Review of sentencing for sexual assault and rape offences

Response to Consultation Paper Question 25: "Is there any other issues about sentencing for sexual assault and rape offences that you would like to raise with the Council?"

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Thank you for the opportunity to make a submission to this Consultation Paper to the Queensland Sentencing Advisory Council (QSAC). My name is Rita Lok, a second-year PhD student in Criminology at the University of Queensland (UQ). I am making this submission in my personal capacity, which is informed by my relevant research work in this area. I am happy to make my submission public.

The importance of having consistent transparency in sentencing decisions

The judiciary has long been grappling with the dilemma of balancing the protection of one's dignity and privacy on the one hand and publishing information and materials for public education purposes on the other.

(1) Public participation in the CJS and its functioning

The crisis of public confidence in the criminal justice system (CJS) has been a persistent problem faced in many Western jurisdictions for over a decade. This is an important issue because the CJS operation heavily depends on the participation of victims in reporting crimes, members of the public acting as witnesses, and jurors determining guilt or otherwise. This echoed what was mentioned on page 11 of your consultation paper, where comprehensive guidance regarding sentencing factors can "improve transparency and expand the public's knowledge about sentencing and increase their confidence in it". Public opinion on sentencing has been well studied, whereby the findings are by and large consistent on a few observations/findings, including the public tend to think that sexual assault/rape sentences are too lenient and that people have very little accurate knowledge of crime (e.g., adhere to rape myths) and how the CJS functions/operates in general.

(2) Public concerns and favour heavy sentence

In addition, over the last few decades, sentencing in many commonwealth jurisdictions has persistently become harsher in sex crimes; some have attributed this phenomenon to the fact that the court's sentencing decisions were informed and impacted by specific public sentiments and concerns (e.g., the public view on sex offenders as a persistent threat and concern over the uncontrollable increment in sex crimes). Nonetheless, it is found that when people are given more information, their punitiveness drops dramatically and that public sentencing preferences are, in fact, very similar to those expressed by the judiciary or used by the courts (Roth, 2014). I espouse that the public does not fall into one of two camps: one preferring lenient sentences, the other harsh sentences; instead, it is spread out into a spectrum where an individual could move along at any point in time when presented with more informative narratives.

Expand/rectify the public's knowledge

To educate the public, the QSAC has been working hard to debunk sentencing myths and published the Queensland sentencing guide (2023)[1] to comprehensively explain how Queensland courts sentence adults. Incorporating such effort and initiative into the sentencing routine could further fulfil our commitment to open justice and ameliorate the alarming decline in public trust. According to the 1,904 sampled cases analysed in the QSAC's consultation paper on sentencing for sexual assault, it was found that 53.9% were sentenced in the Magistrate Court and 46.9% were sentenced in the higher courts. Despite over half of the cases being heard and sentenced in the Magistrate court, matters heard in the Magistrates or Local Courts will rarely lead to a written decision compared to higher courts.

Recommendations:

- Publish written documentation of the "summing up process".
    - Summing up is the time when the Judge sums up the case to the jury after all the evidence is given by both the prosecutor and the accused's lawyer address the jury. The Judge also explains the law that applies to the case during this process.
- More consistent publishing of sentence remarks in lower courts, such as District and Magistrate courts. One can refer to the publishing mechanisms adopted by superior courts, namely the Supreme Courts and Courts of Appeal, which consistently produce and publish written decisions.
- All the documents should communicate judicial decision-making processes and outcomes to the public in a simple, jargon-free, clear and consistent manner.

Current inconsistent availability of sentencing data and remarks

There is evident inconsistency in the availability of judicial documentation on how legal professionals unpack and evaluate a sexual assault/rape allegation in the courts (especially in lower courts), which significantly impedes purposes of public education, scrutiny or questioning. For instance, only *selected* judgments and sentence remarks are published online for public consumption, whereby the selection criteria are inconsistent and unclear in the New South Wales (NSW) jurisdiction, let alone cross-jurisdictional discrepancies.

In Queensland, sentencing remarks are only handed down by Judges when a defendant in a criminal case has either pleaded guilty or been found guilty at trial by a jury or a judge alone. In other words, the documentation and remarks of the judicial decision-making processes and discussion in the court for instances where defendants were acquitted are unavailable to the public (e.g., Kurtley Beale trial). Furthermore, in cases where the charges are dropped, the case would have gone through a committal hearing and a pre-trial hearing in the relevant court where the prosecution and defence present their case and evidence to a Judge. These hearings are procedural and do not require the Judge to decide on a question of law, whereby Judges do not have to provide written reasons. In other words, the public has limited opportunity to fathom why certain charges were dropped (e.g., the rape allegation against John Jarratt).

Some challenged the leniency of the judicial decision and speculated that the court was biased towards famous, powerful and wealthy defendants without having accurate knowledge of the

[1] https://www.sentencingcouncil.qld.gov.au/__data/assets/pdf_file/0004/572161/QLD-Sentencing-Guide.pdf

existing sentencing framework in Australia. Some sampled data extracted from my research regarding public views on rape cases are inserted below for illustration:

> "They just let them out to do it over again and again. This country protects abusers, and its disgusting"
>
> "Judge who pet him out on bail after found guilty needs to be stood down".
>
> "Crowdfund and appeal the leniency."
>
> "Courts are supposed to be impartial, neutral, disinterested, objective, unbiased. This is no longer the case."
>
> "State has had two goes, now he should be released and not face trial again".

Furthermore, it complicates the picture further when there are disparities in sentencing between judges, even when assessing and evaluating the same case with identical sets of evidence. Take the court granting Jarryd Hayne bail as an example. District Court Judge Graham Turnbull SC accepted Hayne's argument that he would be a target in custody "only because he's Jarryd Hayne", making his case exceptional (Harris & Parkes-Hupton, 2023). What followed was a hearing by Justice Richard Button, where he articulated and detailed the reasons for revoking Hayne's bail that was granted by Judge Turnbull earlier (i.e., *DPP (NSW) v Van Gestel [2022] NSWCCA 171*). Unfortunately, the documentation of Judge Turnbull's sentencing decision or judgment is not available anywhere, hindering one's understanding of his decision-making processes and the discrete judicial outcomes across judges.

Observation: The public is confused about where laws show ambiguity

The public tends to disagree with judicial decisions due to a lack of accurate knowledge of the sentencing framework, as aforementioned, and also the confusion about where the law shows ambiguity and imprecision. To illustrate, the law has gotten the public into a state of "consent confusion" (Gruber, 2016, p.415), where there have been overwhelming competing views on what constitutes "consent" (i.e., the mental element) in sexual assault/rape cases.

People contested that the legal definition of rape has been progressively expanding destructively. In one of my research findings, for example, the public was widely debating on and confused about the contour of the offence, the legal terminology of sexual assault and rape, and the idea of consent.

> "I am a woman but I am questioning now what is rape. Didn't he just bite her. I am not defending him but well. Has the definition of rape changed."
>
> "Rape these days is when you look directly at a woman without sunglasses"
>
> "Exactly what is sexual assault? Is that flirting or porking…We need clarity…"
>
> "Practically everyone's guilty under this chastity law"
>
> "Sex is a crime in Australia".

Contemporary trends in rape law reform have resulted in the adoption of more affirmative or communicative conceptions of sexual consent across many commonwealth jurisdictions. However, the consent-based model is naturally more expansive than a force- or coercion-based one (Conaghan, 2019). The concept of consent in real-life settings "depending on who you ask, runs the gamut from nonverbal foreplay to 'an enthusiastic yes'." (Gruber, 2016, p.417). Sexual consent signalling, for example, can often be entirely passive and subtle by allowing themselves to be undressed by their partner, not saying no, or not stopping their partner's advances (Gruber, 2016).

Consequently, the massive hurdle we face is the law's (in)ability to capture the complexity of human interactions in reality. Laws supply logic that helps regulate our relationships, our interactions, how we behave, what we say, and how we live. The law has the power to define the parameters of rape as a criminal act, and through this codification, the law conveys to the public particular ideas about normal sexual behaviour against which experiences of rape are measured and judged. It is paramount for all stakeholders to continue their efforts to improve the clarity of books, especially ensuing major reforms.

References

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