had the offender not pleaded guilty.

(2) A reduction under subsection (1)(b) may be made having regard to the time at which the offender—

(a) pleaded guilty; or

(b) informed the relevant law enforcement agency of his or her intention to plead guilty.

(3) When imposing the sentence, the court must state in open court that it took account of the guilty plea in determining the sentence imposed.

(4) A court that does not, under subsection (2), reduce the sentence imposed on an offender who pleaded guilty must state in open court—

(a) that fact; and

(b) its reasons for not reducing the sentence.

(5) A sentence is not invalid merely because of the failure of the court to make the statement mentioned in subsection (4), but its failure to do so may be considered by an appeal court if an appeal against sentence is made.

15 Information or submissions for sentence

(1) In imposing a sentence on an offender, a court may receive any information, including a report mentioned in the *Corrective Services Act 2006*, section 344, or a sentencing submission made by a party to the proceedings, that it considers appropriate to enable it to impose the proper sentence.

(1A) Also, without limiting subsection (1), in imposing a sentence on an offender, a court may receive any information, or a sentencing submission made by a party to the proceedings, that the court considers appropriate to enable it to decide—

(a) whether it may make a control order for the offender under part 9D, division 3; or

(b) the appropriate conditions of a control order it must, or may, make for the offender under part 9D, division 3.

(2) An authorised corrective services officer must not, in any information or report, recommend that a fine option order or community based order should not be made for an offender merely because of—

(a) any physical, intellectual or psychiatric disability of the offender; or

(b) the offender's sex, educational level or religious beliefs.

(3) In this section—

sentencing submission, made by a party, means a submission stating the sentence, or range of sentences, the party considers appropriate for the court to impose.

Appendix 6 - Non-parole periods in Australian jurisdictions

Table 34: Legislative provisions in Australian jurisdictions in relation to the statutory ratios between non-parole periods and head sentences

Jurisdiction	Details
ACT	• For sentences of imprisonment of 12 months or longer (excluding a life sentence) the court must set a non-parole period ('NPP'), unless the court considers it would be inappropriate to do so.[1] • No statutory ratio.[2]
Commonwealth	• NPP generally only if head sentence (or aggregate) is greater than 3 years[3] (recognizance release order for sentences of 3 years or less).[4] • Generally no fixed ratio or proportion between the head sentence imposed on a federal offender and the period, or minimum period, to be served. • 75% minimum NPP for certain national security offences.[5]
NSW	• For sentences of imprisonment of 6 months or longer the balance of the sentence must not exceed one-third of the NPP (meaning NPP is effectively 75% or more of the total sentence length) unless there are special circumstances.[6] • For sentences of 3 years or less, a court can make statutory parole orders to release the person,[7] while for sentences over 3 years the NPP signifies parole eligibility only. • Standard non-parole scheme (SNPP) applies to a range of serious offences. SNPPs are legislated and operate as a 'guidepost' in sentencing. The ratio between the SNPP and the maximum penalty varies by offence.
Northern Territory	• For sentences of imprisonment of 12 months or longer, NPP of not less than 70% of the head sentence for offences of sexual intercourse without consent, certain other sexual offences and violent offences, and certain offences committed against people under 16 years of age.[8] • NPP of not less than 50% of the head sentence for other offences where a court sentences an offender to be imprisoned for 12 months or longer.[9] • A court can also decline to fix a NPP if the court considers the fixing of a NPP is inappropriate.[10]
Queensland	• NPP of 50% of the head sentence, where the head sentence exceeds three years and the court does not set a parole eligibility date (or in other specified circumstances, such as imprisonment arising from the breach of a suspended sentence, cancelled parole or imprisonment for a sexual offence where the head sentence is not more than 3 years).[11] • NPP is 80% of the head sentence for listed Schedule 1 serious violent offences — mandatory where the sentence is 10 years or more, discretionary where the sentence is less than 10 but more than 5 years.[12] Can also apply to a sentence of any length, and to a non-schedule 1 offence convicted on indictment of an offence — (i) that involved the use, counselling or procuring the use, or conspiring or attempting to use, serious violence against another person; or (ii) that resulted in serious harm to another person; and (b) sentenced to a term of imprisonment for the offence.[13]
South Australia	• The court must set an NPP[14] for sentences of imprisonment of 12 months or longer, unless the court considers it would be inappropriate to do so.[15] • Minimum NPP of four-fifths (80%) of the head sentence for serious offences against the person,[16] or for a serious offence where the offender is, or has been, declared to be a serious repeat offender[17] unless there are exceptional circumstances.[18]
Tasmania	• NPP of not less than 50% of the head sentence.[19]

Victoria	• No statutory ratio between the NPP and head sentence.
	• The court must set a NPP for sentences of 2 years or more that must be at least 6 months less than the head sentence, and may fix a non-parole period for sentences of 1 year or more, but less than 2 years.[20]
	• Mandatory minimum NPP for some offences, with no legislative requirement for the head sentence.[21]
	• For standard sentence offences the court must fix:
	  ○ NPP of at least 60% of the head sentence when less than 20 years
	  ○ NPP of at least 70% of the head sentence when 20 years or more
	  ○ NPP of 30 years if life imprisonment imposed,
	unless the court finds it is in the interests of justice not to do so.[22]

1 *Crimes (Sentencing) Act 2005* (ACT) s 65.

Western Australia	• NPP generally 50% of the head sentence, where the head sentence is 4 years or less, or • Two years less than the head sentence if the head sentence is greater than 4 years.[23] • Minimum NPP of 75% for grievous bodily harm committed in the course of an aggravated home burglary.[24]

2 The 'usual [percentage] range of 50-75%' has been noted in several Court of Appeal decisions: see *Zdravkovic v The Queen* [2016] ACTCA 53 at [74] (Murrell CJ, Elkaim and Ross JJ) citing observations made in *Barrett v The Queen* [2016] ACTCA 38 at [52]; *Taylor v the Queen* [2014] ACTCA 9 at [20] (Murrell CJ, Refshauge and Penfold JJ agreeing generally as to reasons).
3 *Crimes Act 1914* (Cth) ss 19AB, 19AD.
4 Ibid ss 20(1)(b), 19AC and 19AE.
5 Ibid s 19AG.
6 *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.
7 *Crimes (Administration of Sentences) Act 1999* (NSW) s158(1).
8 *Sentencing Act 1995* (NT) ss 55 and 55A.
9 Ibid ss 53 and 54, but not less than 8 months. This requirement also applies to life sentences, but does not apply if the sentence is suspended in whole or part.
10 Ibid ss 53(1), 54(3), 55(2), 55A(2).
11 *Corrective Services Act 2006* (Qld) s 184.
12 *Penalties and Sentences Act 1992* (Qld) pt 9A, ss 161A–161C; *Corrective Services Act 2006 (Qld) s 182*.
13 Ibid s 161B(4).
14 While there is no statutory minimum sentencing ratio, the South Australia Criminal Court of Appeal has noted the non-parole periods have 'tended to range between 50% and 75% of the head sentence': *R v Devries* [2018] SASCFC 101 at [19] (Hinton J) citing *R v Palmer* [2016] SASCFC 34 at [4] (Kourakis CJ).
15 *Sentencing Act 2017* (SA) s 47.
16 *Criminal Law (Sentencing Act) 1988* (SA) s 47(5)(d).
17 Ibid ss 53 and 54.
18 Ibid ss 48(2) and 54(2). In the case of the serious repeat offender provisions, the person must also satisfy the court it is not appropriate that they be sentenced as a serious repeat offender.
19 *Sentencing Act 1997* (Tas) s 17(3).
20 *Sentencing Act 1991* (Vic) s 11.
21 Ibid pt 3, ss 9A-10A.
22 Ibid s 11A.
23 *Sentencing Act 1995 (WA)* s 93 (for aggregate sentences see s 94).
24 *Criminal Code Act Compilation Act 1913* (WA) sch ss 297(5)(a)(i)–(ii).

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Disclaimer

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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 impact of this offending, including the criminal justice and sentencing process, can have long lasting effects, extending beyond the offence and affect their mental, emotional and physical well-being. These impacts can extend beyond the victim survivor, affecting the victim survivor's relationships, family dynamics and social networks, as well as the community and wider society.

Sexual assault and rape each account for 0.1% of all matters sentenced in Queensland. However, 1 in 5 women and 1 in 16 men report experiencing sexual violence since the age of 15. The Council recognises that sentenced sexual assault and rape offences do not reflect the true extent of this form of offending in the community due to the significant underreporting of these offences and high rates of attrition.

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.

Paper 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.

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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