

PART A:

Context of the review and Council approach

Chapter 1

Introduction

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Nature and extent of sexual violence and relevance to sentencing

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Chapter 1 – Introduction

1.1 Background

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

- Part 1** Sentencing practices for sexual assault and rape offences; and
- Part 2** The operation of the aggravating factor in section 9(10A) of the *Penalties and Sentences Act 1992* (Qld) ('PSA') and the impact of increase in maximum penalties for contravention of a domestic violence order.

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

The referral of sentencing practices for sexual assault and rape offences to the Council followed the delivery by the Women's Safety and Justice Taskforce ('WSJT') of its second report, *Hear Her Voice – Report Two: Women and Girls' Experiences Across the Criminal Justice System* ('*Hear Her Voice, Report Two*') in July 2022.¹ In that report, the Taskforce, chaired by the Honourable Margaret McMurdo AC, made 188 recommendations intended to improve Queensland's criminal justice system for women and girls as victim survivors of sexual violence, or charged with or convicted of a criminal offence.² Sentencing practices were not specifically examined as part of this earlier inquiry.

1.2 About this report

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

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

1.3 The Terms of Reference

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

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

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

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

We were asked to:

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

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

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

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

³ Appendix 1, Terms of Reference, 3.

⁴ Letter from Yvette D'Ath MP, former Attorney-General and Minister for Justice, Minister for the Prevention of Domestic and Family Violence to the Ann Lyons AM, Chair, Queensland Sentencing Advisory Council, 25 September 2024.

⁵ This scheme was recently reviewed by the Queensland Crime and Corruption Commission: see Crime and Corruption Commission, *Protecting the Lives and Sexual Safety of Children – Review of the Child Protection (Offender Reporting and Offender Prohibition Order) Act 2004 – Report* (2023) <<https://www.ccc.qld.gov.au/publications/CPOROPA-Act-review-2023>>.

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

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

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

The Queensland Crime and Corruption Commission completed a legislative review of the CPOROPOA in 2023.⁸ The Commission's report is available on its website.

1.4 The Council's role and purpose

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

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

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

1.5 Offences of rape and sexual assault in Queensland

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

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

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

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

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

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

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

1.5.1 Rape

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

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

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

1.5.2 Sexual assault

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

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

Sexual assault can also include forcing another person to commit an act of gross indecency, or making a person see an act of gross indecency¹⁸ – for example, a person masturbating in front of another person.

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

The maximum penalty is:

Life imprisonment:

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

¹¹ *Criminal Code Act 1899* (Qld) sch 1, s 349(2)(a) ('*Criminal Code* (Qld)'). The words 'engages in penile intercourse with' replaced 'has carnal knowledge with or of' on the coming into force of section 17 of the *Domestic and Family Violence Protection (Combating Coercive Control) and Other Legislation Amendment Act 2003* (Qld).

¹² *Criminal Code* (Qld) (n 11) s 349(2)(b).

¹³ *Ibid* s 349(2)(c).

¹⁴ *Ibid* s 349(1).

¹⁵ *Ibid* s 352(1)(a). Note that this provision does not expressly prescribe consent to be an element of the offence of sexual assault. However, assault is an element of the offence and is defined in section 245 as being 'without the other's consent'. See also s 347.

¹⁶ *Ibid* s 352(1)(a).

¹⁷ *R v McBride* [2008] QCA 412, [20]; *R v Jones* (2011) 209 A Crim R 379 [29]–[32]. See also *R v BAS* [2005] QCA 97 [16] citing *R v Harkin* (1989) 38 A Crim R 296 [301].

¹⁸ *Criminal Code* (Qld) (n 11) s 352(1)(b).

¹⁹ For the definition of a circumstance of aggravation, see *ibid* s 1.

²⁰ *Ibid* s 352(3)(a).

²¹ *Ibid* s 352(3)(b).

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

14 years' imprisonment:

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

10 years' imprisonment:

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

1.6 The Council's approach

1.6.1 Council leadership

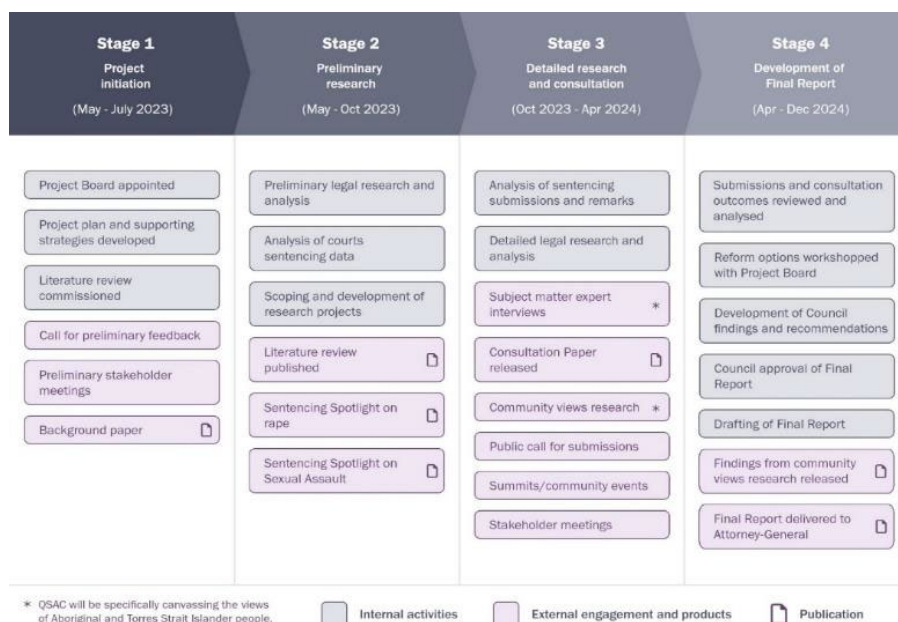
The Hon Ann Lyons AM was appointed as Council Chair in October 2023, following the retirement of John Robertson as Chair.

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

1.6.2 Review stages

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

Figure 1.1: Key stages of the review



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

²² Ibid s 352(3)(c).

²³ Ibid s 352(2).

1.6.3 What informed the development of this report?

The development of this report has been informed by:

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

1.6.4 Development of the Council's key findings and recommendations

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

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

1.7 Data we used

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

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

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

1.8 Other research

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

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

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

1.9 Language in this report

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

- **Sexual violence** is a broad term we use to mean any unwanted acts of a sexual nature perpetrated by one person against another person. The focus of the report is on two offences involving the use of sexual violence: rape and sexual assault.
- **Victim survivors and people who have experienced sexual violence** are used to mean those people who have had (or are alleged to have had) the act of sexual violence committed against them.²⁴ In the context of criminal proceedings, the term 'victim' refers to the person alleged by the prosecution to be a victim (often referred to as the 'complainant').²⁵ Many individuals who have experienced sexual violence prefer the term 'victim survivor' or 'survivor' rather than 'victim',²⁶ while some people do not identify with any of these terms. We acknowledge that the experience of crime victimisation does not define who a person is.²⁷
- **Sentenced people/people who have committed sexual violence** are generally used in place of 'offenders' or 'prisoners' unless these terms are used in legislation. This recognises that terms such as 'prisoner' and 'offender' can perpetuate stigma²⁸ and a false dichotomy between people who have been a victim of crime and those who commit crime, as discussed in **Chapter 2**. We sometimes also use 'perpetrator' or 'alleged perpetrator'.

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

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

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

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

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

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

2.1 Introduction

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

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

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

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

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

2.1.1 Sexual violence is serious, pervasive and gendered

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

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

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

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

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

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

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

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

The ABS found that 1 in 5 women had experienced sexual violence since the age of 15, and 1 in 16 men had experienced sexual violence since the age of 15.⁹ This research also found that, compared with Australian men, Australian women are about 4 times more likely to experience sexual violence¹⁰ and more than 8 times more likely to experience sexual violence by a partner.¹¹

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

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

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- ⁴ Judy Cashmore and Rita Shackel, 'The long-term effects of child sexual abuse' (Child Family Community Australia Paper No 11, Australian Institute of Family Studies, January 2013) 2; Natalie Townsend et al, *A Life Course Approach to Determining the Prevalence and Impact of Sexual Violence in Australia: Findings from the Australian Longitudinal Study of Women's Health*, (Research Report No 14, ANROWS, 2022).
- ⁵ Commonwealth Government Department of Social Services, *National Plan to End Violence Against Women and Children 2022–2032* (2022) 41 ('National Plan 2022–2032').
- ⁶ Emma Fulu et al, *Why Do Some Men Use Violence Against Women and How Can We Prevent It? Quantitative Findings from the United Nations Multi-Country Study on Men and Violence in Asia and the Pacific* (Bangkok: UNDP, UNFP, UN Women and UNV, 2013); Australian Bureau of Statistics, *2021–22 Personal Safety Survey* (15 March 2023) ('PSS 2021–22').
- ⁷ Sexual violence is measured by combining experiences of sexual assault and sexual threat. Sexual assault is an act of a sexual nature carried out against a person's will through the use of physical force, or intimidation or coercion, including any attempts to do this. This includes offences such as rape, attempted rape, aggravated sexual assault (assault with a weapon), indecent assault, forced sexual activity that did not end in penetration and any attempts to force a person into sexual activity. Sexual threat is any threat of a sexual nature that was made face-to-face, and that the person targeted believed was able and likely to be carried out.
- ⁸ PSS 2021–22 (n 6) Table 1.1. The PSS estimates information about populations of interest using survey responses and a person weighting approach. For more information on this approach see *The Australian Bureau of Statistics Personal Safety Survey: User Guide* <<https://www.abs.gov.au/statistics/detailed-methodology-information/concepts-sources-methods/personal-safety-survey-user-guide/2021-22#:~:text=The%20survey%20collected%20information%20from,abuse%20by%20a%20cohabiting%20partner>>.
- ⁹ PSS 2021–22 (n 6) and Australian Bureau of Statistics, *Personal Safety Survey 2016* (8 November 2017).
- ¹⁰ Christine Coumarelos et al, *Attitudes Matter: The 2021 National Community Attitudes towards Violence Against Women Survey (NCAS), Findings for Australia* (Research Report 14, ANROWS, 2023) 31.
- ¹¹ Ibid.
- ¹² Australian Bureau of Statistics, *Recorded Crime - Victims 2023* (27 June 2024) ('ABS Victims 2023'). Recorded means offences that may have been reported by a victim, witness or other person, or detected by police. The sexual assault definition is based on ANZSOC classification 0311 and 0312).
- ¹³ A total of 206 victims per 100,000 females compared with 39 victims per 100,000 males: see Australian Bureau of Statistics, *Recorded Crime - Victims 2022* (29 June 2023) ('ABS Victims 2022').
- ¹⁴ A total of 14,059 victims: see *ibid*.
- ¹⁵ Queensland Police Service, *Queensland Crime Statistics* (web page) <<https://mypolice.qld.gov.au/queensland-crime-statistics>>. Sexual offences include rape, sexual assault and other sexual offences.
- ¹⁶ Ibid: Sexual offences other than rape/attempted rape includes indecent treatment of children, incest, indecent assault, bestiality, wilful obscene exposure and other sexual offences.

11.8 per cent of all QPS recorded victims in 2022–23.¹⁷ Female victim survivors aged 19 years and younger were most commonly the victims (42.7%, n=3,732).¹⁸ Offences against male victims are also most commonly reported for the 19 years and younger age group (n=733).¹⁹

2.1.2 Sexual violence is predominantly committed by men and boys

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

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

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

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

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

2.1.3 Sexual violence is experienced in different ways

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

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

¹⁷ Queensland Government Statistician's Office, Queensland Treasury, *Crime Report, Queensland, 2022–23* (Report, 2024) 76, Table 61 ('QGSO Crime Report').

¹⁸ Ibid 78.

¹⁹ Ibid.

²⁰ Fulu et al (n 6); PSS 2021–22 (n 6); QGSO Crime Report (n 17) 48, Table 49.

²¹ PSS 2021–22 (n 6) *Sexual Violence (female experiences in PSS)* Table 1.1. Where a person experienced sexual violence by both a male and a female, they were counted separately for each. Some 52,300 women (2.4%) reported experiencing sexual violence by both a male and a female.

²² Of the 341,700 reporting a male perpetrator, 48,200 (14.1%) involved both a male and female perpetrator: PSS 2021–22 (n 6). PSS *National prevalence and time series data download, Table 1.1 (Persons aged 18 years and over, experiences since and before the age of 15)*.

²³ QGSO Crime Report (n 17) 48. These figures included child offenders aged 10–17 years, which are not within the scope of our review.

²⁴ Michael Flood et al, *Who Uses Domestic, Family, and Sexual Violence, How, and Why? The State of Knowledge Report on Violence Perpetration* (Queensland University of Technology, 2022) 7.

²⁵ The PSS defines boyfriend or date as a relationship that 'may have different levels of commitment and involvement that does not involve living together. For example, this will include persons who have had one date only, regular dating with no sexual involvement or a serious sexual or emotional relationship. Includes both current boyfriend and ex-boyfriend. Excludes de facto relationships.'

²⁶ Australian Institute of Health and Welfare, *Sexual Assault in Australia* (Infocus Report, August 2020) 8–9 ('*Sexual Assault in Australia*').

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

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

2.1.4 Sexual violence is experienced at higher rates by some communities

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

Aboriginal and Torres Strait Islander peoples

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

²⁷ Royal Commission into Institutional Responses to Child Sexual Abuse, *Final Report Volume 2: Nature and Cause* (2017) 34 ('*Royal Commission on Child Sexual Abuse Final Report Vol 2*').

²⁸ PSS 2021–22 (n 6) *Violence (Female Experiences in PSS) – Incident Characteristics*; Australian Bureau of Statistics, *Sexual Violence 2021-22* (23 August 2023)

²⁹ Mary Stathopoulos, *Sexual Revictimisation: Individual, Interpersonal and Contextual Factors*, (Research Summary, Australian Centre for the Study of Sexual Assault, Australian Institute of Family Studies, May 2014) 1–5.

³⁰ For more information on intersectionality, see Diversity Council Australia, *Culturally and Racially Marginalised Women in Leadership: A Framework for (Intersectional) Organisational Actions*, (Factsheet, 2023) <https://www.dca.org.au/wp-content/uploads/2023/09/carm_women_infographic_intersectionality_explained_final.pdf>.

³¹ *National Plan 2022–2032* (n 5) 41.

³² Australian Institute of Health and Welfare, *Family, Domestic and Sexual Violence in Australia* (Report, 2018).

³³ Queensland Government Statistician's Office analysis of Queensland Police Service unpublished data, extracted in September 2023.

be victims of non-aggravated sexual assault³⁴ than non-Indigenous women³⁵ and Aboriginal and Torres Strait Islander men were slightly more likely to be victims of non-aggravated sexual assault than non-Indigenous men.³⁶

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

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

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

Children and young people

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

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

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

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

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

³⁶ Ibid.

³⁷ *ABS Victims 2022* (n 13).

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

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

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

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

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

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

People with disability

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

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

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

Aboriginal and Torres Strait Islander people with disability:⁵⁰

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

Children with disability:⁵¹

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

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

⁴³ QGSO *Crime Report* (n 17) 78, Figure 33.

⁴⁴ Ibid 78, Figure 33.

⁴⁵ Centre of Research Excellence in Disability and Health, *Nature and Extent of Violence, Abuse, Neglect and Exploitation Against People with Disability in Australia: Research Report* (Report, March 2021) 9.

⁴⁶ Royal Commission into Violence, Abuse, Neglect and Exploitation of People with Disability, *Nature and Extent of Violence, Abuse, Neglect and Exploitation: Final Report Volume 3* (2023), 116 ('*Royal Commission on Disability Final Report*').

⁴⁷ Centre of Research Excellence in Disability and Health (n 45) 14. The data was on prevalence of women's experiences of violence by impairment type and type of violence. Researchers considered all forms of disability, and specific forms of impairment – sensory/speech, physical, psychological and cognitive.

⁴⁸ Ibid 10.

⁴⁹ *Royal Commission on Disability Final Report* (n 46) 84–6, 134.

⁵⁰ Centre of Research Excellence in Disability and Health, *Research Report* (n 45) 43–8.

⁵¹ Ibid 29.

⁵² Ibid 44.

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

People from culturally and racially marginalised groups

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

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

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

LGBTQIA+ people

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

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

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

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

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

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

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

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

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

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

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

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

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

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

An ANROWS study into CALD trans women's experiences of sexual violence conducted a survey to compare sexual violence experiences of CALD trans women, non-CALD trans women and cisgender (people whose gender identity matches the sex assigned to them at birth), LBQ and heterosexual women. Researchers found over two-thirds of cisgender⁶⁷ and CALD trans women⁶⁸ and half of the non-CALD trans women (50%) reported experiencing a sexual assault since the age of 16.⁶⁹ Researchers concluded that 'sexual violence is an endemic problem for trans women of colour living in Australia, as it is for every group of women'.⁷⁰

People in the custodial system

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

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

⁶² Ibid.

⁶³ Ibid.

⁶⁴ Eloise Layar et al., *LGBTQ+ People's Experiences and Perceptions of Sexual Violence*, Research Summary Report (2022) 15.

⁶⁵ Ibid.

⁶⁶ Shaez Mortimer, Anastasia Powell and Larissa Sandy, "Typical scripts" and their silences: Exploring myths about sexual violence and LGBTQ people from the perspectives of support workers (2019) 31(3) *Current Issues in Criminal Justice* 335, citing Crystal Boza and Kathryn Nicholson Perry, 'Gender-related victimisation, perceived social support, and predictors of depression among transgender Australians' (2014) 15(1) *International Journal of Transgenderism* 35.

⁶⁷ N=825, 66% hetero and n = 573, 66% LBQ (lesbian, bisexual and queer): Jane M. Ussher et al., *Crossing the Line: Lived Experience of Sexual Violence Among Trans Women of Colour from Culturally and Linguistically Diverse (CALD) Backgrounds in Australia* (ANROWS, June 2020) 131.

⁶⁸ N=18, 66%: *ibid.*

⁶⁹ *Ibid.*

⁷⁰ *Ibid* 156.

⁷¹ This data was self-reported and likely to be an under-estimate of the true number of sexual assaults in prison. See Australian Institute of Health and Welfare, *The Health of People in Australia's Prisons 2022* (2023) 23.

⁷² Victorian Law Reform Commission, *Improving Justice System Response to Sexual Offences Final Report* (2021) 23 ('*Improving Justice Responses*'); Mary Stathopoulos et al, *Addressing Women's Victimisation Histories in Custodial Settings* (Australian Institute of Family Studies, December 2012) 1–5 ('*Addressing Women's Victimisation Histories*'), 16; Mary Stathopoulos and Antonia Quadara, *Women as Offenders, Women as Victims: The Role of Corrections in Supporting Women with Histories of Sexual Abuse* (Women's Advisory Council of Corrective Services NSW, 2014) 13–14.

⁷³ Stathopoulos et al, *Addressing Women's Victimisation Histories* (n 72) 16.

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

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

2.2 Sexual violence is poorly understood

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

Nationwide research indicates:

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

⁷⁴ Debbie Kilroy, 'Women in prison in Australia', <<https://www.njca.com.au/wp-content/uploads/2023/03/Kilroy-Debbie-Women-in-Prison-in-Australia-paper.pdf>>.

⁷⁵ Preliminary Submission 28 (Sisters Inside Inc) 2.

⁷⁶ Sam Lynch and Lorana Bartels, 'Transgender prisoners in Australia: An examination of the issues' (2017) 19 *Flinders Law Journal* 190.

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

⁷⁸ Mandy Wilson et al, 'You're a woman, a convenience, a cat, a poof, a thing, an idiot': Transgender women negotiating sexual experiences in men's prisons in Australia' (2017) 20(3) *Sexualities* 380.

⁷⁹ Ibid 388.

⁸⁰ *Improving Justice System Response* (n 72) 36.

⁸¹ Christine Coumarelos et al, *Attitudes Matter: The 2021 National Community Attitudes Towards Violence Against Women Survey (NCAS), Summary for Australia* (ANROWS Research Report, 2023) 139 Figure 6-5.

⁸² Ibid.

⁸³ Ibid 143, Figure 6-6.

⁸⁴ Ibid.

⁸⁵ Ibid. 139, Figure 6-5. This question was only asked to one-quarter of the sample.

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

2.2.1 Rape myths

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

Beliefs that blame the victim survivor, such as the belief that people who get voluntarily intoxicated are at least partly responsible for their rape, that is the [victim survivor] did not scream, fight or get injured, then it is not rape or that it is not rape if the complainant fails to sufficiently communicate her lack of consent to the accused.

Beliefs that cause doubt on allegations, such as the belief that false allegations due to revenge or regret are common or that any delay in reporting rape is suspicious.

Beliefs that excuse the accused, such as the belief that male sexuality is uncontrollable once 'ignited', or that women often send mixed signals about their willingness to engage in sexual activity.

Beliefs about what 'real rape' looks like, such as the belief that rape only occurs between strangers in public places, that it is always accompanied by violence or that male rape only occurs between gay men.⁸⁸

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

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

⁸⁶ Heiki Gerger et al, 'The acceptance of modern myths about sexual aggression scale: development and validation in German and English' (2007) 33(5) *Aggressive Behaviour* 422, 423.

⁸⁷ Fiona Leverick, 'What do we know about rape myths and juror decision making?' (2020) 24(3) *The International Journal of Evidence & Proof* 255, 256.

⁸⁸ Ibid 257.

⁸⁹ Yvette Tinsley, Claire Baylis and Warren Young, '"I think she's learnt her lesson": Juror use of cultural misconceptions in sexual violence trials' (2022) 52(2) *Victoria University of Wellington Law Review* 463, 464.

⁹⁰ Ibid 466–7.

⁹¹ See research referred to in Patrick Tidmarsh and Gemma Hamilton, *Misconceptions of Sexual Crimes Against Adult Victims: Barriers to Justice* (Australian Institute of Criminology, 2020) 6 ('*Misconceptions of Sexual Crimes*').

⁹² Ibid.

⁹³ Tinsley, Baylis and Young (n 89) 475.

⁹⁴ Ibid 476.

2.3 Barriers to reporting and attrition in the criminal justice system

The figures discussed throughout this report on sentenced cases, trends and outcomes are only a proportion of sexual violence offences perpetrated in Queensland and Australia. Even though experiencing sexual violence is common, it is one of the most under-reported crimes, with research showing 'incidents of rape, sexual offences and child sexual abuse are significantly under-reported, under-prosecuted and under-convicted'.⁹⁵ Encouragingly, the rate of reporting sexual violence offences to police has increased in Australia, with a 30-year high recorded in 2023.⁹⁶ However, despite this increase in reporting, there has not been a substantial change to attrition rates.⁹⁷

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

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

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

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

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

⁹⁵ Australian Institute of Family Studies and Victorian Police, *Challenging Misconceptions About Sexual Offending: Creating an Evidence-based Resource for Police and Legal Practitioners* (2017) 2 ('Challenging Misconceptions').

⁹⁶ PSS 2021–22 (n 6).

⁹⁷ See, for example, findings reported in Jacqueline Fitzgerald, 'The attrition of sexual offences from the New South Wales criminal justice system', (NSW Bureau of Crime Statistics and Research Crime and Justice Bulletin, January 2006); Bridget Gilbert, 'Attrition of Sexual Assaults from the New South Wales Criminal Justice System' (Bureau Brief No 170, NSW Bureau of Crime and Justice Statistics, May 2024) (*Attrition of Sexual Assaults in NSW 2024 report*).

⁹⁸ S Caroline Taylor and Leigh Gassner, 'Stemming the flow: Challenges for policing adult sexual assault with regard to attrition rates and under-reporting of sexual offences' (2010) 11(3) *Police Practice and Research* 241.

⁹⁹ KPMG & RMIT University's Centre for Innovative Justice, *This is My Story. It's Your Case, but It's My Story. Interview Study: Exploring Justice System Experiences of Complainants in Sexual Offence Matters* (Research Report, NSW Department of Communities and Justices, NSW Bureau of Crime Statistics and Research, July 2023) 12–17 ('*This is my story*').

¹⁰⁰ Australian Institute of Family Studies and Victoria Police, *Challenging Misconceptions* (n 95) 3.

¹⁰¹ Victorian Law Reform Commission, *Improving Justice System Response to Sexual Offences* (n 72) 23–26.

¹⁰² Commission of Inquiry into Queensland Police Service responses to domestic and family violence, *A Call for Change* (Final Report, 2022) 50 ('*A Call for Change*'). The Commission of Inquiry into Police conducted a victim survivor survey. Of the proportion who responded to a question about barriers to reporting, the most common response was 'fear of how the other party would react' (20.62% of respondents). See also '*This is my story*' (n 99) 12–17.

¹⁰³ *Hear Her Voice – Report Two* (n 1). Victim survivors in a Queensland study shared how rape myths impacted the way they were treated by friends and families, as well as how a jury views a complainant's testimony: Heather Douglas, *Prosecution of Rape and Sexual Assault in Queensland: Report on a Pilot Study* (2017) 19.

¹⁰⁴ *Improving Justice System Response* (n 72) 23–7. See also '*This is my story*' (n 99) 12–17.

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

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

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

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

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

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

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

¹⁰⁶ *Ibid* 101–3.

¹⁰⁷ *Challenging Misconceptions* (n 95) 3.

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

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

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

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

¹¹² *Challenging Misconceptions* (n 95) 4.

¹¹³ Fitzgerald (n 97) 2.

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

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

2.3.2 Why attrition rates continue to remain high

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

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

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

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

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

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

¹¹⁶ *Misconceptions of Sexual Crimes* (n 91) 1.

¹¹⁷ *Hear Her Voice Report Two* (n 1) 147.

¹¹⁸ Australian Law Reform Commission, *Family Violence - A National Legal Response* (Final Report 114, October 2010) 1187 [26.13] referring to Denise Lievore, *Prosecutorial Decisions in Adult Sexual Assault Cases: An Australian Study* (prepared for the Office of the Status of Women, 2004); Denise Lievore, *Non-Reporting and Hidden Recording of Sexual Assault: An International Review* (prepared for the Commonwealth Office of the Status of Women, 2003); Bree Cook, Fiona David and Anna Grant, 'Sexual Violence in Australia' (*Australian Institute of Criminology Research and Public Policy Series No. 36*, 2001); Australian Institute of Family Studies, Submission FV 222, 2 July 2010; Fadwa Al-Yaman, Mieke Van Doeland and Michelle Wallis, *Family Violence Among Aboriginal and Torres Strait Islander Peoples* (prepared for the AIHW, 2006).

¹¹⁹ *Hear Her Voice, Report Two* (n 1).

¹²⁰ Sarah Bright et al, *Attrition of Sexual Offence Incidents Through the Criminal Justice System* (2021) 9 ('*Attrition of Sexual Offences*').

¹²¹ The Queensland Law Reform Commission reviewed 135 rape and sexual assault trials in 2018 and found that almost two-thirds were discharged (64%, n=87) and one-third resulted in a conviction (36%, n=48): Queensland Law Reform Commission, *Review of Consent Laws and the Excuse of Mistake of Fact: Report 78* (Final Report, June 2020) 31 ('*Review of Consent*').

¹²² *Improving Justice Responses* (n 72) 10.

¹²³ See, for example, Leverick, 'What do we know about rape myths?' (n 87) 255; James Chalmers, Fiona Leverick and Vanessa E Munro, 'The Provenance of What is Proven: Exploring (Mock) Jury Deliberations in Scottish Rape Trials' (2021) 48(2) *Journal of Law and Society*; *Misconceptions of Sexual Crimes* (n 93); Natalie Taylor, 'Juror Attitudes and Biases in Sexual Assault Cases' (*Trends & Issues in Crime and Criminal Justice No. 344*, Australian Institute of Criminology, August 2007) 4–5.

¹²⁴ A study of the proportion of reported sexual violence cases that do not progress through the justice system to a conviction.

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

Police investigation and charging stage is the highest point of attrition

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

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

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

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

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

¹²⁵ *Attrition of Sexual Assaults in NSW 2024 report* (n 97) 12. See also Victorian Crime Statistics Agency, *Attrition of Sexual Offence Incidents Through the Criminal Justice System* (2021) 16.

¹²⁶ *Attrition of Sexual Assaults in NSW 2024 report* (n 97) 1.

¹²⁷ Fitzgerald (n 97) 11.

¹²⁸ Victorian Crime Statistics Agency, *Attrition of Sexual Offence Incidents Through the Criminal Justice System* (2021) 16 ('Attrition of Sexual Offences').

¹²⁹ UK Government (Ministry of Justice) *End to End Review of the Criminal Justice System Response to Rape* (2021) iii ('End to End Review').

¹³⁰ Daly and Bouhours (n 114) 609.

¹³¹ These findings are from analysis of the Essex Rape and Sexual Assault Partnership dataset. Reasons for withdrawing were analysed in 521 complaints: Office of the Victims' Commissioner for England and Wales, *VC Analysis of Victims' Reasons for Withdrawing Sexual Offence Complaints* (August 2019) 3 and 5.

¹³² Melanie Heenan and Suellen Murray, *Study of Reported Rapes in Victoria 2000–2003: Summary Research Report* (2006).

¹³³ Denise Lievore, *No Longer Silent: A Study of Women's Help-Seeking Decisions and Service Responses to Sexual Assault* (A report prepared for the Australian Institute of Criminology for the Australian Government's Office for Women, June 2005), 46.

Criminal proceedings stage is affected by prospects of a conviction

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

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

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

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

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

Court hearing stage and final outcomes

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

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

¹³⁴ *Attrition of Sexual Assaults in NSW 2024 report* (n 97).

¹³⁵ *Ibid.*

¹³⁶ Office of the Director of Public Prosecution, Draft *Director's Guidelines 2022* as at 30 June 2022 ('*Director's Guidelines*') Guideline 4, 2–8. The public interest test has 2 components: (1) is there sufficient evidence to proceed with the prosecution; and (2) does the public interest require a prosecution.

¹³⁷ Taylor (n 123) 2; Fitzgerald (n 97) 11.

¹³⁸ Karen Iles, Director and Principal Solicitor, Violet Co Legal and Consulting, Committee Hansard, Canberra, 25 July 2023, 40–1 to Legal and Constitutional Affairs References Committee, *Current and Proposed Sexual Consent Laws in Australia* (Report, September 2023) 40 ('*Sexual Consent Laws in Australia*').

¹³⁹ See Appendix 4, section 1.5.2 for plea characteristics of rape and sexual assault in Queensland.

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

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

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

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

2.4 Systemic CJS reviews and inquiries into sexual violence

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

- **The Royal Commission into Institutional Responses to Child Sexual Abuse** was a pivotal inquiry into child sexual abuse that has significantly impacted the way these offences are responded to by the criminal justice system; its final report was released in December 2017.¹⁵⁰
- The **WSJT** was a significant inquiry into the barriers faced by Queensland women and girls accessing the criminal justice system, both as victims and as defendants, particularly in relation to sexual violence. In July 2022, the Taskforce made 188 recommendations in *Hear Her Voice*,

¹⁴⁰ *Improving Justice Responses* (n 72) 10.

¹⁴¹ *Ibid* 414.

¹⁴² Tidmarsh and Hamilton (n 91) 2.

¹⁴³ Taylor (n 123) 2.

¹⁴⁴ Leverick (n 87) 255 (emphasis in original).

¹⁴⁵ *Attrition of Sexual Assaults in NSW 2024 report* (n 97) 16.

¹⁴⁶ *Ibid* 13.

¹⁴⁷ *Ibid*.

¹⁴⁸ *Ibid* 16.

¹⁴⁹ Fitzgerald (n 97) 4. See also similar finding in New Zealand: New Zealand Government (Ministry of Justice), *Progression and Attrition of Reported Sexual Violence Victimisations in the Criminal Justice System: Victimisations reported April 2017–March 2023* (August 2023) 2

¹⁵⁰ Royal Commission into Institutional Responses to Child Sexual Abuse, *Final Report* (Report 2017).

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

- **Reviews of consent laws:** Over the last 2 years, the Australian Capital Territory ('ACT'),¹⁵² NSW,¹⁵³ Queensland,¹⁵⁴ Tasmania¹⁵⁵ and Victoria¹⁵⁶ have amended their sexual consent laws. With the exception of Tasmania, those amendments were made following reviews on consent laws for sexual violence offences.¹⁵⁷ All these reviews also made recommendations on ways to improve the criminal justice system response to sexual violence. There have also been Tasmania's Commission of Inquiry into the Tasmanian Government's Response to Child Sexual Abuse in Institutional Settings¹⁵⁸ and the Commonwealth Senate's Legal and Constitutional Affairs References Committee review into current and proposed sexual consent laws in Australia.¹⁵⁹ The Western Australian Law Reform Commission into criminal justice system responses to sexual offending (including consent) was completed in November 2023.¹⁶⁰

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

- legislative reform to prevent some penalty options being available for sexual offences (e.g. Intensive Correction Orders and suspended prison sentences);¹⁶⁶
- consideration of a rebuttable presumption in sentencing for sexual offending that the offending caused certain harms for the victim survivor; and¹⁶⁷
- developing a sexual assault bench book.¹⁶⁸

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

- The **Western Australian Office of the Commissioner for Victims of Crime** is reviewing victim survivor experiences of the criminal justice system.
- The **South Australian Government** is also reviewing sexual consent laws and released a Discussion Paper in December 2023.¹⁶⁹
- The **Australian Law Reform Commission** was issued with Terms of Reference in January 2024. This review will examine justice responses to sexual violence.¹⁷⁰ In conjunction with this review, the Commonwealth Government has established a Lived Experience Expert Advisory Group to inform this work.¹⁷¹
- The **NSW Sentencing Council** is reviewing evidence of 'good character' in all sentencing proceedings.¹⁷²

Several reviews to improve the criminal justice response to rape in the last 10 years have been completed overseas in the United Kingdom,¹⁷³ Northern Ireland,¹⁷⁴ Scotland,¹⁷⁵ New Zealand¹⁷⁶ and Canada.¹⁷⁷ Similar recommendations have been made to improve the criminal justice response for sexual offending.

¹⁶⁶ *Listen. Take Action* (n 157) rec 23(c), 80.

¹⁶⁷ *Ibid* rec 23(g), 80. s

¹⁶⁸ *Hear Her Voice Report Two* (n 1) rec 73, 22; *Listen. Take Action* (n 157) rec 18, 70; *Sexual Consent Laws in Australia* (n 138) rec 11, viii.

¹⁶⁹ Attorney-General's Department (SA), *Review of Sexual Consent Laws in South Australia: Discussion Paper* (December 2023).

¹⁷⁰ Australian Law Reform Commission, 'Terms of Reference' *Justice Responses to Sexual Violence* (web page, 23 January 2024) <<https://www.alrc.gov.au/inquiry/justice-responses-to-sexual-violence/terms-of-reference>>.

¹⁷¹ The Hon Mark Dreyfus KC MP, Attorney-General 'National roundtable on justice responses to sexual violence' (Media Release, 23 August 2023) <<https://www.markdreyfus.com/media/media-releases/national-roundtable-on-justice-responses-to-sexual-violence-mark-dreyfus-kc-mp/>>.

¹⁷² NSW Sentencing Advisory Council, Good character in sentencing (web page, 10 July 2024) <<https://sentencingcouncil.nsw.gov.au/our-work/current-projects/good-character-in-sentencing.html>>.

¹⁷³ UK Government (Ministry of Justice), *End to End Review of the Criminal Justice System Response to Rape* (Report, June 2021) iii ('*End to End Review*').

¹⁷⁴ Sir John Gillen, *Report into the Law and Procedures in Serious Sexual Offences in Northern Ireland: Part 1* (2019) ('*The Gillen Report*').

¹⁷⁵ Scottish Courts and Tribunals Service, *Improving the Management of Sexual Offence Cases: Final Report from the Lord Justice Clerk's Review Group* (Report, March 2021) ('*The Dorrian Review*').

¹⁷⁶ New Zealand Law Commission, *The Justice Response to Victims of Sexual Violence: Criminal Trials and Alternative Processes: Report 136* (December 2015) ('*Justice Response to Victims of Sexual Violence*').

¹⁷⁷ Coordinating Committee of Senior Officials Working Group on Access to Justice for Adult Victims of Sexual Assault, *Reporting, Investigating and Prosecuting Sexual Assaults Committed Against Adults - Challenges and Promising Practices in Enhancing Access to Justice for Victims* (Report, December 2018).

Chapter 3 – The Council's approach to the review

3.1 Introduction

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

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

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

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

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

¹ Appendix 1, Terms of Reference (emphasis added).

² Ibid (emphasis added).

³ Queensland Sentencing Advisory Council, *The '80 per cent Rule': The Serious Violent Offences Scheme in the Penalties and Sentences Act 1992 (Qld)* (Report, 2022) ('The '80 per cent Rule'); and Queensland Sentencing Advisory Council *Community-Based Sentencing Orders, Imprisonment and Parole Options* (Report, 2019) ('Community-Based Sentencing Orders, Imprisonment and Parole Options').

⁴ Women's Safety and Justice Taskforce, *Hear Her Voice – Report Two: Women and Girls' Experiences Across the Criminal Justice System* (2022) ('Hear Her Voice Report Two').

3.2 Council's approach to assessing adequacy and appropriateness

3.2.1 Background

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

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

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

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

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

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

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

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

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

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

⁵ *Director of Public Prosecutions (Vic) v Dalglish (a pseudonym)* (2017) 262 CLR 428, 434 [7] (Kiefel CJ, Bell and Keane JJ) ('*Dalglish*').

⁶ *Markarian v The Queen* (2005) 228 CLR 357, 384 [66] (McHugh J).

⁷ (2001) 207 CLR 584.

⁸ *Wong v The Queen* (2001) 207 CLR 584, 611–2 [74]–[76] (Gaudron, Gummow and Hayne JJ) (footnotes omitted).

⁹ *Markarian v The Queen* (2005) 228 CLR 357, 384 [65] (McHugh J).

¹⁰ *Dalglish* (n 5) 448–9 [63] (Kiefel CJ, Bell and Keane JJ)

¹¹ *Ibid* 449 [66] (Kiefel CJ, Bell and Keane JJ) citing *Malvaso v The Queen* (1989) 168 CLR 227, 233; *Barbaro v The Queen* (2014) 253 CLR 58, 72–4 [34]–[39] (French CJ, Hayne, Kiefel and Bell JJ).

¹² *Markarian v The Queen* (2005) 228 CLR 357, 371 [27] (Gleeson CJ, Gummow, Hayne and Callinan JJ).

¹³ *Dalglish* (n 5) 434 [7] (Kiefel CJ, Bell and Keane JJ).

¹⁴ *Barbaro v The Queen* (2014) 253 CLR 58, 70 [26] (French CJ, Hayne, Kiefel and Bell JJ) (emphasis in original).

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

3.2.2 Overview of the framework for assessing adequacy and appropriateness

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

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

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

Measure	Method of assessment
Evidence of misalignment between current sentencing practices and community and stakeholder views	
1. Evidence from informed and structured consultation of community views on sentencing/seriousness of sexual assault and rape offences	Qualitative <ul style="list-style-type: none"> Community views research Consultation events and meetings Consultation paper submissions Academic research
2. Evidence of Parliament's views on the seriousness of sexual assault and rape	Quantitative <ul style="list-style-type: none"> Maximum penalties Mandatory sentencing schemes Qualitative <ul style="list-style-type: none"> Legislative reforms for these offences, and sexual offences more broadly Case law analysis
3. Evidence of alignment between sentencing outcomes and the community's and Parliament's views of offence seriousness	Quantitative <ul style="list-style-type: none"> Data analysis Qualitative <ul style="list-style-type: none"> Community views research Consultation events and meetings Consultation paper submissions
4. Evidence of alignment between sentencing outcomes and the purposes of sentencing	Quantitative <ul style="list-style-type: none"> Data analysis Qualitative <ul style="list-style-type: none"> Community views research Consultation events and meetings Consultation paper submissions Academic research
5. Evidence of Court of Appeal and/or s 222 District Court judgment statements or questioning of whether current sentencing levels, outcomes or guidance for sexual assault and/or rape are adequate and whether practices change following statements or questioning	Qualitative <ul style="list-style-type: none"> Sentencing remarks and submissions analysis Case law analysis
6. Evidence of sentencing outcomes for sexual assault and rape offences in comparison with other offence types of similar assessed levels of seriousness	Quantitative <ul style="list-style-type: none"> Data analysis Qualitative <ul style="list-style-type: none"> Community views research Case law analysis

Measure	Method of assessment
Evidence of inconsistencies or problems with the current approach to sentencing	
7. Evidence of the weight given to aggravating and mitigating factors	Qualitative <ul style="list-style-type: none"> • Community views research • Sentencing remarks and submissions analysis • Case law analysis • Subject matter expert interviews
8. Evidence of the categorisation of the objective seriousness of sexual assault and rape offences	Qualitative <ul style="list-style-type: none"> • Community views research • Consultation paper submissions • Sentencing remarks and submissions analysis • Case law analysis • Subject matter expert interviews
9. Evidence of the treatment of victim survivors of sexual assault and rape in the sentencing process	Qualitative <ul style="list-style-type: none"> • Consultation events and meetings • Consultation paper submissions • Sentencing remarks and submissions analysis • Case law analysis • Subject matter expert interviews
10. Evidence of adequacy of information to inform sentencing of sexual assault and rape offences	Qualitative <ul style="list-style-type: none"> • Consultation events and meetings • Consultation paper submissions • Case law analysis • Subject matter expert interviews • Sentencing remarks and submissions analysis
11. Evidence of the impact of systemic disadvantage on Aboriginal and Torres Strait Islander peoples, and human rights considerations pursuant to the <i>Human Rights Act 2019</i> (Qld)	Quantitative <ul style="list-style-type: none"> • Data analysis Qualitative <ul style="list-style-type: none"> • Consultation events and meetings • Consultation paper submissions • Case law analysis • Subject matter expert interviews • Sentencing remarks and submissions analysis
Evidence of inconsistency of approach with other jurisdictions	
12. Evidence of the approach taken in other jurisdictions to sentencing for sexual assault and rape	Qualitative <ul style="list-style-type: none"> • Analysis of appeal decisions and recent cases • Analysis of effective or promising alternative sentencing practices

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

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

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

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

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

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

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

Criterion 12: Evidence of inconsistency of approach with other jurisdictions

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

3.3 Fundamental principles guiding this review

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

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

Relevant sources of evidence have included:

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

¹⁹ Preliminary Submission 7 (Aboriginal and Torres Strait Islander Legal Service) 2–3 [3].

²⁰ Preliminary submission 21 (Women's Legal Service Queensland) 1. See also Preliminary submission 20 (North Queensland Women's Legal Service) and Preliminary submission 10 (Queensland Indigenous Family Violence Legal Service).

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

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

It is important for the criminal justice system to ensure that sentences properly reflect the seriousness of the offending behaviour, as well as the harm caused to victims. The common law principle of proportionality²¹ recognises that this assessment of offence seriousness includes not just an assessment of the person's culpability for the offence, but also the degree of harm caused by the offending.²²

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

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

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

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

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

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

²¹ *Veen v The Queen [No 2]* (1988) 164 CLR 465 ('Veen').

²² Arie Freiberg, *Fox & Freiberg's Sentencing: State and Federal Law in Victoria* (Thomson Reuters, 2014) 239–40.

²³ *Penalties and Sentences Act 1992* (Qld) s 9(2)(c)(i) ('PSA'). This includes harm mentioned in information relating to the victim given to the court, such as in the form of a victim impact statement: see Part 10B.

²⁴ *Ibid* s 9(3)(c).

²⁵ *Ibid* s 9(6)(a). Applies to all sexual offences of a sexual nature where the victim is a child under 16 years.

²⁶ Judicial College of Victoria, *Victorian Sentencing Manual* (4th ed, 2023) 335, citing *R v Mason* [2001] VSCA 62 [8].

²⁷ *R v Kilic* (2016) 259 CLR 256, 266–7 [21] (Bell, Gageler, Keane, Nettle and Gordon JJ).

²⁸ See *Griffith University Literature Review* (n 15). The effectiveness of supervision, however, relies on adherence to best practice.

²⁹ *Ibid* 50, citing Smallbone and McHugh (2010).

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

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

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

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

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

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

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

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

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

³⁰ Ibid 50.

³¹ Ibid 52.

³² Walter Sofronoff KC, *Queensland Parole System Review: Final Report* (Report, 2016) 38 [140], 2 [11], 38 [139] ('*Queensland Parole System Review*').

³³ Ibid 1 [7] citing Wan Wai-Yin et al, *Parole Supervision and Reoffending* (Trends and Issues in Crime and Criminal Justice No 485, Australian Institute of Criminology, 2014) 1.

³⁴ *Queensland Parole System Review* (n 32) 7 [46]. The comment was made in the context of provisions requiring some people convicted of an offence to serve 80 per cent of their prison term before being eligible for release on parole, such as in the case of those subject to an SVO declaration.

³⁵ *University of Melbourne Literature Review* (n 16) 13–14, 22.

³⁶ Evann J. Ooi and Joanna Wang, 'The effect of parole supervision on recidivism' (2022) 245 *Crime and Justice Bulletin* ('*The Effect of Parole Supervision on Recidivism*'). This research found that for the marginal parolee, being released to parole reduces the likelihood of reconviction within 12 months of release by 10 percentage points (a decrease of 17.5 per cent); reduces the likelihood of committing a personal, property or serious drug offence within 12 months of release by 10.3 percentage points (a decrease of 24 per cent); and reduces the likelihood of being re-imprisoned within 12 months of release by 5 percentage points (a decrease of 18.2 per cent). These reductions in recidivism were statistically significant and generally persisted 24 months after release from prison.

³⁷ Appendix 1, Terms of Reference, 2.

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

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

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

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

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

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

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

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

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

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

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

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

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

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

⁴¹ PSA (n 23) s 160D.

⁴² Klaire Somoray, Samuel Jeffs and Anne Edwards, *Connecting the Dots: The Sentencing of Aboriginal and Torres Strait Islander Peoples in Queensland* (Sentencing Profile, Queensland Sentencing Advisory Council, 2021) 22–4.

⁴³ This data relates to adults sentenced only. For this reason, it is different to the information contained in our *Sentencing Spotlights*.

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

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

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

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

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

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

As with previous reports, the Council has endeavoured to balance many competing interests and views when developing its recommendations. The importance of preserving judicial discretion to ensure that sentences under the reformed scheme are just in all the circumstances⁴⁸ has been central to the Council's decision-making. At the same time, we have been concerned to ensure that the impact of serious offences on victim survivors is given adequate and appropriate recognition, thereby promoting community confidence.

⁴⁴ Appendix 1, Terms of Reference, 1.

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

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

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

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

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

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

Both the Queensland Productivity Commission in its inquiry into imprisonment and recidivism⁵⁰ and the QPSR⁵¹ highlighted funding and resourcing challenges faced by the Queensland criminal justice system and made recommendations designed to improve the management of offenders. Recommendations made by the QPSR included several that are relevant to the current review, including:

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

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

The strengthening of laws protecting victims of crime, the expansion of end-to-end case management and the introduction of real-time notifications and enhanced domestic and family violence order information sharing with our justice system partners.

The QPSR is the foundation for reforms which will enhance the safety of all Queenslanders through modern, sustainable and evidence-based corrective services. A key artifact of this work is the End-to-End Offender Management Framework, which was launched on 1 July 2021. The framework supports QCS' vision of safer communities and fewer victims of crime by 2030.⁵²

⁴⁹ Australian Law Reform Commission, *Pathways to Justice – An Inquiry into the Incarceration Rate of Aboriginal and Torres Strait Islander Peoples, Final Report* (Report No 133, 2017).

⁵⁰ Queensland Productivity Commission, *Inquiry into Imprisonment and Recidivism: Final Report* (Report, 2019).

⁵¹ *Queensland Parole System Review* (n 32).

⁵² Queensland Corrective Service, *Annual Report 2021–22* (2022) 1.

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

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

Participant selection is determined by sexual offending risk. A high intensity program of approximately 350 hours is available for high-risk sexual offenders with a moderate intensity, culturally specific and adapted program for cognitively impaired participants also available.

... To improve outcomes for First Nations men, QCS contracted the University of the Sunshine Coast to develop Strong Solid Spirit program which was piloted during 2022–23.⁵⁵

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

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

The management of sexual violence offenders – both in custody and in the community – is highly relevant when considering reform options for the current penalty and sentencing framework for this type of offending. Research has shown that '[s]ex offender treatment programs, especially those delivered in the community, have a small but significant effect on reducing sexual offence recidivism'.⁵⁹ The QPSR found that assessment for sexual offending risk and treatment need⁶⁰ was only administered to prisoners who were 'sentenced to a period of custody in excess of 12 months'.⁶¹ This is because of the time required to complete a preparatory and moderate intensity sexual offending program, which the majority of sexual offenders will be required to do.

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

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

⁵³ Queensland Corrective Service, *Annual Report 2022–23* (2023) 3.

⁵⁴ Ibid 21.

⁵⁵ Ibid.

⁵⁶ Ibid.

⁵⁷ Ibid.

⁵⁸ Ibid 18.

⁵⁹ Karen Gelb, *Recidivism of Sex Offenders Research Paper* (Prepared for the Victorian Sentencing Advisory Council, January 2007) vii.

⁶⁰ Three actuarial assessment tools are used to do this: the Static-99R, STABLE-2007 and ACUTE-2007.

⁶¹ *Queensland Parole System Review* (n 32) 120 [603].

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

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

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

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

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

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

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

⁶² For a discussion of these problems, see *University of Melbourne Literature Review* (n 16) 3–4; Complex Adult Victim Sex Offender Management Review Panel, *Advice on the Legislative and Governance Models under the Serious Sex Offenders (Detention and Supervision) Act 2009 (Vic)* (2015) 15–16 [1.59]–[1.65].

⁶³ *University of Melbourne Literature Review* (n 16) 3–4.

⁶⁴ PSA (n 23) s 9(2)(p).

⁶⁵ *Ibid* ss 9(2)(p)(i)–(ii).

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

- the Women's Safety and Justice Taskforce Reports One and Two;⁷³
- the Legal Affairs and Safety Committee's Inquiry into Support provided to Victims of Crime⁷⁴
- the Council's previous reports following its review of:
 - the serious violent offences ('SVO') scheme under Part 9A of the PSA;⁷⁵
 - community-based sentencing orders, imprisonment and parole options.⁷⁶

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

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

⁷¹ Legal Affairs and Safety Committee, Queensland Government, *Inquiry into Support provided to Victims of Crime* (Report No. 48, 57th Parliament, May 2023), rec 3 ('*Inquiry into Support to Victims*'). The Charter of Victims' Rights used to be a schedule to the *Victims of Crime Assistance Act 2009* (Qld). It is now in the *Victims' Commissioner and Sexual Violence Review Board Act 2024* (Qld) sch 1.

⁷² *Inquiry into Support to Victims* (n 71) 4 (response to rec 3).

⁷³ Women's Safety and Justice Taskforce, *Hear Her Voice: Report One - Addressing Coercive Control and Domestic and Family Violence in Queensland* (2021); *Hear Her Voice Report Two* (n 4).

⁷⁴ *Inquiry into Support to Victims* (n 71).

⁷⁵ *The '80 per cent Rule'* (n 3).

⁷⁶ *Community-Based Sentencing Orders, Imprisonment and Parole Options* (n 3).

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

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

Chapter 4 – Information sources used in this report

4.1 Introduction

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

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

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

4.2 Administrative data sources

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

4.2.1 Queensland courts data

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

Courts database

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

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

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

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

The analysis in this report includes cases sentenced between July 2005 to June 2023, where the case involved a charge of rape² or sexual assault.³ Cases involving child defendants sentenced under the *Youth Justice Act 1992* (Qld) are not included in this analysis.

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

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

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

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

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

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

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

¹ Australian Bureau of Statistics, *Criminal Courts, Australia methodology, 2022–23*.

² *Criminal Code Act 1899* (Qld), sch 1 s 349.

³ *Ibid* s 352.

⁴ Queensland Sentencing Advisory Council, *Sentencing Spotlight on Rape* (2023, v 2).

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

Supplementary courts data

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

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

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

Higher courts appeals data

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

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

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

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

4.2.2 Queensland Police Service data

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

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

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

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

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

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

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

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

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

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

4.2.3 Queensland Corrective Services data

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

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

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

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

4.2.4 Administrative data analysis notes and limitations

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

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

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

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

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

Access to high-quality information supports good decision-making at both a policy level and a service delivery level. Robust and timely data, modelling and program evaluation, combined with best practice policy processes, allow the government to improve performance.

High-quality information systems support a better understanding of the experience of offenders inside and outside of the criminal justice system. Further, data systems that straddle the criminal justice agencies can enable system-wide analysis.¹⁰

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

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

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

⁷ Queensland Sentencing Advisory Council, *Community-based Sentencing, Imprisonment and Parole Options: Final Report* (Report, 2019) 446.

⁸ Martin Moynihan, *Review of the Civil and Criminal Justice System in Queensland* (Report, 2009) 20, expanded on in section 10.6.

⁹ Ibid 105.

¹⁰ Queensland Productivity Commission, *Inquiry into Imprisonment and Recidivism: Final Report* (Report, 2020) 105.

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

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

4.2.5 Supplementary data sources

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

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

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

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

4.3 Sentencing remark transcripts

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

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

How transcripts were obtained

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

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

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

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

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

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

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

4.3.1 Content analysis of sentencing remarks

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

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

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

Sampling methodology

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

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

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

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

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

Coding the sample

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

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

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

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

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

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

Relationship information was coded according to a coding frame developed based on the classification used by the ABS in the PSS 2021–22.¹³ This was a two-tiered classification, which first classified perpetrators into four broad categories as listed below, and then further disaggregated each category into sub-categories:

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

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

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

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

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

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

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

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

¹³ Australian Bureau of Statistics, *Personal Safety Survey: User guide, 2021-22* (User guide, 2022).

¹⁴ Oral rape comprised penile-mouth penetration, tongue(lingual)-vaginal penetration and tongue(lingual)-anal penetration.

¹⁵ Body part included penetration by the person's whole hand or fist.

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

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

Analysis and results

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

4.3.2 Thematic analysis of sentencing remarks

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

Sampling methodology

A stratified random sample was drawn from the population of rape and sexual assault cases that were sentenced over 3 years from July 2020 to June 2023. In total, over this 3-year period, 404 cases were identified where the MSO was rape¹⁶ and 505 cases were identified where the MSO was sexual assault.

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

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

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

Table 4.1: Thematic sample quota of sentencing remarks for cases involving rape 2020–21 to 2022–23

Sentencing outcome ¹⁷	Court location		Quota total
	Major cities Population = 249	Regional/remote Population = 167	
Imprisonment (more than 5 years) Population = 190	Quota: 19 Population: 106 (25.7%)	Quota: 15 Population: 84 (20.6%)	34
Imprisonment (5 years or less) Population = 226	Quota: 26 Population: 143 (34.3%)	Quota: 15 Population: 83 (19.4%)	41
Quota total:	45	30	75

Table 4.2: Thematic sample quota of sentencing remarks for cases involving sexual assault 2020–21 to 2022–23

Court level and sentencing outcome	Court location		Quota total
	Major cities Population = 333	Regional/remote Population = 177	
Higher courts			
Custodial Population = 172	Quota: 17 Population: 114 (22.4%)	Quota: 9 Population: 58 (11.4%)	26
Non-Custodial Population = 41	Quota: 4 Population: 27 (5.3%)	Quota: 2 Population: 14 (2.7%)	6
Lower courts			
Custodial Population = 160	Quota: 13 Population: 91 (17.8%)	Quota: 10 Population: 69 (13.5%)	23
Non-Custodial Population = 137	Quota: 15 Population: 101 (19.8%)	Quota: 5 Population: 36 (7.1%)	20
Quota total	49	26	75

Cases were randomly selected from the population until the quota for each stratum was met, with an even distribution of cases selected across each year (n=25 per year) for both offences.

Comparison of sample to overall case population

We compared the sample of rape and sexual assault cases used for the thematic analysis, the sample of cases in the sentencing remarks analysis and the population of rape and sexual assault cases over the

¹⁷ The population used to determine the strata contained 416 cases and included historical offences that were committed prior to the reforms to the rape offence introduced in 2000. As these offences were deemed out of scope for this review, those cases were removed from the overall population to give a total of 404 cases. One case was removed as the person was sentenced for sexual assault, reducing the final population to 403 cases. Rape offences that received non-custodial sentences or a life sentence were treated as outliers in the sample. They were not included in the thematic sample but were coded as part of the larger content analysis, the results of which are presented in Appendix 5.

3-year period to determine whether the characteristics of each of the samples closely mirrored the characteristics of the broader population. This type of comparison helps to provide confidence that the sample is representative of the broader population and also helps to ensure that any conclusions drawn from this study are valid for the general population of cases sentenced and are not skewed by any unusual or rare instances.

Separate analyses were undertaken for the sexual assault sample and the rape sample. For sexual assault, 75 cases were included in the sentencing remarks sample. Of these, 56 cases were included in the qualitative thematic analysis. These two groups were compared with the remaining population of sexual assault cases sentenced over the 3-year period (n=430).

For the rape sentencing remarks sample, during the descriptive content coding two cases were identified as having involved an historical offence that was committed prior to the year 2000. These cases were removed from the sample, bringing the total number of rape cases in the sample to n=73, as compared with the remaining population of rape cases over the 3-year period (n=331). Of the 73 cases in the sentencing remarks sample, 54 were included in the qualitative thematic analysis.

Table 4.3 shows the demographic characteristics of each sample compared to the remaining cases in the population. For both offences, there were no statistically significant differences found in demographics.

Table 4.3: Comparison of the full thematic sample of sentencing remarks with population attributes

Attribute	Rape cases			Sexual assault cases		
	Thematic analysis sample	Sentencing remarks sample	All other cases	Thematic analysis sample	Sentencing remarks sample	All other cases
Sample size	54	73	331	56	75	430
Men	96.3%	97.3%	99.1% ¹⁸	100.0%	100.0%	97.9% ¹⁹
Aboriginal and Torres Strait Islander peoples	18.5%	17.8%	17.2% ²⁰	19.6%	17.3%	20.7% ²¹
Average age at offence	41.2 years	41.1 years	38.8 years ²²	42.0 years	41.0 years	39.7 years ²³

For the cases involving rape, there were no statistically significant differences in the proportion of custodial sentences in the sentencing remarks sample compared with the rest of the population.²⁴ Similarly, there were no statistically significant differences in median custodial sentence length.²⁵

The proportion of custodial sentences in the sentencing remarks sample (imprisonment: 65.8%, partially suspended prison sentence: 30.1%, wholly suspended prison sentence: 4.1%) was similar to the proportion across the remaining cases (imprisonment: 64.8%, partially suspended prison sentence: 30.9%, wholly suspended prison sentence: 4.3%). The sample included in the thematic analysis was also

¹⁸ Pearson's chi-square test: $\chi^2(1) = 1.65$, $p = .1997$, $V = 0.06$.

¹⁹ Pearson's chi-square test: $\chi^2(1) = 1.60$, $p = .2062$, $V = 0.05$.

²⁰ Pearson's chi-square test: $\chi^2(2) = 0.23$, $p = .8900$, $V = 0.02$.

²¹ Pearson's chi-square test: $\chi^2(1) = 0.45$, $p = .5031$, $V = 0.03$.

²² Independent groups t-test: $t(402) = -1.29$, $p = .1961$, $r = 0.03$ (equal variances assumed).

²³ Independent groups t-test: $t(503) = -0.68$, $p = .4946$, $r = 0.064$ (equal variances assumed).

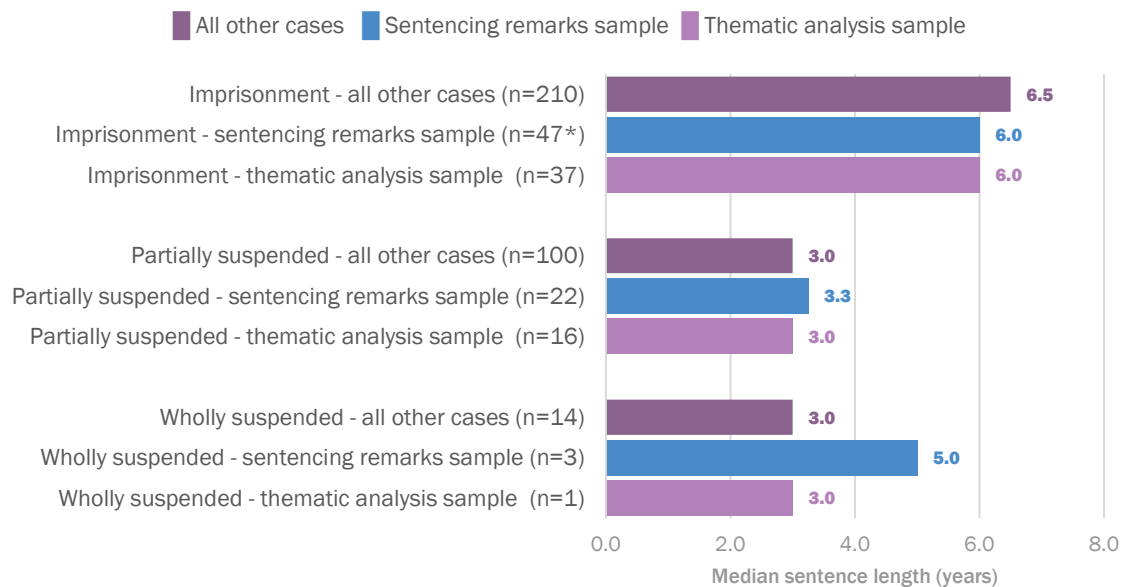
²⁴ Pearson's chi-square test: $\chi^2(1) = 1.57$, $p = .2101$, $V = 0.06$.

²⁵ Wilcoxon rank-sum test: $W_s = 13948.0$, $z = -0.69$, $p = .4858$, $r = -0.02$.

similar (imprisonment: 68.5%, partially suspended prison sentence: 29.6%, wholly suspended prison sentence: 1.9%).

Figure 4.1 shows the median sentence length for the qualitative sample, the study sample, and the remaining cases in the population.

Figure 4.1: Median sentence length for rape cases by sample status

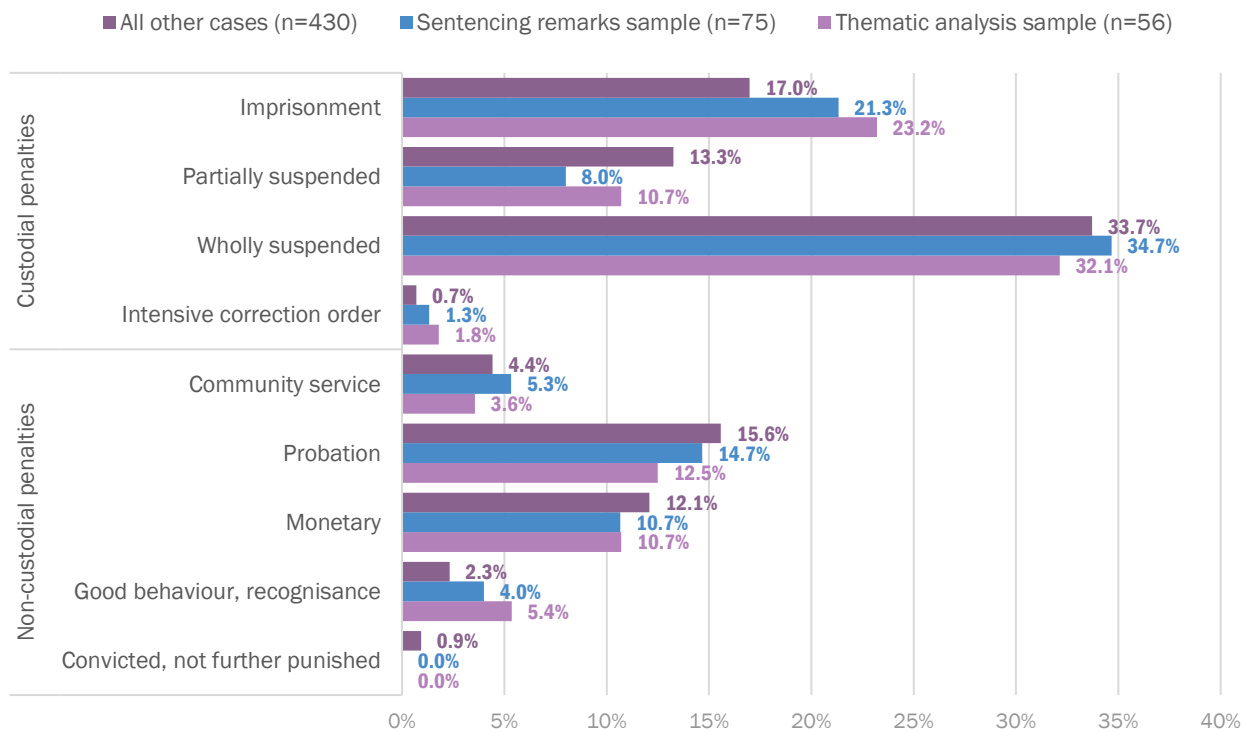


* excludes 1 life sentence

For the cases involving sexual assault, there were similarly no differences in the proportion of cases that received a custodial order between the thematic analysis sample (67.9%), sentencing remarks sample (65.3%) or all other cases (64.7%). The median length of custodial sentences ordered was 9.0 months for both the sentencing remarks sample and all other sexual assault cases and 9.2 months for the thematic analysis sample.

Figure 4.2 shows that there was no difference in penalty types between the thematic analysis sample, the sentencing remarks sample, and the remaining cases.

Figure 4.2: Penalty type for sexual assault cases by sample status



Development of a codebook

In qualitative research, a codebook is a tool that helps researchers sort through large amounts of text and identify common themes and patterns in a consistent way. Using a codebook, lengthy text from court transcripts was able to be organised into ‘themes’ that could be analysed systematically.

To generate a codebook, a smaller sample of 60 transcripts of sentencing remarks from the higher courts were selected for review. This sample included a random distribution of cases involving the offences of both rape and sexual assault. The coding took an inductive thematic approach – that is, reading through the sentencing remarks and identifying themes that emerged when reading the text.

The codebook was generated using an iterative data-driven approach using the work of DeCuir-Gunby et al²⁶ as a guide. This process involves using a five-step process to generate data-driven codes that reduce the raw information into smaller sub-sets, identify sub-sample themes, compare themes across sub-samples, create codes and determine reliability of codes.

One researcher reviewed this sample of 60 sentencing remark transcripts to create a preliminary codebook. After the initial codes or ‘themes’ were developed, four other team members undertook a review of the codebook to confirm consensus.²⁷

It was important that the coding reflected the legal framework under the *Penalties and Sentences Act 1992* (Qld) ('PSA') in which judicial sentencing remarks and sentencing submissions are grounded.

²⁶ Jessica T DeCuir-Gunby et al, 'Developing and using a codebook for the analysis of interview data: An example from a professional development research project' (2011) 23(2) *Field Methods* 136.

²⁷ We note the difference in our approach from our guide material in that DeCuir-Gunby and colleagues met for a total of 36 hours during the development of the codebook whereas, due to availability, this occurred towards the end of our process.

Additionally, the developed coding needed to be mindful of the elements of the offences as set out in the *Criminal Code* (Qld), as these were likely to inform the language used by the judiciary when constructing a sentencing remark.

In line with these considerations, an a priori approach was taken to further refine the preliminary codebook to ensure the initial codes either reflected these legal frameworks, both in language and intent/meaning, or expanded the iterative coding.

Two different researchers then reviewed the iterative coding alongside the relevant legislation and applied more detail to the existing coding to better reflect the legal constructs/language present in the guiding legislation. In some instances, the original codes were subsumed by the expanded codes.

To ensure agreed interpretation of coding, once the primary coder had finished coding the first 10 sentencing remarks, two additional team members conducted an independent coding of those 10 sentencing remarks to check for agreement of the coding.

Descriptive and thematic coding and analysis

The NVivo 12 software application was used to record and analyse all coding of the data. NVivo is a program designed to assist researchers to manage and analyse qualitative data; it is particularly useful for analysing unstructured data such as court transcripts.

The sentencing remarks were coded and analysed both descriptively and thematically.

Descriptive coding and analysis

Descriptive content coding occurred for all 150 cases in the sample.

Descriptive coding and the associated analysis focused on quantifying and categorising various attributes of each case, without delving deeply into interpreting the underlying themes or meanings. For each case, we coded and analysed structured information from the transcript, including attributes about the defendant (e.g. demographic information), attributes about the victim survivor (e.g. whether they knew the defendant), attributes about the case (e.g. the location of the courthouse) and attributes about the sentence (e.g. the type of penalty ordered).

This descriptive data allowed for analysis to be broken down by various factors – for example, to allow for comparative analysis to check whether particular themes were more common in a particular location, or for a particular type of defendant.

The 'case classification' feature of NVivo was used to record descriptive data about each case.

Thematic coding and analysis

Qualitative thematic coding was also undertaken on the sample; however, not all cases in the full sample were qualitatively coded and included in the final thematic analysis.

Qualitative coding was undertaken until saturation was reached. Saturation is important in qualitative research as it is a common indication of the rigor and quality of the research conducted.²⁸ The approach to saturation taken in this research involved 'inductive thematic saturation', where the primary researcher found no further codes or themes emerging from the coding, deeming saturation had been reached.²⁹

²⁸ Benjamin Saunders et al, 'Saturation in qualitative research: Exploring its conceptualization and operationalization' (2018) 52(4) *Quality & Quantity* 1893.

²⁹ Ibid 1897.

Qualitative coding of the sentencing remark transcripts was completed for 72.0 per cent (54/75) of the sample rape cases and 74.7 per cent (56/75) of the sample of the sexual assault cases. In total, 110 cases were included in the final sample for the thematic analysis.

As a thematic approach was adopted in the development of the codebook, a similar approach was utilised for the analysis of the sentencing remarks, following the guidance in Braun and Clarke³⁰ as set out below:

Phase 1: Familiarising yourself with the data.

The coding researcher will immerse themselves in the sample data generated from the sampling protocol detailed above. This process will likely involve reading the data multiple times.

Phase 2: Generating initial codes.

Initial codes for this project were already developed during the process of developing the codebook. However, these will be confirmed in the analysis phase and any new codes will be added to the codebook.

Phase 3: Searching for themes.

After all of the sample data has been coded, the researcher will search for any emerging themes in the data relevant to the areas of interest dictated by the Terms of Reference.

Phase 4: Reviewing themes.

After areas of interest are identified these will be reviewed and discussed with the wider team. Codes within themes will also be reviewed and refined to ensure they fit a coherent pattern and “belong together”.

Phase 5: Defining and naming themes.

In this phase we will look at the identified themes more critically, determining what is interesting about them in relation to the key issues surrounding sexual assault and rape.

Phase 6: Producing the report.

A detailed description of the themes in the context of the terms of reference will be prepared.

4.3.3 Limitations of sentencing remarks as a data source

The Council acknowledges the limitations associated with analysing sentencing remarks, particularly when undertaking thematic analyses.

Sentencing remarks present only certain facts of the case, the sentence imposed and often the reasons,³¹ in a way that appears neutral.³² What judges and magistrates say in their remarks does not necessarily reflect all the factors considered in determining the sentence. How a factor is expressed may not reflect the true influence of the court's attitude towards it.³³

It has also been recognised that, in delivering their remarks, judicial officers may need to ‘satisfy a range of often contradictory purposes and audiences’ (e.g. victim survivors, the person being sentenced, prosecution and defence lawyers, other judicial officers, the appeal court and the media),³⁴ and not be aware of all the relevant factors and considerations that have influenced their decision-making.³⁵ This may influence what factors are expressly mentioned.

³⁰ Virginia Braun and Victoria Clarke, ‘Using thematic analysis in psychology’ (2006) 3(2) *Research in Psychology* 77.

³¹ PSA (n 5) s 10. Only in the case of imprisonment, including suspended imprisonment.

³² Ronit Dinovitzer, ‘The myth of rapists and other normal men: The impact of psychiatric considerations on the sentencing of sexual assault offenders’ (1997) 12 (Spring) *Canadian Journal of Law and Society* 147, 169.

³³ Ibid.

³⁴ See Cyrus Tata, *Sentencing: A Social Process – Re-thinking Research and Policy* (Palgrave Macmillan, 2020) ch 3, 69; ch 7, 147.

³⁵ See, for example, Jeffrey J Rachlinski, *Judging the Judiciary by the Numbers: Empirical Research on Judges* (2017).

The 'instinctive synthesis' approach to sentencing³⁶ is another reason why it is not possible to quantify with precision the extent or weight given to specific purposes and factors and their relevance. The weight or otherwise of these individual purposes or factors can only be estimated.

While sentencing remarks may not always reflect the complete thought process of a judicial officer, they are the best resource available to communicate the logic, reasons, factors and purposes that influenced the decision.³⁷

Our approach

The type and level of information and detail provided in the sentencing remarks examined varied by judicial officer and often by court level, making them an inconsistent source of data. Nevertheless, as part of a mixed-methods research design, sentencing remarks supplement purely data-driven analyses, providing a rich source of additional information on the context of rape and sexual assault offences.

For the purposes of our analysis, factors were only coded when the judge specifically commented on the circumstances of the offending. For example, if the sentencing remarks did not mention that an offence was committed in a private residence, this does not mean that the offence was not committed in a private residence but simply that these circumstances of offending were not expressly mentioned during sentencing.

In **Chapter 9**, the Council discusses its findings from a review of 'good character' evidence in sentences for sexual assault and rape. This review considered whether a specific 'good character' element was present, and the weight given – that is, whether there was 'a lot of weight'; 'a little weight'; neutral (no identifiable weight given or weight not apparent) or no weight, where it was expressly stated 'no weight given' (i.e. because of s 9(6A) of the PSA or the person was not considered to be of 'otherwise good character').

For the 'good character' coding, it was not possible, given time and resourcing constraints, to undertake cross-coding.³⁸

Access to transcripts

Criminal defence lawyers, prosecutors and judges require access to sources of case comparators – that is, a way to find and locate previous cases that are similar to any matter presently before a court. The ability to locate previous comparable sentences helps to ensure consistency in sentencing. The Council notes that there is an apparent lack of information-sharing across agencies and potential duplication of effort as individual agencies keep and maintain separate internal databases of comparable cases.

The QGIS was developed as a comprehensive collection of higher court sentencing remark transcripts that would be available to legal officers. However, recent shortcoming of QGIS, including significant functional and content issues, have hindered the ability for practitioners and judicial officers to identify sentencing trends and have led to further reliance on in-house databases.

As part of this review, the Council relied upon the QGIS database as a source of higher court transcripts required to undertake qualitative and quantitative analysis of sentencing remarks. Due to a recent

³⁶ *Markarian v The Queen* (2005) 228 CLR 357, 388–90 [76]–[83] (McHugh J).

³⁷ Katherine J McLachlan, 'Trauma-informed sentencing: How South Australian sentencing judges use information about defendants' child sexual abuse victimization and subsequent trauma' (2023) *Journal of Child Sexual Abuse* 485.

³⁸ In other sentencing remark research, cross-coding has been used to reduce subjectivity and bias: see Kate Warner et al, 'Comparing legal and lay assessments of relevant sentencing factors for sex offences in Australia' (2021) 45 *Criminal Law Journal* 57.

redesign of QGIS, the search functionality was not fit for purpose and the Council could not locate required transcripts on the service. Instead, reliance was placed on administrative courts data to identify relevant matters and use that list as a starting point to locate transcripts on QGIS.

The Council found that a significant number of transcripts were not available on QGIS. This was partially due to processing delays and partially due to the collection being incomplete. The lack of functionality in the QGIS database, coupled with gaps in the collection, posed a significant barrier to the Council's review.

Transcripts from the lower courts are generally not transcribed and are not available on QGIS. These had to be requested and obtained by the Council at cost and incurred time delays to the review. Transcripts not otherwise available in QGIS must be requested individually via QTranscripts, which is time intensive when many transcripts are required. See **Chapter 18** for a further discussion.

4.4 Submissions and consultation

A full list of submissions and consultation sessions and meetings is provided at **Appendix 3**.

4.4.1 Submissions

The Council received 28 preliminary submissions from stakeholders and members of the public in response to its call for submissions regarding issues relevant to both sexual violence offences and offences committed within a domestic violence setting (both aspects of the review). These submissions informed the Council's early consideration of the key issues raised by this review and the development of the Council's Consultation Paper.

The Council subsequently invited submissions in response to its Consultation Paper, released in March 2024. The *Consultation Paper: Issues and Questions* posed 25 targeted questions for stakeholders and members of the community to consider. We received 35 submissions in response to our Consultation Paper. These submissions assisted the Council in considering our position and informed the development of our recommendations. They are referenced throughout this report.

Preliminary submissions³⁹ and submissions in response to our Consultation Paper⁴⁰ made in a non-confidential capacity have been published on our website.

4.4.2 Consultation events

The Council held a series of in-person and online consultation events to facilitate meaningful and informative discussions on issues relevant to the review and to encourage written submissions in response to our Consultation Paper.

The Council held 2 in-person consultative events in Brisbane and Cairns, with more than 100 attendees across both events. These events were facilitated by members of the Council and attended by legal and justice representatives, academics and members of victim survivor support and advocacy groups. Hosting forums in both a regional location and Brisbane enabled more stakeholders to attend these events in person, consistent with the Council's objective of broadening the reach of our consultation processes and hearing as from a diverse range of stakeholders.

³⁹ See 'Sentencing sexual and domestic violence', *Queensland Sentencing Advisory Council* (web page) <https://www.sentencingcouncil.qld.gov.au/projects/sentencing-sexual-and-domestic-violence>.

⁴⁰ See 'Sentencing sexual violence', *Queensland Sentencing Advisory Council* (web page) <https://www.sentencingcouncil.qld.gov.au/projects/sentencing-sexual-and-domestic-violence/sentencing-sexual-violence>.

The Council held 2 online consultation events which were open to all members of the community and were attended by 29 people. These online events were facilitated by members of the Council and the Secretariat and offered an opportunity for all Queenslanders – including those living in rural, regional, and remote areas of the state – to participate directly in these discussions.

Attendees were divided into groups of between 5 and 10 people and assigned a facilitator to lead the discussions. The facilitator posed key questions to each group and invited feedback from, and discussions between, attendees. With their consent, the views of attendees were recorded by a member of the Secretariat without identifying the speaker, and subsequently coded into a thematic summary, which informed the consideration of the Council's recommendations and formal views.

4.4.3 Stakeholder meetings

The Council also met throughout the review with members of our Aboriginal and Torres Strait Islander Advisory Panel. The purpose of these discussions was to share key findings, seek the Panel's views on draft reform proposals and invite the Panel to share its perspectives on the impacts of the current criminal justice system and sentencing practices on Aboriginal Torres Strait Islander people charged with a sexual violence offence or who are victim survivors of sexual offending.

We also held individual meetings with the Council's Practitioner Stakeholder Forum, the ODPP, QCS, the Queensland Law Society's Criminal Law Committee, and other professional and representative bodies, including the Australian Psychological Society's College of Forensic Psychologists and the Family Responsibilities Commission.

4.5 Interviews

4.5.1 Interviews with legal stakeholders

The Council initiated a qualitative interview project with legal subject matter experts to gather information about the current approach to sentencing for rape and sexual assault offence and related matters between November 2023 to February 2024. A total of 26 interviews were held with members of the judiciary, legal representatives (including from private defence, Legal Aid Queensland, Aboriginal and Torres Strait Islander Legal Service practitioners and public prosecutors from QPS and the DPP). They are referenced through this report.

Interviews were conducted as qualitative, semi-structured one-on-one interviews. An interview guide was prepared for each group of interview partners. Provided there was consent, the interviews were audio-recorded and transcribed. Interviews were coded to identify the main themes. An experienced interviewer conducted the interviews. The interview guide is available at **Appendix 8**.

4.5.2 Interviews with victim survivor support and advocacy organisations

Similar to the interviews conducted with legal stakeholders, the Council undertook qualitative interviews with workers at victim survivor support and advocacy organisations to gather information about their experience of supporting victim survivors through the sentencing process, in particular.

These interviews were conducted between March and June 2024, with some occurring one-on-one and others occurring in a group format. In total, eight victim survivor support and advocacy workers were interviewed.

The interviews with support and advocacy workers followed the same methodology as the interviews with legal stakeholders outlined above. The interview guide is available at **Appendix 8**.

4.5.3 Interviews with victim survivors

In partnership with victim survivor support and advocacy organisations, the Council initiated a qualitative interview project with victim survivors of sexual assault and rape to gather information about their experience of the sentencing process.

These interviews were conducted using a trauma-informed approach, ensuring the victim survivor had adequate support before, during and following the interview. A total of 7 interviews were held between March and September 2024.

Interviews were conducted in a qualitative, semi-structured way. An interview guide was prepared and provided there was consent, the interviews were audio-recorded and transcribed. Interviews were coded to identify the main themes. An experienced interviewer conducted the interviews. The interview guide is available at **Appendix 8**.

4.6 Legal research

4.6.1 Case law analysis

To inform its understanding of the current approach to sentencing for rape and sexual assault and any trends or anomalies in the sentencing of these offences, as required by the Terms of Reference, the Council undertook a comprehensive case law analysis, with a focus on Court of Appeal jurisprudence and appeals to the District Court under section 222 of the *Justice Act 1886* (Qld).

The Council used the Queensland case law databases of Queensland Judgments, the Supreme Court Library of Queensland and QGIS to identify relevant Queensland case law. We used a range of search terms, including 'rape', 'sexual assault', 'indecent assault', '349 Criminal Code', '352 Criminal Code' and 'sentence'. We also identified cases through Queensland criminal law and sentencing publications, such as *Carter's Criminal Law of Queensland*,⁴¹ the *Queensland Sentencing Manual*⁴² and *Indictable Offences Queensland*.⁴³

Interstate and international case law was identified using JADE, Westlaw, Lexis Nexis, relevant court websites and case law databases (e.g. NSW Caselaw), searches across the Commonwealth Law Reports, and relevant sentencing manuals and benchbooks. We also identified additional cases through submissions made to the review, information shared with the Council by state and territory justice agencies and meetings with legal stakeholders.

4.6.2 Sentencing submission analysis

The Council was interested in understanding what case law practitioners use in submissions and the way submissions were being made for digital and oral rape where the victim was a child or an adult. We wanted to know whether practitioners were applying recent Court of Appeal decisions affirming the principle that penetrative conduct should not be 'compartmentalised' in terms of relative offence

⁴¹ Soraya Ryan et al, *Carter's Criminal Law of Queensland* (online) (LexisNexis Butterworths, November 2024).

⁴² John Robertson and Geraldine Mackenzie, *Queensland Sentencing Manual* (online) (Thomas Reuters, November 2024).

⁴³ Brendan Butler and Saul Holt, *Butler and Holt's Indictable Offences Queensland* (online) (Thomson Reuters (Professional) Australia Limited).

seriousness when recommending appropriate sentencing ranges⁴⁴ and, in the case of child victims, the decision of *R v Stable (a pseudonym)*⁴⁵ which recognised the Queensland Parliament's intention that sexual offences against children should be treated more seriously and that sentences should have increased following amendments in 2003 and 2010 to that effect.

The Council reviewed 24 audio recordings of sentencing hearings from the District Court in 2022–23 for digital-vaginal and oral rape of both children and adults.

We coded the submissions made by prosecution and defence on penalty type, range and any case authorities or comparative sentencing decisions tendered in support. We also coded for whether a victim impact statement was given and how this was discussed.

Given time and resourcing constraints, only a small sample of sentencing submissions were reviewed, and it was not possible to undertake cross-coding.

Despite these limitations, the review provides a useful indication of how and what kind of comparable cases are used and the discussion around the type of conduct.

The findings of this analysis are discussed in **Chapter 6**.

4.6.3 Cross-jurisdictional legal analysis

The Council was asked to examine relevant offence, penalty and sentencing provisions in other Australian and international jurisdictions.

To facilitate this, in addition to undertaking its own review of relevant provisions, the Council wrote to key contacts in Australia and internationally from departments of justice and attorneys-general, prosecution services, legal aid commissions and sentencing councils, seeking their assistance in responding to a series of questions regarding sentencing of sexual assault and rape (or their equivalent offences).

From those responses and a desktop review, comprehensive analysis of the relevant offences, penalties and sentencing provisions was compiled for the following jurisdictions:

- Australian Capital Territory
- Commonwealth of Australia
- New South Wales
- Northern Territory
- Tasmania
- Victoria
- Western Australia
- Canada
- England and Wales
- New Zealand
- Scotland.

⁴⁴ *R v RBG* [2022] QCA 143 and *R v Wallace* [2023] QCA 22, 5 [13] (Bowskill CJ) endorsing remarks made in *R v Wark* [2008] QCA 172 by McMurdo P (at [2]), Mackenzie AJA (at [13]–[14]) and Cullinane J (at [36]) also referring to remarks by Dalton JA in *RBG* at [4] referring to *R v Smith* [2020] QCA 23 at [34]–[37] per Morrison J. Similar remarks were also made by Dalton JA in her dissenting judgment.

⁴⁵ *R v Stable (a pseudonym)* [2020] QCA 270.

4.7 Commissioned research

4.7.1 Literature review

The Council engaged a team of researchers from the Griffith Criminology Institute to prepare a review of the available literature relevant to the sentencing of rape and sexual assault offences. The research team carried out a Rapid Evidence Assessment (REA) to find and synthesise relevant literature. This involved targeted literature searches to generate lists of potential references. The list of potential references was loaded into DistillerSR, a web-based reference management system. The DAISY rank feature was used to screen the references. The DAISY rank is an 'AI' machine learning tool. The researchers manually screened the first few hundred studies, which trained the AI model on the types of studies to screen. The AI model was then used to help screen the remaining ~15,000 articles. The remaining lists were manually reviewed, coded and synthesised by the researchers before being incorporated into a final report.⁴⁶

Research summary

Effectiveness of sentencing measures

- Imprisonment is theorised to reduce recidivism through deterrence, incapacitation and treatment, but studies on the impact of imprisonment on sexual offenders' recidivism yield inconsistent results.⁴⁷
- Community supervision for offenders can be effective under some circumstances, with some studies showing lower recidivism rates compared to imprisonment, especially when accompanied by quality treatment and post-release supervision.⁴⁸
- Best practices in community supervision align with the risk-need-responsivity (RNR) model, emphasising tailored interventions based on the assessment of risk and criminogenic needs, addressing the underlying causes of offending.⁴⁹
- There are gaps in the available evidence regarding the sentencing of individuals convicted of sexual offences, as the research team did not identify any research that evaluated the effectiveness of many standard penalties (e.g. suspended prison sentences, probation), and many existing evaluations have significant methodological limitations affecting the interpretation of findings.⁵⁰
- Research did not find sufficient evidence to assess the effectiveness of monetary penalties, including fines and legal fees, in preventing crime or deterring reoffences, particularly in cases of sexual violence. Some studies suggest that the impact of fines on recidivism varies depending on factors such as the nature of the offence, socioeconomic status and the size of the fine relative to the offender's financial capacity. There is some evidence that these sentencing measures disadvantage those from lower socioeconomic backgrounds.⁵¹
- Research findings regularly reveal that treatment for sex offenders can be highly effective.⁵²

⁴⁶ Lacey Schaefer et al, *Sentencing Practices for Sexual Assault and Rape Offences* (Final Report, prepared for the Queensland Sentencing Advisory Council by Griffith University, 2024) 114–15.

⁴⁷ Ibid 46.

⁴⁸ Ibid.

⁴⁹ Ibid.

⁵⁰ Ibid.

⁵¹ Ibid 53–4.

⁵² Ibid 65.

- Restorative justice practices may hold promise as a novel approach to the sentencing of individuals who have committed sexual offences. Evaluation results on the impact of such practices on reoffending are very slim, although there is broader evidence that some victim survivors are supportive of restorative justice.⁵³
- The Circles of Support and Accountability ('COSA') program, designed to aid high-risk sexual offenders transitioning back into society, has demonstrated effectiveness in reducing reoffending rates.⁵⁴

Victim survivor perceptions on the sentencing of sexual offences

- Victim survivors of sexual violence are often dissatisfied with the sentencing process and outcomes, especially when they feel unheard.⁵⁵
- Some studies show that victim survivors are not wed to specific sentences in many instances, but rather seek to have their perspectives accounted for during sentencing.⁵⁶
- Victim survivors who observed their impact statement being read before the court expressed greater satisfaction with the sentence handed down.⁵⁷
- Victim survivors of sexual assault indicated that their perspectives should be considered at sentencing but strongly believed that the type and severity of the sentence should be the sole responsibility of the judge.⁵⁸
- The suggested lengths of imprisonment provided by victim survivors in an Australian study were very close to the actual sentences handed down by judges.⁵⁹
- Victim survivors express mixed views regarding the best timing and function of restorative justice in cases of sexual violence, although most felt that conferencing should occur post-sentencing.⁶⁰

Community perceptions of the sentencing of sexual offences

- The research identified that the public considers many of the same factors as judges when considering sentencing, such as culpability and harm.⁶¹
- Studies reveal that members of the community prescribe sentences that are largely consistent with those handed down by courts.⁶²
- The literature reviewed identified that the public initially lean towards punitive measures but become less inclined to do so when given more information on crime and justice issues.⁶³

⁵³ Ibid 66–7.

⁵⁴ Ibid 71–2.

⁵⁵ Ibid 86.

⁵⁶ Ibid 87.

⁵⁷ Ibid.

⁵⁸ Ibid.

⁵⁹ Ibid.

⁶⁰ Ibid.

⁶¹ Ibid 100.

⁶² Ibid.

⁶³ Ibid.

Evidence limitations

The authors of the literature review noted the following limitations in the evidence base:⁶⁴

Studies on victim survivors' views:

- Many studies were affected by selection bias, due to a low reporting rate of sexual offences generally, but also as research on victim survivors of crime necessitates a requirement for individuals to elect to participate in research.
- Research on victim survivors was also affected by recall bias, where victim survivors who have suffered a traumatic event may have difficulty in providing an accurate retelling of the event. Small sample sizes of much of the prior research limits the generalisability of findings.
- Social desirability bias may occur when researching sensitive topics such as sexual violence.

Studies on community views:

- Community views are nuanced, and more sophisticated research methods are required to tease out appropriate findings.
- Many studies relied on samples of convenience, limiting the generalisability of findings, selection bias, and an overreliance on students.
- Many studies were point-in-time surveys and did not provide longitudinal trends or the depth of information available from qualitative methods.⁶⁵

4.7.2 Community perspectives on sentencing for rape and sexual assault

The Council engaged a team of researchers from the Sexual Violence Research and Prevention Unit at the University of the Sunshine Coast ('UniSC') to carry out research on the views of the community on the importance of sentencing purposes and the seriousness of rape and sexual assault offences. The researchers conducted 19 focus groups with a total of 89 participants. The focus groups were carried out in-person at the Sunshine Coast, Brisbane, Cairns and Goondiwindi, as well as online to capture views from community members who were located in more regional areas or otherwise were unable to attend in person.⁶⁶

The researchers only selected participants who were over the age of 18, permanently resident in Queensland and able to speak conversational English. Anyone who had previously been accused or convicted of rape or a sexual assault offence was excluded from the research.⁶⁷ Victim survivors were invited to participate and comprised 40 per cent of the participants.⁶⁸ The majority of the participants were women (74%)⁶⁹ and a small number identified as Aboriginal or Torres Strait Islander people (16%).⁷⁰

Participants in the focus groups completed an activity using vignettes based on real Queensland judgments, which contained information about aggravating and mitigating factors and information about the victim survivor. Participants were asked to rate the importance of each of the sentencing purposes

⁶⁴ Ibid 95–7.

⁶⁵ Ibid 114–15.

⁶⁶ Dominique Moritz, Ashley Pearson and Dale Mitchell, *Community Views on Rape and Sexual Assault Sentencing: Final Report* (Prepared for the Queensland Sentencing Advisory Council by the Sexual Violence Research and Prevention Unit, University of the Sunshine Coast, June 2024) 11 ('UniSC Final Report').

⁶⁷ Ibid

⁶⁸ Ibid 12.

⁶⁹ Ibid 11.

⁷⁰ Ibid 12.

on a Likert scale of 1 to 5. The activity was followed by a group discussion to gather reasoning for the participant responses.⁷¹

To determine how seriously the participants viewed sexual offences, 14 short fictional scenarios were developed for consideration. These scenarios described basic details of the offence such as age, body parts involved and relationship between the perpetrator and victim survivor. They depicted a range of sexual and non-sexual offences. These scenarios were then paired with each other to create 26 combinations that were presented to participants for them to rank the most serious of the offences in each pair. Sexual offences were paired with other sexual offences and non-sexual offences, and a discussion was held after the participants had finished ranking the pairs to gather reasoning for the participant responses.⁷²

Findings from this research are discussed throughout the report.

Limitations

The researchers noted the following limitations of this study:⁷³

- Challenges in registration and recruitment was noted as a limitation. There was attrition from those who initially registered for focus groups to those who actually attended, primarily due to registrants not meeting the inclusion criteria or failing to attend (particular for male participants). The recruitment of male participants was particularly challenging; however, the researchers noted that this may be a reflection of low male participation in sexual violence programs generally.
- Due to lower-than-expected participation rates, the original strategy of organising focus groups according to 4 profiles (female general/victim survivor, male general/victim survivor) had to be changed.
- Scheduling of focus groups was impeded by an adverse weather event (cyclone and flooding) and there was a need to convert to online engagement, which introduced connectivity and technological issues.
- One of the online focus groups had to be cancelled as one of the registrants had forwarded the registration details on to others who had not registered. This circumvention of the registration process meant it was not possible to confirm the inclusion criteria for all participants attending, and the focus group did not proceed.
- To avoid confusion, the vignette scenarios used gendered language, which meant the scenarios did not reflect the non-binary community.
- Due to short timeframes for this project, there was limited ability to develop cultural relationships with First Nations Peoples. Only one targeted First Nations focus group was held and the members were all male. In total, 16 per cent of the participants in this project identified as Aboriginal or Torres Strait Islander (n=14).

⁷¹ Ibid 15.

⁷² Ibid.

⁷³ Ibid 40–2.

4.7.3 Queensland Crime Harm Index

In 2017, the QPS commissioned the Griffith Criminology Institute to research the harm caused by crime and to develop a crime harm index.⁷⁴ As part of this reference, the Council requested that the Griffith University Criminology Institute prepare and publish an updated working paper on the development of this Queensland Crime Harm Index. In March 2024, this updated paper was published on the Griffith University website.⁷⁵

The key output of this project was a weighted crime harm ranking of 33 broad crimes, as ranked from community perceptions of the harm caused by each crime. The top 10 offences in order of the perception of harm caused to the Queensland public were:⁷⁶

1. murder;
2. child sexual abuse;
3. rape;
4. terrorism;
5. child physical abuse causing physical injury;
6. sexual assault other than rape;
7. death caused by dangerous driving;
8. grievous bodily harm (physical assault resulting in permanent injury);
9. domestic violence; and
10. drug trafficking.

The community views to develop the index were collected via a survey conducted in 2017 with a random selection of 2,000 Queensland residents aged 18+ years. Data were collected via Computer Assisted Telephone Interviewing (CATI), during which participants were asked about their perceptions of the harm caused by various crimes, as well as their perceptions of safety in their neighbourhood, their experience of crime and police priorities.⁷⁷

The survey aimed to determine how the public viewed the harm caused by various offences. Participants were asked a series of questions about a range of crimes and were required to indicate how harmful they considered the crime to be to victim survivors, their families and the community. Response categories for each crime ranged from 0 to 100, with 0 indicating participants believed the crime ‘causes no harm at all’ to victim survivors, their families, and the community, while 100 indicates participants believed the crime ‘causes the most extreme harm possible’ to victim survivors, their families, and the community. A higher crime harm score is taken to indicate that the public perceives the crime as more harmful.⁷⁸ Thirty-three crimes were presented to the participants in a random order for them to rank. A weighted crime harm score was then calculated.⁷⁹

Findings from this research are discussed throughout the report.

⁷⁴ Kristina Murphy, ‘What do communities care about: Outcomes from the Queensland Crime Harm Survey’ (Conference Paper, QPS-Griffith University Future of Policing Symposium, 7 August 2019).

⁷⁵ Janet Ransley and Kristina Murphy, *Working Paper on the Development of the Queensland Crime Harm Index* (Griffith Criminology Institute Paper Series, March 2024).

⁷⁶ Ibid 37.

⁷⁷ Ibid 16.

⁷⁸ Ibid 28.

⁷⁹ For a detailed description of how the weighted score was calculated, see *ibid* 33.

Limitations

The survey was designed to obtain a quantitative measurement of how harmful the public viewed a range of offences to be. The survey did not aim to gain any qualitative information regarding the participants' reasoning for these rankings.