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Chapter 8 – Legislative sentencing guidance

8.1 Introduction

The Terms of Reference asked us to advise the Attorney-General about whether current sentencing purposes and factors are adequate for the purposes of sentencing sexual assault and rape offenders and whether any additional legislative guidance is required.[1]

In this chapter, we consider the current approach in Queensland to the sentencing purposes, principles and factors under the *Penalties and Sentences Act 1992* (Qld) ('PSA'), which provides courts with legislative guidance about how to approach the complex task of sentencing.

We explore:

1. the statutory objectives of the PSA and how these are relevant to the sentencing of sexual assault and rape offences;
2. the permitted purposes of sentencing under section 9(1) of the PSA and similarities and differences with other Australian jurisdictions and select overseas jurisdictions;
3. the principles and factors a court must consider and apply when determining sentence set out in section 9 of the PSA and other relevant sections of the Act; and
4. the primary sentencing considerations to which a court must have regard when either sentencing a person for an offence involving the use of violence against another person or for an offence of a sexual nature committed in relation to a child aged under 16 years.

We discuss the maximum penalties that apply to sexual assault and rape as well as the structure of these offences to determine whether they are appropriate, particularly for the offence of sexual assault.

The chapter also briefly discusses other forms of legislative sentencing guidance, such as mandatory and presumptive sentencing schemes in Queensland and other Australian and international jurisdictions, as well as standard sentence and standard non-parole period schemes. More information about these schemes can be found in Chapter 10 of our **Consultation Paper: Background**.

8.2 Overview of the current approach in Queensland

The PSA is the primary legislation that guides the sentencing of adults in Queensland. It sets out the purposes of sentencing, principles and factors that Parliament has determined a court must consider and the types of penalties and parole options open to a court to impose, as well as, in some cases, their conditions.

The general approach to sentencing, as in other Australian jurisdictions, is based on structured discretion (choice).

Parliament prescribes the limits within which judicial discretion can be exercised (setting maximum penalties, and in some cases, minimum or mandatory penalties) which in the case of sexual assault and

1 Appendix 1, Terms of Reference.

rape, are set out in the sections establishing these offences in the *Criminal Code* (Qld). The PSA includes the principles and factors that courts may (or must) consider and apply when determining sentence.

Courts exercise their discretion to impose a sentence that is reflective of the circumstances of the offence and the person sentenced in accordance with the important principle of individualised justice. This approach to sentencing is known as 'instinctive synthesis'.[2]

The High Court has consistently said that 'there is no single correct sentence' and the process of sentencing is not a mechanical or mathematical exercise.[3] While consistency of sentencing is an important objective, the consistency generally sought to be achieved is consistency of approach rather than consistency of outcome.[4] This is also a stated objective of the PSA.[5]

Within this context, legislative forms of sentencing guidance take many different forms, ranging from 'broad, generalised guidance, such as the way a maximum penalty indicates parliament's assessment of the seriousness of an offence, to more specific and prescriptive guidance'.[6] In certain cases, the Queensland Parliament has determined there is only one 'correct' sentence, such as 'repeat serious child sex offences', to which a mandatory life sentence applies.[7]

8.3 Sentencing guidance under the PSA: An overview

8.3.1 Purposes of the Act

A statement of legislative intent is set out in the preamble to the PSA. This highlights Parliament's views in enacting this legislation:

1. Society is entitled to protect itself and its members from harm.
2. The criminal law and the power of courts to impose sentences on offenders represent important ways in which society protects itself and its members from harm.
3. Society may limit the liberty of members of society only to prevent harm to itself or other members of society.[8]

The strong focus of the preamble on the protection of members the community from harm is highly relevant to the sentencing of sexual assault and rape given the nature of these offences and the significant harm they can cause to victim survivors.

The PSA also contains a statement of purposes in section 3 which elevates the protection of the Queensland community as being 'a paramount consideration' in appropriate circumstances, in the context of its broader purpose of 'providing for a sufficient range of sentences for the appropriate

2 *Markarian v The Queen* (2005) 228 CLR 357 ('*Markarian*').
3 Ibid 371 [27] (Gleeson CJ, Hayne and Callinan JJ), 405 [133] (Kirby J); *DPP (Vic) v Dalgliesh (a pseudonym)* (2017) 262 CLR 428, 443 [45] (Keifel CJ, Bell and Keane JJ) ('*Dalgliesh*') citing *Wong v The Queen* (2001) 207 CLR 584, 611 [75] (Gaudron, Gummow and Hayne JJ) ('*Wong*').
4 See Sarah Krasnostein and Arie Freiberg, 'Pursuing Consistency in an Individualistic Sentencing Framework: If You Know Where You're Going, How Do You Know When You've Got There?' (2013) 76(1) *Law and Contemporary Problems* 265.
5 *Penalties and Sentences Act 1992* (Qld) s 3(d) ('PSA').
6 Sentencing Advisory Council (Victoria), *Sentencing Guidance in Victoria* (Report, 2016) 22 ('*Sentencing Guidance in Victoria*').
7 PSA (n 5) s 161E. As an alternative, the court can instead impose an indefinite sentence in place of a life sentence: s 161E(2). Relevant mandatory sentencing schemes are discussed below in section 8.6.2 and in Chapter 11.
8 It also states 'Society is entitled to recover from offenders funds to help pay for the cost of law enforcement and administration'.

punishment and rehabilitation of offenders'.[9] Other relevant purposes listed in section 3 of the Act include:

- 'promoting consistency of approach in the sentencing of offenders' (s 3(d));
- 'providing sentencing principles that are to be applied by courts' (s 3(f)); and
- 'promoting public understanding of sentencing practices' (s 3(h)).

These purposes can be used by a court in interpreting other sections of the PSA.[10]

Some jurisdictions have also legislated similar statements of legislative purposes and principles that apply specifically to sexual offending. For example, the Victorian Parliament amended the *Crimes Act 1958* (Vic) to include objectives and guiding principles that apply to sexual offences and related procedural and evidential matters.[11] This approach has been supported by the Australian Law Reform Commission ('ALRC') and NSW Law Reform Commission on the basis that

> these statements can perform an important symbolic and educative role in the application and interpretation of the law, as well as for the general community. While much more is required than simply a statement of guiding principles to change culture, it does provide an important opportunity for governments and legal players to articulate their understanding of sexual violence and a benchmark against which to assess the implementation of the law and procedure.[12]

8.3.2 Sentencing guidelines

Part 2 of the PSA sets out governing principles and sentencing guidelines and also includes some provisions that are procedural in nature.

The purposes and principles of sentencing and sentencing factors contained within sections 9(1) and (2) of the PSA were introduced by the legislature with the intention of encouraging 'a higher degree of conformity and consistency' in sentences imposed.[13]

There have been many other additions made to section 9 over the years, as well as to other sections falling within that Part of the Act.

As discussed in section 8.4, some provisions falling within section 9 of the PSA require a court to have primary regard to certain purposes and listed factors when sentencing for certain types of offences, including offences of a sexual nature committed in relation to a child under 16 years[14] and offences involving violence against another person, or which resulted in physical harm.[15]

Aggravating factors are also established under section 9 of the PSA requiring a court to treat certain factors as making the offence more serious, including whether the offence committed was a domestic violence offence,[16] or where it was committed against a person who was performing the functions of that

9 PSA (n 5) s 3(b).
10 *Acts Interpretation Act 1954* (Qld) s 14A(1): 'In the interpretation of a provision of an Act, the interpretation that will best achieve the purpose of the Act is to be preferred to any other interpretation'.
11 ss 37A and 37B.
12 Australian Law Reform Commission, *Family Violence–Improving Legal Frameworks* (ALRC CP 1, 2010) Chapter 16, 'Guiding principles and objects clauses'.
13 Queensland, *Parliamentary Debates*, Legislative Assembly, 5 November 1992, 150.
14 PSA (n 5) s 9(6).
15 Ibid ss 9(2A)–(3).
16 Ibid s 9(10A).

person's office or employment,[17] unless it is not reasonable to do so due to the exceptional circumstances of the case.

Section 9 of the PSA also requires certain factors to be treated as mitigating – in particular, in sentencing a person who is a victim of domestic violence, the effect of that violence on the person unless it is not reasonable due to the exceptional circumstances of the case; and if domestic violence was a contributing factor to the person's offending, the extent to which this is the case.[18]

Other provisions within Part 2 include considerations for a court in deciding whether to record a conviction,[19] a requirement to take a person's plea of guilty into account[20] and giving preference to compensation for victims over the imposition of a fine.[21]

In the following sections, we explore some aspects of those purposes and factors listed in section 9 of the PSA.

8.4 Sentencing principles and factors in the PSA

8.4.1 Introduction

In this section, we discuss the relevant sentencing principles and factors under the PSA and whether there are any issues or anomalies with the application of these factors when sentencing for sexual assault and rape. We also consider whether there is a need for additional legislative guidance as required under the Terms of Reference.[22]

General and primary sentencing principles and factors to which a court *must* have regard to in sentencing are set out in sections 9(2)–9(11) of the PSA. Although consideration of these factors is mandatory, it has been recognised with respect to a similar provision to section 9(2) in Victoria that the phrase 'must have regard to' 'should be read as subject to the necessary qualification that the relevance of a particular matter to the court's determination will affect the weight, if any, that it will be given. Some of the listed matters may have no relevance in a particular case':[23]

> No single matter specified … is 'fundamental' to the fixing of the sentence. The imperative that the sentencing court 'have regard to' the enumerated matters requires the judge to consider each of the matters and determine whether any or any particular weight should be given to them. The judge is required only to have regard to the factors so far as they are known to him or her. The provision does not require that the matter in question have an actual influence on the ultimate result. Every matter may inform the 'instinctive synthesis' but none is determinative; the emphasis each receives will vary from case to case.[24]

Table 8.1 sets out a summary of the factors in section 9 that must be applied (so far as these are relevant and known) when sentencing any offence generally. Under the general factors, imprisonment should only be imposed as a last resort and a sentence which allows the person to stay in the community is preferable.

17 Ibid s 9(10F).
18 Ibid s 9(10B).
19 Ibid s 12.
20 Ibid s 13.
21 Ibid s 14.
22 See Appendix 1, Terms of Reference.
23 *AB v The Queen (No 2)* [2008] 18 VR 391 [44] (Warren CJ, Maxwell P and Redlich JA agreeing) (citations omitted).
24 Ibid [45].

Table 8.1: General sentencing principles and factors

PSA Section	General factors applying to all offences
9(2)	In sentencing an offender, a court must have regard to:
(a)	principles that:
	(i) a sentence of imprisonment should only be imposed as a last resort; and
	(ii) a sentence that allows the offender to stay in the community is preferable; and
(b)	the maximum and any minimum penalty prescribed for the offence; and
(c)	the nature of the offence and how serious the offence was, including:
	(a) any physical, mental or emotional harm done to a victim, including harm mentioned in information relating to the victim …[including in the form of a victim impact statement]; and
	(b) the effect of the offence on any child under 16 years who may have been directly exposed to, or a witness to the offence; and
(d)	the extent to which the offender is to blame for the offence [culpability]; and
(e)	any damage, injury or loss caused by the offender; and
(f)	the offender's character, age and intellectual capacity; and
(fa)	the hardship that any sentence imposed would have on the offender, having regard to the offender's characteristics, including age, disability, gender identity, parental status, race, religion, sex, sex characteristics and sexuality; and
(fb)	regardless of whether there are exceptional circumstances, the probable effect that any sentence imposed would have on— (i) a person with whom the offender is in a family relationship and for whom the offender is the primary caregiver; and (ii) a person with whom the offender is in an informal care relationship; and (iii) if the offender is pregnant—the child of the pregnancy; and
(g)	The presence of any aggravating or mitigating factor concerning the offender; and …
(gb)	(i) whether the offender is a victim of domestic violence; and (ii) whether the commission of the offence is wholly or partly attributable to the effect of the domestic violence on the offender; and (iii) the offender's history of being abused or victimised; and
(h)	the prevalence of the offence; and
(i)	how much assistance the offender gave to law enforcement agencies in the investigation of the offence or other offences; and
(j)	time spent in custody by the offender for the offence before being sentenced; and
(k)–(m)	[other sentences imposed on the offender or that the offender is liable to serve]; and…
(o)	if the offender is on bail and is required under the offender's undertaking to attend a rehabilitation, treatment or other intervention program or course—the offender's successful completion of the program or course; and
(oa)	if the offender is an Aboriginal or Torres Strait Islander person—any cultural considerations, including the effect of systemic disadvantage and intergenerational trauma on the offender; and
(p)	if the offender is an Aborigional or Torres Strait Islander person–any submissions made by a representative of the community justice group in the offender's community …; and …
(r)	any other relevant circumstance.
9(9)(b)	[The court must not have regard to whether or not the person may become, or is, subject to an application or an order under the dangerous prisoners scheme]

9(9A)	Voluntary intoxication of an offender by alcohol or drugs is not a mitigating factor …
9(10)&(11)	[The court must treat the offender having 1 or more previous convictions as aggravating. The court must consider the nature and relevance of the criminal history and the time since the conviction Despite the offender's criminal history, the sentence must not be disproportionate to the gravity of the offence]
9(10A)	[If the offence is a domestic violence offence, this is an aggravating factor unless it is not reasonable because of exceptional circumstances][25]
9(10B)	[If the person sentenced is a victim of domestic violence] the court must treat as a mitigating factor: (a) the effect of the domestic violence on the offender, unless it is not reasonable to do so because of the exceptional circumstances of the case; and (b) if the commission of the offence is wholly or partly attributable to the effect of the domestic violence on the offender—the extent to which [this is the case].
9(10E)& (10F)	If— [(a) the court is sentencing a person for an offence involving personal violence (including attempting or conspiring) or result in physical harm to another person; and (b) the offender committed the offence while the other person … was performing, or had performed, the functions of the person's office or employment] …the court must treat the fact that the offender committed the offence while the other person was performing, or had performed, the functions of the person's office or employment as an aggravating factor, unless the court considers it is not reasonable to do so because of the exceptional circumstances of the case.

8.4.2 Application of sections 9(2A) and 9(3) of the PSA: Offences involving personal violence/physical harm

When sentencing a person for an offence that 'involved the use of, or counselling or procuring the use of, or attempting or conspiring to use, violence against another person' or that resulted in physical harm to another person,[26] there are special sentencing considerations. Courts must apply section 9(2A) (the principle of imprisonment as a last resort does not apply)[27] and give primary consideration to the factors in section 9(3) of the PSA (Table 8.2).[28]

25 For example, if the victim has previously committed an act of serious domestic violence, or several acts of domestic violence against the offender.
26 PSA (n 5) s 9(2A).
27 Ibid s 9(2)(a).
28 This does not mean that general factors in section 9(2) are wholly irrelevant: *R v HYQ* [2024] QCA 151 [78] (Bowskill CJ, Dalton JA and Wilson J agreeing) ('*HYQ*') citing *R v McGrath* [2006] 2 Qd R 58 [37] (Mackenzie J).

Table 8.2: Primary sentencing factors for offences of personal violence/resulting in physical harm

PSA Section		Primary factors applying to offences of personal violence / resulting in physical harm
9(2A)		The principles that imprisonment should only be imposed as a last resort and allowing the person to stay in the community is preferable do not apply
9(3)		The court must have regard primarily to:
	(a)	the risk of physical harm to any members of the community if a custodial sentence were not imposed
	(b)	the need to protect any members of the community from that risk
	(c)	the personal circumstances of any victim of the offence
	(d)	the circumstances of the offence, including the death of or any injury to a member of the public or any loss or damage resulting from the offence
	(e)	the nature or extent of the violence used, or intended to be used, in the commission of the offence
	(f)	any disregard by the offender for the interests of public safety
	(g)	the past record of the offender, including any attempted rehabilitation and the number of previous offences of any type committed
	(h)	the antecedents, age and character of the offender
	(i)	any remorse or lack of remorse of the offender
	(j)	any medical, psychiatric, prison or other relevant report in relation to the offender
	(k)	anything else about the safety of members of the community that the sentencing court considers relevant

Primary factors and the offence of rape – section 9(3) of the PSA

Section 9(2A) and the primary factors in section 9(3) of the PSA apply to rape as courts have found the act of 'rape involves physical harm to another'.[29] The position in respect of sexual assault is not so clear, and is discussed below. It has also been recognised that rape is an inherently violent offence.[30]

Section 9(3) of the PSA was introduced in 1997 to 'reflect the Parliament's judgment that the community expected that crimes of violence were to be punished more severely by courts than they had been'.[31] These factors have not been amended since their introduction.

The nature of the offence can make imprisonment more likely due to the primary sentencing considerations which apply.[32] As explained in *R v Oliver*:[33]

> At the forefront of a sentencing judge's consideration of an offender who falls within s 9(2A) must be the risk to the community on the one hand and the interests of the victim of the offender on the other hand. No longer is the sentence to be seen, in the first instance, from the perspective of the offender who should not, except as a last resort, be sentenced to an actual term of imprisonment. Instead, a judge must place at the forefront of the sentencing process the question whether the risk to the public and to the victim, as well as the circumstances of the victim, point to the need for prison.

29 *R v KU; Ex Parte A-G (Qld) (No 2)* [2008] QCA 154 [157] (de Jersey CJ, McMurdo P and Keane JA agreeing) ('*KU (No 2)*').
30 See, for example, *R v MBY* [2014] QCA 17 [71] nn 70 (Morrison JA, Muir JA and Daubney J agreeing); *R v Benjamin* (2012) 224 A Crim R 40 ('*Benjamin*'); *R v Tong (a pseudonym)* [2021] QCA 261 [43] (Sofronoff P, McMurdo JA and Applegarth J agreeing).
31 *R v O'Sullivan; Ex parte A-G (Qld)* (2019) 3 QR 196, 224 [75] (Sofronoff P, Gotterson JA, Lyons SJA) ('*O'Sullivan*').
32 PSA (n 5) ss 9(6)(d), (f)–(g), (k); (3)(a)–(b), (k).
33 *R v Oliver* [2018] QCA 348 ('*Oliver*').

> This is a large difference from s 9(2). It is justified by the community's abhorrence of the use of violence and the community's expectation that the courts will protect the community when necessary from the risk of further violence by incarcerating the offender. That will deter the particular offender, will deter others from offending and will satisfy a justified need for a sense of retribution.
>
> These considerations are not at the forefront of sentencing non-violent offenders.[34]

The section 9(3) factors are framed in a way that places a strong focus on *physical harm, violence* and *injury* and, while they refer to the 'circumstances of the offence', they do not expressly refer to victim harm, or mental and emotional harm, which are mentioned in the general sentencing factors.[35] This may contribute to how Court of Appeal decisions have previously considered an absence of physical injury or additional substantial violence as a distinguishing feature in cases of rape.[36] Recent decisions have encouraged legal practitioners and sentencing courts to adopt a broader understanding of harm rather than using physical injury as a tool for comparison, as 'psychological harm cannot be said to be any less significant'.[37]

The factors in section 9(3) also prioritise the sentencing purpose of *community protection*, rather than making reference to other purposes that are equally as important in sentencing for sexual offences, such as denunciation. For a court to assess risk to the community as a primary factor, it must have reliable information on risk of reoffending.[38] We consider this further in **Chapter 12**.

Whether sexual assaults involve the use of personal violence and therefore imprisonment is not a sentence of last resort

While courts have found the act of rape itself is an offence which involves physical harm to another and therefore, section 9(2A) will apply,[39] there is no similar clear statement of the application of section 9(2A) of the PSA applying to sexual assault. For this reason, whether this provision applies depends upon the individual facts of the case.[40]

The term 'violence' is not defined in the PSA. The Court of Appeal has said it should not have a broad meaning because a person will be subject to a 'harsher sentencing regime' that can affect the level of punishment.[41] In other cases, the Court of Appeal has considered the term 'violence' in respect of threatening behaviour and offences that have not involved physical contact.[42]

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34 Ibid [26]—[28] (Sofronoff P, Fraser and Philippides JJA agreeing).
35 PSA (n 5) s 9(2)(c)(i).
36 See *R v Tory* [2022] QCA 276 [38] (Kelly J, McMurdo and Dalton JJA agreeing); *R v Buchanan* [2016] QCA 33; *R v Benjamin* (n 30) [4].
37 *R v VN* [2023] QCA 220 [32] (Bowskill CJ, Morrison and Dalton JJA) ('*VN*'). See also *R v WBM* [2020] QCA 107 [31] (Applegarth J, Fraser and Mullins JJA agreeing) ('*WBM*').
38 Geraldine Mackenzie and Nigel Stobbs, *Principles of Sentencing* (The Federation Press, 2010) 225–26.
39 *KU (No 2*) (n 29) [157] (de Jersey CJ, McMurdo P and Keane JA).
40 *Oliver* (n 33) [33]–[34], [42] (Sofronoff P, Fraser and Philippides JJA agreeing).
41 *R v Breeze* [1999] QCA 303 [16]–[18] [23] (Pincus, Davies JJA, Demack J). See more recently *Oliver* (n 33) [32] (Sofronoff P, Fraser and Philippides JJA agreeing).
42 *Oliver* (n 33) (unlawful stalking where there were threats of violence); *R v Barling* [1999] QCA 16 (arson); *R v Breeze* [1999] QCA 303 (threat in a robbery); *R v Tobin* [2008] QCA 54 (bomb threat). In *Tran v Queensland Police Service* [2023] QDC 217 Heaton KC DCJ stated: 'Despite there being evidence of physical contact … the evidence was so nebulous about that contact as to deny a court from concluding [it] involved the use of 'violence'. It was, however, a concerning feature of the offence of stalking.' [17]. Going armed to caused fear is an offence of 'violence' [19]. See also *Youth Justice Act 1992* (Qld) ('YJA'), and whether manslaughter as a result of dangerous driving is considered an offence of 'violence': see *R v BXY* [2023] 11 QLR [74] (Bowskill CJ) cf *R v YTZ; Ex parte A-G (Qld); R v YTZ* [2023] QCA 87 [21], [31]–[32] (Mullins P, Gotterson AJA and Henry J).

In several District Court appeals, judges have reached different conclusions about whether section 9(2A) applies in sentencing similar forms of offending – for example:

- In *Biswa v Queensland Police Service,*[43] the appellant approached a stranger in public and attempted to cuddle her, laid across her legs with his face on her inner thigh face down touching bare skin and began kissing her bare skin. He was pushed away but grabbed her thighs with both hands and made repeated attempts to embrace her, then lunged at her trying to grab her groin, despite being repeatedly pushed away and told to stop.[44] This was held not to be 'violence against another person' for the purposes of section 9(2A) and therefore his actions did 'not warrant that the appellant serve actual time in custody'.[45]
- In *Braga v Commissioner of Police*,[46] the appellant grabbed the victim around the waist, pulling her to him before trying to kiss her mouth and neck, but in this case, bit her neck. This was held to be personal violence, and sections 9(2A) and 9(3) were therefore applied.[47]
- In *R v Downs,*[48] the offender had committed multiple acts of sexual assault against 8 teenage employees.[49] While not directly stated, the conclusion reached by the Court that imprisonment was a last resort gives rise to an inference that section 9(2A) did not.[50] The Court referred to the sentencing judge's considerations, which supported imprisonment as a last resort, including that 'none of the acts involved the use of force or threats of physical violence'.[51]

Recently, in *R v Singh*,[52] a case involving 3 sexual assaults by an Uber driver against an 18-year-old female victim (touching her breasts, attempting to kiss her, pushing her underwear to one side to touch her vulva, forcibly placing her hand on his penis and attempting to get her to masturbate it), the Court of Appeal found it 'unnecessary to consider whether the actions of the applicant involved violence'.[53] In doing so, it was noted that the sentencing judge acknowledged he was not compelled to order the applicant to serve time in actual custody, and 'it was not contended … that the offending involved violence'.[54]

Section 9(2A): Thematic sentencing remarks and data findings[55]

Data findings

In **Appendix 4**, we explore the sentencing trends and outcomes for sexual assault using the administrative courts dataset.[56]

43 [2016] QDC 333 ('*Biswa*').
44 Ibid [6]–[8].
45 Ibid 9 [43].
46 [2018] QDC 48.
47 Ibid [11]–[12] and [28].
48 [2023] QCA 223 ('*Downs*').
49 The offending involved unclipping a bra, touching and squeezing breasts, punching a breast, a slap on the bottom, grabbing one complainant's breasts and lifting her: Ibid [8]—[27], [32](i) (Morrison JA, Mullin P and Bond JA agreeing)
50 Ibid [32](i), [45] (Morrison JA, Mullin P and Bond JA agreeing)
51 Ibid [32] (i).
52 [2024] QCA 50 ('*Singh*').
53 Ibid 8 [39] nn 17.
54 Ibid.
55 See Chapter 4 for the methodology of the thematic sentencing remark analysis.
56 Ibid for a description of the methodology used for quantitative analysis.

We found that, over the 18-year data period, just under half of the penalties imposed in the Magistrates Courts for a non-aggravated sexual assault were custodial penalties (48.3%, n=466), while in the higher courts, almost 80 per cent of non-aggravated sexual assault penalties involved a custodial sentence.

In the higher courts, the proportion of custodial sentences has remained relatively stable over time, while in the Magistrates Courts, the proportion of custodial sentences has been increasing (from 31.5% in the period 2005–06 to 2008–09 to 53.6% in the period 2020–21 to 2022–23).

The proportion of sentences that involved actual imprisonment (imprisonment, partially suspended prison sentence or prison-probation order) in the Magistrates Courts also increased from 15.1 per cent to 26.8 per cent over this same time period. However, the reverse trend was found in the use of actual imprisonment in the higher courts, with 45.7 per cent of cases resulting in a sentence involving actual imprisonment in the period 2005–06 to 2007–08 compared with 31.8 per cent in the period 2020–21 to 2022–23.

Wholly suspended prison sentences are commonly imposed across both court levels for non-aggravated sexual assault, representing 26.8 per cent of sentencing outcomes in the Magistrates Courts and 45.3 per cent of outcomes in the higher courts based on cases sentenced in 2020–21 to 2022–23, and their use has been increasing.

The use of custodial sentences may provide some indication of how often section 9(2A) is being applied given this displaces the usual principle of imprisonment as a sentence of last resort. It does not, however, prevent a court from imposing a sentence other than imprisonment.

Thematic sentencing remarks analysis

From the thematic review of sentencing remarks for sexual assault, it was difficult to discern any pattern in the application of section 9(2A) or a finding of 'imprisonment as a last resort' under section 9(2)(a) of the PSA applied. This was due to the small number of sexual assault cases where this principle or relevant subsections were mentioned (n=9). A finding of 'imprisonment as a last resort' does not mean a sentence of imprisonment was not imposed but the numbers were too small for any analysis on the likelihood of this occurring.

There were no observed differences as to whether imprisonment was or was not considered to be a sentence of last resort, based on the conduct involved in the sexual assault, however this finding should be treated with caution due to the small sample size.

For example, in one case in the Magistrates Courts, involving a hug and then 'touching and firmly groping the complainant's breast' it was stated 'although there is not a high level of violence, it still comes within the definition, I am satisfied, of violence under the Penalties and Sentence Act' (sexual assault, major city, lower courts, non-custodial, #5). In contrast, in another case in the Magistrates Courts, in which the offence involved the sentenced person touching the victim's breast, removing the shoulder strap of their garment to expose the victim's breast and then grabbing her calf and trying to pull her back to him as he was being pushed away, the judicial officer in this case said, 'a period of [imprisonment] is to be a sentence of last resort' (sexual assault, major city, lower courts, custodial, #3).

In a District Court case, the perpetrator approached the victim survivor, who had an intellectual disability and Down Syndrome, at a bus stop, held her shoulder or face and put his tongue in her mouth, touched her breasts, touched her bottom and tried to put his hand inside her dress. The judge considered that 'a sentence of imprisonment should only be imposed as a last resort and that a sentence that allows an offender to stay in the community is preferable' (sexual assault, regional/remote, higher courts, custodial, #4).

One magistrate noted the lack of case law and the subjectiveness of determining whether an offence involved 'violence'. In this case, the sentenced person followed the victim, who was walking home late at night, grabbed her from behind and put his hand across her face and eyes and with the other hand put pressure on her 'vagina

over her clothing'. Attempting to drag her off the street caused her to scream, struggle to escape and use her keys to strike him:

> The question of violence against [an]other person is a vexed one. And it really in my view turns on how one takes a view about the grabbing from behind and the attempt to drag off the street whether that is sufficient to be violent, to be considered violent. There is no definition under the Penalties and Sentences Act of the word 'violence'. There are multitudes of cases that have dealt with what it means for these purposes. There is no case that is clear for this particular set of circumstances and certainly there's none been put before me. I do think that it is a violent offence but I'm going to err on the side of caution and sentence on the basis that imprisonment is the last resort. (sexual assault, major city, lower courts, custodial, #7)

8.4.3 Application of sections 9(4)–(6) of the PSA: Offences of a sexual nature against a child under 16 years

Sections 9(4)–(6) of the PSA (summarised in Table 8.4: Examples of special purposes, principles and factors in sentencing sexual offences – select jurisdictions) state primary factors that a court must consider when sentencing an offence of a sexual nature committed against a child under 16. For a discussion of the limitations placed on the use of 'good character' evidence under section 9(6A) of the PSA, see **Chapter 9**.

Table 8.3: Primary sentencing factors for offences of a sexual nature committed in relation to a child under 16 years

PSA Section	Primary factors applying to offences of a sexual nature committed in relation to a child under 16 years.
9(4)(a)	Sentencing practices, principles and guidelines applicable when the sentence is imposed apply, rather than when the offence was committed
(b)	The principles that imprisonment should only be imposed as a last resort and allowing the person to stay in the community is preferable do not apply
9(4)(c), 9(5)	The person must serve an actual term of imprisonment, unless there are exceptional circumstances (a court may consider the closeness in age between the offender and child when deciding exceptional circumstances)
9(6)	The court must have regard primarily to:
(a)	the effect of the offence on the child
(b)	the age of the child
(c)	the nature of the offence, including, for example, any physical harm or the threat of physical harm to the child or another
(d)	the need to protect the child, or other children, from the risk of the offender reoffending
(e)	any relationship between the offender and the child
(f)	the need to deter similar behaviour by other offenders to protect children
(g)	the prospects of rehabilitation including the availability of any medical or psychiatric treatment to cause the offender to behave in a way acceptable to the community
(h)	the offender's antecedents, age and character
(i)	any remorse or lack of remorse of the offender
(j)	any medical, psychiatric, prison or other relevant report relating to the offender
(k)	anything else about the safety of children under 16 the sentencing court considers relevant
9(6A)	The court must not have regard to the offender's good character if it assisted the offender in committing the offence

Primary factors

The factors in sections 9(4)–(6) of the PSA and their relevance to sentencing purposes were explained by the court in *R v Stable (a pseudonym)*:[57]

> Subsection 9(6) is different. It is preceded by s 9(4) which excludes the application of the general principle that imprisonment is a punishment of last resort and substitutes the principle that, except in cases in which there are extraordinary circumstances, an offender must be ordered to serve an actual term of imprisonment. This legislative command overrides any weight that would otherwise be given, if the discretion were unconstrained, to factors that do not amount to exceptional circumstances that would mitigate against a prison term, including facts relating to the rehabilitation of the offender.
>
> The 11 factors to which the court "must have regard primarily" fall into two categories. Seven of the factors are directed to circumstances affecting the child victim or potential victims. The remaining four factors concern the offender.
>
> Each of these are factors that a sentencing judge would have regarded as relevant as a matter of common law. However, that is not a reason to regard s 9(6) as a mere declaration of existing law. This is because s 9(6) does not

57 [2020] QCA 270 ('*Stable*').

> just put forward these factors as something that may be taken into account. They are factors to which the sentencing judge 'must have regard *primarily*'.
>
> The seven factors that are referrable to child victims of sexual offences have nothing to do with the offender's subjective circumstances. The first three factors direct attention to the victim and to the effect of the offence upon the victim, something distinct from the offender's personal situation. These factors are also irrelevant to general deterrence. The fourth factor, concerning the need to protect the victim and other potential victims, requires attention to be paid to the likelihood of recidivism and whether, taking that into account, the weight to be given to the mitigating factors might otherwise serve to reduce the sentence. The fifth factor directs attention to the relationship between the offender and the victim. This factor requires consideration of such factors as the child's vulnerability to the offender and the degree to which the offender took advantage of the relationship in order to be able to commit the offence. The sixth factor expressly requires weight to be given to general deterrence as a factor. The final factor, requiring the sentencing judge to have regard "primarily" to "anything else about the safety of children" that is considered relevant, again addresses matters beyond the offender's personal mitigating circumstances.[58]

While the majority of primary factors are concerned with the victim of the offence and a court must have regard to the age of the child, there is no express mention of a child's vulnerability because of their age, although this may be implied. The vulnerability of the child can be concluded by considering 'the relationship between the offender and the child'.

Similar to the discussion above with respect to the factors in section 9(3), the factors listed in this subsection are framed in a way that places a strong focus on *physical harm* and *threat of physical harm* and the need to protect the child or other children from that risk.[59] While recent decisions have encouraged legal practitioners and sentencing courts to adopt a broader understanding harm rather than using physical injury as a tool for comparison,[60] consideration of mental and emotional harm are only mentioned in the general sentencing factors, not the primary factors of 9(6).[61]

In **Chapter 6**, we discussed the intention behind the introduction of these primary considerations when a victim is a child under 16 (section 6.3.2). In summary, they 'constituted a legislative command to sentencing judges and signify the legislature's opinion that, henceforth, offences of a sexual nature against children were to be regarded with greater seriousness than previously' and 'to ensure that such offences were to be equated in seriousness to offences of violence'.[62]

As discussed in **Chapter 7**, we are mindful that median sentences for rape generally have remained stable over the past 18 years. Our research based on current sentencing trends for 3 years of data (2020–21 to 2022–23) shows that when custodial sentence lengths for rape of a child are compared with those for rape of an adult by conduct type, the increase or 'premium' that offences against children attract appears relatively modest, and in some cases there is no difference.[63]

Definition of 'an offence of a sexual nature', knowledge of victim age and application to sexual assault

The PSA does not define what constitutes 'an offence of a sexual nature in relation to a child'. While the PSA defines a 'sexual offence' by reference to schedule 1 of the *Corrective Services Act 2006* (Qld) ('CSA')

58 Ibid [41]–[44] (Sofronoff P and Fraser and Philippides JJA) (emphasis in original) (footnotes omitted).
59 PSA (n 5) ss 9(6)(c), (d).
60 See *VN* (n 37) [32] (Bowskill CJ and Morrison and Dalton JJA); *WBM* (n 37) [31] (Applegarth J, Fraser and Mullins JJA agreeing).
61 PSA (n 5) s 9(2)(c)(i).
62 *Stable* (n 57) [33]–[34] (Sofronoff P, Fraser and Philippides JJA).
63 See further Appendix 4.

for the purpose of the parole provisions,[64] the courts have found section 9(4)–(6) of the PSA captures a broader range of offences beyond the definition of a 'sexual offence'.[65]

Some offences of a sexual nature against a child prescribe the child's age as an element of the offence.[66] For sexual assault, the victim survivor's age is not an element of the offence, which means it is not directly relevant to establishing the offence.

Despite a victim being under 16, a person being sentenced may seek to rely on the principle of imprisonment as a last resort. This point is illustrated in *DMS v Commissioner of Police*,[67] where the victim was 15 and 11 months and in *R v Downs*,[68] in which the victims were aged between 15 and 17 and imprisonment was considered a last resort.

Prior to the introduction of section 9(4)(c) of the PSA (as it is now), case law established that imprisonment should be imposed for a sexual assault on a child unless there were exceptional circumstances.[69] In this respect, the introduction of this provision simply reflected the position at common law. However, in *R v Manser*,[70] the complainant was aged 17 years and the Court found 'the legislature chose, by amendment, to except from s 9(2)'s application sexual offences against children under the age of 16, but not older. This is not, of course, to say that imprisonment cannot be imposed in such cases.'[71]

8.4.4 Aggravating and mitigating factors

Under the PSA, a court is required to take any aggravating or mitigating factors into account when determining a sentence.[72] Aggravating factors include objective details about the offence, the victim and/or the person to be sentenced, which tend to increase the person's culpability and the sentence they receive. Mitigating factors include subjective details about the person and the offence, which tend to reduce the severity of the sentence. At times 'many of these factors conflict with each other',[73] 'pulling … in opposite directions'.[74]

In **Chapter 6**, we list some of the relevant aggravating and mitigating considerations that are relevant in sentencing sexual offences. Statutory aggravating factors include the offence being a 'domestic violence offence',[75] a person's prior criminal history (if reasonable to do so, taking into account its nature, relevance and time since the conviction),[76] and whether the offence was committed while the victim was at work.[77] In some cases, these do not apply if a court decides it is not reasonable to treat these as

64 PSA (n 5) pt 9 div 3; *Corrective Services Act 2006* (Qld) sch 1 ('CSA').
65 See *HYQ* (n 28).
66 See, for example, Indecent treatment of children under 16: *Criminal Code Act 1899* (Qld) sch 1, s 210 ('*Criminal Code* (Qld)).
67 [2020] QDC 345 ('*DMS*').
68 *Downs* (n 48).
69 *R v Quick; Ex parte A-G (Qld)* [2006] QCA 477 [5] (de Jersey CJ, Chesterman J agreeing) citing *R v L; Ex parte A-G (Qld)* [2000] QCA 123; *R v M; Ex parte A-G (Qld)* [1999] QCA 442; *R v Pham* [1996] QCA 3 ('*Pham [1996]*').
70 [2010] QCA 32.
71 Ibid [14].
72 PSA (n 5) s 9(2)(g).
73 *R v Symss* (2020) 3 QR 336, 345 [31] (Sofronoff P, Morrison JA agreeing at [43] and McMurdo JA agreeing at [44]) ('*Symss*'). The High Court of Australia has made statements to this effect in discussing the nature of the approach taken to sentencing in Australia known as 'instinctive synthesis'. See *Wong* (n 37) (n 3) 611 [75] (Gaudron, Gummow and Hayne JJ cited with approval by Gleeson CJ, Gummow, Hayne and Callinan JJ in *Markarian* (n 2) at 373–5 [37].
74 *Markarian* (n 2) 405 [133] (Kirby J).
75 PSA (n 5) s 9(10A). This applies unless the court considers it is not reasonable due to the exceptional circumstances of the case. For the definition of a 'domestic violence offence', see *Criminal Code* (Qld) (n 66) s 1.
76 PSA (n 5) s 9(10), however the weight given depends on the nature of the previous conviction and its relevance to the current offence and the time elapsed since the conviction.
77 Ibid s 9(10F) - only if section 9(2A) applies.

aggravating because of the exceptional circumstances involved.[78] An aggravating factor is different from a 'circumstance of aggravation', which means the person who has been convicted is 'liable to a greater punishment' than if that circumstance is not charged and proven.[79]

8.4.5 Other factors

Child Protection (Offender Reporting and Offender Prohibition Order Act 2004 (Qld)

Where a victim of a sexual offence is a child (under 18 years), the *Child Protection (Offender Reporting and Offender Prohibition Order) Act 2004* (Qld) ('CPOROPO Act') can apply.

For certain offences to which the scheme applies,[80] the court may take into account the effect of the CPOROPO Act.[81] The purpose of the CPOROPO Act is to require particular offenders who commit sexual or other serious offences against children to keep police informed of their whereabouts and other personal details for a period of time after their release into the community. The objective of this scheme is to reduce the likelihood that they will reoffend, and to facilitate the investigation and prosecution of any future offences.[82]

Serious vilification and hate crimes

In 2024, amendments were made to the *Criminal Code* (Qld) establishing a circumstance of aggravation under section 52B of the *Criminal Code* (Qld), which applies if the offender was wholly or partially motivated to commit the offence by hatred or serious contempt for a person or group of person in relation to race, religion, sexuality, sex characteristics or gender identity.[83]

These reforms, when legislated, were not extended to the offence of sexual assault or other sexual offences.

The inclusion of sexual offences as prescribed offences under the new scheme was supported by the Caxton Legal Centre and Equality Australia.[84]

The Legal Affairs and Safety Committee ('LASC') on its report on the amendment Bill recommended '[t]hat the Queensland Government conducts a review within 24 months of the commencement of the Bill to ensure that the offences to which the circumstance of aggravation apply are adequate to address the serious vilification and hate crimes experienced by members of the Queensland community, with

78 Ibid ss 9(10A), (10F).
79 *Criminal Code* (Qld) (n 66) s 1. For example, there are 2 specific subsections of section 352 of the *Criminal Code* which establishes the offence of sexual assault that define circumstances of aggravation for the purposes of this offence and provide for higher maximum penalties to apply where those aggravating circumstances are established.
80 For what is a 'reportable offence' see *Child Protection (Offender Reporting and Offender Prohibition Order) Act 2004* (Qld) s 9 ('CPOROPO Act').
81 *R v Bunton* [2019] QCA 214 [27]–[31] (Morrison JA, Sofronoff P and Fraser JA agreeing) citing *R v Rogers* [2013] QCA 192 [40]–[42]. While a court may take it into account, a sentence should not be 'calculated to avoid the operation' of the scheme: *R v Nona* [2022] QCA 26 [79] citing *R v Rodgers* [2021] QCA 97 [11] (Henry J, Boddice J agreeing), see also [74]-[89] and [4] (Bond JA).
82 *CPOROPO Act* (n 80).
83 *Criminal Code (Serious Vilification and Hate Crimes) and Other Legislation Amendment Act 2023* (Qld) pt 3. This part commenced on 29 April 2024: *Proclamation No 2—Criminal Code (Serious Vilification and Hate Crimes) and Other Legislation Amendment Act 2023* (Qld) SL 193/2023.
84 Caxton Legal Centre Inc, submission 21, 2; Equality Australia, submission 23, cited in the Legal Affairs and Safety Committee, Parliament of Queensland, *Criminal Code (Serious Vilification and Hate Crimes) and Other Legislation Amendment Bill 2023* (Report No. 49, 57th Parliament, June 2023) 16–17 ('Legal Affairs and Safety Committee Report').

particular consideration to be given to the inclusion of sexual offences and property crimes such as graffiti.'[85]

The then government, in its response, committed to:

> give this recommendation detailed consideration, including the timeframe within which a review might occur, in conjunction with the implementation of the [Queensland Human Rights Commission Report, *Building Belonging – Review of Queensland's Anti-Discrimination Act 1991*)] recommendations'.[86]

The LASC further commented that consideration should be given to 'amending s 9 of the *Penalties and Sentences Act 1992* to allow judicial discretion in sentencing to increase a sentence where serious vilification or a hate crime may be identified as an aggravating circumstance'.[87]

8.4.6 How legislative changes can impact sentencing practices

As the primary source of sentencing guidance, section 9 of the PSA has been a convenient focus of law reform since it was first introduced in 1992, and in the last 32 years, the sentencing factors in this section have been amended, created, repealed or reintroduced on 29 occasions. When the PSA was introduced, section 9 spanned 3 pages with 4 subsections (**Appendix 12**). Currently, it comprises 11 pages with 24 subsections (**Appendix 11**). The frequency of amendments and volume of changes can make the law difficult to navigate and understand.[88] This can create an unnecessary burden on the criminal justice system, impact efficiency by resulting in delays or unnecessary appeals and impact public confidence.[89]

Legislative amendments to section 9 of the PSA generally are intended to change sentencing practices.[90] For example, in 2003 the *Sexual Offences (Protection of Children) Amendment Act 2003* (Qld) amended the *Criminal Code* (Qld) and PSA 'to ensure that sentences imposed on child sex offenders reflect the significant physical and psychological consequences of these offences'.[91] Parliament was of the view these reforms would ensure that 'a tougher sentencing regime [would] apply for persons convicted of sexual offences against children'.[92] Importantly, the sentencing reforms were 'designed to ensure that child sex offences are recognised as offences equating in seriousness to offences of violence'.[93]

In May 2016, the PSA was amended to express that if an offence was a domestic violence offence, this was an aggravating factor, unless there are exceptional circumstances.[94] While the relationship between the person being sentenced and the victim, and its relevance to sentencing was always a relevant sentencing factor that could be taken into account, [95] this was not expressly stated in the legislation. The

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85 Legal Affairs and Safety Committee Report (n 84), rec 5.

86 Queensland Government, *Queensland Government Response to the Legal Affairs and Safety Committee Report No. 49, 57th Parliament, Criminal Code (Serious Vilification and Hate Crimes) and Other Legislation Amendment Bill 2023* (3 October 2023) 3.

87 Legal Affairs and Safety Committee Report (n 84) 20.

88 Law Commission (UK), *The Sentencing Code* (Report, Law Com No 382, 2018) vol 1, 7 [1.15] ('*The Sentencing Code*').

89 Ibid 8–9 [1.16] – [1.21].

90 Another example is in respect of manslaughter where the child was under 12 years, under PSA (n 5) s 9(9B): see *R v Timberlake* (Supreme Court of Queensland, 29 September 2023, Freeburn J), *R v Peverill* (Supreme Court of Queensland, 6 October 2023, North J); *R v Conley* (Supreme Court of Queensland, 16 February 2023, Applegarth J) for recent examples where the aggravating factor has been applied.

91 Explanatory Notes, Sexual Offences (Protection of Children) Amendment Bill 2002 (Qld) 1 ('Sexual Offences (Protection of Children)' . This Act was the result of a joint Queensland Crime Commission and Queensland Policy Service inquiry into child sexual abuse, which was the subject of a report, *Project Axis, Child Sexual Abuse in Queensland: The Nature and Extent*.

92 Explanatory Notes, Sexual Offences (Protection of Children) (n 91) 7.

93 Ibid 2.

94 PSA (n 5) s 9(10A). Inserted by *Criminal Law (Domestic Violence) Amendment Act 2016* (Qld) s 5. The Act was passed on 5 May 2016 to commence the date of assent. For where the exception has been applied: see, for example, *R v Blockey* [2021] QCA 77 [11] (Sofronoff P and McMurdo JA and Boddice J); *R v Solomon* [2022] QCA 100.

95 See *R v Gesler* [2016] QCA 311 [31] (Henry J and Fraser and McMurdo JJA); *R v McCauley* [2000] QCA 265, 5–6 (Thomas JA, Davies and McPherson JJA agreeing).

intention of the aggravating factor was to recognise the increased culpability of an offender who committed an offence in these circumstances.[96]

Since this amendment, the Court of Appeal has referred to this aggravating factor as signifying legislative intention that offences committed in the context of domestic violence are more serious than previously decided cases.[97] In this way, an aggravating factor in legislation can influence sentencing practices, as cases decided prior to the amendment may no longer be used as a useful comparison:

> The previous sentencing decisions that were relied upon at first instance to determine the sentences in this case concerned sentences that were imposed under a different statutory regime. There have been the successive legislative changes to the laws that must be applied in the exercise of the sentencing discretion in these cases.[98] The range for appropriate sentences that was established by cases like *Chard* can no longer be regarded as useful for purposes of comparison because in none of them were the presently applicable legislative provisions taken into account. They were also not considered in the sentences under appeal.[99]

In *R v McConnell*,[100] the Court of Appeal also noted that comparable cases decided prior to these legislative amendments carried limited weight:

> All of those cases were decided before the commencement of operation on 5 May 2016 of subsection 10A of section 9 of the *Penalties and Sentences Act 1992* (Qld). … As Mullins J observed in *R v Hutchinson*, this provision is likely over time to have an effect on the sentencing of offenders convicted of offences that are domestic violence offences, but the effect in a particular case will depend on balancing all of the relevant factors relating to the offending and the offender.[101]

Similarly, in *R v SDM,*[102] the Court of Appeal also commented on the limited utility of cases decided prior to the amendment:

> In view of the response of the Parliament to addressing the problem of violence committed within, or after the conclusion of, a domestic relationship that is reflected in s 9(10A) of the Act, the sentence imposed in *Pickup* would not now reflect an appropriate sentence for that type of offending with the aggravating factor of being a domestic violence offence.[103]

However, in *R v RBO*,[104] it was considered 'past cases which took the aggravating context of violent offending in a domestic setting into account as a relevant circumstance, may retain some potentially comparable relevance.'[105] It was also found that introducing an aggravating factor in the PSA "may' result in a more punitive sentence' however, all the circumstances of the case must be considered.[106] The Court of Appeal referred to an earlier decision of *R v Pham*:[107]

> some of the principles described by s 9 of the PSA may have great weight and others little weight, depending on the circumstances of each offence and each offender. In some cases, some of these principles will have little or no effect upon the outcome of the process because, in the particular circumstances, other principles have an almost overwhelming claim on the sentencing discretion.[108]

96 Explanatory Notes, Criminal Law (Domestic Violence) Amendment Bill (No. 2) 2015 (Qld).
97 See *O'Sullivan* (n 31); *R v Hutchinson* (2018) 271 A Crim R ('*Hutchinson*'); *R v McConnell* [2018] QCA 107 [22] (Fraser JA, Sofronoff P and Philippides JA agreeing) ('*McConnell*').
98 see *R v Kaye* (1986) 22 A Crim R 366, discussed in *Dalgliesh* (n 3) [57] per Kiefel CJ, Bell and Keane JJ
99 *O'Sullivan* (n 31) [110] (Sofronoff P and Gotterson JA and Lyons SJA).
100 *McConnell* (n 97).
101 Ibid [17] (citations omitted).
102 [2021] QCA 135.
103 Ibid [37] (Mullins JA, Fraser JA and Henry J agreeing).
104 [2024] QCA 214 ('*RBO*').
105 Ibid [111] (Henry J, Mullins P and Brown JA agreeing).
106 Ibid [119] (Henry J, Mullins P and Brown JA agreeing).
107 (2009) 197 A Crim R 246.
108 Ibid [7] (Keane JA) ('*Pham (2009)*').

A legislated aggravating factor will not always have a significant impact, particularly in circumstances where it was already considered aggravating prior to its amendment, such as repeated sexual conduct with a child:

> the amendment to s 9(10A) of the *Penalties and Sentences Act* would not of itself have justified a significantly more severe sentence in the present case compared to sentences imposed in the past, which were imposed in similar circumstances and where similar aggravating circumstances were taken into account. In the present case, given the fact that the sentence of 12 years is not outside the exercise of sound sentencing discretion when the comparable cases which serve as a yardstick are considered, s 9(10A) of the *Penalties and Sentences Act* has little impact, although it serves to support a sentence being imposed at the upper end of that sentencing discretion.[109]

8.4.7 What do other jurisdictions do?

Similar to Queensland, the sentencing legislation in other states and territories and international jurisdictions examined set out general purposes, principles and factors courts must consider when imposing sentence.[110] Some jurisdictions provide a comprehensive list of factors (including aggravating and mitigating factors) a court must have regard to (see New South Wales, Australian Capital Territory and the Commonwealth).[111] In comparison, other jurisdictions list aggravating factors but make no reference at all to mitigating factors, leaving the discretion to the sentencing court (see Tasmania).[112]

Some jurisdictions express special purposes, principles and factors when sentencing offences involving sexual violence and/or a child victim, presented in Table 8.4.

109 *R v BDQ* (2022) 298 A Crim R 120 [54] (Brown J, Morrison and McMurdo JJA agreeing).
110 See *Crimes (Sentencing) Act 2005* (ACT) s 33; *Crimes (Sentencing Procedure) Act 1999* (NSW); *Sentencing Act 1995* (NT); *Sentencing Act 2017* (SA) s 11; *Sentencing Act 1991* (Vic); *Sentencing Act 1995* (WA) s 6(2); *Crimes Act 1914* (Cth); *Sentencing Act 2002* (NZ); *Sentencing Act 2020* (UK) pts 2–13, constitute the 'Sentencing Code': s 1.
111 *Crimes (Sentencing) Act 2005* (ACT) s 33; *Crimes (Sentencing Procedure) Act 1999* (NSW) s 21; *Crimes Act 1914* (Cth) s 16A.
112 *Sentencing Act 1997* (Tas).

Table 8.4: Examples of special purposes, principles and factors in sentencing sexual offences – select jurisdictions

Jurisdiction	Relevant section	What it applies to	Special purposes/factors
South Australia	*Sentencing Act 2017*, s 11(b)	Any offence	Court must take into account: • The personal circumstances and vulnerability of any victim of the offence, whether because of the victim's age, occupation, relationship to the defendant, disability or otherwise
Northern Territory	*Sentencing Act 1995*, s 5(2)(ba)	Sexual offences[113]	Court must have regard to: • whether the victim contracted a sexually transmissible medical condition as a result of the offence; and • whether the offender was aware at the time of the offence that he or she had a medical condition that could be sexually transmitted.
Tasmania	*Sentencing Act 1997*, s 11A(1)	Sexual offences	Court must treat as aggravating: • victim under the care, supervision or authority of the person; • victim being a person with a disability; or • victim under the age of 13 (or 18 years if the person is in a position of authority in relation to the victim); or • subjecting the victim to violence/threat of violence; • supplying the victim with alcohol or drugs to facilitate the commission of the offence; • entering the victim's home forcibly or when uninvited; • committing the offence in the presence of someone beside the victim; • doing an act likely to 'seriously and substantially degrade or humiliate the victim'.
Victoria	*Sentencing Act 1991*, s 6D	'serious offender' (including a 'serious sexual offender')[114] for a 'relevant offence'[115]	Where imprisonment is justified, when deciding the sentence length, court must treat the protection of the community as the principal sentencing purpose.[116]

113 Sexual offences are defined in s 3 of the *Sentencing Act 1995* (NT) to mean offences set out in sch 3.

114 *Sentencing Act 1991* (Vic) s 6B defines what is meant by a 'serious offender', including a 'serious sexual offender'. This scheme is discussed in Chapter 10 of the *Consultation Paper: Background*.

115 A 'relevant offence' in relation to a serious offender, is defined for a serious sexual offender to mean a sexual offence or a violent offence: ibid s 6B(3). A sexual offence or violent offence is further defined in s 6B(1) to mean an offence to which clauses 1 and 2 of Schedule 1 apply and includes rape, sexual assault as well as other sexual violence and non-sexual violence offences.

116 The court is also permitted, in order to achieve that purpose, to sentence the offender to a term of imprisonment that is longer than that which is proportionate to the gravity of the offence considered in light of its objective circumstances. The discretion to impose a disproportionate sentence is one the Victorian Court of Appeal has found should be exercised rarely: *R v GLH* [2008] VSCA 88, [25] (Lasry AJA, Warren CJ and Ashley JA agreeing) referring with approval to observations made by Buchanan JA in an earlier decision of *R v Prowse* [2005] VSCA 287.

Jurisdiction	Relevant section	What it applies to	Special purposes/factors
Cth	*Crimes Act 1914,* s 16A(2AAA)	Commonwealth child sex offences[117]	In addition to any other matters, court must have regard to the objective of rehabilitating the person, including by considering whether it is appropriate, taking into account such of the following matters as are relevant and known to the court: (a) when making an order--to impose any conditions about rehabilitation or treatment options; (b) in determining the length of any sentence or non-parole period--to include sufficient time for the person to undertake a rehabilitation program.
Canada	*Criminal Code,* RSC 1985, c C-46, ss 718.01, 718.04 718.2(1) and 718.201	Offence that involved the abuse of person under 18 years	Court required to give primary consideration to the purposes of denunciation and deterrence.
		Offence that involved the abuse of a person who is vulnerable (including because the person is Aboriginal and female)	Court required to give primary consideration to the purposes of denunciation and deterrence.
		Offence involving the abuse of an intimate partner	Court must consider the increased vulnerability of female persons who are victims, giving particular attention to the circumstances of Aboriginal female victims
		Any offence	Statutory aggravating factors include that the offender: • abused the person's intimate partner or member of the victim or the person's family; • abused a person under the age of eighteen years; abused a position of trust or authority in relation to the victim.
New Zealand	*Sentencing Act 2002,* s 9A s 9(1)(g)	Offence involving violence against, or neglect of child under 14 years	Court must treat as aggravating (to the extent they apply): • the defencelessness of the victim; • any serious or long-term physical or psychological effect on the victim; • the magnitude of the breach of any relationship of trust between the victim and offender; • threats by the offender to prevent the victim reporting the offending; • deliberate concealment of the offending from authorities.
		Any offence	Court must treat as aggravating factors including: • that the victim was particularly vulnerable because of his or her age or due to any other factor known to the offender.

117 Commonwealth child sex offences are defined in s 3 of the *Crimes Act 1914* (Cth) and include child abuse material offences established under the Commonwealth *Criminal Code*.

8.4.8 Stakeholder views

In our Consultation Paper, we invited feedback on:

- how well section 9 of the PSA captures the principles and factors that are important in sentencing for sexual assault and/or rape offences, and whether the section can be improved (Q.3);
- whether current forms of sentencing guidance are adequate to guide sentencing for rape and sexual assault, and any problems or limitations with these (Q.4); and
- whether the current approach to sentencing for sexual assault and rape committed against children is appropriate. What about for other people who are vulnerable? (Q.5).

Submissions from victim survivor support and advocacy stakeholders

Fighters Against Child Abuse Australia ('FACAA') supported changes to sentencing guidance to remove mitigating factors:

> The current guidelines offer several acceptable reasons why someone might commit [an] offence however there is no justification for rape or sexual abuse. It mentions the perpetrator being a victim of domestic violence or rape themselves, yet any survivor of these crimes will tell you that they wouldn't inflict this crime upon their worst enemy. It mentions their heritage however ignorance of the law is not an excuse for breaking the law. The fact is there are no acceptable reasons for committing a sexual offence so there should be no reasons for giving lenient sentences to rapists and sexual abusers.[118]

It also considered that where a victim is under 16 there should be 'special protections'[119] and changes to section 9(4) and (6) of the PSA:

> [A] There needs to be changes made to … the specifics of the exceptional circumstances that could lead to a non-custodial sentence. There needs to be a sliding scale whereby the younger the victim the more severe the sentence. C does not take into account that all rapes are violent offences because forcible penetration of a child is always violent and painful for the child and therefore rape is always a violent offence. D Once someone has raped a child, they are a risk to all children because they will forever be trying to find more child victims. E needs to include a severely aggravating factor for those in charge of children. F the need to deter similar behaviours needs to be re-written to be the need to stop similar crimes as it is a crime we are talking about also this principal should be the reason that non-custodial sentences should never apply for rape or sexual abuse cases. G child rapists can never be rehabilitated.[120]

Basic Rights Queensland supported further guidance to recognise the vulnerability of the victim in relation to age, the impact of the offence on the victim, the power imbalance and whether the offence occurred in the workplace. It was suggested that:

> protected attributes under Queensland Anti-Discrimination law, and any intersection of multiple attributes of disadvantage (as is foreshadowed in the forthcoming Anti-Discrimination Bill 2024 (Qld)), be a reference point for the consideration and determination of the vulnerability of the victim, and power imbalance and abuse between the parties.[121]

Basic Rights Queensland supports a similar approach to that of New Zealand, which provides the court must treat as aggravating 'that the victim was particularly vulnerable because of his or her age or due to any other factor known to the offender.[122] It also supports a similar approach to the additional aggravating factors:

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118 Submission 15 (Fighters Against Child Abuse Australia), 9–10.
119 Ibid 10.
120 Ibid 11.
121 Submission 19 (Basic Rights Queensland).
122 Ibid, citing *Sentencing Act 2002* (NZ) s9(1)(g).

> 9A Cases involving violence against, or neglect of, child under 14 years:
>
> (1) This section applies if the court is sentencing or otherwise dealing with an offender in a case involving violence against, or neglect of, a child under the age of 14 years.
>
> (2) The court must take into account the following aggravating factors to the extent that they are applicable in the case:
>
> (a) the defencelessness of the victim:
>
> (b) in relation to any harm resulting from the offence, any serious or long-term physical or psychological effect on the victim:
>
> (c) the magnitude of the breach of any relationship of trust between the victim and the offender:
>
> (d) threats by the offender to prevent the victim reporting the offending:
>
> (e) deliberate concealment of the offending from authorities.
>
> (3) The factors in subsection (2) are in addition to any factors the court might take into account under section 9.
>
> (4) Nothing in this section implies that a factor referred to in subsection (2) must be given greater weight than any other factor that the court might take into account.[123]

Moreover, it considers 'any attempt to further intimidate or prevent the victim from seeking assistance or reporting the event, should be an aggravating factor'.[124]

In respect of offences in the workplace, it considers that, '[t]he breach of trust, and the abuse of a work-related power dynamic, especially where the victim has one or multiple, and intersecting protected attributes, should be considered and reflected in sentencing.'

Basic Rights Queensland also supports inclusion of greater cultural considerations in sentencing, observing that that while these factors do not excuse rape and sexual assault, 'there are circumstances where it may be considered relevant in the context of sentencing for these offences'.[125] It was stressed that these circumstances are only of relevance where they relate to the experience of trauma or other psychological factors.

The Queensland Sexual Assault Network (''QSAN') advocated that, for 'victim-survivor rights to be recognised in any meaningful way, these rights need to be explicit and clear, especially in the criminal justice system which traditionally has focussed on defendants' rights and not on the rights of victim-survivors'.[126] It also considered that 'sentencing practice should be more aligned to community expectations and the gravity and impact of these crimes on victim survivors and a sentencing uplift be considered'.

With respect to amending sentencing legislation, QSAN suggested that 'stronger sentencing guidelines be developed' to limit 'suspended sentences and no convictions recorded in sexual violence matters'.[127]

Several victim survivor support and advocacy stakeholders raised significant concerns about the use of 'good character' evidence and, in particular, the use of character references. They told us that the use of personal references attesting to the person being otherwise of ‘good character’ can be deeply distressing and retraumatising for victim survivors, and this evidence should not be permitted at all, or at a minimum, the assertions made should be more closely scrutinised. Among the many concerns raised was that the

123 *Sentencing Act 2002* (NZ) s 9A.
124 Submission 19 (Basic Rights Queensland).
125 Ibid.
126 Submission 24 (QSAN).
127 Ibid.

use of personal references that suggest the person being sentenced is otherwise of 'good character' serves to minimise the objective seriousness of the person's offending, water down messages of denunciation and undermine perpetrator accountability. This issue is explored in detail in **Chapter 9**.

Other submissions

One submission considered that the current approach to sentencing sexual assault and rape offences committed against a child is not appropriate, as 'all too often we hear perpetrators get off lightly on rape [offences] of children'.[128] They considered that parole should not be an option 'when there has been any type of child sexual abuse'.[129] It was also recommended there needs to be greater transparency and publication of sentencing remarks, by recommending section 9 of the PSA be amended 'to release all judgments onto the Parole Board's website or create a public register in support of community safety'.[130]

Submissions from legal stakeholders

Legal Aid Queensland ('LAQ') told us:

> Section 9 in its current form is sufficiently detailed to consider and apply the relevant principles and factors that are prevalent in sexual offences. Relevantly, section 9 specifically addresses punishment, rehabilitation, personal and general deterrence, protection of the community and harm done to the victim. It does not reserve a sentence of imprisonment as a sentence of last resort. It further ensures that any circumstances the court considers relevant can be taken into account. LAQ does not support further amendments, particularly of a prescriptive nature, that could have the effect of restricting the ability of a judicial officer to exercise discretion as to the relevant purposes, guidelines, and principles to have regard to in each case and appropriately reflect in their sentence the specific circumstances of that case.[131]

They also considered 'exceptional circumstances' should not become 'too prescriptive' and supported maintaining judicial discretion, particularly in unique cases.[132] LAQ supports, as far as possible, maintaining the Courts' sentencing discretion to be able to cater for unique and unexpected situations. They supported not further defining this provision to allow for 'changing or evolving community standards relevant at the time of sentence'.

The Youth Advocacy Centre (''YAC') similarly considered that section 9 of the PSA captures important sentencing factors and principles. It considered that any further amendments should be meaningful and 'should not complicate or fetter the sentencing discretion by narrowing the considerations for sentencing'.

YAC recommended 'there needs to be a statutory recognition of victim vulnerability of children' to recognise their exceptional vulnerability and the long-term harm and impact on their development sexual offences have on children. It also noted that a child with disability or from another background has additional vulnerabilities and 'victim vulnerability connected to disability and background could be identified as a separate aggravating feature under the PSA.'

It considered that 'exceptional circumstances' are difficult to establish but noted that it does not automatically apply where age is not an element of the offence.[133] YAC requested us to consider extending the application of section 9(4)–(6) to victims aged under 18, to recognise the vulnerability of all children and to be consistent with new laws.

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128 Submission 27 (name withheld).
129 Ibid.
130 Ibid.
131 Submission 23.
132 Ibid, citing *R v Rainbow* [2018] QDCSR, 13 December 2018; *R v OYJ* [2020] QDCSR 379.
133 Citing *DMS* (n 67); *Downs* (n 48).

The Aboriginal and Torres Strait Islander Legal Service ('ATSILS') considered 'any proposed amendments to the existing regime do not inadvertently worsen progress towards targets to reduce incarceration rates of Aboriginal and Torres Strait Islander individuals' and considered 'opportunities are taken to improve the current regime to promote alternatives to incarceration'.[134] In this regard they recommended that we consider whether to legislate the principle in *Bugmy v The Queen*,[135] that 'the effects upon an offender of profound deprivation do not diminish over time and should be given full weight when sentencing the offender'.[136]

Subject matter expert interview participants

Sentencing factors in the PSA

Most participants considered the factors in the PSA were extensive and that no additional guidance as to relevant factors was required.[137] Many considered that there are too many factors[138] and section 9, in particular, had become 'increasingly complicated',[139] with one participant suggesting if anything more was added, it would 'need its own index at the end of the section'.[140] Another viewed is as a 'growing beast', while being a 'useful checklist', particularly for self-represented people appearing in the Magistrates Courts.[141]

Another participant commented that while they found section 9 useful, it may not be accessible to community members from a non-legal background:

> I also think that in terms of explaining it in a wider sense to those who are not lawyers, the phraseology is problematic, but I think with sufficient legal knowledge, you are able to explain to them what each one of them means in the context of their particular matter.[142]

Another participant similarly considered that section 9 'could probably be rewritten in a way that was clearer and more user-friendly.'[143]

There were mixed views about whether greater clarification was needed for 'exceptional circumstances' in section 9(4)(c), with some participants considering it was appropriately clear[144] but others considering it a 'grey area'.[145]

Application of PSA ss 9(2A) and 9(3)

One participant discussed the focus in section 9(3) on physical harm, 'particularly sexual assault, it's – there's less physical harm than emotional'.[146] Another participant noted that the

> brutality involved with rape is always front and centre. I don't think that needs clarifying to anyone because it's just, I mean, it comes with all those factors of the abhorrent nature of the offending … I can't see how you're helping anything or anyone by adding it in.

134 Submission 28 (Aboriginal and Torres Strait Islander Legal Service Inc).
135 (2013) 249 CLR 571 (''*Bugmy*'').
136 Submission 28 (Aboriginal and Torres Strait Islander Legal Service Inc).
137 SME Interviews 1, 5, 6, 7, 9, 10, 15, 17, 21, 22, 24, 25.
138 SME Interviews 8, 13, 14, 16.
139 For example, SME Interviews 14 and 25.
140 SME Interview 25.
141 SME Interview 6.
142 SME Interview 11.
143 SME Interview 13.
144 SME Interviews 7, 20.
145 SME Interview 4
146 SME Interview 12.

There were different views about whether sexual assault involved 'violence' for the purpose of section 9(2A) and 9(3). One participant considered sexual assault should automatically fall into section 9(2A) and 9(3): 'Because it's got the word assault in it. So straight up, it involves violence. It doesn't matter what the level is, it involves violence.'[147] Another considered that it is 'not clear' and 'would involve specific arguments to the court'.[148] Yet another considered clarity would be beneficial in cases such as where the victim was unconscious.[149] One participant considered that 'if there is a prevailing view that any sexual assault is by its nature violent, that expressly stating that would, I think be helpful'.[150]

Application of PSA s 9(6) – whether to extend it

There were mixed responses from participants about whether to extend the primary factors in section 9(6) of the PSA to victims aged 16 and 17 years. Some participants supported an extension[151] because a child is aged 16 and 17 years[152] and they are 'in their formative years'.[153] Other participants did not agree on the basis that it would not make a difference[154] and that further prescription in the PSA is not needed,[155] or unnecessary.[156]

Consultation events

At our consultation events, comments included:

- Most victim survivors considered the sentence given is not sufficiently reflective of the harm they have suffered and want more punitive sentences. However, there was agreement that most victim survivors just want to be believed more than anything.[157]
- The PSA currently reflects a gendered lens, and it was questioned whether it works in harmony with the *Human Rights Act 2019* (Qld) ('HRA').[158]
- There needs to be better genuine recognition/acknowledgment of the victim from both the court and the offender during the sentence, including what has happened to them, the impact the offending has had on their lives and how their life trajectory has changed.[159]
- For First Nations persons/victims of crime, this means being treated in such a way that they feel like they have been seen and heard, and that they feel safe when proceeding through the criminal justice system.[160]
- Judges require more flexibility, not less, to impose the most appropriate sentence in all the circumstances they face.[161]

147 SME Interview 14.
148 SME Interview 15.
149 SME Interview 20.
150 SME Interview 23.
151 SME Interviews 4, 10, 15, 17.
152 SME Interview 10.
153 SME Interview 4.
154 SME Interview 14.
155 SME Interviews 6, 9.
156 SME Interviews 21, 22.
157 Cairns Consultation Event, 21 March 2024.
158 Ibid.
159 Ibid.
160 Ibid.
161 Brisbane Consultation Event, 11 March 2024.

8.5 The purposes of sentencing

8.5.1 Introduction

Section 9(1) of the PSA (reproduced in **Appendix 11**) states that the permitted purpose of sentence in Queensland are:

> (a) to punish the offender to an extent or in a way that is just in all the circumstances; or
>
> (b) to provide conditions in the court's order that the court considers will help the offender to be rehabilitated; or
>
> (c) to deter the offender or other persons from committing the same or a similar offence; or
>
> (d) to make it clear that the community, acting through the court, denounces the sort of conduct in which the offender was involved; or
>
> (e) to protect the Queensland community from the offender; or
>
> (f) a combination of 2 or more of the purposes mentioned in paragraphs (a) to (e).

These purposes provide broad guidance to judicial officers when determining sentence and help guide the court in determining the relevance and weight given to aggravating, mitigating and other contextual factors.

The PSA does not suggest that one purpose should be more or less important than any other purpose, and the court can determine that only one, just a few or all are relevant; in practice, their relative weight must be assessed taking into account the individual circumstances involved,[162] including the nature of the offence and its seriousness, as well as the circumstances of the person being sentenced. For example, as discussed below, for rape, purposes that are often prioritised at sentence include deterrence and denunciation.

Over time, section 9 of the PSA has been expanded significantly, but the purposes have not changed substantially.[163]

8.5.2 Punishment that is 'just in all the circumstances'

A sentence can serve the purpose of punishment by seeking to adequately punish the person for the offence committed in a way that is just (fair) in all the circumstances. For example, imprisonment has a punitive purpose to meet the purpose of punishment[164] and is also a means for the criminal justice system to act on behalf of the victim and the community, as a form of retribution.[165]

The High Court has recognised that meeting the objective of punishment or retribution is an important aspect of maintaining public confidence in the criminal justice system:

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162 See, eg, *Veen v The Queen* [No 2] (1988) 164 CLR 465 ('*Veen [No. 2]*') in which the Court said that '[t]he purposes overlap and none of them can be considered in isolation from the others when determining what is an appropriate sentence in a particular case. They are guideposts to the appropriate sentence but sometimes they point in different directions' at [476] (Mason CJ, Brennan, Dawson and Toohey JJ).

163 Since 1992, the two purposes which have been amended are PSA s 9(1)(c) 'discourage' was replaced with 'deter' and s 9(1)(d) 'does not approve of' replaced with 'denounce': *Penalties and Sentences (Serious Violent Offences) Amendment Act 1992* (Qld) ss 6(1)–(2).

164 *Yeo v Attorney-General (Qld)* [2012] 1 Qd R 276, 276 (McMurdo P, Muir and White JJA agreeing); *R v NG* [2007] 1 Qd R 37 [71] (Keane JA).

165 Australian Government, Productivity Commission, *Australia's Prison Dilemma* (Research Report, October 2021) 49 ('Australia's Prison Dilemma').

> the existing principles require many sentences to be retributive in nature, a notion that reflects the community's expectation that the offender will suffer punishment and that particular offences will merit severe punishment. The "persistently punitive" attitude of the community towards criminals would mean that public confidence in the courts to do justice would be likely to be lost if courts ignored the retributive aspect of punishment.[166]

This is particularly the case with regard to child sex offences 'because their crimes are committed against one of the most vulnerable groups in society and they almost invariably have long term effects on their victims'.[167]

The concept of 'just punishment' reflects the principle of proportionality – a fundamental principle of sentencing in Australia. Sentencing courts must ensure the sentence imposed 'should never exceed that which can be justified as appropriate or proportionate to the gravity of the crime considered in the light of its *objective* circumstances'.[168]

8.5.3 Rehabilitation

The sentencing purpose of rehabilitation is forward-looking and aims to alter an individual's behaviour to reduce the likelihood that they will commit another offence. Rehabilitation is often relevant in the context of considering the need for community protection, particularly if the person is young and has a limited criminal history.[169] It may also be relevant where there is evidence of a person's good prospects of rehabilitation and an objectively low risk of reoffending.[170]

The primary goal of many community-based orders, such as probation and good behaviour orders with a condition to attend a program, is to rehabilitate the person.[171]

In some cases, particularly if the person is young, courts have acknowledged the desirability of rehabilitation as a sentencing purpose, noting the potential of imprisonment to expose a young person to negative influences and result in other impacts, thereby 'defeating the very purpose of the punishment imposed'.[172] Courts therefore have recognised that, for a young person, 'reformation is always an important consideration and, in the ordinary run of crime, the dominant consideration in determining the appropriate punishment to be imposed'.[173]

8.5.4 Deterrence

Deterrence is also forward-looking and aims to discourage the person and others from committing harmful acts through the fear of the perceived consequences.[174] As acknowledged by the Court of Appeal,

> the fear of severe punishment does, and will, prevent the commission of many offences that would have been committed if it was thought that the offender would escape without punishment, or only with light punishment. If a

166 *Ryan v The Queen* (2001) 206 CLR 267, 282–3 [46] (McHugh) ('*Ryan*').
167 Ibid.
168 *Hoare v The Queen* (1989) 167 CLR 348, 354 (Mason CJ, Deane, Dawson, Toohey and McHugh JJ) (emphasis in original).
169 See *R v Bainbridge* (1993) 74 A Crim R 265, 268 ('*Bainbridge*'); *R v Dullroy; Ex Parte A-G (Qld)* [2005] QCA 219 ('*Dullroy*') cf with *-R v Hopper; Ex parte A-G (Qld)* [2015] 2 Qd R 56 [28] (Fraser JA) citing *R v Horne* [2005] QCA 218 and *R v Mules* [2007] QCA 47 [21].
170 See *R v Theohares* [2016] QCA 51 [29]–[31] (Philippides J, Holmes JA and Philip McMurdo JA agreeing) ('*Theohares*'). See also PSA ss 9(3)(g), (6)(g).
171 Mackenzie and Stobbs (n 38) 48–9.
172 See *R v Kuzmanovski; Ex parte A-G* (Qld) [2012] QCA 19 [15] (White JA) citing *Dullroy* (n 169). See also *R v Bouttell* [2018] QCA 52 [5] (Holmes CJ, Fraser and Gotterson JJA agreeing). For the impact of imprisonment also see comments made in *Boulton* (n 108) 334, [108]. See also *DPP v Anderson* (2013) 228 A Crim R 128, 144 [65] which notes these views were expressed in 1975 and held to still apply in 2013.
173 *Dullroy* (n 169) [52] citing *R v Price* [1978] Qd R 68.
174 Mackenzie and Stobbs (n 38) 44–5; *Australia's Prison Dilemma* (n 165) 49 citing Aaron Chalfin and Justin McCrary 'Criminal Deterrence: A Review of the Literature' (2017) 55(1) *Journal of Economic Literature* 5, 6; Steven Shavell, 'A Simple Model of Optimal Deterrence and Incapacitation' (2015) 42 *International Review of Law and Economics* 13.

> court is weakly merciful, and does not impose a sentence commensurate with the seriousness of the crime, it fails in its duty to see that the sentences are such as to operate as a powerful factor to prevent the commission of such offences.[175]

General deterrence is 'always important in relation to sexual offences against young children'.[176] However, where a person's moral culpability is reduced – for example, because they have significant mental impairments, 'it is not generally appropriate to impose a sentence on such offenders to reflect the need for general deterrence' because they are 'inappropriate "mediums for making an example of to others"'.[177]

There is evidence that deterrence is associated with detection and conviction, rather than from imrisonment.[178]

Research has found 'there is limited evidence that simply lengthening the prison sentence for a given crime increases the deterrence effect'; moreover, 'imprisonment, harsher prison conditions and longer sentences may increase the likelihood or severity of recidivism'.[179] Based on a review of research, imprisonment has been found not to be effective as a deterrent to further offending and it appears to reduce reoffending via incapacitation only to a limited extent.[180]

8.5.5 Denunciation

The denunciatory role of sentencing involves a court communicating 'society's condemnation of the particular offender's conduct'.[181] As explained by Sofronoff P:

> Denunciation is intended to vindicate the community values that have been insulted by the wrongful act. It works to confirm the validity of those values by an act of judicial government that repudiates the offending conduct. A denunciatory sentence works to defeat the wrongdoer's own repudiation of the community value and works to restore the correct moral relationship between wrongdoer and victim. However, a denunciatory punishment must not be disproportionate to the seriousness of the offence. A disproportionate punishment might satisfy the community's need for vindication of the values that the wrongdoer has insulted, but it would itself constitute an affront to the shared moral value that requires every punishment to be a just punishment. In its excess it would constitute unjust retribution.[182]

While denunciation has been recognised as 'largely symbolic' in nature, it is considered to be an important purpose of sentencing and closely tied to the purpose of just punishment.[183]

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175 *R v H* (1993) 66 A Crim R 505, 507 ('*H*') quoting *R v Cuthbert* (1967) 86 W.N.N.S.W. 272, 277–8, approving a passage in *R v Radich* (1954) NZLR 86, 87.
176 *R v DBR* [2019] QCA 218 [19] (Philippides JJA, Fraser and Gotterson agreeing). See also PSA (n 5) s 9(6)(f).
177 *R v Potter; Ex parte A-G (Qld)* [2008] QCA 91, [73] (Chesterman J). See also *R v Zarnke* (2019) A Crim R 19 [33] (McMurdo JA) ('*Zarnke*').
178 *Australia's Prison Dilemma* (n 165) 49 citing Maurice J.G Bun et al. 'Crime, Deterrence and Punishment Revisited' (2020) 59(5) *Empirical Economics* 2303. For criticisms made of general deterrence, see Andrew Ashworth, *'The Common Sense and Complications of General Deterrent Sentencing'* (2019) 7 *The Criminal Law Review* 564.
179 *Australia's Prison Dilemma* (n 165) 50.
180 Karen Gelb, Nigel Stobbs and Russell Hogg, *Community-based Sentencing Orders and Parole: A Review of Literature and Evaluations across Jurisdictions,* 91 (Prepared for the Queensland Sentencing Advisory Council by Queensland University of Technology, 2019).
181 *Ryan* (n 166) 302 [118] (Kirby J).
182 *O'Sullivan* (n 31) 202–3; 242–3 [145] (Sofronoff P, Gotterson JA, Lyons SJA).
183 Mackenzie and Stobbs (n 38) 49.

Similar to the purpose of deterrence, in circumstances where a person's moral culpability is reduced, for example, because they have significant mental disabilities, denunciation will be 'less significant because of the offender's limited moral culpability'.[184]

8.5.6 Community protection

The protection of the community is a key concern of the legislature and a key consideration in sentencing for sexual assault and rape offences.[185]

As discussed in **Chapter 11**, there are complexities in considering how this might best be achieved.

While a person may be incapacitated (such as through imprisonment) for this purpose, as discussed above, the period of incapacitation or detention cannot be disproportionately based on the nature of the person's offending. Proportionality therefore sets 'outer limits' for a person's detention imposed as part of their sentence.[186]There are other ways the objective of community protection can be met, however, taking into account evidence that 'imprisonment has criminogenic effects',[187] with 'the great majority of studies point[ing] to a null or criminogenic effect on subsequent offending'.[188] The Court of Appeal has recognised in the case of people sentenced to imprisonment:

> Community protection is not achieved only by actual incarceration, it is also achieved by the oversight of the Parole Board, before a person may be released on parole; and by supervision of the person, on parole, if they are released, for the remainder of their sentence, whilst they make the adjustment from custody and back into the community.[189]

Engagement in treatment, program and other forms of interventions may also reduce a person's longer-term risks of reoffending in support of achievement of this objective.

8.5.7 Sentencing factors and sentencing purposes

While the PSA does not suggest that one purpose should be more or less important than any other purpose, the PSA identifies particular factors to be of primary importance when sentencing a person for an offence of a sexual nature in relation to a child under 16 years, or involving the use, or attempted use, of violence or resulting in physical harm to another person, including of an adult victim.[190] As listed in Table 8.2 and Table 8.3, these factors include elements of the purposes:

- community protection;[191]
- general deterrence;[192] and

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184 *Zarnke* (n177) [33] (McMurdo JA). As to the relevance of mental health conditions to sentencing discretion generally, see *R v Yarwood* (2011) 220 A Crim R 497 ('*Yarwood*') adopting the principles set down by the Victorian Court of Appeal in *R v Tsiaras* [1996] 1 VR 398 at 400 ('*Tsiaras*') and *R v Bowley* [2016] QCA 254, [34] adopting the approach in *R v Verdins* (2007) 16 VR 269 ('*Verdins*').

185 See primary sentencing considerations in PSA (n 5) ss 9(3)(a)–(b), (k), (6)(d), (f), (k).

186 *Veen [No 2]* (n 162) 490–1 (Deane J); see also *R v Parker* [2015] QCA 181 [31] (Gotterson JA, Fraser JA and Flanagan J).

187 Andrew Day, Stuart Ross and Katherine McLachlan, *The Effectiveness of Minimum Non-Parole Period Schemes for Serious Violent, Sexual and Drug Offenders and Evidence-Based Approaches to Community Protection, Deterrence and Rehabilitation* (Literature Review, University of Melbourne, August 2021) 13.

188 Lacey Schaefer et al, *Sentencing Practices for Sexual Assault and Rape Offences* (Literature Review prepared by Griffith University for the Queensland Sentencing Advisory Council, 2024) 47 ('*Griffith University Literature Review*').

189 *R v Free; Ex parte A-G (Qld)* [2020] 4 QR 80 [91] (Philippides JA and Bowskill and Callaghan JJ). See similar comments made in *Zarnke* (n 177) [34]–[36] (McMurdo JA).

190 PSA (n 5) ss 9(3), (6). Primary factors also apply when sentencing a child exploitation material offence (see s 9(7)), but this is not relevant to this review.

191 Ibid ss 9(3)(a), 9(3)(b) and 9(6)(k).

192 Ibid s 9(6)(f).

- rehabilitation.[193]

The purposes of sentencing are distinct from sentencing factors and represent high-level guidance. Understanding what sentencing purposes are most important can not only help guide courts in sentencing, but has been important during the Council's previous reviews in deciding that legislative reforms are needed. For example, during our review of the serious violent offences scheme, the Council determined that there are categories of offences that cause serious harm to individuals and the wider community, and therefore require the courts to place greater weight on the purposes of punishment, denunciation and community protection to ensure a just sentence.[194] The offences of aggravated sexual assault and rape were regarded by the Council as being among such offences. This finding was an important factor in the Council deciding to recommend changes to the serious violent offences scheme (see further **Chapter 11**).

8.5.8 How Queensland courts apply sentencing purposes

Which purposes are viewed as most important helps to guide sentencing courts in determining the appropriate sentence in an individual case. This includes helping to guide how a sentencing court approaches the consideration of other sentencing factors in deciding what factors are relevant and, if so, how much weight they should be given.

It is well established at common law that the purposes of sentencing overlap and cannot be considered in isolation when determining what is an appropriate sentence. The purposes represent 'guideposts to the appropriate sentence but sometimes they point in different directions'.[195]

A review of relevant Queensland Court of Appeal decisions indicates the purposes of punishment, denunciation, deterrence and community protection, in particular, are to be given significant weight by courts in sentencing these offences.[196] The purpose of rehabilitation is often considered in the context of community protection, and particularly where the offender is young and has a limited criminal history.[197] It may also be relevant where there is evidence of a person's good prospects of rehabilitation and an objectively low risk of reoffending.[198] The Court of Appeal has acknowledged the importance of sentencing practices reflecting community views about the seriousness of this form of offending through the sentences imposed:

> It is important not to fall into the trap of excusing inexcusable behaviour. Sexual assault is a very grave and serious affront to human dignity and personal space. It is unacceptable behaviour. It is essential that the courts reflect community sentiment, in a general way, by the sentences which are imposed for offences of this kind …[199]

The Council conducted a thematic analysis of sentencing remarks (at first instance) to consider how judicial officers in Queensland apply relevant sentencing purposes within the context of sentences for

193 Ibid ss 9(3)(g) and 9(6)(g).
194 Queensland Sentencing Advisory Council, *The '80 per cent Rule': The Serious Violent Offences Scheme in the Penalties and Sentences Act 1992 (Qld)* (Final Report, 2022).
195 *Veen [No 2]* (n 162) 476–7.
196 See, for example, *R v Misi; Ex parte A-G* (Qld) [2023] QCA 34 [4] (Mullins P, Dalton and Flanagan JJA); *Pham [1996]* (n 69); *R v GAW* [2015] QCA 166; *H* (n 175); *R v Williams; Ex parte A-G* (Qld) [2014] QCA 346 [58], [73] (McMeekin J, Henry JJ agreeing); *McConnell* (n 97) [22] (Fraser JA, Sarnoff P and Philippides JA agreeing); *R v Ruiz; Ex parte A-G* (Qld) [2020] QCA 72 [19] (Sofronoff P, McMurdo and Mullins JJ) ('*Ruiz*'); *R v Teece* [2019] QCA 246 [38] (Philippides JA, Morrison and McMurdo JJA agreeing).
197 *Bainbridge* (n 169) 268; *Dullroy* (n 169) .
198 *See R v Theohares* (n 170) [29]–[31] (Philippides J, Holmes JA and Philip McMurdo JA agreeing). See also PSA (n 5) ss 9(3)(g), (6)(g).
199 *R v Daniel* [1998] 1 Qd R 499, 519–20 (Fitzgerald P, McPherson JA agreeing), citing *R v Russell* (1995) 84 *Australian Criminal Reports* 386, 391, 395 (Kirby ACJ).

sexual assault and rape offences. These findings are discussed below. For more information about the methodology used to obtain the data, refer to **Chapter 4**.

Sentencing courts apply sentencing purposes in different ways

Judicial officers are not required to state which sentencing purpose they considered to be the most important and can refer to multiple sentencing purposes at sentence.[200]

The Council's thematic sentencing remark analysis revealed that magistrates and sentencing judges take varying approaches when applying sentencing purposes. For example, some judicial officers:

- began their sentencing remarks with an explanation that they must consider the purposes detailed in s 9(1) of the PSA;[201]
- expressly identified the sentencing purposes that they felt did not require consideration (e.g. stating that specific deterrence was unnecessary for a person considered to be a low risk of reoffending);[202]
- provided a general statement about the purposes of sentencing, without clearly stating the specific purpose for the sentence they handed down;[203] or
- expressly identified and provided a more extensive explanation of the purposes considered to be the most relevant to the specific person being sentenced.[204]

Sentencing courts often refer to the sentencing purposes of deterrence and denunciation, rather than punishment and community protection

The Council's content analysis of the most common sentencing purposes applied when sentencing offences of rape and sexual assault revealed that:

- for rape offences, the most common sentencing purposes included general deterrence and specific deterrence, followed by denunciation and then, to a lesser extent, rehabilitation, punishment and community protection; and
- for sexual assault offences, general deterrence was also often referred to, followed by denunciation, then specific deterrence and rehabilitation, with equal reference being made to these two purposes. Express reference was made to the purpose of 'punishment' in only 13 per cent (n=10/75) of cases.

For both rape and sexual assault offences, judicial officers mentioned community protection and punishment the least when considering the relevant sentencing purposes.[205] See **Chapter 4** for more

200 PSA (n 5) s 9(1).
201 Council thematic sentencing remark analysis, as observed in ,rape, regional/remote, imprisonment > 5 years, #13 .
202 As observed in the following remarks sexual assault, regional/remote, higher courts, non-custodial, #2; rape, major city, imprisonment < 5 years, #15.
203 As observed in rape, regional/remote, imprisonment < 5 years, #1.
204 As observed in the following remarks rape, major city, imprisonment > 5 years, #5; sexual assault, major city, higher courts, custodial, #6; sexual assault, major city, lower courts, custodial, #3; sexual assault, regional/remote, higher courts, custodial, #4; rape, major city, imprisonment < 5 years, #22; rape, major city, imprisonment < 5 years, #19.
205 A failure to mention a sentencing purpose does not mean it was not taken into account: See, for example, *Ruiz* (n 196) [19] (Sofronoff P and McMurdo and Mullins JJA): 'Of course, community protection was a live issue in the case … It should not be thought that a sentencing Judge has to prove that she has taken a particular factor into account by reciting or parroting the content of section 9 of the *Penalties and Sentences Act 1992* (Qld).'

information about the methodology of this analysis. Potential reasons for punishment not being more commonly mentioned are discussed below.

Deterrence as a sentencing purpose includes both specific deterrence and general deterrence

When referring to deterrence, judicial officers often highlighted the difference between the need to deter the sentenced person from committing further offences (specific deterrence) and the need to deter others in the community from committing similar offences (general deterrence). In some remarks, the 2 forms of deterrence were considered in tandem, but in others the judicial officer deemed one more important than the other – for example:

> General and personal deterrence are important to the exercise of my discretion. The sentence I impose must send a message to you, but, more significantly, to other likeminded individuals in the community that if you commit an offence of this nature, then you will be punished. (HCMC_SA8)

> There is also the very real and significant need to provide, what is called, general deterrence, to ensure that everyone within our community knows that this behaviour by you is wholly unacceptable in our community and our society and that, should others be minded to behave in such a way, they also are aware of the very real penalties that are imposed and of the real consequences that flow in relation to such offending. (MCL5_R21)

In sentences involving sexual offences committed against a child, the court specifically referred to both specific and general deterrence when sentencing the person, stating, for example:

> Nevertheless, you have continued to offend. In your case, there is what we lawyers call specific or personal deterrence. I have to impose a heavy penalty to impress on your mind, 'Don't do it again.' And you may or may not have followed the discussion with your barrister. But you, in the future, should not form any relationship with any woman who has a child and you should stay away from children from now on, okay. (MCM5_R15)

> I have taken into account the principle of general deterrence, that is, the courts must impose heavy penalties to send a message to men – it is mainly men that commit these offences; occasionally, women do – that you will get caught and you will get punished severely for it. You have to be living under a rock not to realise the community's grave concerns about the sexual abuse of children. We had a Royal Commission into it that went for some years in respect of sexual abuse within institutions. We have had [a] former Australian of the Year who is an advocate for victims of sexual abuse. So it is a matter of high social concern. (MCM5_R15)

Just because 'punishment' is not expressly mentioned, this does not mean it is not considered important

Punishment featured more prominently for rape cases than it did for cases of sexual assault. This may reflect community perceptions on the seriousness of rape offences. However, our thematic analysis of sentencing remarks also revealed that, for rape and sexual assault offences, punishment was rarely mentioned without being described as 'just punishment' or 'just in all the circumstances',[206] reflecting the wording in section 9(1)(a) of the PSA.[207]

Punishment was also not always used in isolation in the remarks in the way that other purposes of sentencing were. Often, when judicial officers discussed punishment, they made it clear that this was not the only purpose for imposing their sentence, but rather that the punishment was also to fulfil the sentencing purposes of denouncing the behaviour and deterring similar behaviour. For example, judicial officers stated that:

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206 Council thematic sentencing remark analysis: as observed in the following remarks, sexual assault, regional/remote, lower courts, custodial, #7; rape, major city, imprisonment < 5 years, #4.

207 PSA (n 5) 9(1)(a) states: 'to punish the offender to an extent or in a way that is *just* in all the circumstances' (emphasis added).

> You can accept that they deserve full protection from the law; and people who commit, on the other hand, these sorts of offences against vulnerable children deserve contempt by the community and must face the full impact, not only as punishment but to deter others from committing such brazen offences. (Rape, major city, imprisonment < 5 years, #20)

> Ultimately, the purposes for which I am sentencing you today are to punish you to an extent or in a way that is just in all the circumstances, to provide conditions which I consider may help you be rehabilitated. Importantly, in respect of offences of this kind, to deter you personally and other persons from committing the same or similar offences, and also of particular relevance in terms of these kinds of offences, to make it clear that the community acting through the Court, denounces the sort of conduct in which you were involved. (Rape, major city, imprisonment > 5 years, #1)

> What must be done by the Court in dealing with you is seeking a balance between the need to denounce and punish you for your conduct, particularly in order to finally send the message to you, although I think you understand that by now, of the seriousness of what you did, but also to send that message more generally into the community and otherwise to seek to protect the community as I have explained, particularly by having regard to your prospects of rehabilitation. (Sexual assault, major city, higher courts, custodial, #15)

These findings are consistent with an Australian study that analysed 135 sentencing remarks obtained for a study of jurors' views of sentencing in Victoria.[208] The study found that, despite statements commonly made by academic philosophers about the distinct and sometimes conflicting objectives of sentencing purposes, 'judges do make statements that tend to conflate general deterrence, just punishment and denunciation'.[209] The research also found that, despite the criticisms of the efficacy of general deterrence, this purpose was the dominant sentencing purpose to which judges referred, including for sex offences and in cases of child sexual assault.[210] A 'practical reason' for this suggested by the authors was judges' concern that to ignore it may result in an appeal.[211]

Within that study, the authors suggested a number of possible reasons why, in contrast, 'just punishment' is not more commonly referred to, including:

- There is 'broad acceptance of the principle of proportionality' which 'is so fundamental to sentencing practice that it does not require repetition or elaboration'.
- 'The association of just punishment with retribution, which … connotes a sense of vengeance, may not sit well with judges' sense of their role as dispensers of justice' which 'could lead to a preference for mentioning a forward-looking purpose like deterrence that appears to offer some beneficial outcome for the community'.
- Those 'judges who are disinclined to use an overtly retributive rationale' may instead 'express themselves in terms of censure, condemnation and the need to vindicate society's values' meaning that denunciation may be used 'as a proxy for just punishment', with both operating as 'different ways of emphasising the seriousness of the crime'.[212]

The findings echo earlier Queensland-based research based on interviews with judges.[213]

208 Kate Warner, Julia Davis and Helen Cockburn, 'The Purposes of Punishment: How Do Judges Apply a Legislative Statement of Sentencing Purposes?' (2017) 41 *Criminal Law Journal* 69.
209 Ibid 72.
210 Ibid 76, 84.
211 Ibid 77.
212 Ibid 75. Another possible reason the authors refer to is judges' potential reluctances that by prioritising just punishment, it may be interpreted as the adoption of a two-stage approach to sentencing of which the High Court has been highly critical.
213 Mackenzie and Stobbs (n 38) 93.

Community protection is considered important where the offender is deemed a high risk of reoffending

Community protection was most often referred to by judicial officers as a sentencing purpose in cases where the sentenced person was deemed by the sentencing judge to be at high risk of reoffending – particularly in circumstances where an element of domestic violence was involved.[214]

Comparatively, where the person being sentenced was deemed to be a low risk of reoffending, some judicial officers highlighted that they did not feel community protection should be a large consideration in determining their sentence, but rather the sentence should deter others from committing similar offences. For example, one stated:

> I accept that protection of the community plays little role in determining the appropriate sentence, but general deterrence is of particular importance, particularly in light of the serious nature of the offending against a particularly vulnerable man. (Sexual assault, major city, higher courts, custodial, #8)

Queensland courts do not always refer to harm

Recognition of the harm caused to the victim, was not discussed as a reason or purpose for which the sentence was being imposed as Queensland does not recognise this as a sentencing purpose. However, the harm caused to the victim survivor and the impact of the offence on that person is a primary sentencing factor in that it is relevant to the nature and seriousness of the offence and is implicit in the imposition of the sentence itself.[215] Acknowledgement of harm caused to victim survivors by sexual violence offending within the courtroom varies by case. This acknowledgement may include recognition of the presence of a victim survivor within a courtroom at sentence, the specific harm suffered by the victim survivor (as outlined in a victim impact statement, if provided) and/or the general, long-term physical damage caused to a victim survivor as a consequence of sexual violence offending (in the absence of a victim impact statement). However, there were also occasions where the sentencing judge made no reference at all to the victim survivor or the harm they suffered as a consequence of the offending.

8.5.9 Sentencing purposes in other jurisdictions

Most jurisdictions reviewed in Australia and internationally apply similar general purposes of sentencing to their equivalent offences of rape and sexual assault. Domestically, states and territories vary as to the purposes included. Notably, Western Australia's sentencing legislation does not contain a legislative statement of sentencing purposes.[216]

Where some jurisdictions differed was the additional sentencing purposes of perpetrator accountability and recognition of harm to a victim survivor – See Table 8.5.

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214 Council thematic sentencing remark analysis: an example being, sexual assault, major city, lower courts, custodial, #1 .

215 For any offence, a court must take into account 'the nature of the offence and how serious the offence was, including … any physical, mental or emotional harm done to a victim': PSA (n 5) s 9(2)(c)(i). In particular for an offence of personal violence see s 9(3)(c)–(e) and for an offence of a sexual nature committed in relation to a child under 16 years see ss 9(6)(a), (c).

216 A 2013 review of the *Sentencing Act 1995* (WA) found against the adoption of a purposes statement on the basis there was 'little need' for this in light of feedback this would simplify codify the current law: Department of the Attorney-General, *Statutory Review of the Sentencing Act 1995 (WA)* (October 2013) 12, Conclusion 2.

Table 8.5: Legislated sentencing purposes in Australian jurisdictions

Purpose	Qld	Cth	NSW	Vic	SA	WA	NT	Tas	ACT	NZ	Canada
Punishment	✓	✓	✓	✓	✓	×	✓	×	✓	✓	✓
Rehabilitation	✓	✓	✓	✓	✓	×	✓	✓	✓	✓	✓
Deterrence	✓	✓	✓	✓	✓	×	✓	✓	✓	✓	✓
Denunciation	✓	×	✓	✓	✓	×	✓	✓	✓	✓	✓
Community protection	✓	×	✓	✓	✓	×	✓	✓	✓	✓	✓
Perpetrator accountability	×	×	✓	×	✓	×	×	×	✓	✓	✓
Recognition of harm	×	×	✓	×	✓	×	×	×	✓	✓	✓

Recognition of victim, and in some cases community harm, is a legislated sentencing purpose in some jurisdictions

Sentencing legislation in both Canada and New Zealand contains multiple references to victim harm in listing relevant sentencing purposes.[217] Notably, in these jurisdictions, victim harm is not reflected as a standalone purpose, but rather is mentioned alongside other purposes, such as denunciation, holding the offender accountable and reparation. Canadian courts have interpreted their respective recognition of harm provisions as collectively 'promoting a sense of responsibility and an acknowledgment of the harm caused on the part of the offender, and attempting to rehabilitate or heal the offender'.[218]

The sentencing legislation in the Australian Capital Territory ('ACT'), New South Wales ('NSW'), South Australia ('SA') as well as in New Zealand and Canada contains specific sentencing purposes that, to varying degrees, acknowledge the harm the victim may have experienced as a result of the offending.

In NSW and SA, recognition of victim harm is a singular, stand-alone purpose.[219] In NSW, the relevant section was introduced in 2002 'to recognise the harm done to the victim of the crime and the community'.[220] It was intended to encourage 'consistency and transparency in sentencing' and promote 'public understanding of the sentence process'.[221] In practice, the NSW Court of Appeal has regarded section 3A of the *Crimes (Sentencing Procedure) Act 1999* (NSW) as a codification of common principles of sentencing.[222] The SA provision states, as a secondary purpose of sentencing, 'to publicly recognise the harm done to the community and to any victim of the offending behaviour'.[223]

Those jurisdictions that have included recognition of victim harm as a sentencing purpose also incorporate recognition of the harm caused to the broader community. In Canada, recognition of harm to the community is stated as an alternative to recognition of victim harm (through the use of the conjunction 'or'), while in the ACT, NSW and SA, the harm to both the victim and the community is to be acknowledged.[224]

217 *Criminal Code* RSC 1985 c C-46, s 718; *Sentencing Act 2002* (NZ) s 7(1).
218 *R v Gladue* [1999] 1 S.C.R. 688, [43] (Cory and Lacoucci JJ).
219 *Crimes (Sentence Procedure) Act 1999* (NSW) s 3A(g); *Sentencing Act 2017* (SA) s 4(1)(c).
220 *Crimes (Sentence Procedure) Act 1999* (NSW) s 3A, introduced by the *Crimes (Sentencing Procedure) Amendment (Standard Minimum Sentencing) Act 2002* (NSW).
221 New South Wales, *Parliamentary Debates*, Legislative Assembly, 23 October 2002, 5815.
222 *R v MA* [2004] A Crim R 434 [23].
223 *Sentencing Act 2017* (SA) s 4(1)(c). The primary purpose of sentencing is to 'protect the safety of the community': s 3.
224 *Crimes (Sentencing) Act 2005* (ACT) s 7(g); *Crimes (Sentencing Procedure) Act 1999* (NSW) s 3A(g); *Sentencing Act 2017* (SA) s 4(1)(c).

Promoting accountability and responsibility for their actions is a sentencing purpose in some jurisdictions

Ensuring that offenders are held accountable for acts of sexual violence (and domestic violence) is often recognised as an important aspect of the criminal justice system responses to sexual violence.[225]

Under section 9(2)(d) of the PSA, in sentencing courts must consider to what extent the offender is to blame for the offence as well as other factors listed in the Act, such as the nature and seriousness of the offence. Holding people accountable for their actions is an inherent part of the sentencing process and is also encompassed within the broader purpose of 'just punishment' recognised under section 9(1)(a).

In contrast to Queensland, the ACT, NSW and SA have legislated to include as an express purpose of sentencing to hold or make the offender accountable for their offending behaviour.[226] It is listed alongside the sentencing purpose of ensuring the offender is adequately punished for the offence.

In New Zealand, courts are required to consider purposes aimed at holding an offender accountable for the harm done to the victim and community and promoting a 'sense of responsibility for, and an acknowledgment of' the harm done to the victim and the community by their offending.[227]

The relevant section in the Canadian *Criminal Code*, similar to New Zealand, expresses the purpose as being 'to promote a sense of responsibility in offenders' and an acknowledgment of the harm caused.[228]

In Canada and New Zealand, punishment is not listed as a purpose of sentencing, while in the ACT, NSW and SA, reference to holding the offender accountable is made alongside the need for the person to be adequately punished for the offence.[229]

For more information on the wording of these sections, see **Appendix 14**.

Similar to Queensland, certain sentencing purposes are prioritised in legislation when a court is sentencing a person for certain types of offences

Similar to Queensland, some jurisdictions also direct the court to pay specific attention to some sentencing purposes when sentencing for specific types of offences.[230]

For example, in Canada, courts are required to give primary consideration to the purposes of denunciation and deterrence in sentencing a person for an offence that involved the abuse of a person under 18 years.[231] The same requirement applies for an offence that involved the abuse of a person who is vulnerable because of their personal circumstances (including because the person is Aboriginal and female).[232]

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225 See, for example, Victorian Law Reform Commission, *Improving the Justice System Response to Sexual Offences* (Report, September 2021) 32.

226 *Crimes (Sentencing) Act 2005* (ACT) s 7(1)(e); *Crimes (Sentence Procedure) Act 1999* (NSW) s 3A(e); *Sentencing Act 2017* (SA) s 4(1)(a)(ii).

227 *Sentencing Act 2002* (NZ) ss 7(1)(a)–(b).

228 *Criminal Code* RSC 1985 c C-46, s 718(f).

229 *Crimes (Sentencing) Act 2005* (ACT) s 7(1)(a); *Crimes (Sentence Procedure) Act 1999* (NSW) s 3A(a); *Sentencing Act 2017* (SA) s 4(1)(a)(i).

230 See section 8.4 of this report for an overview of the specific sentencing principles and factors which are for primary consideration in Queensland.

231 *Criminal Code*, RSC 1985 c C-46, s 718.01 inserted in 2005, c 32, s 24.

232 Ibid s 718.04 inserted in 2019, c 25, s 292.1 in response to the recommendations in the National Inquiry into Missing and Murdered Indigenous Women and Girls, *Reclaiming Power and Place: The Final Report of the National Inquiry into Missing and Murdered Indigenous Women and Girls* (Report, 2019), 185 [5.18].

For Commonwealth offences, the sole objective for all offences is to 'impose a sentence … that is of a severity appropriate in all the circumstances of the offence'.[233] In cases involving Commonwealth child sex offences, a court must also have regard to the objective of rehabilitation,[234] which includes consideration of 'sufficient time for the person to undertake a rehabilitation program' when determining the sentence length.[235]

In Victoria, a 'court must treat the protection of the community as the principal sentencing purpose' where imprisonment is justified for certain offences (including a 'serious sexual offender').[236]

For more information on the approach in other jurisdictions, see **Consultation Paper: Background**, Chapter 10.

8.5.10 What we know from other reviews of the purposes of sentencing

Australian Law Reform Commission

The ALRC undertook a comprehensive review of the sentencing of federal offenders in 2006.[237] In considering what sentencing purposes should be adopted under federal law, it acknowledged that victim harm and promoting perpetrator accountability were recognised in some jurisdictions as sentencing purposes.[238] However, it concluded 'the [only] legitimate purposes of sentencing are retribution, deterrence, rehabilitation, incapacitation, denunciation and restoration' which aside from restoration, were 'well established at common law and regularly applied by courts in all Australian jurisdictions'.[239] The Commission's views were reflected in its recommendation regarding changes to federal sentencing legislation.[240] These changes are yet to be enacted.[241]

New South Wales

The NSW Law Reform Commission considered the purposes of sentencing as part of its review of sentencing.[242] It considered that a legislative statement of sentencing purposes was needed and recommended a revised list of sentencing purposes, which included that the purpose to 'recognise the harm done to the victim of the crime and the community' be retained and 'to reduce crime' be added.[243] It did not consider restoration and reparation should be sentencing purposes as their objectives 'are sufficiently accommodated within the proposed purposes concerned with accountability and recognition of the harm caused'.[244]

233 *Crimes Act 1914* (Cth) s 16A(1).
234 Ibid s 16A(2AAA). 'Commonwealth child sex offence' is defined in s 3(1) of that Act to mean an offence against listed provisions of the *Criminal Code Act 1995* (Cth) Sch, including relating to child exploitation material offences.
235 Ibid s 16A(2AAA)(b).
236 *Sentencing Act 1991* (Vic) ss 6B, 6D.
237 Australian Law Reform Commission, *Same Crime, Same Time* (Report 103, 2006).
238 Ibid 140 [4.23].
239 Ibid 141 [4.27].
240 Ibid 147, rec 4-1. 'Restoration' was framed as 'to promote the restoration of relationship between the community, the offender and the victim'.
241 See *Crimes Act 1914* (Cth) s 16A which recognises as relevant matters to which a court must have regard: 'the deterrent effect that any sentence or order under consideration may have on the person' as well as 'on other persons', 'the need to ensure the person is adequately punished for the offence' and 'the prospects of rehabilitation of the person': ibid ss 16A(2)(j), (ja), (k), (n).
242 NSW Law Reform Commission, *Sentencing* (Report 139, 2013).
243 Ibid 37, rec 2.1.
244 Ibid 39–40 [2.136].

Scottish Sentencing Council

In 2024, the Scottish Sentencing Council considered the views and experiences of the sentencing process of victim survivors of rape and other sexual offences in Scotland.[245] The Scottish Sentencing Council found that victim survivors of rape and sexual assault value the imposition of custodial sentences as an important tool for victim survivors' recovery and perceptions of safety. There was also some support for imposing custodial penalties as a default sentence for offences involving rape.

England and Wales: House of Commons Justice Committee's Inquiry

In 2023, the House of Commons Justice Committee in the United Kingdom published a report that examined the public's understanding of sentencing in England and Wales.[246] The Committee recommended '[t]he Government should review the statutory purposes of sentencing to consider whether greater emphasis should be placed on achieving justice for the victims of crime and their families.'[247] In response, the government noted victims have an opportunity to be involved in the sentencing process through being able to make a Victim Personal Statement and courts must take into account the harm caused.[248] In respect of the recommendation to further review this, the response noted:

> The courts' role is to sentence on behalf of the wider public and sentencing must be proportionate to the offence committed. Maintaining this is critical and ensures that no victim is responsible for a sentence imposed and avoids the risk of threats being used if a victim were to be perceived as having an impact on the severity of a sentence.[249]

8.5.11 The UniSC findings

As discussed in **Chapter 5**, part of the research undertaken by the University of the Sunshine Coast ('UniSC') was exploring the community views of the most important purposes of sentencing for sexual assault and rape offences.

Researchers found that without exposure to contextual information about a case, offence type influences community views on which sentencing purposes should be given most consideration by the court. However, participant views were different when they were asked to consider the importance of sentencing purposes for the offence of rape generally, compared with when they were provided more contextual information about a specific case of rape (or sexual assault).[250] This finding was supported by the literature review which found that in general the public lean towards punitive measures, but become less inclined to do so when given more information.[251]

Three key themes emerged in the UniSC research about the sentencing purposes and sexual assault and rape offences:

- Community protection is linked to the perceived dangerousness of a perpetrator.[252]

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245 Scottish Sentencing Council, *Victim-Survivor Views and Experiences of Sentencing for Rape and Other Sexual Offences* (2024) 2.
246 House of Commons Justice Committee, *Public Opinion and Understanding of Sentencing* (10th Report of Session 2022-23, 2023).
247 Ibid 37 [85], 58 [16].
248 House of Commons Justice Committee, *Public Opinion and Understanding of Sentencing: Government and Sentencing Council Responses to the Committee's Tenth Report of Session 2022–23* (2024) Appendix 1, 10 [48].
249 Ibid [49].
250 See Dominique Moritz, Ashley Pearson and Dale Mitchell, *Community Views of Rape and Sexual Assault Sentencing: Final Report* (Sexual Violence Research and Prevention Unit, UniSC, June 2024) 17.
251 *Griffith University Literature Review* (n 188) 101.
252 Moritz, Pearson and Mitchell (n 250) 20.

- Denunciation has value when responding to family and domestic violence.[253]
- Punishment is favoured in circumstances involving a vulnerable victim survivor or where the offending made the community vulnerable.[254]

8.5.12 Stakeholder views

In its Consultation Paper, the Council invited feedback on:

- the most important purposes in sentencing a person for sexual assault and rape and the reasons for this (Q.1); and
- whether any changes should be made to the general or specific purposes a court must consider when sentencing a person for rape or sexual assault (Q.2).

Stakeholder views on the adequacy of the current sentencing purposes were mixed.

Submissions from victim survivor support and advocacy and support stakeholders

A common theme in submissions from and meetings with victim survivors and advocacy and support agencies was the need for justice to be seen to be done, especially in circumstances where victim survivors are reporting feeling alienated by the criminal justice system. It was recognised that incorporating recognition of harm as an express sentencing purpose, in this context, may serve as an important symbolic acknowledgement of the experiences of victim survivors.

The North Queensland Women's Legal Service ('NQWLS') noted that 'the concept of a sentence that is "just" in all the circumstances must clearly be shown to be "just" to the victim-survivor, not only the defendant'.[255] The NQWLS also observed that if harm were expressly recognised as a purpose, its impact on the sentencing process may be better communicated to the community. Not only would this improve the satisfaction of victim survivors, but it may assist the community at large.[256]

QSAN was supportive of the approach in NSW, SA and the ACT in listing recognition of harm to victims as a distinct sentencing purpose.[257]

In a similar vein, DV Connect told us that victim survivors do not consider that current sentencing practices adequately denounce offending as it is felt 'there is more negative impact from being a victim/survivor than being a perpetrator'.[258]

The Women's Legal Service Queensland recognised that sentencing purposes (and factors) may have broader impacts on other stages of the criminal justice process and how sexual offences are responded to.[259]

253 Ibid 22.
254 Ibid 24.
255 Preliminary submission 20 (North Queensland Women's Legal Service) 2.
256 Ibid.
257 Submission 24 (Queensland Sexual Assault Network) 9.
258 Submission 20 (DV Connect).
259 Preliminary submission 21 (Women's Legal Service Queensland) 1–2.

FACAA told us:

> The most important purpose of sentencing for a person for sexual assault and rape is the safety of the victim-survivors. This is one of the most common themes throughout all responses. Safety for victim-survivors of rape and sexual abuse is not just limited to their immediate safety needs but must extend to their lifelong safety.[260]

Submissions from research institutions, professional bodies and community advocacy organisations

TASC Legal and Social Services (Social Justice) questioned the efficacy of the sentencing purposes and told us:

> There is a strong likelihood that the criminal justice system cannot punish or deter its way out of the challenge presented by rape and other forms of sexual assault. While it may be effective for select individuals, it stands to increase criminogenic tendencies in many others. For individuals who were raised in violent and harsh environments, prison only confirms what these individuals already believe to be true. Deviant behaviour reflects both a deviant developmental environment and the overlay of social norms and belief systems which make it easier for these disordered inclinations to be rationalised and acted upon.[261]

Submissions from legal stakeholders

LAQ noted that harm done to the victim is already expressly addressed in section 9(2)(c) of the PSA which requires a court to take into account 'the nature of the offence and how serious the offence was, including—(i) any physical, mental or emotional harm done to a victim'. They also expressed concern about how harm would be quantified if it was further legislatively recognised.[262]

LAQ also observed that section 9 'has been revised and amended many times, resulting in legislation which is detailed and sometimes prescriptive'.[263]

The Queensland Law Society did not support adding victim harm as a purpose of sentencing in section 9(1) of the PSA as it is already a factor in the PSA.[264]

ATSILS told us rehabilitation and community safety should be prioritised as sentencing purposes. The most important purposes when sentencing for sexual assault and rape 'are penalties commensurate with the specifics of the conduct in question (punitive); but cross-referenced with community safety and thus the rehabilitation of the offender.'[265] Rehabilitation should be considered in a holistic way, having regard to 'criminogenic factors, cultural context and the best evidence-based way for that individual to address the root causes of the offending'.[266] ATSILS told us:

> Whilst punishment and deterrence … by way of incarceration and other punitive measures certainly have a place in certain contexts, these measures do not, in isolation, address the root causes of offending. Improving community safety necessitates an approach that also prioritises rehabilitation of the individual such that the individual is less likely to reoffend. In the context of Aboriginal and Torres Strait Islander individuals, to have the best chance of success, rehabilitation programs must be delivered by community-controlled organisations preferably within the local community that the individual belongs, to provide the cultural safety required to promote engagement by the individual. We are aware that there is a significant paucity of culturally safe rehabilitation/healing programs

260 Submission 15 (Fighters Against Child Abuse Australia).
261 Submission 22 (TASC Legal and Social Services (Social Justice)).
262 Submission 23 (Legal Aid Queensland) 3.
263 Ibid 3.
264 Meeting with Queensland Law Society, 9 July.
265 Submission 28 (Aboriginal and Torres Strait Islander Legal Service).
266 Ibid.

> throughout the State, especially in rural and remote areas. We see this as an area were there needs to be additional funding to empower local community-controlled organisations to expand delivery of such programs.[267]

YAC told us: 'All purposes have a role in determining the sentence for sexual assault and rape offences to balance the competing interests of the victim, the offender and community in arriving at a just punishment.'[268] It considered that, 'The protection of community, the protection of the children, deterrence and rehabilitation in sections 9(3) and (6) of the PSA is appropriate and should not change.'[269]

Subject matter expert interviews

Which sentencing purposes are the most important?

Participants in our subject matter expert interviews had different views on which sentencing purposes were generally the most important when sentencing for sexual assault and rape.

Some acknowledged the importance of the principles of community protection and denunciation in particular, along with punishment when sentencing sexual offences.[270] There was also support for the sentencing purpose of deterrence for sexual offending[271] – although some participants considered that while sentencing responses may be effective in meeting the purposes of punishment and individual or specific deterrence, they might be unlikely to be effective in achieving general deterrence.[272]

Rehabilitation in some cases was also viewed as an important sentencing consideration.[273] However, some participants were cautious about the ability to accurately assess a person's risk of reoffending[274] and suggested that providing the court with specific evidence of rehabilitation could be helpful to a judge when sentencing.[275]

Are current purposes adequate?

Most participants told us that they thought the sentencing purposes were adequate and provided a broad basis for sentencing.[276] They supported sentencing purposes being broad and flexible and considered rigid purposes can become 'problematic'.[277]

One participant questioned whether the purpose to protect the community should be limited to Queensland, as section 9(1)(e) of the PSA states, 'to protect the Queensland community'.[278]

Should any purposes be added?

Some participants told us there could be a recognition if victim harm as a purpose.[279] In this regard, one participant supported a stronger emphasis on punishment and recognising the impact on a victim.[280] Another also mentioned the importance of measures to protect victims from further harm.[281]

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267 Ibid.
268 Submission 30 (Youth Advocacy Centre).
269 Ibid.
270 SME Interviews 2, 9, 13, 14.
271 SME Interviews 2, 6, 8.
272 See, for example, SME Interviews 3, 13.
273 SME Interviews 6, 9, 11.
274 SME Interviews 2, 3, 11.
275 SME Interview 11.
276 SME Interviews 2, 4, 6, 7, 8, 9, 10, 11, 12, 13, 14, 16, 20.
277 SME Interview 11. See also SME Interviews 13, 21.
278 SME Interview 21.
279 SME Interviews 3, 15, 25.
280 SME Interview 15. See also SME Interview 25.
281 SME Interview 3.

Another participant was sceptical about the benefits of adding further legislative weight to specific factors, but recognised that there may be a benefit in the representation made to the community.[282]

Consultation events

There were mixed views by participants at the consultation events held in Brisbane, Cairns and online about which sentencing purposes were the most important. Many participants considered community protection/safety and denunciation the most important purposes when sentencing sexual offences. There was also support for a purpose specifically for recognition of victim harm.

Some participants considered that sentencing responses should act as a deterrent, and deliver clear retribution or punishment, while others were less confident about the ability of sentences to act as an effective deterrent (particularly, in deterring that individual from reoffending).

Several participants commented on sentences having particular value in 'sending a message' to the community about the offending, as well as to other victim survivors of this form of offending, reflected in the sentencing purpose of denunciation in conjunction with specific deterrence: 'We need to send a message that there are serious consequences for those types of actions.'[283]

Many participants considered that community safety/protection was the most important sentencing purpose, alongside other purposes.

At the Cairns consultation event, participants also mentioned the importance of ensuring offender accountability, alongside safety for the victim and the community and taking into account the need for rehabilitation, as well as the importance of restoration/restoring relations within the community in the context of sexual offending.[284]

In considering potential changes or enhancements to existing purposes, there was some support for recognition of victim harm being elevated to a sentencing purpose. Some participants commented that there might be particular value to victim survivors in having this harm clearly acknowledged through the sentencing process: 'The role of the criminal justice system is [to] deliver justice but the victim also needs to feel that this justice was delivered.'[285]

The recognition of the harm to the victim as a sentencing purpose was also viewed as potentially useful in guiding the crafting of sentencing remarks and in reinforcing the harm their actions had caused to the person being sentenced[286] as well as promoting community understanding and better reflecting contemporary values: 'The courts must recognise that times are changing and the sentencing "pillars" need to move with the times.'[287]

There was also support from some participants for the broader harms to the community of this form of offending to be more clearly recognised through the sentencing process.

However, some participants did not consider that there was any need to change the current purposes as recognition of victim harm as a purpose would always apply in considering the application of other sentencing purposes, and was already recognised under the Act. Some participants also raised concerns about the need in applying this purpose to quantify harm, and whether this fairly should be considered,

282 SME Interview 1.
283 Online Consultation Event 16 April 2024.
284 Cairns Consultation Event 21 March 2024.
285 Brisbane Consultation Event 11 March 2024.
286 Cairns Consultation Event 21 March 2024.
287 Online Consultation Event 16 April 2024.

noting the impact on individual victims will be different, and some of the harms may not be evident until a significant period of time after the offence has occurred—particularly in the case of child victims.

8.6 Other legislative forms of sentencing guidance and schemes

8.6.1 Introduction

In addition to the purposes, principles and factors contained in Part 2 of the PSA, several legislative schemes are established under the PSA that provide guidance to courts in sentence. In some cases, the guidance provided is of a mandatory nature meaning courts have no discretion to depart. In other cases, the court retains some discretion.

We explore some of these schemes below.

8.6.2 Mandatory, presumptive and standard sentencing schemes

Mandatory legislative schemes require a sentencing court to impose specific sentence outcome, regardless of any relevant factors in mitigation. Presumptive schemes allow for some discretion to depart from this if certain circumstances apply (for example, the court finds it is 'unjust to do so', is not 'in the interests of justice' or if 'exceptional circumstances' apply).

Current mandatory and presumptive sentencing schemes in Queensland

A number of statutory sentencing schemes have been established under the PSA to respond to certain types of offending that also impact sentencing levels and practices, including for rape and sexual assault. Some of these schemes operate wholly or partly in a mandatory way. They include the following:

- A requirement for a court when sentencing a person for **an offence of a sexual nature against a child aged under 16 years** to order the person to serve **an actual term of imprisonment** (meaning a term of imprisonment served wholly or partly in a corrective services facility) unless there are exceptional circumstances (presumptive imprisonment).[288]
- **The serious violent offences ('SVO') scheme**, which requires a person declared convicted of certain listed offences (including rape and sexual assault)[289] to serve 80 per cent of their sentence (or 15 years, whichever is less) in prison before being eligible for release on parole.[290] The making of a declaration is mandatory in the case of sentences of imprisonment of 10 years or more, but discretionary for offences dealt with on indictment where the sentence imposed is for 5 years or more, but less than 10 years.[291]

288 PSA (n 5) s 9(4)(c).

289 Or of counselling, procuring, attempting or conspiring to commit such an offence. Relevant offences are listed in Schedule 1 of the PSA. There is also discretion for a court to make a declaration in relation to a conviction for any offence dealt with on indictment provided such offence: (i) involved the use, counselling or procuring the use, or conspiring or attempting to use, serious violence against another person; or (ii) resulted in serious harm to another person: PSA (n 5) s 161B(4). The term 'serious harm' is defined in section 4 to mean: ' any detrimental effect of a serious nature on a person's emotional, physical or psychological wellbeing, whether temporary or permanent'.

290 *Corrective Services Act 2006* (Qld) s 182 ('CSA').

291 PSA (n 5) s 161B. See also n 289 regarding a discretion to make a declaration for any offence, or for a Schedule 1 offence where the sentence is under 5 years provided certain conditions are met.

- **Mandatory sentences for repeat 'serious child sex offences'** which requires a court to impose a life sentence or an indefinite sentence[292] with a 20-year minimum non-parole period[293] for certain repeat 'serious child sex offences'. This applies to an adult offender convicted of a 'serious child sex offence'[294] committed after 19 July 2012,[295] who has a prior conviction (as an adult) for a relevant 'serious child sex offence'.[296] Rape and aggravated sexual assault (liable to life imprisonment) are both prescribed offences under the scheme.
- **A mandatory cumulative sentence in some circumstances:** where a person has been convicted of certain listed offences (or of counselling, procuring, attempting or conspiring to commit it) and the person committed the offence while in prison serving a term of imprisonment, on parole or during other post-prison community-based release, on a leave of absence from prison, or unlawfully at large after escaping from lawful custody under a sentence of imprisonment.[297] Any sentence of imprisonment imposed for the listed offence must be ordered to be served cumulatively (one after the other) with any other term of imprisonment the person is liable to serve. Both sexual assault and rape are listed offences.[298]

Issues regarding the ordering of cumulative versus concurrent sentences are explored in **Chapter 15**.

Mandatory and presumptive sentencing schemes for sexual offences in other jurisdictions

Other Australian and overseas jurisdictions have taken different approaches to remedying what have been viewed as inadequate sentencing levels.

In **Appendix 10**, we consider developments in Victoria as a case study of how sentencing reforms have come about and relevant evaluations of their impacts.

Mandatory sentencing schemes do not allow for any departure from required sentence type of sentencing levels. For example, they may provide that a sentencing court must impose:

- imprisonment of a certain fixed or set length (such as the mandatory life sentence in Queensland that applies to murder and repeat serious child sex offences);
- a sentence that is at least the minimum specified length, but allowing for the court to decide if the sentence should be longer;
- a certain type of penalty (usually imprisonment), but otherwise giving courts discretion to decide the sentence length;
- a non-parole period that is at least the minimum specified period, either framed as a fixed percentage of the head sentence or as a specified minimum term (e.g. 2 years).

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292 Ibid ss 161E(2), 161E(3).
293 CSA (n 290) s 181A.
294 PSA (n 5) s 161D and sch 1A. A serious child sex offence is an offence against a provision mentioned in schedule 1A, or an offence that involved counselling or procuring the commission of an offence mentioned in schedule 1A, committed – (a) in relation to a child under 16 years; and (b) in circumstances in which an offender convicted of the offence would be liable to imprisonment for life.
295 Date of assent and commencement.
296 It does not matter whether the first offence was committed, or the offender was convicted of the first offence, before or after the commencement of the Bill. The second offence must be committed after the conviction of the first offence: PSA (n 5) s 223.
297 Ibid s 156A, sch 1.
298 Ibid sch 1.

Presumptive sentencing schemes provide courts with discretion. The discretion provided under these schemes is on a continuum from those schemes that retain a high level of discretion to those that set fixed sentences or non-parole periods from which a court can depart in very limited circumstances. As for mandatory sentencing schemes, they are similarly varied in nature and include, for example:

- presumptive imprisonment or order requiring supervision;
- presumptive minimum sentencing levels;
- presumptive minimum non-parole periods;
- a presumptive requirement for sentence cumulation.

For example, with respect to a requirement to order a person to serve imprisonment when sentencing for sexual offences, mandatory and presumptive sentence provisions in other jurisdictions include the following:

- In the Northern Territory: a requirement for courts to record a conviction and impose either a term of actual imprisonment or a partly suspended prison sentence when sentencing an offender for a sexual offence.[299]
- In Victoria: mandatory imprisonment (which must not be imposed in addition to making a community correction order)[300] which applies to 23 'Category 1 offences' (including rape, rape by compelling sexual penetration and sexual penetration with a child offences),[301] providing the offence was committed by a person aged 18 years or more at the time the offence was committed.[302]

299 *Sentencing Act 1995* (NT) s 78F(1). A 'sexual offence' to which this section applies means an offence specified in sch 3: s 3 and included offences against *Criminal Code Act 1983* (NT) sch 1, ss 188(2)(k) (indecent assault) and 192 (sexual intercourse and gross indecency without consent). A court can also make a home detention order after service of part of a term of imprisonment under a partially suspended sentence, meaning that this is a sentencing option that is available in these cases: *R v Bennett* [2021] NTCCA 2.

300 *Sentencing Act 1991* (Vic) s 5(2G). There are some limited exceptions to this. See ss 5(2GA), 10A.

301 Ibid s 3(1) (definition of 'Category 1 offence').

302 Ibid.

- In New South Wales: a requirement, when sentencing a person found guilty of a domestic violence offence (including a sexual offence committed in the context of domestic violence),[303] for a court to impose either a sentence of full-time detention or a supervised order[304] unless satisfied that a different sentencing option is more appropriate in the circumstances.[305]
- In New Zealand: a presumption of imprisonment in circumstances where a person is convicted of sexual violation by unlawful sexual connection or rape.[306] The court can impose a sentence other than imprisonment if, having regard to the particular circumstances of the person convicted and the offence (including the nature of the conduct involved), it thinks that the person should not be sentenced to imprisonment.[307] This is not limited to offences committed in relation to children.
- In Canada: mandatory minimum prison sentences apply to offences of sexual assault in certain cases. Where the offence was committed against a child under the age of 16 years, these are fixed at one year for an indictable offence and 6 months for an offence dealt with summarily.[308] Higher minimum sentences apply for aggravated sexual assault.[309]

These schemes and other forms of mandatory and presumptive schemes are discussed in more detail in Chapter 10 of our **Consultation Paper: Background**.

303 A 'domestic violence offence' for this purpose has the same meaning as in the *Crimes (Domestic and Personal Violence) Act 2007* (NSW) ('CDPV Act'): *Crimes (Sentencing Procedure) Act 1999* (NSW) s 3. A 'domestic violence offence' is defined in s 11 of the CDPV Act and includes 'an offence committed by a person against another person with whom the person who commits the offence has (or has had) a domestic relationship' which is also a 'personal violence offence'. The definition of a 'personal violence offence' in s 4 of the Act includes several sexual offences under the *Crimes Act 1900* (NSW) including sexual assault (s 61I), aggravated sexual assault (s 61J), aggravated sexual assault in company (s 61JA), sexual touching (s 61KC), aggravated sexual touching (s 61KD), sexual act (s 61KE), aggravated sexual act (s 61KF), sexual intercourse with a child under 10 (s 66A), sexual intercourse with a child between 10 and 16 years (s 66C) as well as sexual touching and sexual act offences where committed against a child (ss 66DA–DF), persistent sexual abuse of a child (s 66EA) and incest (s 78A).

304 This includes an intensive correction order, a community condition correction order or a conditional release order that includes a supervision condition: see *Crimes (Sentencing Procedure) Act 1999* (NSW) ss 4A(1), 4(A)(3).

305 Ibid s 4A(2).

306 *Crimes Act 1961* (NZ) s 128B(2). 'Sexual violation' for these purposes is defined in s 128.

307 Ibid ss 128B(2)–(3).

308 *Criminal Code,* RSC 1985, c C-46, s 271.

309 Ibid s 273(2).

The effectiveness of mandatory and presumptive sentence schemes

Mandatory sentencing laws restrict the discretion of judicial officers to impose a 'just' sentence in all the circumstances and can have unintended consequences for the justice system. For this reason, such forms of sentencing schemes have attracted strong criticism from legal scholars and some practitioners, and on occasion have been referred to as a 'fundamentally bad idea'.[310] Concerns have been raised that:

> Mandatory minimum sentences have few, if any, discernible deterrent effects and, because of their rigidity, result in unjustly harsh punishments in many cases and wilful circumvention by prosecutors, judges, and juries in others.[311]

These types of mandatory laws have also been criticised in the context of sexual violence offending. For example, in 2021, the NT Law Reform Committee ('Committee') examined mandatory sentencing and community-based sentencing options. With respect to the requirement to impose an actual term of imprisonment for a sexual offence, it reported:

> In practice, it has not been uncommon for courts to resort to the imposition of "rising of the court" sentences to avoid any injustice the requirement in s 78F(1)(a) [that the offender must serve a term of actual imprisonment] may cause.[312]

The Committee was concerned that 'such practices can tend to impair confidence in the integrity of the criminal justice system', suggesting it was preferable that 'courts be empowered to impose just sentences other than in a manner that may appear to be inconsistent with the intent of the legislature'.[313]

In considering the effectiveness of the mandatory sentencing laws in deterring sexual violence offending, The Committee pointed to the low rates of reporting, prosecution and convictions as evidence such reform had had little, if any, impact.[314] Its conclusion was that these provisions should be repealed.[315] Similar calls have been made for repeal of mandatory provisions that apply to sexual offences elsewhere,

Legislation that has a mandatory element in respect of sentencing, can be viewed as limiting human rights. For example, the requirement for a judge to impose a life sentence or indefinite sentence for a 'repeat serious child sex offence', which now exists in Queensland, may infringe the right to liberty and the right to not be subjected to arbitrary detention.[316]

At the time the mandatory penalty was introduced in 2012, the Explanatory Notes acknowledged:

> A mandatory sentence that cannot be mitigated represents a significant abridgment of traditional rights. However, the effect on the individual must be balanced against the need for community protection. Child sex offenders victimise one of the most vulnerable groups in the community. It is incumbent on the community to provide adequate protection from harm to this group, as they are inherently unequipped to protect themselves from such predation.
>
> The new mandatory sentencing regime is necessary to: denounce repeat child sex offenders; provide adequate deterrence for this cohort of offenders; protect one of the most vulnerable groups of the community; and to enhance community confidence in the criminal justice system.[317]

310 Michael Tonry, 'Fifty Years of American Sentencing Reform: Nine Lessons' *(*2019) 48 *Crime and Justice* 1, 6.
311 Ibid.
312 Northern Territory Law Reform Committee, *Mandatory Sentencing and Community-based Sentencing Options: Final Report* (Report No 47, 2021) 56.
313 Ibid 56-57.
314 Ibid 57.
315 Ibid 59, recs 4-4, 4-5.
316 *Human Rights Act 2019* (Qld) s 29 ('HRA').
317 Explanatory Notes, Criminal Law (Two Strike Child Sex Offenders) Amendment Bill 2012 (Qld) 2–3.

The Queensland Human Rights Commission has made previous submissions to this Council that comment on mandatory penalties, drawing attention to the need for significant evidence 'to demonstrate that mandatory minimum sentences are the least restrictive manner of achieving the purposes' of sentencing.[318]

It is difficult to determine whether the mandatory penalty is deterring would-be child sexual offenders from committing these offences, although there is little doubt that this provide a strong denunciatory aspect and, through the incapacitation of these individuals (for a minimum period of 20 years prior to parole eligibility),[319] the prevention of reoffending.

Concerns about these types of laws in the past have included that, to the extent the consequences are known, may impact on people's willingness to plead guilty, potentially reducing rates of conviction, resulting in plea negotiations to lesser charges and, more concerningly, risking child sex offenders going to extreme lengths to avoid detection, exposing to children to an even greater risk of harm.[320]

A review of this scheme falls outside the scope of the Council's current review, and for this reason we have not considered its operation further.

Presumptive sentencing provisions typically attract fewer criticisms than mandatory ones, as they retain some discretion for courts to impose a just and appropriate sentence.

Relevant evaluations of these reforms are explored in Chapter 10 of our **Consultation Paper: Background**.

8.6.3 Standard sentencing and non-parole period schemes

Another type of special scheme introduced to increase guidance to court in sentencing is standard non-parole periods in NSW and standard sentences in Victoria.

NSW standard non-parole period scheme

The NSW standard non-parole period ('SNPP') scheme was introduced in 2003[321] and applies to a range of serious offences, including several sexual offences.[322] The scheme's introduction was justified on the basis that it would provide judges with 'a further important reference point' when sentencing offenders for SNPP offences.[323]

An SNPP represents the non-parole period for an offence that 'is in the middle of the range of seriousness', 'taking into account only the objective factors affecting the relative seriousness' of that offence.[324] The SNPP operates as a 'legislative guidepost' in sentencing, along with the maximum penalty.[325] When

318 Queensland Human Rights Commission, Preliminary submission 3 to Queensland Sentencing Advisory Council, *Penalties for Assaults on Public Officers* (9 January 2020) 9 [31].
319 CSA (n 290) s 181A.
320 See, for example, Thomas B Marvell and Carlisle E Moody, 'The Lethal Effects of Three Strikes Laws' (2001) 30 *The Journal of Legal Studies* 89; and Anthony M Doob, Cheryl Marie Webster and Rosemary Gartner, 'Issues related to Harsh Sentences and Mandatory Minimum Sentences: General Deterrence and Incapacitation' (Centre for Criminology and Sociolegal Studies, University of Toronto,February 2014) Research Summary from *Criminological Highlights*.
321 Part 4, Division 1A of the *Crimes (Sentencing Procedure) Act 1999* (NSW) was inserted by the *Crimes (Sentencing Procedure) Amendment (Standard Minimum Sentencing) Act 2002* (NSW).
322 *Crimes (Sentencing Procedure) Act 1999* (NSW) ss 54A–54D.
323 NSW Law Reform Commission, *Sentencing: Interim Report on Standard Minimum Non-parole Periods* (Report 134, 2012) [1.14] ('*Sentencing: Interim Report*').
324 *Crimes (Sentencing Procedure) Act 1999* (NSW) s 54A(2).
325 *Muldrock v The Queen* (2011) 244 CLR 120, [27] (French CJ, Gummow, Hayne, Heydon, Crennan, Kiefel and Bell JJ) ('*Muldrock*').

sentencing an offence to which an SNPP applies, the court must also consider other legislated and common law sentencing considerations.[326]

The offences under the scheme and associated SNPPs are set out in a Table to Part 4, Division 1A of the *Crimes (Sentencing Procedure) Act 1999* (NSW). When originally introduced, the scheme applied to more than 20 categories of serious indictable offences, including a range of violence, sexual violence and drug offences. The number of offences under the scheme has since expanded to over 30, and the offence categories 'cover the majority of serious crimes that have a relatively high volume'.[327]

SNPPs are expressed as a number of years. For example, the SNPPs for NSW's rape equivalent offences are:

- aggravated sexual assault in company is 15 years (life imprisonment);
- aggravated sexual assault is 10 years (20 years); and
- sexual assault simpliciter is 7 years (14 years).

The levels at which the SNPPs were originally set 'generally were at least double the median non-parole period between 1994 and 2001, and in some cases, including for sexual offences, they were nearly triple the existing median periods'.[328] The SNPP is based on the seriousness of the offence, the maximum penalty and sentencing trends for the offence.[329]

The court must give reasons for setting a NPP that is longer or shorter than the SNPP and outline each factor that was taken into account when making this determination.[330]

Victorian standard sentence scheme

The standard sentencing scheme is established under sections 5A and 5B of the Victorian *Sentencing Act 1991*.

The scheme was established based on recommendations made by the Victorian Sentencing Advisory Council ('VSAC') in its 2016 report, *Sentencing Guidance in Victoria*.[331] While the Council preferred increased use of guideline judgments, it also presented advice about the form of standard sentence scheme that should be adopted should such a scheme be introduced.[332]

VSAC was asked for advice on legislative mechanisms for sentencing guidance in Victoria, and specifically to provide an alternative to the baseline sentencing provisions,[333] which the Victorian Court of Appeal had found to be 'incapable of being given any practical operation'.[334]

326 *Crimes (Sentencing Procedure) Act 1999* (NSW) s 54B(2).
327 *Sentencing: Interim Report* (n 323) [1.21].
328 Ibid [1.16].
329 NSW Sentencing Council, *Standard Non-parole Periods: Final Report* (2013) 3 citing the Second Reading speech in the NSW Parliament on 23 October 2002.
330 *Crimes (Sentencing Procedure) Act 1999* (NSW) s 54B(3).
331 Sentencing Advisory Council (Victoria), *Sentencing Guidance in Victoria* (Report, 2016).
332 Ibid.
333 A 2014 scheme introduced to set median prison sentence lengths for certain serious offences. It was repealed and replaced with the standard sentence scheme.
334 *DPP v Walters (a Pseudonym)* [2015] VSCA 303 (17 November 2015).

It was asked specifically to advise on 'the most effective legislative mechanism to provide sentencing guidance to the courts in a way that promotes consistency of approach in sentencing offenders and promotes public confidence in the criminal justice system'.[335]

The government's expectations at the time of the new scheme's introduction were that sentences would increase for standard sentence offences, 'bringing sentencing for the most serious offences in line with community expectations',[336] and also send 'a strong message to perpetrators that they can expect longer terms of imprisonment if they commit serious offences'.[337]

The standard sentencing scheme closely resembles the NSW defined-term SNPP scheme, but with the period set as the 'standard sentence' in this case applying to the setting of the head sentence, rather than to the setting of the NPP.

An offender aged 18 years or older who commits a prescribed offence on or after 1 February 2018 is subject to the standard sentencing scheme.[338] The court must consider the standard sentence when sentencing a person for 12 serious offences, including rape, sexual penetration of a child under the age of 16, sexual penetration of a child under the age of 12 and other sexual offences against children.

Consistent with the NSW model, the standard sentence operates as a 'legislative guidepost',[339] being the sentence for an offence that, taking into account only the objective factors affecting its relative seriousness, is in the middle of the range of seriousness.[340] In determining the objective factors, a court must consider only the nature of the offence and not the personal circumstances of the offender.[341] When sentencing a person under this scheme, the court must state how the sentence imposed on a standard sentence offence relates to the prescribed standard sentence.[342]

The standard sentence is just one factor to be considered by the court, alongside all other relevant sentencing principles and factors. The standard sentence is not more important than other factors, and it does not affect instinctive synthesis nor does it permit 'two-stage sentencing'.[343]

Courts must only have regard to sentences previously imposed for the offence if the standard sentence offence scheme applied to them.[344]

The standard sentence scheme also includes presumptive NPPs, which can be departed from if 'it is in the interests of justice' to do so.[345] For sentences of 20 years or more, the statutory NPP is 70 per cent and for sentences under 20 years, the statutory NPP is 60 per cent. The Victorian Court of Appeal has clarified that the standard sentencing scheme 'does not in any way diminish the importance of giving proper weight to mitigating factors' including 'the personal circumstances of the offender, his or her prospects of rehabilitation and, where appropriate, the need to give due weight to a plea of guilty (particularly if coupled with remorse)'.[346]

335 Parliament of Victoria, *Parliamentary Debates*, Legislative Assembly, 25 May 2017, 1508 (Martin Pakula, Attorney-General).
336 Ibid 1509.
337 Ibid.
338 *Sentencing Act 1991* (Vic) ss 5A, 5B.
339 *Brown v The Queen* (2019) 59 VR 462, 464–5 [4] ('*Brown*').
340 *Sentencing Act 1991* (Vic) s 5A(1)(b).
341 Ibid s 5A(3).
342 Ibid ss 5B(4)–(5).
343 *Brown* (n 339) [4], [44], [106].
344 *Sentencing Act 1991* (Vic) ss 5B(2)(b).
345 Ibid s 11A(4).
346 *Lockyer (a pseudonym) v The Queen* [2020] VSCA 321, [67] (Priest and Weinberg JJA).

Assessing the effectiveness of the standard non-parole period and sentences schemes

Reviews of the NSW SNPP scheme

The Judicial Commission of New South Wales reviewed the impact of the SNPP scheme on sentencing patterns in 2010.[347] It concluded that the scheme has 'generally resulted in greater…consistency in, sentencing outcomes' but has also had led to:

> an increase in the severity of penalties imposed and the duration of sentencing of full-time imprisonment. This is, in part, a result of the relatively high levels at which the standard non-parole periods were set for some offences. However, the study also found significant increases in sentences for offences with a proportionally low standard non-parole period to maximum penalty ratio.[348]

This evaluation occurred prior to the High Court's decision in *Muldrock v The Queen,*[349] which clarified that courts are not to give the SNPP 'primary, let alone determinative significance'.[350]

In 2012 and 2013, the NSW Sentencing Council and the NSW Law Reform Commission ('NSWLRC') both examined the SNPP scheme. One of the main criticisms was the 'absence of any consistent pattern in the relationship between the maximum penalties for the offences that are included in the SNPP Table and the SNPPs nominated for these offences',[351] and absence of transparency in relation to the reasons for which the individual SNPP offences were selected for the scheme, or in relation to the way in which the relevant SNPP levels were set'.[352]

When the NSWLRC examined the SNPP as a percentage of the maximum penalty, it found significant variation between offences. This included offences with the same maximum penalty having different SNPPs, and offences having the same ratio of SNPP to maximum penalty, despite one being the aggravated form of an offence.[353] The NSWLRC also noted that the 'proximity of the SNPP to the maximum sentence for some offences causes problems in applying the scheme and can result in sentencing outcomes that would be inconsistent with general sentencing practice'.[354]

Both bodies recommended retaining the scheme,[355] along with recommending changes to provide more structure to the scheme.

Review of the Victorian sentencing reforms

In 2021, VSAC reported on the impact of 3 sentencing reforms to sentences imposed from 2010 to 2019.[356] VSAC's review investigated the effect of: (1) the Category 1 classification of certain offences committed and sentenced on or after 20 March 2017; (2) the standard sentence scheme for relevant offences committed and sentenced on or after 1 February 2018; and (3) calls to uplift sentencing

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347 Patrizia Poletti and Hugh Donnelly, *The Impact of the Standard Non-Parole Period Sentencing Scheme on Sentencing Patterns in New South Wales* (Research Monograph 33, Judicial Commission of NSW, 2010).
348 Ibid 60.
349 *Muldrock* (n 325).
350 Ibid [26].
351 *Sentencing: Interim Report* (n 323) [2.5], [2.34].
352 Ibid [2.34].
353 Ibid Appendix A. For example, attempted murder has a maximum penalty of 25 years and an SNPP of 10 years (40%), compared with wounding with intent to do bodily harm which has the same maximum penalty of 25 years, but a SNPP of 7 years (28%), and sexual assault and aggravated sexual assault both have an SNPP ratio of 50% despite having a different maximum penalty. These differences remain today.
354 Ibid [2.11]–[2.13].
355 Ibid xi–xiii. The NSW Government adopted the recommendation made by the NSWLRC in that report.
356 Victorian Sentencing Advisory Council, *Sentencing Sex Offences in Victoria: An Analysis of Three Sentencing Reforms* (June 2021).

practices for incest offences in the *Dalgliesh* decisions by the High Court[357] and the Victorian Court of Appeal.[358]

VSAC reported that the standard sentencing scheme appeared to 'have had a tangible effect on the length of prison sentences imposed, as intended'.[359] Its analysis of sex offences found that in 2019 'the average prison sentences were uniformly longer for standard sentence offences of the relevant sex offences than for non-standard sentence versions of the same offences'.[360] VSAC thought this difference could be:

> due to the 'anchoring effect' arising from the numerical guidance provided by the standard sentence set for each offence or it could be due to courts being prohibited from considering sentencing practices in cases in which the offence was a non-standard sentence offence - or a combination of the two.[361]

For example, the average prison sentence imposed for rape in the higher courts in 2019, which carries a 10-year standard sentence, was 6 years and 8 months for standard sentence offences, and 5 years and 8 months for non-standard sentence offences (that is, offences committed prior to the commencement of the standard sentence provisions).[362]

VSAC found that of the offences examined, incest offences experienced the greatest shift in sentence lengths, resulting in longer prison sentences, with it being acknowledged that this offence was also subject to the most reform over the period examined (being classified as a standard sentence offence, directly impacted by the *Dalgleish* decisions, and the ability to charge incest as a course of conduct offence).[363]

VSAC also reported an increase in average prison sentences for some child sex offences that were non-standard sentence offences. It viewed this as being: 'likely, at least in part, due to the requirement that when sentencing non-standard sentence offences, courts consider all current sentencing practices … including sentences imposed for standard sentence offences'.[364]

While it found that each of the reforms appeared to have influenced sentencing practices for sexual offences, particularly against children, this might be a consequence of 'changing community expectations about, and judicial understanding of, the effect of sex offending on victims', not simply law reform.[365]

8.6.4 Stakeholder views

In our Consultation Paper, we invited feedback on:

- whether current forms of sentencing guidance are adequate to guide sentencing for rape and sexual assault, and any problems or limitations with these (Q.4); and
- whether current guidance for courts in deciding what type of sentencing order to make was appropriate and if any changes should be made (Q.14).

Many aspects of the feedback in response to the first question posed concerned principles and factors under section 9, and are discussed in section 8.4.8 above.

357 *Dalgliesh* (n 3).
358 *DPP v Dalgliesh (A Pseudonym)* [2016] VSCA 148; *DPP v Dalgliesh (A Pseudonym)* [2017] VSCA 360.
359 Victorian Sentencing Advisory Council (n 356) xii.
360 Ibid.
361 Ibid 78 [9.6].
362 Ibid 22.
363 Ibid xi.
364 Ibid 78 [9.7].
365 Ibid xii.

Feedback received about the use of specific forms of orders and guidance required with respect to this is discussed in **Chapter 11**.

As discussed in detail in **Chapter 5**, a number of aspects of sentencing were viewed as inadequate and there was a strong view by victim survivors and support and advocacy services that sentences are not sufficient given the significant harm caused by these offences, with calls for these to be increased.

Submissions and feedback received that specifically referred either to limiting discretion or calls not to do so are discussed below.

Submissions from victim survivor support and advocacy stakeholders

FACAA, in a preliminary submission, recommended 'mandatory minimum sentences for penetrative rapes of 10 years for first offences and up to 14 years for aggravating circumstances such as the victim being under the age of 12'.[366] In its submission in response to the consultation paper, it expressed strong support for Queensland's current repeat serious child sex offence scheme, but was concerned about the use of plea negotiations to avoid their application, submitting that

> there are too many ways around these mandatory minimum sentences. Public defenders or police prosecutors can make deals with the perpetrators to get charges downgraded, judges can downgrade charges to help get guilty pleas or because they feel the charge was too "harsh" there are several ways perpetrators can get around the mandatory life sentences. These loopholes need to be closed immediately to prevent these good and just laws going to waste.[367]

Reflecting comments made in its earlier submission it suggested: 'The very simple solution to [victim survivors' dissatisfaction with current sentencing levels] is to make a mandatory custodial sentence for anyone found guilty of a penetrative rape offence particularly against a child.'[368]

QSAN referred to victim-survivors and the community expecting 'offenders to serve their whole sentence or at least most of it' and told us that '[v]ictim-survivors are shocked to find out they may only serve a fraction of their sentence.'[369] They referred to only a small number of SVO declarations being made as contrary to victim-survivors' perceptions of these offences as being serious violent offences and suggested this evidence showed a need for 'a system that is transparent as possible about its decision making'.[370]

Respect Inc and the Scarlet Alliance referred to a consequence of mandatory sentencing being that it 'removes the ability to recognise intergenerational trauma experienced by Aboriginal & Torres Strait Islander people and would result in longer sentences for an already over-incarcerated population'.[371]

Submissions from legal stakeholders

LAQ cautioned against any further restrictions being placed on sentencing for sexual offences, telling us:

> Limiting a judicial officer's ability to structure a sentence to reflect the unique circumstances in each case even further than what is already the case, moving in the direction of mandatory sentencing could result in a greater number of contested matters, resulting in more victims being required to give evidence in criminal proceedings.[372]

366 Preliminary submission 17 (Fighters Against Child Abuse Australia).
367 Submission 15 (Fighters Against Child Abuse Australia).
368 Ibid.
369 Submission 24 (Queensland Sexual Assault Network).
370 Ibid.
371 Submission 25 (Respect Inc and Scarlet Alliance).
372 Submission 23 (Legal Aid Queensland).

It submitted that: 'Mandatory sentencing is not consistent with the right to liberty, specifically not to be subject to arbitrary detention. Legislation with a mandatory element in respect of sentencing can be viewed as limiting this right.'[373] It referred to existing examples as being 'mandatory life imprisonment for "repeat serious child sex offences", and serious violent offence declarations'.[374] Its strong view was that:

> Mandatory minimums and legislative changes that would narrow judicial sentencing discretion should not be implemented. Being too prescriptive, for example through mandatory sentencing practices, risks unjust sentences being imposed.[375]

YAC similarly expressed strong opposition to mandatory sentencing, telling us:

> YAC does not support a prescriptive legislative response that implements mandatory sentencing to all types of sexual offences. It will result in sentences focused on deterrence and offenders serving a period of their sentence in prison. Imprisonment does not effectively reduce re-offending or contribute to meaningful rehabilitation.[376]

It considered judicial discretion was 'important to ensure the punishment reflects the broad spectrum of sexual offending behaviours balancing the mitigating and aggravating features of each case'.[377] YAC's view was that: 'Sentences must vary to reflect ‘differences related to the severity, frequency, and form of their use of violence.'[378]

These views were shared by Sisters Inside, which opposed the use of mandatory sentencing of any kind, advocating for judicial discretion to 'account for nuance, complexity and circumstance' in each case.[379]

ATSILS referred to the need to consider commitments under the National Agreement on Closing the Gap (NACTG),

> such that any proposed amendments to the existing regime do not inadvertently worsen progress towards targets to reduce incarceration rates of Aboriginal and Torres Strait Islander individuals and that, where possible and appropriate, opportunities are taken to improve the current regime to promote alternatives to incarceration.[380]

It noted that the causes of over-representation 'are complex and multi-faceted' but that: 'Appropriate consideration of such matters upon sentencing is consistent with the principles of individualised justice, proportionality in sentencing and substantive equality before the law.'[381]

The potential for 'extending mandatory sentencing and/or removing the ability for the judge to exercise discretion in relation to personal circumstances' was also raised by Legal Aid as a concern on the basis that it

> could impose further serious disadvantage on prisoners who are Aboriginal and/or Torres Strait Islander, and/or people with disabilities which would be inconsistent with the right to equality before the law (HRA section 15) and cultural rights of Aboriginal and/or Torres Strait Islander persons (HRA section 28).[382]

Justice reform and advocacy bodies

The Justice Reform Initiative cautioned that mandatory sentencing or punitive sentences might have negative impacts across the system, including on victim survivors:

373 Ibid.
374 Ibid.
375 Ibid.
376 Submission 30 (Youth Advocacy Centre).
377 Ibid.
378 Ibid.
379 Preliminary submission 28 (Sisters Inside Inc).
380 Submission 28 (ATSILS).
381 Ibid.
382 Submission 23 (Legal Aid Queensland).

> more punitive sentencing regimes, systems of mandatory sentencing, and increasing maximum sentencing limits for particular offences increases the likelihood that an accused person will elect to plead not guilty to an offence. There is little value for an accused person to plead guilty in the hope of a reduced sentence where the relevant legislative sentencing provisions have been made more punitive. They will be more likely to robustly defend the charges and defence counsel are likely to cross examine victim witnesses with a view to undermining their credibility. This is likely to subject victims to further trauma. A more punitive sentencing regime is not a trauma-informed framework that will benefit victims of crime.

Subject matter expert interview participants

Legal stakeholders who participated in subject matter expert interviews told us that the retention of some degree of discretion was important.[383]

Some referred to the case law about factors relevant to considering if there are exceptional circumstances as being clear[384] and resulting in a consistent approach.[385] It was thought that a judge finding exceptional circumstances was 'close to an impossibility'[386] for rape offences.[387] The Council's data findings suggest this is the case with only 24 cases over the 18-year data period receiving a non-custodial penalty for rape (MSO) — and most of these involving offences people committed when they were a child.[388]

One practitioner interviewed described mandatory sentencing as being 'very difficult', with reference to the exceptional circumstances requirement and acknowledged that the impact of going to prison is significant.[389] Another practitioner thought the exceptional circumstances provision should be extended 'to all sexual offences, not just sexual offences committed against a child'.[390]

One participant expressed the view that while they would support

> mandatory supervision like mandatory probation … a mandatory custody … it just doesn't allow for the examples that people will come up with that do happen where clearly going to custody is not within anyone's best interest and doesn't really assist anyone.[391]

Another participant supported flexibility in sentencing: 'the greater the options the better the justice, I think. We can design penalties that meet the situation best when we have more options.'[392]

Consultation events

At the Brisbane consultation event,[393] some groups were strongly opposed to mandatory sentencing, due to concerns that judges need more flexibility to impose orders that are most appropriate in the circumstances of the case, not less – for example, by extending the availability of intensive correction orders and reforming suspended sentences of imprisonment. There was a view by some participants that sentencing should be individualised, given that the circumstances of every offence and the context in which it has occurred, as well as the circumstances of the person sentenced and the victim survivor, are different. An example was given where the victim might not be seeking a severe penalty in circumstances where the person being sentenced is remorseful and has accepted responsibility for their actions.

383 See, for example, SME Interviews 3, 6, 9.
384 SME Interviews 7, 10.
385 SME Interview 7.
386 Ibid.
387 SME Interview 13.
388 See Appendix 4 for more information.
389 SME Interview 8.
390 SME Interview 17.
391 SME Interview 25.
392 SME Interview 6.
393 Brisbane Consultation Event, 11 March 2024.

Similar comments were made by some participants at the Cairns consultation event, although overall they considered that most victim survivors are of the view that the sentences imposed do not sufficiently reflect the harm they have suffered and are seeking more punitive sentences.[394]

Representatives of organisations who worked with victim survivors across all consultation sessions noted that what victim survivors want and expect is different, and depends on the individual person. Some victim survivors are concerned about the length of sentence imposed and the person receiving a sentence as a punishment and deterrent, while for others, it may be more about the process and acknowledging the harm caused.

Some participants thought the completion of rehabilitation programs should be mandatory.[395]

At one of our online consultation events, a participant pointed to concerns about community safety, supporting a view by victim survivors that long periods of detention are required – especially where offences against children are concerned.[396] Another participant considered that a requirement for the person to serve at least 80 per cent of their sentence in custody would also go some way towards recognising the harm caused to victims by allowing the victim survivor more time to recover and build safety without concerns that the person might soon be released.[397] Others supported rehabilitation being the focus, noting the significant costs associated with imprisonment.[398]

Increasing the certainty of conviction and the consequences of this was viewed by one participant as more important from a deterrence perspective than increasing sentencing levels.[399] The observation was made that many states in the United States still have the death penalty, but this has not reduced rates of offending: 'People who do horrible things are not thinking rationally.'[400]

8.7 Structure of current offences and maximum penalties

8.7.1 Introduction

In the preceding chapters of the report, we discussed the broad range of conduct captured with the offence of sexual assault under section 352 of the *Criminal Code* (Qld), as well as the different types of penetrative conduct captured within the offence of rape.

The way offences are structured and the maximum penalties that apply are another form of sentencing guidance as they define the scope of conduct captured within specific offences or their aggravated forms, and the relative seriousness of specific forms of conduct in comparison to other types of conduct.

In this section, we consider the role of maximum penalties as a mechanism of sentencing guidance and differences between the approach in Queensland and in other jurisdictions regarding offence structure and maximum penalties.

8.7.2 The role of maximum penalties

The maximum penalty for an offence reflects the views of Parliament (and therefore the community) about the seriousness of that offence, relative to other offences. It must be taken into account when

394 Cairns Consultation Event, 21 March 2024.
395 Brisbane Consultation Event, 11 March 2024.
396 Online Consultation Event, 4 April 2024.
397 Ibid.
398 Ibid.
399 Online Consultation Event, 16 April 2024.
400 Ibid.

sentencing,[401] and sets 'the outer or upper limits of the punishment that is proportionate to the offence'.[402] The highest maximum penalty in Queensland is a life sentence, which applies to all types of rape and to sexual assault offences with a circumstance of aggravation charged under section 352(3).[403]

If the maximum penalty is changed, 'that is a significant matter for sentencing'.[404] Increasing maximum penalties could be a signal from Parliament to courts and the community that rape and sexual assault are considered more serious than they were previously and 'is an indication that sentencing levels for that offence should be increased'.[405]

As the maximum penalty is already life imprisonment for rape and aggravated sexual assault (*Criminal Code* (Qld) s 352(3)), there is no scope to increase the maximum penalty to achieve an uplift in sentencing practices.

However, for non-aggravated sexual assault, which has a maximum penalty of 10 years, and the aggravated form of sexual assault with a 14-year maximum penalty (*Criminal Code* (Qld) s 352(2)), changes could be made to increase the penalty that applies, with a likely increase in sentencing levels.

8.7.3 The UniSC findings

As discussed in **Chapter 7**, the findings from UniSC's research and community rankings of offence seriousness when we compared this with the median sentencing outcome, suggest that the maximum penalty does not align with community views of offence seriousness for these offences:

- Participants ranked sexual assault (non-aggravated) and sexual assault (aggravated, 14-year maximum) scenarios as more serious than a man breaking into a house at night taking property while the occupants were asleep (74.2% v 21.3% and 93.3% vs 3.4% respectively) (burglary, life imprisonment maximum).
- A sexual assault (aggravated, 14-year maximum) offence involving a teacher fellating a student was viewed as more serious by the community compared with a sexual assault (aggravated, life imprisonment maximum) against an adult woman forced to self-penetrate her vagina with a sex-toy (86.5% vs 7.9%).

This is evidence of the existence of a sentencing problem.

8.7.4 Problems with the structure of sexual assault

Inconsistencies in treatment of different non-consensual penetrative acts

A potential inconsistency exists between the treatment of penetrative acts captured within the offence of rape and indecent assaults charged and sentenced under section 352(2). This is because non-consensual fellatio (oral stimulation of the male genitals) performed on victim survivors would be charged and sentenced under section 352(2), to which a lower 14-year maximum penalty applies. In contrast, penetrative acts involving mouth to genital contact charged as rape (involving the penetration of victim's

401 PSA (n 55) s 9(2)(b); *Sentencing Act 1991* (Vic) s 5(2)(a); *Sentencing Act 1995* (WA) s 6(2)(a); *Sentencing Act 1995* (NT) s 5(2)(a).
402 Sentencing Advisory Council (Victoria), *Maximum Penalties: Principles and Purposes—Preliminary Issues Paper* (2010) vii. See also *Ibbs v The Queen* (1987) 163 CLR 447, 451-2.
403 *Criminal Code* (Qld) (n 75) s 352(3).
404 *R v Stable* (n 57) 14 [37] (Sofronoff P, and Fraser and Philippides JJA agreeing).
405 See also *Muldrock* (n 325) 133 [31].

vulva, vagina or anus by the perpetrator's mouth or tongue) carries a maximum penalty of life imprisonment. The objective seriousness of both types of conduct could reasonably be assessed as equivalent, as they both involve the violation of the victim's autonomy, bodily and sexual integrity and sexual identity by an offender involving similar types of conduct.

This highlights a potential gendered difference between male and female victim survivors. A male victim's experience of having their genitals taken into the mouth of a perpetrator without consent (an act of compelled oral penetration) is treated as a less-serious form of offending than conduct involving penetration of a female victim survivor, given the significant difference in maximum penalties.

Inappropriate emphasis being placed as to whether similar acts involve 'actual' penetration

The current structure of the offences of sexual assault and conduct captured within section 352(2) also could be criticised as placing undue emphasis, both at trial and in the course of plea negotiations, on determining whether there was 'actual penetration' (i.e. the tongue in the vagina or anus), which would support a conviction for rape.[406] From a victim's perspective, this may be immaterial to their experience.

Impact on sentencing practices

There is little doubt that the way acts of non-consensual fellatio and cunnilingus are classified under the *Criminal Code* (Qld) impacts on the sentences imposed. Courts must sentence in accordance with the lower 14-year maximum penalty that applies to such conduct charged under section 352(2) compared with rape, which carries a maximum penalty of life imprisonment:

- Although there were an insufficient number of cases of oral rape (coded for our purposes to include penile-mouth and lingual-vaginal or lingual-anal rapes)[407] involving adult victim survivors, the median custodial sentence for child victim oral rape cases was 4.0 years (with the assumption that the median sentence for offences against adult victim survivors would have been lower).
- In comparison, the median custodial sentence for aggravated sexual assault offences charged under section 352(2) was 1.5 years.

As Callaghan J commented in *R v Mogg*,[408] the existence of this statutory regime

> does not mean that there is a sharp dividing line between the sentencing range applicable to….sexual offences punishable by 14 years imprisonment and that which is applicable in cases of rape … it is nonetheless always essential to acknowledge the significance of the maximum penalty and in particular the fact that the element of penetration creates a regime with a higher maximum penalty of life imprisonment.[409]

The Women's Safety and Justice Taskforce's recommendations

Relevant to this review, the Women's Safety and Justice Taskforce ('Taskforce') found the law in Queensland was 'currently sending inconsistent and confusing messages about when children have the capacity to consent to sexual activity'.[410]

406 See, for example, *R v Silcock* (2020) 4 QR 517, where there was extensive discussion during the trial as to whether licking the victim survivor's clitoris constituted penetration.
407 There were no lingual-anal rapes in the 3 years of data analysed.
408 *R v Mogg* [2024] QCA 125, [41] (Callaghan J, dissenting as to the outcome).
409 Ibid [41]–[42].
410 Women's Safety and Justice Taskforce, *Hear Her Voice – Report Two: Women and Girls' Experiences Across the Criminal Justice System* (2022) vol 1, 212.

In its 2022 report, the Taskforce recommended that Chapter 22 (Offences against morality) and Chapter 32 (Rape and sexual assaults) should be reviewed and amended where necessary to ensure that the *Criminal Code:*

- treats the capacity of children aged 12 to 15 years old to consent to sexual activity in a way that is trauma informed and consistent with community standards;
- addresses sexual exploitation of children and young people aged 12 to 17 years old by adults who occupy a position of authority over those children; and
- provides internal logic across the two chapters so that the applicable maximum penalties reflect a justifiable scale of moral culpability.[411]

Some reforms recommended by the Taskforce were progressed in the *Criminal Justice Legislation (Sexual Violence and Other Matters) Amendment Act 2024* (Qld) by the former government, although the amendments to the *Criminal Code* (Qld) are yet to be proclaimed. They include:

- the introduction of a new standalone offence in the *Criminal Code* (Qld) under a new section 210A 'Sexual acts with a child aged 16 or 17 under one's care, supervision or authority'; and
- the introduction of a second limb to the existing offence of 'Repeated sexual conduct with a child' in section 229B of the *Criminal Code* (Qld).

The proscribed acts for the purposes of these new provisions were modelled on the physical elements of the offences of rape, engaging in penile intercourse with a child under 16, and indecent treatment of a child under 16.[412] The rape equivalent conduct under the new standalone offence will be subject to a 14-year maximum penalty, while other acts of indecent assault and gross indecency will carry a maximum penalty of 10 years. The maximum penalty for the new limb of section 229B will be life imprisonment.

The stated intention of the amendments is 'to capture and deter members of the community who may use the influence, trust and power that is vested in them when a young person is under their care, supervision or authority', thereby providing 'a protective function for young people over the age of consent but under the age of 18 years'.[413]

What other jurisdictions do

The approach in Queensland is in contrast to that in several other Australian and international jurisdictions. For example, in NSW, SA, WA, the ACT and the NT, rape (or its equivalent) is defined to include not only acts of penile–vaginal, penile–anal and penile–oral penetration, or penetration of the vagina or anus by another body part or object, but also fellatio and cunnilingus.[414]

In Western Australia, the offence of 'sexual penetration without consent'[415] includes engaging in fellatio and cunnilingus even if there is no penetration.[416] The definition applies regardless of which party performs which aspect of the sexual act.

The Western Australian Law Reform Commission recently completed a review of sexual offences and recommended both forms of conduct continue to be regarded as sexual penetration without consent:

411 Ibid 216, rec 42.
412 Explanatory Notes, Criminal Justice Legislation (Sexual Violence and Other Matters) Amendment Bill 2024 (Qld) 5.
413 Ibid 4.
414 See Appendix 15.
415 *Criminal Code Act Compilation Act 1913* (WA) sch ('*Criminal Code* (WA)') s 325 (Sexual penetration without consent). Separate offences are established for offences against children (see ss 320 and 321).
416 Ibid s 319 (definition of 'to sexually penetrate').

The accused performs an act of non-penetrative oral sex (i.e., fellatio or cunnilingus) on the complainant;

The accused substantially causes the complainant to perform an act of non-penetrative oral sex on the accused.[417]

In Victoria, of the offence of 'rape by compelling sexual penetration', which has the same maximum penalty as rape (25 years), includes indecent assaults performed on a male victim involving non-consensual acts of fellatio.[418]

Maximum penalties

The maximum penalties for sexual penetration without consent offences also vary by jurisdiction.[419]

While in some jurisdictions these offences attract a maximum penalty of life imprisonment (such as in the NT, SA, and NSW for aggravated sexual assault in company), there is significant variation by jurisdiction. For example, in Victoria the maximum penalty is 25 years for rape and sexual penetration with a child under 12, while the ACT and WA have tiered penalties ranging from 12 years in the ACT and 14 years in WA for a non-aggravated offence and up to 18 years in the ACT and 20 years in WA for certain aggravated forms.[420]

Maximum penalties in the international jurisdictions examined similarly vary from life imprisonment in England and Wales, Scotland and Canada (for certain aggravated sexual assaults only) to 20 years in New Zealand down to 10 years in Canada for non-aggravated forms of sexual assault (which includes non-consensual penetrative conduct) and even lower on summary conviction.

For more information, see **Appendix 15**.

The Model Criminal Code Committee recommendations

The Model Criminal Code Officers Committee made recommendations regarding the framing of an offence of unlawful sexual penetration (in place of 'rape') and the definition of 'sexually penetrate', which also would have the effect of acts of fellatio performed on a male victim falling within the new 'rape' offence.[421] This is because the Committee recommended that 'sexually penetrate' includes an act involving penetration (to any extent) of the mouth of a person by the penis of a person' (without specifying who is the victim and who is the perpetrator).

The Committee recommended that the maximum penalty for unlawful sexual penetration should be 15 years for a 'basic' offence and 20 years for an 'aggravated offence'.[422] The Committee's recommended circumstances of aggravation were that the offence involved the use or threatened use of a weapon, was committed by the person in the company of another person, was committed during torture, was committed in circumstances involving the victim being caused 'serious harm' or threatened with serious harm or death, was committed against a child under the age of consent, or was committed against a person in abuse of a position of trust or position of authority.[423]

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417 Law Reform Commission of Western Australia, *Sexual Offences: Final Report* (Project 113, October 2023) 186 ('*Sexual Offences: Final Report*').
418 *Crimes Act 1958* (Vic) s 39.
419 See Christopher Dowling et al, *National Review of Child Sexual Abuse and Sexual Assault Legislation in Australia* (Australian Institute of Criminology, 2024).
420 The Western Australian Law Reform Commission recommended the maximum penalties be increased for penetrative and non-penetrative sexual offences against adults and children: *Sexual Offences: Final Report*, recs 116 - 121.
421 Model Criminal Code Officers Committee of the Standing Committee of Attorneys-General, *Model Criminal Code – Chapter 5: Sexual Offences Against the Person Report* (May 1999) 5.2.1. Queensland was not represented on the Committee.
422 Ibid 5.2.6.
423 Ibid 5.2.36.

8.8 The Council's view

8.8.1 Key findings

Key Finding

6. **Legislative sentencing guidance is not adequate and requires enhancement**

Existing forms of legislative sentencing guidance regarding principles and factors under the *Penalties and Sentences Act 1992* (Qld) are not adequate and require enhancement to:

- reinforce that sexual violence offences committed against children are more serious due to the higher level of harm experienced by child victim survivors and the greater culpability of perpetrators in targeting a vulnerable victim; and
- respond to issues identified in this report regarding the use of 'good character' evidence.

See **Recommendations 1, 2 and 5**.

Taking into consideration the information and evidence gathered, we have concluded that existing forms of legislative sentencing guidance regarding principles and factors under the PSA are not adequate and require enhancement to:

- reinforce that sexual violence offences committed against children are more serious due to the higher level of harm experienced by child victim survivors and the greater culpability of perpetrators in targeting a vulnerable victim; and
- respond to issues identified in this report regarding the use of 'good character' evidence.

We discuss our reasons regarding the need to reinforce the seriousness of sexual assault and rape offences and our recommendation for reform below.

Issues regarding the use of 'good character' evidence are explored in **Chapter 9.**

Key Finding

7. **Current sentencing purposes do not adequately recognise the harm caused to victim survivors**

The current purposes of sentencing under section 9(1) of the *Penalties and Sentences Act 1992* (Qld), while broad, do not adequately recognise the need to hold the perpetrator accountable for harm done to the victim survivor and to promote in the perpetrator a sense of responsibility for, and acknowledgement of, that harm as an important aspect of sentencing.

See **Recommendation 2**.

The Council has further concluded that while the current sentencing purposes under section 9(1) of the PSA are broad, they do not adequately recognise victim harm as an important aspect of sentencing (**Key Finding 7**).

We note existing provisions within section 9 of the PSA require courts to consider not only the harm to the victim, and any victim impact statement, but the surrounding contextual factors of the offending that

may also speak to the experience of harm.[424] While the operation of these provisions aims to ensure that victim harm is acknowledged in the sentencing process, in our view legislating to make recognition of victim harm an express purpose of imposing sentence will enhance its visibility for both the judiciary and the community at large.

We acknowledge that this finding goes beyond sentencing purposes that apply to sexual assault and rape offences, but we consider this change justified given the importance of recognition of victim harm in imposing sentence. We discuss our reasons in more detail below.

In **Chapter 7** we also found evidence that sentencing outcomes for sexual assaults are inadequate due to how offence seriousness is determined and the current structure of the offence (**Key Finding 5**).

We note the structure of offences and the maximum penalties that apply to different forms of conduct can impact sentencing outcomes in significant ways. It also has the potential to impact community confidence in circumstances where the scope of offences is broad capturing a wide spectrum of conduct, but with the same maximum penalty applying to all forms of that conduct.

8.8.2 Introduction of a new aggravating factor for offences against chidlren

Recommendation

1. Sentencing guidance reforms – new aggravating factor for offences against children under 18 years

The Attorney-General and Minister for Justice progress amendments to section 9 of the *Penalties and Sentences Act 1992* (Qld) to require a court to treat the fact an offence of rape or sexual assault was committed in relation to a child as aggravating.

Such amendments should be progressed in the context of a broader review of section 9 (see **Recommendation 3**).

As discussed in **Chapter 7**, we have concluded that penalties imposed for rape are not adequate due to the failure to reflect the seriousness of this form of offending and the important purposes of sentencing, including punishment, denunciation and community protection – particularly as these relate to offences against children (**Key Finding 4**).

With respect to offences against children, we found that sentencing levels do not match the higher level of seriousness with which the community views these offences. In particular, as discussed in **Chapter 7**, the digital–vaginal rape of a child was ranked by a majority of participants of the UniSC's community views research as being more serious than every other type of rape conduct committed against adult victim survivors. This included an in-company rape offence involving two counts of rape.

We also found the community viewed an offence of aggravated sexual assault involving a 16-year-old male victim as more serious than other offences carrying higher maximum penalties and resulting in higher sentences.

We consider the best way to explicitly acknowledge that a victim is more vulnerable and a person is more culpable for the offending if the victim is under 18 years is to require a court to treat the fact that an offence of rape or sexual assault was committed in relation to a child as aggravating. Importantly, it is an

[424] For any offence, a court must take into account 'the nature of the offence and how serious the offence was, including … any physical, mental or emotional harm done to a victim': PSA (n 5) s 9(2)(c)(i). In particular, for an offence of violence, see ss 9(3)(c)–(e) and for an offence of a sexual nature committed in relation to a child under 16 years, see ss 9(6)(a), (c).

option that can simultaneously achieve symbolic recognition, limit complexity, and maximise judicial discretion and legislative consistency.

Applying the Council's fundamental principles

Applying the Council's fundamental principles guiding the review[425] to the issues raised in considering sentencing guidance and to address **Key Finding 6** guided us in making a recommendation:

- **Principle 1: Reforms to sentencing laws should be evidence-based with a view to promoting public confidence:** The Council has drawn on findings from community views research, data analysis, observations sentencing submissions and remarks, appeal decisions, past reviews and research, as well as extensive consultation. We have found that while sentencing practices reflect current sentencing principles and case authorities, current sentencing levels for rape and sexual assault appear to be out of step with community views of offence seriousness as these relate to offences against children.[426]
- **Principle 3: Sentencing outcomes for sexual assault and rape offences should reflect the seriousness of these offences, including their impact on victims, while not resulting in unjust outcomes.** We are mindful that median sentences for rape generally have remained stable over the past 18 years.[427] While the PSA provides primary sentencing principles and factors for where the victim is a child under 16 years, our research of current sentencing trends in the last 3 years of data, when custodial sentence lengths for rape of a child are compared to rape of an adult by conduct type, the increase or 'premium' that offences against children attract appears relatively modest.[428] While there are a large number of potentially relevant case features that might be used to explain the sentencing trends, at an aggregate level the data suggests that without legislative reform, sentencing levels for offences against children cannot be expected to increase. It is clear to us that a sentencing 'uplift' is required for offences committed against children. In our view, higher sentences for rape and sexual assault of child victims are warranted given the improved understanding of the significant long-term impacts of child sexual abuse. While the court must take into account any 'effect of the offence on a child under 16 years'[429] and 'any physical harm or the threat of physical harm to the child' under 16 years,[430] creating an aggravating factor recognises a child under 18 is vulnerable and this increases the culpability of the perpetrator, which should mean the person receives a higher sentence while retaining judicial discretion.
- **Principle 5: Sentencing inconsistencies, anomalies and complexities should be minimised.** This recommendation is only intended to apply to sexual assault and rape sentenced under the PSA.[431] We acknowledge section 9(10A) of the PSA also recognises the higher level of seriousness of offences committed in the context of a family relationship by requiring a court to treat the fact an offence is a domestic violence offence as aggravating unless it is not reasonable because of the exceptional circumstances of the case.[432] We consider this is a conceptually different consideration to an aggravating factor based on a victim's vulnerability because of their age and

425 For a full list of the fundamental principles, see Chapter 3.
426 For a discussion on UniSC findings see Chapter 7, section 7.4.1.
427 As discussed in Appendix 4.
428 See Chapter 7, section 7.3.1.
429 PSA (n 5) ss 9(2)(c)(ii), 9(6)(a).
430 Ibid s 9(6)(c).
431 No similar provision is recommended to be inserted into the YJA (n 42).
432 See also *R v MDZ* [2024] QCA 139 [16] (Dalton JA, Bradley and Hindman JJ)

it will apply in all cases of sexual assault and rape involving a child under 18 years, regardless of the relationship. Similar to the operation of section 9(10A) of the PSA, as its own subsection it will complement other sentencing considerations and does not need to be a 'primary' factor listed in subsection 9(3) or 9(6).[433] Its aim is to ensure consistency in the approach of all judicial officers to the aggravating effect of a victim to sexual assault or rape being a child.

- **Principle 6: Reforms should take into account the likely impacts on the disproportionate representation of Aboriginal and Torres Strait Islander peoples in the criminal justice system.** The potential impacts on Aboriginal and Torres Strait Islander persons as defendants and victims are considered. It is envisaged this reform will benefit child victim survivors. It may impact changing sentencing outcomes for those sentenced for these offences where the child is a victim.
- **Principle 7: The circumstances of each person being sentenced, the victim survivor and the offence are varied. Judicial discretion in the sentencing process is fundamentally important.** While it does not increase maximum penalties, the aggravating factor would operate in cases of sexual assault where the ordinary statutory presumption against imprisonment applies. This recommendation would complement existing sections 9(3) and 9(6) (although it would not be considered a 'primary' factor) but would operate in a similar way to section 9(10A) of the PSA. Judicial discretion would be retained, and the factor would permit a thorough consideration and weight to be given to this factor. As with any aggravating factor, the degree of weight to be given to it will depend on the quality of evidence establishing it as well as its relevance in a given case.
- **Principle 10: Any reforms should aim to be compatible with the rights protected and promoted under the *Human Rights Act 2019* (Qld) ('HRA') or be reasonably and demonstrably justifiable as to limitations.** The Council considers a new aggravating factor may limit the right not to be deprived of liberty in section 29 of the HRA because a more severe sentence may be imposed. When considering the nature of the limitation, we consider it make clear to the community that offences of sexual assault and rape involving a child under 18 years will be treated by courts in sentencing as more serious, thereby serving an important communicative function. It will also promote the protection of children under section 26(2) of the HRA. Although it limits a right, this is justifiable as it is one of many considerations that will be relevant in any given sentence proceeding.

We do not recommend an exceptional circumstances exception should apply

Legislated aggravating factors can be subject to a qualification that these apply 'unless it is not reasonable because of the exceptional circumstances of the case'.[434] We acknowledge there can be legitimate reasons for providing for this legislative exception to avoid any unintended consequences of a mandatory aggravating factor.[435]

In this case, we are concerned that to legislate the new aggravating factor with such an exception would be to accept that there will be cases in which it would be unjust or unfair to treat acts of rape and sexual assault committed against a child as being more serious. We disagree with this proposition.

433 See PSA (n 5) ss 9(3), (6).
434 Ibid ss 9(9C), (10A), (10F) cf s 9(9B).
435 See, for example, ibid s 9(10A): the aggravating factor may not apply where the victim of the offence has previously committed an act of serious domestic violence, or several acts of domestic violence, against the offender or it is manslaughter under section 304B under the *Criminal Code* (Qld).

This is not to suggest that we consider all cases should be treated alike or that the aggravating factor should be applied a blunt fashion. As with other legislated aggravating factors, such as section 9(10A) of the PSA:

> the application of the amending sentencing principles in the sentencing discretion 'may' result in a more punitive sentence than may have occurred prior to the amendments, it remains that the sentencing discretion must be exercised having regard to the individual circumstances of the case.[436]

We acknowledge, for example, that there could be circumstances where an offender may not have reasonably known a victim was under 18 years, where a person's behaviour was affected by a mental illness, or where a person may be young and immature, meaning their culpability is reduced.[437] Such circumstances may mean it is appropriate to give less weight to the aggravating factor rather than that it should be given no weight at all.

Applying an aggravating factor to child victims and not adults

As discussed in **Chapter 7**, we do not consider that there is the same need to legislate to address issues we have identified with sentencing levels for rape offences against adults.

In limiting our recommendation to sexual assault and rape committed against a child, we acknowledge that many victim survivors and sexual assault services with whom we met who made submissions did not consider sentences for rape and sexual assault involving adult victims to be adequate or appropriate in light of the significant harm caused by this form of offending. We have sought to respond to these concerns in other sections of this report, including with respect to:

- elevating the recognition of victim harm as an express purpose of sentencing (**Recommendation 2**);
- providing courts with guidance regarding the permitted uses of 'good character' evidence, limiting its use to where this is linked to assessing the person's prospects of rehabilitation or the risks they pose to the community (**Recommendation 5**);
- reforms to the current range of sentencing orders available to courts to ensure appropriate levels of supervision to reduce risks of reoffending (**Recommendation 8**);
- creating a presumptive scheme where people sentenced for rape and aggravated sexual assault serve a greater proportion of their head sentence in custody (between 50 and 80%) prior to being eligible for parole by making changes to the current serious violent offences scheme (**Recommendation 10**); and
- enhancing the resources available to judicial officers and legal practitioners to inform sentence (**Recommendations 6.1 and 6.2**), ensuring training and resources for prosecutors and criminal defence practitioners promotes recognition of the objective seriousness of this form of offending and the significant impacts it has on victim survivors (**Recommendations 19 and 20**), and ensuring judicial officers have access to ongoing professional development focused on sexual violence (**Recommendation 18**).

As highlighted in **Key Finding 3** discussed in **Chapter 7** of this report, we also acknowledge that unhelpful distinctions are often made when determining offence seriousness based on the type of conduct alone,

436 See *RBO* (n 104) [119]–[120] (Henry J, Mullins P and Brown JA agreeing) citing *Pham* (n 108) [7].
437 As to the impact of a person's mental illness on a court's assessment of culpability, see *Verdins* (n 184); *Tsiaras* (n 184); *Yarwood* (n 184).

contrary to a clear direction by the Queensland Court of Appeal that the seriousness of each individual case must be determined based on its own particular circumstances.[438]

This reflects the tendency of prosecutors and defence practitioners in making submissions on sentence to rely on comparative cases involving the same type of rape conduct (for example, cases involving digital–vaginal rape of an adult in making submissions on sentence in a case involving a digital–vaginal rape) rather than focusing on other factors relevant to the assessment of offence seriousness. This appears to have resulted in the development of accepted sentencing 'ranges' based on penetration type alone, with other considerations, such as victim vulnerability, being treated as secondary considerations.

The Court of Appeal has provided clear guidance that such 'compartmentalisation' of rape conduct is to be avoided.

Given the significant impact this current approach has on sentencing levels for rape, we have identified a need for the current focus on conduct type as the principal or a primary determinant of offence seriousness as an issue that should be monitored over time following the delivery of this report (see **Recommendation 7**). Our intention is to enable a change in practice to occur in response to Court of Appeal guidance rather than recommending a short-term legislative 'fix' that, in practice, would be very difficult to implement. Further, the additional step of recommending changes to legislation in our view should only be taken where it is not possible to achieve the desired change to sentencing practice without legislative reform.

The development and enhancement of existing resources for prosecutors, defence practitioners and judicial officers is also important in support of these practice changes. We discuss this further in **Chapter 10**.

Systemic disadvantage considerations

Sentencing guidance can play an important role in the sentencing of Aboriginal and Torres Strait Islander persons in directing courts to consider the complex experiences of intergenerational trauma and other cultural considerations that are relevant to their offending.

We considered sentencing outcomes in cases sentenced for rape (MSO) from 2020–21 to 2022–23 by Aboriginal and Torres Strait Islander status and non-Indigenous status where the victim was a child.[439] While Aboriginal and Torres Strait Islander people are over-represented (17.4%, n=70/403),[440] we found no significant difference in the proportion of cases involving a child victim when compared with non-Indigenous people sentenced (45.7%, n=32 for Aboriginal and Torres Strait Islander person; 51.2% n=170 for non-Indigenous persons).[441] We also found no significant difference in the proportion of people receiving a custodial penalty based on Aboriginal and Torres Strait Islander status[442] or any difference in the type of penalty type outcomes imposed.[443] ATSILS was concerned that any proposed amendments 'do not inadvertently worsen progress towards targets to reduce incarceration rates of Aboriginal and

438 See *R v Wark* [2008] QCA 172 [2] (McMurdo P) [13]–[14] (Mackenzie AJA), [36] (Cullinane J), referred to with approval in *R v Wallace* [2023] QCA 22, 5 [13] (Bowskill CJ). See also *R v RBG* [2022] QCA 143, [4] (Dalton JA) referring to *R v Smith* [2020] QCA 23, [34]–[37] (Morrison JA).

439 See Appendix 4. This analysis was not undertaken for sexual assault as the number of people sentenced where the victim was child was too small for analysis (n=21 non-Indigenous; n=3 Aboriginal and Torres Strait Islander status).

440 Aboriginal and Torres Strait Islander status was not known for one person.

441 Pearson's Chi-Square Test: $\chi 2(2)=1.70$, $p=0.4264$, V=0.06.

442 Some 93.8 per cent of Aboriginal and Torres Strait Islander people sentenced for rape of a child (MSO) received a custodial penalty, compared with 97.1 per cent of non-Indigenous people sentenced for rape of a child (MSO). Pearson's Chi-Square Test: $\chi 2(1)=0.88$, $p=0.3478$, V=-0.07.

443 Pearson's Chi-Square Test: $\chi 2(5)=1.79$, $p=0.8772$, V=0.09.

Torres Strait Islander individuals'.[444] Based on our analysis, we do not anticipate any further disproportionate impact on Aboriginal and Torres Strait Islander persons among those sentenced for sexual assault and rape of a child to be significant.

Members of the Council's Aboriginal and Torres Strait Islander Advisory Panel supported the aggravating factor as this recognises a child victim is more vulnerable and highlighted the longevity of trauma experienced by a child victim. They also considered important the way recognition of victim harm and perpetrator accountability is communicated and given effect to in sentencing, with a view to ensuring this is done in a culturally safe and appropriate way for both victim survivors and those sentenced for such offences. In **Chapter 15**, we discuss the importance of language and communication in the context of sentencing.

Human rights considerations

Any reforms to section 9 to the extent that they goes beyond a re-statement of the current position at common law need to be considered in light of the right to protection against the operation of retrospective criminal laws. Significantly, the Court of Appeal has considered that amendments to section 9 of the PSA are generally procedural in nature as opposed to substantive and thus apply to a person as at the time of sentence as opposed to when the offence was committed.[445]

An aggravating factor may limit the right of a person not to be deprived of liberty[446] because it directs courts to treat offences committed with these features as being more serious, potentially justifying a more severe sentence being imposed. Including an exception may moderate the potential for any unfair impacts.

To the extent that the new aggravating factor may be viewed as limiting a person's right not to be deprived of liberty, we consider it to be reasonably justified. It is important that sentencing laws protect the rights of children not to be subjected to acts of rape and sexual assault and that the seriousness of this conduct is appropriately recognised in the sentences imposed. Further, courts will retain discretion to determine the appropriate sentence, taking into account all the facts and circumstances of the case.

Other options considered, but not recommended

The Council considered several other options, including:

- **Option 1:** insert additional factors to sections 9(3) and 9(6) of the PSA which expressly acknowledge denunciation and the recognition of victim harm are primary sentencing considerations. For example, insert 'The need to denounce the conduct of the offender and recognise any harm caused to the victim, including any psychological or emotional harm' and/or modify section 9(6)(b) to add the words 'and their vulnerability' after 'the age of the child'.

444 Citing commitments under the National Agreement on Closing the Gap. Submission 28 (Aboriginal and Torres Strait Islander Legal Service) 2.
445 See *R v Truong* [2000] 1 Qd R 663 ('*Truong*'); *Hutchinson* (n 97).
446 HRA (n 316) s 29.

- **Option 2:** insert a new subsection in section 9 with primary sentencing principles when sentencing a person for sexual assault and rape, following the approach used in Victoria which includes express statements of Parliament's intent with respect to certain matters.[447]
- **Option 3:** insert a list of aggravating factors in section 9 of the PSA to direct courts to treat specific factors as aggravating, such as the age and vulnerability of the child; whether there was an abuse of trust or a parental or protective relationship; whether there was more than one victim; the physical and psychological effect of the offence on the child; whether there was evidence of emotional blackmail or other manipulation.

Option 1 would apply to more offences than just sexual assault and rape.

Option 2 would act as a legislative restatement of principles otherwise recognised under case law in Queensland and/or in other jurisdictions and would be intended to operate alongside other principles and factors. It would address concerns that courts do not adequately reflect the harm caused by these offences in sentencing outcomes.

Option 3 was informed by other jurisdictions including Tasmania and New Zealand and would largely reflect the aggravating factors in *R v SAG*[448] and *R v BBY*.[449] The purpose is to direct courts to treat specific factors as aggravating and therefore, over time, to increase sentences.

The Council does not consider that these options offer the best solution, as there is a real risk of them simply being viewed as declaratory, rather than making a clear statement about the seriousness of these offences in a way that is likely to achieve an uplift in sentencing levels. They are also likely to contribute even more complexity to an already very complex section.

As the Council considers that there needs to be a complete review of section 9 of the PSA (discussed below), we consider **Recommendation 1** to insert an aggravating factor that the victim was a child is the more appropriate mechanism to simultaneously achieve symbolic recognition that recognises the vulnerability of child victims, limit complexity and maximises judicial discretion and legislative consistency until a further review of section 9 is undertaken.

8.8.3 Recognition of victim harm in the purposes of sentencing

Recommendation

2. **Recognition of victim harm in the sentencing purposes**

The Attorney-General and Minister for Justice progress amendments to section 9(1) of the *Penalties and Sentences Act 1992* (Qld) to include recognition of the harm done to victim survivors.

Such amendments should be progressed in the context of a broader review of section 9 (see **Recommendation 3**).

The Council has concluded that while the current sentencing purposes under section 9(1) of the PSA are broad, they do not adequately recognise the need to hold the perpetrator accountable for harm caused

447 See, for example, section 37B of the *Crimes Act 1958* (Vic), which sets out guiding principles to which courts must have regard in interpreting and applying provisions relating to the offences of rape and sexual assault, as well as other sexual offences, and sections 5(2GA), 5(2I) 10A(3) *Sentencing Act 1991* (Vic) which provides guidance on Parliament's intention regarding the application of specific sections of that Act.
448 (2004) 147 A Crim R 301.
449 [2011] QCA 69.

done to the victim survivor and to promote in the perpetrator a sense of responsibility for, and acknowledgement of, that harm as an important aspect of sentencing (**Key Finding 7**). We therefore recommend that amendments be progressed to section 9(1) of the PSA to include recognition of the harm done to victim survivors as an important aspect of sentencing.

As noted earlier, this recommendation goes beyond sentencing purposes that apply to sexual assault and rape offences, however we consider this change justified given the importance of recognition of victim harm in imposing sentence.

Applying the Council's fundamental principles

Applying the Council's fundamental principles guiding the review, we determined such a change was consistent with these principles including:

- **Principle 1: Reforms to sentencing laws should be evidence-based with a view to promoting public confidence**: While many legal stakeholders did not see a need to expand current sentencing purposes, the clear view of victim survivors and victim support and advocacy organisations was that victim harm needs to be more clearly recognised throughout the sentencing process. The references made by judicial officers on sentence to victim harm also perform an important function in communicating the wrongfulness of the person's actions and, in doing so, provides victims 'with public vindication of their rights and an acknowledgment both of the wrong done to them and the harm they have suffered'.[450]
- **Principle 2: Sentencing decisions should accord with the purposes of sentencing as outlined in section 9(1) of the PSA**: While not an existing sentencing purpose, recognition of victim harm can be viewed as closely related to other sentencing purposes, such as just punishment and denunciation.
- **Principle 3: Sentencing outcomes for sexual assault and rape offences should reflect the seriousness of these offences, including their impact on victim survivors, while not resulting in unjust outcomes**: The proposed reform will encourage greater recognition of the impact of sexual assault and rape on victim survivors while preserving judicial discretion.
- **Principle 5: Sentencing inconsistencies, anomalies and complexities should be minimised:** To the extent that sentencing purposes encourage consistency of approach in sentencing, the inclusion of a new sentencing purpose may promote consistent reference being made to victim harm as an important aspect of sentencing. While some courts might mention this as a feature of punishment and/or denunciation, this is not uniformly the case.
- **Principle 6: Reforms should take into account the likely impacts on the disproportionate representation of Aboriginal and Torres Strait Islander peoples in the criminal justice system:** The potential impacts on Aboriginal and Torres Strait Islander persons as defendants and victims are considered below. It is envisaged this reform will benefit victim survivors while having a minimal impact in terms of changing sentencing outcomes for those sentenced for these offences.

450 Warner, Davis and Cockburn, (n 208) 80. This comment was made in the context of research on current sentencing practices, with the authors finding denunciation often sought to highlight this and other aspects, thereby going 'beyond symbolism'.

- **Principle 7: The circumstances of each person being sentenced and offence are varied. Judicial discretion in the sentencing process is fundamentally important**: The inclusion of recognition of victim harm as a sentencing purpose will not limit a court's ability to take the personal circumstances of the person being sentenced into account and is consistent with the principles of individualised justice.
- **Principle 10: Any reforms should aim to be compatible with the rights protected and promoted under the HRA or be reasonably and demonstrably justifiable as to limitations**: Given that victim harm is a matter that is already required under section 9(2)(c) of the PSA to be taken into account on sentence for all offences, we do not consider this reform will result in any limitations on a person's human rights. In any case, the Council considers elevating recognition of victim harm to a sentencing purpose is reasonable and justifiable under the HRA, taking into account that sexual assault and rape, in particular, result in significant infringements on the human rights of victim survivors (see **Chapter 7** and **Key Finding 1**).
- **Principle 11: The Council will, as far as possible, ensure consistency with previous positions and recommendations**: During our earlier review of sentencing for child homicide, we advised that no changes were required to the sentencing purposes under section 9(1) of the PSA.[451] This advice was provided in the context of that review and partly out of concern it would create a specialist approach to sentencing for child homicide when similar issues might apply to other offences of violence.[452] Different issues have been raised during the current review and, for this reason, we consider a departure from our earlier position is justified. During that earlier review, we also suggested that there is some benefit to be gained in the sentencing remarks articulating the purpose or purposes of sentencing, given that these are an important means of communicating to the offender, and the broader community, the purposes for which the sentence is being imposed to promote public confidence and understanding of sentencing. This remains our position.

Different legislative models

We considered the merits of adopting the Canadian approach, which might better articulate the concept of 'denunciation' by making a clearer connection under the PSA between denunciation and recognition of victim harm. Relevantly, section 718 of the Canadian *Criminal Code* expresses as a sentencing purpose 'to denounce unlawful conduct and the harm done to victims or to the community that is caused by unlawful conduct'.

Denunciation reflects the moral outrage of the community regarding the harm caused by offending.[453] Expressly linking these concepts would have the advantage of not only promoting greater visibility of victim harm, but further clarifying the concept of denunciation itself in a way that is accessible for the community at large. However, equally, this express linking may be unnecessary and might limit the consideration of victim harm to the concept of denunciation instead of enabling it to operate in support of other sentencing purposes, such as just punishment. In contrast to Queensland, in Canada, punishment is not an express legislated purpose of sentencing.

451 Queensland Sentencing Advisory Council, *Sentencing for Criminal Offences Arising from the Death of Child* (October 2018) Advice 1.
452 Ibid 49.
453 *O'Sullivan* (n 31) 202–3; 242–3 [145]–[146] (Sofronoff P, Gotterson JA, Lyons SJA).

The New Zealand model, discussed below, provides another example of how victim harm might be coupled with the concept of perpetrator accountability and acknowledgment of that harm.

Whatever model is ultimately preferred by government, we acknowledge the importance of the statement of legislative sentencing purposes, whatever form is adopted, being framed in a way that promotes community understanding by reflecting contemporary views and language, ensuring they remain relevant rather than solely 'the domain of philosophers and rhetoricians'.[454]

Systemic disadvantage considerations

As the court is required to take into account the harm caused to victims under section 9(2)(c) of the PSA, we do not anticipate the impact on the disproportionate representation of Aboriginal and Torres Strait Islander persons among those sentenced for sexual assault and rape to be significant.

This recommended approach is in contrast to the alternative approach (discussed below) of elevating certain purposes as 'primary sentencing considerations', which may change the assessed relevance of specific sentencing factors and the weight given to these factors in an individual case.

Members of the Council's Aboriginal and Torres Strait Islander Advisory Panel supported recognising victim harm as a sentencing purpose, further acknowledging that the purposes of sentence in an individual case are likely to be mixed: 'You want to try and rehabilitate the person for the crime committed to stop them from reoffending, but also to punish them for the harm caused to the victim. There is a lot of healing required.'[455] The Panel considered that, 'The overarching question should be: "How can we ensure public safety and what will be effective in achieving rehabilitation to stop people from offending?"'[456]

In addressing the adequacy of the current purposes, ATSILS submitted that emphasis should be placed on rehabilitation and addressing offenders' underlying trauma and noted a paucity of services in this area.[457] ATSILS also sought to emphasise the importance of imposing sentences that align with principles of 'individualised justice, proportionality in sentencing and substantive equality before the law'.[458]

Participants in the Cairns consultation observed that denunciation carries significant weight for Indigenous communities and is therefore more effective when offenders are sentenced in the community in which they live. Stakeholders more generally noted the need for better communication with Aboriginal and Torres Strait Islander peoples, as both offenders and victim survivors, and for greater cultural sensitivity.

Also considered important was the way recognition of victim harm and perpetrator accountability is communicated and given effect to in sentencing, with a view to ensuring this is done in a culturally safe and appropriate way for both victim survivors and those sentenced for such offences. In **Chapter 14** and **Chapter 15**, we discuss the importance of language and communication in the context of sentencing.

Human rights considerations

The current sentencing purposes represent high-level guidance to sentencing courts, and thus have limited interaction with the provisions of the HRA, which operate more to safeguard specific rights.

454 Warner, Davis and Cockburn, (n 208).
455 Aboriginal and Torres Strait Islander Advisory Panel meeting, 18 April 2024.
456 Ibid.
457 Submission 28 (Aboriginal and Torres Strait Islander Legal Service) 4.
458 Ibid.

Beyond the existing purposes, any reform of section 9 of the PSA to an extent that goes beyond a reflection of the current position would need to be considered in light of the right to protection against retrospective criminal law (including that a penalty must not be imposed for an offence than is greater than the penalty that applied to the offence when it was committed).[459] Significantly, the Court of Appeal has considered that amendments to section 9 of the PSA are generally procedural in nature as opposed to substantive and, as such, apply to a person as at the time of sentence as opposed to when the offence was committed.[460]

Greater recognition of victim survivors' experiences in the sentencing process is consistent with the right enshrined within the Charter of Victims' Rights to be treated with 'courtesy, compassion, respect and dignity, taking into account the victim's needs'.[461] Victims survivors' rights and the Council's recommendations for reform are discussed in **Chapter 13** and **Chapter 14**.

Other options considered

In considering the need for reform, the Council considered several options including:

- **Option 1:** recommending no change be made to the current sentencing purposes, given the broader application of these sentencing purposes across all offences;
- **Option 2:** acknowledging community harm as an element of, and related to, the existing sentencing purpose of denunciation.
- **Option 3:** acknowledging perpetrator accountability as a purpose of sentencing

Option 1: Recommending no change

We considered whether to recommend no change to sentencing purposes, having regard to the existing provisions within section 9 of the PSA, which require courts to consider not only the harm to the victim and any victim impact statement, but also the surrounding contextual factors of the offending that may also speak to the experience of harm.[462] While the operation of these provisions aims to ensure that victim harm is acknowledged in the sentencing process, we found that recognition of victim harm as an express purpose of sentencing enhances its visibility for both the judiciary and the community at large.

Option 2: Recognition of harm to the community

As discussed above in section 8.5.9, jurisdictions that recognise victim harm as a sentencing purpose also incorporate recognition of the harm caused to the broader community.

In Queensland, the definition of a 'victim' for the purposes of the making of a victim impact statement[463] allows for parents, caregivers and family members of a sexually victimised adult or child to be recognised as victims in their own right. In this way, the PSA recognises that the harm arising from an offence is broader than just the harm experienced by the direct victim of the offence.

The Council acknowledges that sexual offending has significant costs and consequences for the broader community. The harms of such offending extend beyond those that can be quantified (such as lost

459 HRA (n 316) s 35. See also *Criminal Code* (Qld) (n 75) s 11.
460 See *Truong* (n 445); *Hutchinson* (n 97).
461 *Victims' Commissioner and Sexual Violence Review Board Act 2024* (Qld) sch 1.
462 For any offence, a court must take into account 'the nature of the offence and how serious the offence was, including … any physical, mental or emotional harm done to a victim': PSA (n 5) s 9(2)(c)(i). In particular for an offence of violence see s 9(3)(c)–(e) and for a sexual offence committed in relation to a child under 16 years see ss 9(6)(a), 9(6)(c).
463 *Victims of Crime Assistance Act 2009* (Qld) s 5; PSA (n 5) s 179I.

productivity, costs to the social or health system), which can undermine efforts to achieve gender equality and the full participation of women in economic and public life.[464]

These broader community impacts can be even more pronounced for some victim-survivor groups, compounded by the effects of discrimination, racism and other historical factors.[465] For example, for Aboriginal and Torres Strait Islander women, sexual assault and abuse, and family violence have been identified as major causes of family and community breakdown and social fragmentation, compounded by the effects of colonisation and racism.[466]

The Supreme Court of Canada, in *R v Friesen*,[467] referred to the real risk that sexual violence against children can 'fuel a cycle of sexual violence that results in the proliferation and normalization of the violence in a given community'.[468] It acknowledged '[w]hen children become victims of sexual violence, "[s]ociety as a whole is diminished and degraded"'.[469]

While we do not discount the significant impacts of sexual offending on the community, given that our review is focused on just two offences, and that any reforms will apply to all offences sentenced under the PSA, we consider this aspect of recognition of harm to the community requires further consideration and consultation.

For the purposes of our current review, it may be that the broader impacts of rape and sexual assault on the community can be thought of as a reason to ensure a 'strongly deterrent sentencing response'[470] and for appropriate just punishment alongside denunciation, while not expressly stated as a sentencing purpose. We further acknowledge that the far-reaching consequences of offending, quantifying and articulating the harm to the community may prove challenging.

Option 3: Perpetrator accountability

The Council notes some jurisdictions have holding perpetrators to account and promoting accountability as a separate sentencing purpose.

We agree this is a critical part of the sentencing process for sexual violence offences. Informed by New Zealand's approach, **Key Finding 7** links recognition of victim harm to both 'hold the offender accountable for harm done to the victim and the community by the offending' and 'promote in the offender a sense of responsibility for, and an acknowledgment of, that harm'. This provides a potential model as to how both recognition of victim harm and encouraging the person being sentenced to take responsibility for that harm might be accommodated within any reframed purposes.

We note the objective of promoting accountability of the person for their actions is also arguably captured within the existing sentencing purpose of 'just punishment'.

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464 World Health Organization, *'Violence against women'* (Web page 25 March 2024) <https://www.who.int/news-room/fact-sheets/detail/violence-against-women>.

465 Australian Institute of Health and Welfare, *'Family, domestic and sexual violence'* (Web page, updated 19 July 2024) < https://www.aihw.gov.au/family-domestic-and-sexual-violence/types-of-violence/sexual-violence#impacts>.

466 Ibid.

467 *R v Friesen* [2020] 1 SCR 424.

468 Ibid [64] referencing the report of the Standing Senate Committee on Human Rights, *The Sexual Exploitation of Children in Canada: The Need for National Action* (November 2011) 10, 30, 41.

469 Ibid quoting *R v Hajar* [2016] ABCA 222, 39 Alta. L.R. (6th) 209 [67].

470 See *R v MJJ; R v CJN* [2013] SASCFC 51, 117 SASR 81, [84] (Kourakis CJ).

8.8.4 Other issues with section 9 and the need for a review

Recommendation

3. Review of section 9 of the Penalties and Sentences Act 1992 (Qld)

The Attorney-General and Minister for Justice ask the Council, the Department of Justice or another appropriate entity to undertake a review of the principles and factors set out in section 9 of the *Penalties and Sentences Act 1992* (Qld) to ensure section 9 and related provisions of the Act provide a clear and coherent sentencing framework for courts and to promote community understanding of sentencing.

In addition to the issues discussed above, and the use of 'good character' evidence discussed in **Chapter 9**, we have identified several examples of inconsistencies and anomalies in the application of current sentencing factors in section 9 as well potential gaps in the identification of factors that might be important in sentencing for sexual violence offence.

Ultimately we have determined that further additions and changes should not be made until such time as there has been a comprehensive review of this section.

As the primary source of sentencing guidance, section 9 of the PSA has been a convenient focus of law reform since it was first introduced in 1992, and in the last 32 years, the sentencing factors in this section have been amended, created, repealed or reintroduced on 29 separate occasions. Currently, it comprises 11 pages with 24 subsections (**Appendix 11**).

Legal stakeholders told us the length and complexity of section 9 is increasingly becoming a problem. They were of the view that any additional reforms to respond to the issues we identified during this review would further contribute to a section that is already complex and lengthy.

As discussed in section 8.4.6, while such amendments may be made on a well-reasoned basis to respond to changes in community views and issues identified by parliament requiring further statutory guidance, frequent and numerous changes can make the law difficult to navigate and understand.[471] This can create an unnecessary burden on the criminal justice system, impact efficiency by resulting in delays or unnecessary appeals and impact public confidence.[472]

We agree that 'public confidence is diminished when the process of sentencing, and the law applicable to it, is inaccessible and incomprehensible'.[473]

It is important, in our view, that section 9 of the PSA, as the primary source of legislative sentencing guidance in Queensland, be reviewed to ensure that it provides a useful, clear and coherent sentencing framework for courts in sentencing. This is important both to promote consistency of approach and to promote community understanding of sentencing, which are an important objectives of the Act.[474]

We therefore have concluded that a broader review of section 9 is needed to ensure the sentencing principles and factors in section 9 are appropriate and support the PSA to meet its intended purposes both now, and into the future before any further amendments are made.

471 *The Sentencing Code* (n 88) 7 [1.15].
472 Ibid 8–9 [1.16] – [1.21].
473 Ibid 11 [1.32].
474 PSA (n 5) ss 3(d) and (h).

Applying the Council's fundamental principles

Applying the Council's fundamental principles guiding the review[475] has guided us in making a recommendation that section 9 of the PSA be reviewed:

- **Principle 1: Reforms to sentencing laws should be evidence-based with a view to promoting public confidence:** As discussed above, an important purpose of the PSA is to provide for sentencing principles designed to promote a consistent approach by courts to the sentencing of offenders and to promote public understanding of sentencing practices and procedures. We have heard from legal stakeholders that section 9 is becoming increasingly complex, lengthy and unwieldy. It has also been acknowledged that the language used may be difficult for community members to understand. A review of this section will ensure the objectives of the Act can better be met.
- **Principle 5: Sentencing inconsistencies, anomalies and complexities should be minimised.** The aim of a review of 9 should be to ensure that the principles contained in section 9 provide a useful, clear and coherent sentencing framework for courts. As discussed below, although our review was confined to the principles as these apply to sexual assault and rape, we have found examples of inconsistencies and anomalies in the interpretation and application of relevant sentencing factors. There are also potential inadequacies in the way primary sentencing factors that must be applied for specific purposes, such as under section 9(3), are currently framed.
- **Principle 7: The circumstances of each person being sentenced, the victim survivor and the offence are varied. Judicial discretion in the sentencing process is fundamentally important.** The Council recognises that the circumstances of each person being sentenced, each victim and each offence, are varied. A review of section 9 will consider whether the principles contained in section 9 are appropriately flexible to meet the varied circumstances of offences, each person sentenced and the victim survivor, and maintains judicial discretion.
- **Principle 10: Any reforms should aim to be compatible with the rights protected and promoted under the HRA or be reasonably and demonstrably justifiable as to limitations.** A review of section 9 could support rights protected under the HRA by ensuring that existing and newly added principles contained in section 9 are compatible with human rights or to the extent that rights are limited, these limitations are reasonable and demonstrably justified.
- **Principle 11: The Council will, as far as possible, ensure consistency with previous positions and recommendations.** In our previous review of community-based sentencing orders, imprisonment and parole options, we recommended that section 9 of the PSA should be reviewed by the Council or by another appropriate entity to consider whether the current legislative exceptions to the principles set out in section 9(2)(a), including under subsections (2A) and (4), are appropriate and should be retained.[476] We recommended that this review should occur if the Council's recommended reforms to community-based sentencing orders (including the proposed introduction of a new intermediate sanction, a 'community correction order', or CCO) were to be adopted.

475 For a full list of the fundamental principles, see Chapter 3.
476 Queensland Sentencing Advisory Council, *Community-based Sentencing Orders Imprisonment and Parole Options: Final Report* (2019) rec 2.

In the following sections we identify some of the issues we have identified during this review and reforms considered.

An offence of personal violence: application of section 9(2A) indecent assaults

As a result of our review, we found there is inconsistent application of section 9(2A) of the PSA when sentencing indecent assaults charged under section 352 of the *Criminal Code* (Qld).[477]

While we recognise the benefit and need for a broad definition for an offence of 'personal violence', particularly in circumstances where there is a wide range of conduct and the consequences of such a finding increase the likelihood of imprisonment, our view is that all indecent assaults, whether accompanied by additional acts of physical violence or not, are by their very nature offences 'which involve the use of … violence against another person'.[478] However, we do not consider displacement of the principle of imprisonment as a sentence of last resort is appropriate when sentencing for all such assaults. For this reason, we do not recommend that amendments be made to section 9(2A) to automatically bring all indecent assaults within its scope.

It is evident to us that in many cases of sexual assault (non-aggravated), the existence of a legislative presumption that the person should be sentenced to imprisonment (or rather eroding of the principle that a sentence of imprisonment should not be imposed unless absolutely necessary) will serve little practical purpose, and might actually contribute to the person being at greater risk of reoffending. Particularly where the person is young and has no criminal history, and the nature and seriousness of the offence do not require actual imprisonment, the availability of alternative community-based options that involve conditions such as counselling, a requirement to participate in programs and supervision might offer better long-term outcomes in terms of community safety than a short sentence of immediate imprisonment or a wholly suspended prison sentence.[479] Further, a longer period of supervision on probation, rather than a short period under parole supervision, is likely to be more conducive to promoting rehabilitation.[480]

It remains our view that alternatives to imprisonment that can be better tailored to the individual circumstances of the person being sentenced and their risk factors, while ensuring these orders also meet other purposes of sentencing, including denunciation, community protection and just punishment, should be explored (see **Recommendation 8**).

Amending sections 9(4)–(6A) to apply to an offence of a sexual nature against a child aged 16 and 17

Consistent with **Recommendation 1**, the vulnerability of the child victim of rape or sexual assault in our view requires special recognition.

Currently, section 9(6) sets out primary factors to which a court must have regard when an offence is committed against an offence of a sexual nature committed in relation to a child victim aged under 16 years. Sections 9(4) and 9(6A) also set out special principles that a court must apply when sentencing a person for these offences.

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477 For example, see *Singh* (n 52) and *Biswa* (n 43).

478 PSA (n 5) s 9(2A)(a).

479 See *R v Rogan* [2021] QCA 269, [16]–[18]: 'A very short term of imprisonment can have large effects. Apart from the stigma which imprisonment carries, it may affect present and future employment, housing arrangements and all kinds of financial arrangements. The effects of prison extend to whatever experiences are undergone in prison, which may occur even within a short period. Consequently, the imposition of a very short term of imprisonment is not just a matter of the loss of liberty for a particular period. … an actual period of imprisonment is not always required in cases [of non-aggravated sexual assault]'.

480 See Day, Ross and McLachlan (n 187).

We considered whether those subsections should be extended to also apply to offences committed against children aged 16 and 17 years. The adoption of this broader definition of who is a 'child' for these purposes would have the benefit of being consistent with the approach taken by other Queensland legislation that has a protective focus, such as the CPOROPO Act. It would also be consistent with the definition of who is a 'child' for the proposes of the *Youth Justice Act 1992* (Qld)[481] ('YJA') – taking into account the extension of the principles under this Act to children aged 17 was made on the basis that: 'Children and young people's neurological and cognitive development is immature and incomplete to a degree.'[482] We also acknowledge amendments proposed to be made to the *Criminal Code* (Qld) will establish new specific sexual offences that apply to children in this older age category, recognising that children of this age are still highly vulnerable to this form of sexual violence and the impacts can be greater than for adults victim survivors.[483]

While we support greater recognition of the vulnerability of child victims aged 16 and 17, and the objective of reducing any inconsistency in the law regarding the protection of children, we have ultimately determined changes should not be made to extend the operation of sections 9(4)–(6) of the PSA. We are particularly concerned about the potential impacts of extending section 9(4)(c) of the PSA which would require the court to impose a sentence of actual imprisonment, unless there are exceptional circumstances, to cases of non-aggravated sexual assault in circumstances where the person might be young and have no prior history of offending. As discussed above, we are concerned in this case that the existence of a legislative presumption that the person must be sentenced to serve an actual term of imprisonment unless there are exceptional circumstances, may be counterproductive and contribute to the person sentenced being at even greater risk of reoffending.[484]

We have fewer concerns about the application of the primary sentencing principles and factors set out in section 9(6), or of section 9(6A) regarding the treatment of 'good character' as, in our view, these principles and factors are equally as relevant in cases involving sexual offences committed against older children as they are in cases of offences committed against children under 16 years.

However, in our view, it is better for a broader review to be undertaken rather than to make these provisions even more complicated by applying some subsections of section 9 to some offences only, which would involve a more substantial redrafting exercise.

Elevation of denunciation and recognition of victim harm as primary sentencing considerations under sections 9(3) and 9(6) of the PSA

As discussed above, we considered as an alternative to **Recommendation 2** or in addition to **Recommendation 1** recommending that denunciation and recognition of victim harm be included in the list of primary sentencing considerations set out in sections 9(3) and 9(6) of the PSA.

A Bill introduced to Parliament similarly proposes to amend the YJA to provide that:

> (1AB) In sentencing a child for an offence, a court must have primary regard to any impact of the offence on a victim, including harm mentioned in information relating to the victim given to the court under the *Penalties and Sentences Act 1992*, section 179K.[485]

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481 Both adopt the definition of 'child' as a person under 18 years: *Acts Interpretation Act 1954* (Qld) sch 1. *Youth Justice and Other Legislation (Inclusion of 17-year-old Persons) Amendment Act 2016* (Qld).

482 Explanatory Notes, Youth Justice and Other Legislation (Inclusion of 17-year-old Persons) Amendment Bill 2016 (Qld) 1.

483 *Criminal Justice Legislation (Sexual Violence and Other Matters) Amendment Act 2024* (Qld) ss 8–9 inserting into the *Criminal Code* (Qld) a new s 210A: sexual acts committed against children aged 16 years or older who are under the person's care, supervision or authority and 229B(1A).

484 See n 479 with reference to the impacts of short terms of imprisonment citing *R v Rogan* [2021] QCA 269 [16]–[18].

485 Making Queensland Safer Bill 2024 (Qld) cl 15.

As we have recommended a change to sentencing purposes, and that a broader review of section 9 is warranted, we ultimately determined that separate recognition of victim harm and denunciation as primary sentencing considerations in the context of the operation of these subsections may be unhelpful and unnecessary until a broader review can be undertaken.

We also note that the application of these provisions extends beyond sentencing for the two offences of rape and sexual assault and may benefit from further consultation.

Primary factors in section 9(3) of the PSA

A secondary concern we identified was that the factors listed in section 9(3) of the PSA are framed in a way that places a strong focus on the existence and reduction of the risk to members of the community of physical violence, rather than the concern to protect community members (most usually women and girls) from psychological and emotional harm that is more relevant in the case of sexual assault and rape.

While we might have been inclined to recommend changes to the existing factors in section 9(3) of the PSA, as discussed above, it is our view that no further changes should be made at this time. Our concern with the number of 'add ons' and modifications made to section 9 of the PSA over time is that they have significantly complicated this section and made its application increasingly difficult. A review of section 9 could adopt a more holistic review of the principles and factors that apply to all offences.

Serious vilification and hate crimes

We note there recent amendments have come into effect establishing a circumstance of aggravation under section 52B of the *Criminal Code* (Qld), which applies if the offender was wholly or partially motivated to commit the offence by hatred or serious contempt for a person or group of person in relation to race, religion, sexuality, sex characteristics or gender identity. These reforms, when legislated, were not extended to the offence of sexual assault or other sexual offences.

We considered whether to recommend extending the new circumstance of aggravation to rape and sexual assault, or including this as an aggravating factor under the PSA, but decided not to do so, noting that the Legal Affairs and Safety Committee on its report on the amendment Bill recommended that

> the Queensland Government conducts a review within 24 months of the commencement of the Bill to ensure that the offences to which the circumstance of aggravation apply are adequate to address the serious vilification and hate crimes experienced by members of the Queensland community, with particular consideration to be given to the inclusion of sexual offences and property crimes such as graffiti.[486]

It is better in our view for the operation of the new circumstance of aggravation to be reviewed before any recommendations are considered for its extension.

The absence of a legislated circumstance of aggravation or aggravating factor does not, however, prevent a court from taking relevant factors into account in the proper exercise of a court's sentencing discretion. This includes sexual offending, which is motivated by hate or, for example, by misogynistic attitudes and beliefs.

Other issues

We know sexual violence can occur in the workplace, which increases a victim's vulnerability due to a power imbalance and may make reporting difficult.[487]

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486 Legal Affairs and Safety Committee Report (n 84).
487 Submission 19 (Basic Rights Queensland).

We note the recent introduction of sections 9(10E)–(10G) of the PSA providing an offence is aggravating if it occurs in the context of the victim's employment,[488] which was legislated in response to a previous recommendation made by the Council.[489] For the aggravating factor to apply, the offence must be one sentenced under section 9(2A) of the PSA.

Due to the recent introduction of these provisions, we do not yet know their impact, but we note sexual assault is not consistently sentenced under section 9(2A). This may be a barrier to the application of this new aggravating factor but, as for offences motivated by hatred or serious contempt for a person or group, a court can consider this factor as aggravating despite this not being legislated.

We also do not consider it necessary to further define what constitutes 'exceptional circumstances' for the purposes of section 9(4) of the PSA as a reason to depart from the requirement to impose actual imprisonment for a sexual offence against a child under 16 years.

Similarly, we do not consider there is sufficient evidence to justify expanding section 9(4)(a), which requires a court to have regard to the sentencing practices, principles and guidelines applicable when the sentence is imposed rather than when the offence was committed against an adult victim and we received very little feedback on this issue to suggest the absence of such a provision was impacting current sentencing outcomes.

ATSILS recommended we consider whether to legislate the principle in *Bugmy* that 'the effects of profound childhood deprivation do not diminish with the passage of time or repeat offending'.[490]

As our Terms of Reference were limited to two offences of sexual assault and rape, we consider this would require further investigation.

Should our recommendation that section 9 be comprehensively reviewed be accepted (**Recommendation 3**), these issues can be considered further.

8.8.5 The structure of sexual assault (section 352, *Criminal Code* (Qld))

Recommendation

4. **Structure of the offence of sexual assault (*Criminal Code* (Qld) s 352)**

The Attorney-General and Minister for Justice continue the review of Chapter 22 (Offences Against Morality) and Chapter 32 (Rape and Sexual Assaults) of the *Criminal Code* (Qld) in response to recommendation 42 of the Women's Safety and Justice Taskforce, *Hear Her Voice – Report Two: Women and Girls' Experiences Across the Criminal Justice System* (2022).

The review should further include consideration of whether:

- the structure of conduct captured within section 352(1) is too broad and should instead be structured in a way that better distinguishes different forms of non-aggravated sexual assault with the potential for graduated penalties to be applied;
- the conduct under section 352(2) is appropriately categorised as a lesser form of aggravated offending, particularly with respect to male victims of what would otherwise constitute rape if the victim were forced to perform the same act (fellatio) on the perpetrator;
- conduct in section 352(3) involving self-penetration or being forced to penetrate another person should constitute a separate offence.

488 *Respect at Work and Other Matters Amendment Act 2024* (Qld) s 70.
489 Queensland Sentencing Advisory Council, *Penalties for Assaults of Public Officers: Final Report* (2020) recs 10–11 ('*Penalties for Assault of Public Officers*').
490 *Bugmy* (n 135) 572 (French CJ, Hayne, Crennan, Kiefel, Bell and Keane JJ). See Submission 28 (Aboriginal and Torres Strait Islander Legal Service Inc) 5–6.

Taking community views into account, in conjunction with our own assessment of the objective seriousness of sexual assault and how it is categorised in other jurisdictions, we recommend a review of the current structure of the offence of sexual assault.

Specific problems we have identified include the following:

- The breadth of conduct captured ranges significantly in terms of both seriousness and the type of acts captured. This has potential to undermine community confidence in sentencing levels when what appear to be very low sentences are imposed for an offence that varies in seriousness from a momentary touching of an adult victim's buttocks over clothing to a person rubbing their exposed penis on a victim's bare genitals.
- The treatment of non-consensual fellatio performed by a perpetrator on a male victim as aggravated sexual assault, which has a 14-year maximum penalty, when compared to penile-oral rape, which carries a maximum penalty of life imprisonment is anomalous. In contrast to Queensland, this conduct is treated as equivalent to rape conduct in the ACT, NSW, SA, the NT and WA. In Victoria, this falls within the offence of 'rape by compelling sexual penetration', which carries the same maximum penalty as rape (25 years) (see further **Appendix 15**).
- Inconsistencies exist between the structuring of sexual assault in Queensland the approach adopted in some other jurisdictions, which separates acts involving self-penetration or being forced to penetrate another person as a separate offence. For example, conduct involving a victim compelled or forced to penetrate themselves is captured in SA within the offence of rape (life imprisonment), in Victoria under the offence of 'rape by compelling sexual penetration' (25 years) and in WA as 'sexual coercion' (14 years).

While it is beyond scope of this review to consider changes to the substantive criminal law in Queensland, as discussed in **Chapter 7**, we acknowledge developments in jurisdictions such as Canada to not distinguish between penetrative and non-penetrative sexual acts in the structure of their offences or, as discussed above, to include acts that are currently defined as 'sexual assault' in Queensland under section 352(2) as forms of 'sexual intercourse' falling within rape offence equivalents. These developments signal a clear and intentional move away from a focus on the act involved to an assessment of culpability of the person responsible and the nature and level of harm caused, taking into account the significant infringement involved of a victim survivor's human rights.

We note work underway in response to the Women's Safety and Justice Taskforce's recommendations and suggest that work in response to the Taskforce's report and issues raised should continue with an expansion in scope to consider issues during this review with respect to the offence of sexual assault.

Further, while not identified as a specific problem, we note that the extent to which circumstances of aggravation increase the maximum penalty that would otherwise apply to offences in the *Criminal Code* (Qld) are inconsistent, which may also lead to sentencing issues. For example, the circumstances of aggravation for sexual assault (s 352(3)) are having or pretending to have a weapon or being in company, and they increase the maximum penalty for conduct that would otherwise attract a maximum penalty of 10 years' or 14 years' imprisonment to life imprisonment. In contrast, for the offence of assault occasioning bodily harm, the same factors are also circumstances of aggravation but they only increase the maximum penalty by 3 years (from 7 years' to 10 years' imprisonment).[491] For burglary, those circumstances, as well as the fact that the person committed the offence at night, used or threatened to

491 *Criminal Code* (Qld) s 339.

use actual violence, or damaged or threatened to damage property, increase the usual 14-year maximum penalty to life imprisonment. This is beyond the scope of the Council's current Terms of Reference; however, these variations may lead to sentencing inconsistencies.

As part of an earlier review, the Council declined to recommend changes to the maximum penalty of 14 years that applies to aggravated serious assault on the basis that:

> the classification of offences and setting of statutory maxima – as a general proposition – is best undertaken as a holistic exercise. This enables an assessment to be made of the seriousness of individual offences and conduct captured relative to other similar offences and is therefore more likely to promote a penalty framework that is internally consistent and coherent.[492]

This remains our position.

The appropriate maximum penalties that should be applied will depend on the overall structure of offences and conduct captured within them. We have undertaken a review of offence provisions in other jurisdictions as required under the Terms of Reference to inform this consideration (see **Appendix 1**).

We are further aware that the ALRC is undertaking a separate inquiry into justice responses to sexual violence. While the focus of this review is not on the structure of relevant offence provisions, there may be opportunities to leverage off this work and discussions that may follow at a national level to better harmonise laws with respect to this form of conduct.

The ALRC is due to provide its final report to the Attorney-General by 22 January 2025.

492 *Penalties for Assaults on Public Officers* (n 489) xxvii, 207.

Chapter 9 – Evidence of 'good character' in sentencing for sexual offences

9.1 Introduction

The Terms of Reference ask us to review sentencing practices for sexual assault and rape.[1] They require us to consider several things when undertaking our review, including the need to: protect victims; hold those who commit these offences to account; maintain judicial discretion; and promote public confidence in the criminal justice system. These principles have helped guide our approach to the question of what role, if any, 'good character' evidence should play in sentencing for sexual assault and rape offences and its permitted uses.

In this chapter, we examine the use of 'good character' evidence in sentencing for sexual offences.[2] We discuss the current approach to the use of this evidence, what we mean by 'good character', and how this evidence can be relevant to sentencing. We consider how courts take this evidence into account, both generally and specifically, when sentencing for sexual assault and rape as well as what happens in other jurisdictions. We also present our key findings and recommendation for reform for the use of 'good character' evidence in sentencing in Queensland.

Our recommendation is broader that just the use of this form of evidence for sexual assault and rape. This is in response to a specific request that we 'have regard to the use of good character evidence in sentencing for sexual offences and, if appropriate, recommendations for reform'.[3]

9.2 The current approach

The *Penalties and Sentences Act 1992* (Qld) ('PSA') requires a court to consider the character of the person being sentenced in determining sentence.[4] A person's 'character' is one of the factors to which a court must have primary regard if the offence involved the use (or threatened use) of violence, physical harm, sexual offending against a child under 16 or a child exploitation material offence.[5] The PSA also requires a court to have to regard to 'the presence of any aggravating or mitigating factor concerning the offender'.[6] A person's 'otherwise good character' is an established mitigating factor at common law.[7]

1 Appendix 1, Terms of Reference.
2 Evidence of 'good character' can also be raised during a trial which is a separate issue. Our discussion of 'good character' in this section is confined to sentencing and we do not make any recommendation in respect to its use in trials. For further information on how 'character' evidence is used in a trial, see: *Evidence Act 1977* (Qld) s 15; Supreme Court of Queensland, 'Good character/Bad Character' in *Supreme and District Courts Criminal Directions Benchbook*, (March 2017) 42.1–2 <https://www.courts.qld.gov.au/court-users/practitioners/benchbooks/supreme-and-district-courts-benchbook>; *Melbourne v The Queen* (1999) 198 CLR 1 ('*Melbourne*').
3 Letter from The Hon Yvette D'Ath MP (Attorney-General and Minister for Justice) to the Hon Ann Lyons AM (Chair, Sentencing Advisory Council, 25 September 2024.
4 *Penalties and Sentences Act 1992* (Qld) ('PSA) ss 9(2)(f), (3)(h), (6)(h) with the exception in (6A), (7)(d) with exception in (7AA).
5 Ibid ss 9(3)(h), (6)(h) with the exception in (6A), (7)(d) with exception in (7AA).
6 Ibid s 9(2)(g).
7 *Ryan v The Queen* (2001) 206 CLR 267, 277 [31] (McHugh J) ('*Ryan*').

However, when sentencing a person for a sexual offence against a child aged under 16 years[8] or for a child exploitation offence, a court '*must not* have regard to the offender's *good character* if it assisted the offender in committing the offence'.[9] This limitation was introduced in September 2020[10] and, while its impact is yet to be formally evaluated, responses to the Council indicate that there is still dissatisfaction with the use of evidence of 'good character' in sexual offence cases.

9.2.1 What is 'character' evidence?

Under section 11 of the PSA, when considering a person's 'character'[11] a court may consider any prior convictions (and their nature), community contributions, history of domestic violence and any other relevant matter.[12] There is no uniformly accepted definition of 'character' or 'good character', and these terms are not defined under the PSA. The *Macquarie Dictionary* defines 'character' to include 'qualities that distinguish one person', 'moral constitution', 'reputation', 'good repute' or a person's 'qualities'.[13]

The High Court has explained that 'good character' is complicated by having a positive and negative aspect:

> [T]here is a certain ambiguity about the expression 'good character' [in the sentencing context]. Sometimes it refers to only an absence of prior convictions and has a rather negative significance, and sometimes it refers to something more of a positive nature involving a history of good works and contribution to the community.[14]

The *Macquarie Dictionary* also defines 'out of character' to mean 'inconsistent with what is known of previous character, behaviour etc'.[15]

9.2.2 How does a court accept evidence of 'good character'?

Evidence of 'good character' can take many forms, including a character reference from a family member, friend, employer or work colleague giving an opinion or attesting to the person's traits, qualities or work ethic. There are no formal requirements for this evidence[16] and an author of a character reference does not usually have to attend court and give evidence.[17] It can include submissions from a lawyer or a

8 A 'sexual offence against a child under 16' is not defined. For the application of sentencing principles in the PSA, courts have held offences are not confined to those under the definition of 'sexual offence' in respect of parole provisions in the PSA (n 4) div 3; *Corrective Services Act 2006* (Qld) sch 1. See *R v HYQ* [2024] QCA 151 [38] (Bowskill CJ, Dalton JA and Wilson J agreeing).

9 PSA (n 4) ss 9(6A), (7AA) (*emphasis added*). This section was introduced following recommendation 74 by the Royal Commission into Institutional Responses to Child Sexual Abuse, *Criminal Justice Report Parts VII - X and Appendices* (2017) 299 ('*Criminal Justice Report Parts VII – X')*. The Queensland provision goes further than the Royal Commission's recommendation by providing good character cannot be taken into account *at all* if it assisted the person committing the offence: see PSA (n 44) s 9(6A).

10 Inserted by *Criminal Code (Child Sexual Offences Reform) and Other Legislation Amendment Act 2020* (Qld) s 53(5). Commenced on the day after the date of assent (15 September 2020). Prior to the amendment, the Legal Affairs and Community Safety Committee was told by knowmore that the word 'assisted' would result in a narrow application. The Queensland Law Society submitted that the amendment could undermine the sentencing principle of rehabilitation and undermine judicial discretion. Despite concerns, the Committee recommended the legislation be passed without amendment: see Legal Affairs and Community Safety Committee, *Criminal Code (Child Sexual Offences Reform) and Other Legislation Amendment Bill 2019* (Report 59, 56th Parliament, February 2020), 32–4.

11 PSA (n 4) ss 9(2)(f), (3)(h), (6)(h) with the exception in (6A), (7)(d) with exception in (7AA).

12 Ibid s 11(1).

13 *Macquarie Dictionary* (online at 22 May 2024) 'character' (def 1–6). For other definitions see: *Encyclopaedic Australian Legal Dictionary* (online at 10 October 2024) 'good character' (def) 'Admirable disposition or qualities such as honesty and reliability'. Courts have adopted a similar definition, although 'reputation' is considered separate: see *Ryan* (n 7) 276 [28] (McHugh J) citing *Melbourne* (n 2) 15 [33].

14 *Ryan* (n 7) 276 [27] (McHugh J) citing *R v Levi*, Court of Criminal Appeal (NSW) (Unreported, 15 May 1997) 5 (Gleeson CJ).

15 *Macquarie Dictionary* (online at 22 May 2024) 'character' (def 24).

16 For example, there is no requirement for it to be a Statutory Declaration under the *Oaths Act 1867* (Qld) ss 13C, 13E, 14.

17 An exception can be if the matter has been listed for a contested sentence.

criminal history showing no prior convictions. Legal commentators have suggested that 'if character matters, it must relate to an instrumental objective such as rehabilitation or incapacitation'.[18]

Under the PSA, the court 'may receive any information … it considers appropriate to enable it to impose the proper sentence'.[19] It is common in Queensland to rely on hearsay evidence in sentencing.[20] When information is submitted for consideration at sentence, there are rules about fact finding.[21] If a fact is admitted and not challenged, a court may act on this evidence.[22] Therefore, if a person being sentenced raises evidence of 'good character' as mitigating, a court may act on those facts if they are not challenged by the court or prosecution. If challenged, the person must satisfy a sentencing judge or magistrate that it is true on the balance of probabilities.[23] With respect to the limitation to 'good character' evidence when the victim is a child, courts in other jurisdictions have considered that the onus is on the prosecution (discussed further in section 9.3).

The Queensland *Director of Public Prosecution's Guidelines* states that a prosecutor has a 'duty to do all that can reasonably be done to ensure that the court acts only on truthful information'.[24] This includes making inquiries with an author of a character reference to confirm its content, knowledge of the offence and use of the reference. The *Guidelines* also recognise that a victim survivor can have a good knowledge of the person being sentenced and encourage prosecutors to ask victim survivors to be present at the sentence to inform them of anything said which they know to be false.[25] A court may reopen sentencing proceedings to correct 'a clear factual error of substance'.[26]

9.2.3 The rationale: Why is evidence of 'good character' a relevant sentencing consideration?

A court must consider matters relevant to the offence and to the person being sentenced,[27] including a person's 'character'.[28] Evidence of 'good character' may assist the sentencing court to determine a person's prospects of rehabilitation,[29] risk of reoffending[30] and the relevance of sentencing purposes.[31] Evidence of 'good character' can be relevant to:

18 Julian V. Roberts (ed), *Mitigation and Aggravation at Sentencing* (Cambridge University Press, 2011) 45.
19 PSA (n 4) s 15.
20 *R v Bassi* (2021) 293 A Crim R 149 [70] (Sofronoff P) ('*Bassi*').
21 *Evidence Act 1977* (Qld) s 132C.
22 Ibid s 132C(2). The person is also entitled to assume it is accepted: *Bassi* (n 20) [72] (Sofronoff P) citing *R v Lobban* (2001) 80 SASR 550.
23 Ibid s 132C(3). Where an allegation of fact is not admitted or challenged, the standard of proof is a civil standard (on the balance of probabilities), although the level of satisfaction varies (known as the *Briginshaw* test): see *Briginshaw v Briginshaw* (1938) 60 CLR 336, 362–3. This means the greater the consequences, the higher the standard of 'satisfaction' required, see, for example, *R v Lacey and Lacey* [2010] QDC 344; *R v Ta* [2019] QCA 53 [12]–[13]; *R v Cumner* [2020] QCA 54 [53]. The onus (responsibility) is on the sentenced person to provide evidence: see e.g. *Bugmy v The Queen* [2013] 249 CLR 571, 572 [41]: Where 'it is sought to rely on an offender's background of deprivation in mitigation of sentence, it is necessary to point to material tending to establish that background'.
24 Queensland, Office of the Director of Public Prosecutions, *Director's Guidelines* (as at 30 June 2023) 51.
25 Ibid 52.
26 PSA (n 4) s 188(1)(c).
27 See, for example, *R v Misi; Ex parte A-G (Qld)* [2023] QCA 34 [31] (Mullins P, Dalton and Flanagan JJA)
28 PSA (n 4) ss 9(2)(f), (3)(h), (6)(h) with the exception in s 9(6A), (7AA); *Ryan* (n 7) 299–300 [110] (Kirby J).
29 Arie Freiberg, *Fox and Freiberg's Sentencing: State and Federal Law in Victoria* (Law Book Co, 3rd ed, 2014) 350 [5.45] ('*Fox and Freiberg's Sentencing Law*') ; *R v Knoote-Parke* [2016] 125 SASR 13, 28 [77] (Doyle J) ('*Knoote-Parke*') cited with approval in *R v BI (No 4)* [2017] ACTSC 71 [65]–[70] (Refshauge J).
30 See *R v Rogan* [2021] QCA 269 [15] (Sofronoff P) ('*Rogan*'); *Ryan* (n 7) 276 [28]–[29] (McHugh J), 288 [68] (Gummow J); *Knoote-Parke* (n 30).
31 *Criminal Justice Report Parts VII - X* (n 9) 288.

- support the important principle of individualised justice by allowing a court to consider a person being sentenced as 'a whole person and not solely under the shadow of their crimes'.[32] This ensures a sentence reflects more than a one-dimensional view of the person;[33]
- demonstrate that a person has, despite the offence, 'done things and earned a reputation that redounds to the offender's credit'[34] when considering the sentence to impose;
- consider whether specific deterrence (deterrence directed at the person being sentenced) is needed or rehabilitative measures could reintegrate the person into society.[35]
- suggest that the offence may have been 'an isolated lapse representing human frailty' where the offence is one of strict liability.[36] A person's character in these cases may indicate they have the capacity to appreciate the censure of the criminal process and is unlikely to reoffend.[37] Similarly, for a first-time offender, the behaviour might be considered 'exceptional, atypical and out of character'.[38]
- determine whether the person is more or less deserving of punishment. If the court considers evidence of 'good character' shows the 'inherent moral qualities of the person',[39] this could be relevant to considering whether a 'morally good' person is less deserving than a 'morally bad' person of punishment.[40]

The rationale for using evidence of 'good character' is not universally accepted and there are critiques about its use (see section 9.4.1).

9.2.4 'Good character' and the decision in *Ryan v The Queen*

In *Ryan v The Queen* (*'Ryan'*),[41] a NSW Catholic priest pleaded guilty to 14 offences involving sexually abusing 12 young boys over a 20-year period. He also admitted to 39 sexual offences involving 16 other victim survivors. He was sentenced to 16 years' imprisonment with a minimum non-parole period of 14 years' imprisonment.[42] At sentence, the judge discussed Ryan's character and concluded his 'unblemished character and reputation does not entitle him to any leniency whatsoever':[43]

> I appreciate that, to other priests, and to others within his congregation, the prisoner was a good man who did positive things and who achieved much. This is shown by [various testimonials]. But *whatever he had done and achieved, he is not a good man*. The prisoner is a man who preyed upon the young, the vulnerable, the impressionable, the child needing a friend or a father figure and the child seeking approval from an adult. And for what? For his own sexual gratification, without thought or concern for the feelings or the sexual development of his victims. How can a man, who showed a kind and friendly face to adults, but who sexually abused so many young boys in so many ways over such a long period of time, be considered to be a good man? I accept that to some people there is good in everyone, but *I cannot see any good in the prisoner*.[44]

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32 *Ryan* (n 7) 299 [108] (Kirby J). His Honour went on to say 'Such an approach would equalise the cruel, slothful, indifferent or impenitent offenders with one who can demonstrate conduct over many years, in other aspects of life.'
33 *Weininger v The Queen* (2003) 212 CLR 629, 649 [62] (Kirby J) ('*Weininger*').
34 *Ryan* (n 7) 297 [101] (Kirby J).
35 *Fox and Freiberg's Sentencing: Law* (n 29) 350 [5.45].
36 *Ryan* (n 7) 288 [68] (Gummow J).
37 Ibid (Gummow J).
38 *Fox and Freiberg's Sentencing:* Law (n 29) 350 [5.45] citing Kate Warner, 'Sentencing Review 2008-2009' (2010) 34(1) *Criminal Law Journal* 16.
39 *Melbourne* (n 2) [33].
40 *Ryan* (n 7) 276–7 [30] McHugh J.
41 Ibid.
42 This was cumulative on a previous sentence, making the total effective imprisonment 22 years imprisonment. ibid [165].
43 Ibid 274 [20] (McHugh J) quoting Judge Nield.
44 Ibid 273–4 [19] (McHugh J) quoting Judge Nield (emphasis in original).

The NSW Court of Appeal did not consider that there was an error in the sentencing judge's approach and no weight given to the 'good character' evidence, but a majority of the High Court of Australia (3:2) disagreed.[45]

If a court decides a person is of 'otherwise good character', it is bound to give it some weight

McHugh J found there are 2 distinct stages in the sentencing process regarding 'good character':

1. The judge must decide whether the person being sentenced is of '*otherwise good character*' without considering the offences the person is being sentenced for.[46]
2. If a person is of 'otherwise good character', 'the sentencing judge is *bound* take that into account in the sentence he or she imposes.'[47] The weight given will vary according to all the circumstances of the case.[48]

Assessments of whether a person is of 'otherwise good character' will vary, and 'it is impossible to state a universal rule'.[49]

Offence seriousness can reduce the mitigating effect of 'good character'

While factors in mitigation must be given appropriate weight, they should never result in a sentence that is disproportionate to the gravity of the offence.[50] The weight of a mitigating factor can be reduced because of the nature and seriousness of the offence, which 'is a countervailing factor of the utmost importance'.[51] Based on the facts in *Ryan*, McHugh J commented on factors which may reduce the weight of 'good character' evidence:

> First, there were multiple offences involving repeated acts committed over a number of years. They were not isolated incidents which might be said to be out of character. Second, the appellant was … leading a double life. Over many years, the appellant was doing 'good works' while he was committing grave offences. This contradiction indicates that the appellant's otherwise good character was a minor factor to be weighed. Third, the appellant committed the offences in the course of his priestly duties and it was as a priest that he did the 'good works' which are at the heart of his claim of good character. This reduces the weight that ought to be given to his otherwise good character. Fourth, and related to the third point, the offences involved breaches of trust.[52]

The matter was remitted to the to the NSW Court of Appeal and the sentence was reduced by one year as the Court of Appeal found 'good character' warranted some, but not significant, leniency.[53]

The High Court Justices do not all agree 'good character' should always be given weight

In *Ryan*, there was not unanimous agreement that evidence of 'good character' should always carry some weight.[54] Hayne J, in dissent, observed a person's 'character' and 'reputation' is not inevitably aggravating

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45 Ibid 267 (McHugh, Kirby and Callinan JJ agreeing, Gummow and Hayne JJ dissenting).
46 Ibid 275 [23] (McHugh J) (*emphasis in original*). It was explained at [24]: 'If an offender's character was determined by reference to the offences for which he or she is being sentenced, he or she would seldom be "of good character".'
47 Ibid 275–6 [25] (McHugh J) (emphasis in original).
48 Ibid.
49 Ibid 277 [31] (McHugh J).
50 *Munda v Western Australia* (2013) 249 CLR 600 [53] (French CJ, Hayne, Crennan, Kiefel, Gageler and Keane JJ agreeing) citing *Veen v The Queen [No 2]* (1988) 164 CLR 465, 477; *Commonwealth Director of Public Prosecutions v CCQ* [2021] QCA 4 [190] (Morrison JA, Philippides JA and Crow J agreeing). [197] (Philippides JA).
51 Ibid 278 [33] (McHugh J).
52 *Ryan* (n 7) [34] McHugh J.
53 *R v Ryan (No 2)* [2003] NSWCCA 35, [44]–[45] (Mason P).
54 *Ryan* (n 7) 267 (McHugh, Kirby and Callinan JJ); 288 [70] (Gummow J in dissent) and 311 [147] (Hayne J in dissent),

or mitigating, as that is the task of the sentencing judge or magistrate to determine.[55] His Honour considered a person's 'character and reputation may intersect with the purposes of criminal punishment in more than one way'.[56] His Honour considered the criminal law has tended to treat people in a one-dimensional way and with a single label as having either 'good' or 'bad' character' but this cannot be accepted 'without qualification'.[57] The High Court in *Weininger v The Queen*,[58] found a more holistic view should be taken of what is known of the offence and the person being sentenced.[59]

9.2.5 Queensland Court of Appeal decisions

We reviewed Queensland Court of Appeal cases to consider how evidence of 'good character' is discussed in sexual assault and rape appeals, in conjunction with reviewing sentencing remarks. As courts apply an 'instinctive synthesis' approach to sentencing,[60] the precise extent or sentencing adjustment given to evidence of 'good character' in sentencing it is not always known, as it is one factor considered with other aggravating and mitigating factors to arrive at a sentence that is balanced in all the circumstances. We also note that, as section 9(6A) of the PSA was introduced in September 2020, cases involving a child victim may not be discussed the same way as it would if it were sentenced today. However, Court of Appeal commentary illustrates how 'good character' evidence is accepted and applied.

Rape

Evidence of 'good character' may be one factor taken into account in sentencing for rape,[61] and in some cases may support a decision to partially suspend an imprisonment sentence instead of ordering a parole eligibility date.[62] For example, in *R v Ruiz; Ex parte Attorney-General (Qld)*,[63] the Court of Appeal dismissed the Attorney-General's appeal to increase a 3-year sentence, suspended after 12 months with an operational period of 3 years for one count of penile-oral rape and 2 counts of indecent treatment of a child under 16 who was under 12 years of age. The victim was an 8-year-old girl and Ruiz, who was 32 years old at the time of the offence, was a family friend. Ruiz's remorse and 'good character' were some of the factors relied on to find the sentence was not manifestly inadequate:

> These were loathsome offences, but until he committed them, [Ruiz] had led a stable and normal family life with his wife and children. He had been a respected member of his community. He possessed skills that made him eminently employable. He had committed no previous offences and had committed no offences from the time he committed these offences until his arrest.[64]

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55 Ibid 309–10 [144]–[145] (Hayne J).
56 Ibid [144] (Hayne J).
57 Ibid, citing *Melbourne* (n 2) [34].
58 *Weininger* (n 33).
59 Ibid [27] (Gleeson CJ, McHugh, Gummow and Hayne JJ agreeing).
60 *Markarian v The Queen* (2005) 228 CLR 357, 388–90 [76]–[83] (McHugh J) ('*Markarian*').
61 See *R v McConnell* [2018] QCA 107 [11] [22] (Fraser J, Sofronoff P and Philippides JA agreeing) ('*McConnell*'); *R v HCI* [2022] QCA 2 [15]–[16], [41] (Fraser JA, Bond JA and Daubney J agreeing); *R v Bouttell* (2018) 272 A Crim R 41 [5]–[6] (Holmes CJ in dissent); *R v Davidson* [2019] QCA 120 [25] (Gotterson JA); *R v BAS* [2005] QCA 97 [140] (Fryberg J); *R v NH* [2006] QCA 476 [13] (Jerrard JA, Holmes JA and Mullins J) ('*NH*'); *R v MCM* [2017] QCA 187 (Sofronoff P, Boddice and Flanagan JJ agreeing).
62 See *R v RUJ* (2021) 7 QR 765, [48], [54] (McMurdo JA, Sofronoff P and Mullins JA agreeing); *R v RBG* [2022] QCA 143 [27] (Davis J) ('*RBG*'); *R v Enright* [2023] QCA 89 [84]–[89] (Mullins P, Bond JA and Boddice AJA agreeing); *R v Kelly* [2021] QCA 134 [37]–[38] (Sofronoff P, Morrison JA and Flanagan J agreeing); *R v Morrison Lee* [2022] QDCSR 1243, 4–5 (Jarro DCJ); *R v DMN* [2023] QDCSR 491, 2-3 (Rackemann DCJ). Decisions involving a child victim prior to the application of section 9(6A) of the PSA (n 4): *R v Ruiz; Ex parte A-G (Qld)* [2020] QCA 72 ('*Ruiz*'); *R v Theohares* [2016] QCA 51 [31] (Philippides JA. Holmes CJ and McMurdo JA agreeing) ('*Theohares*'); *R v SAH* [2004] QCA 329 [14] (Williams JA, McPherson JA and Holmes J agreeing).
63 *Ruiz (*n 62)
64 Ibid [20]. The Court also considered it was relevant that Ruiz would be subject to the *Child Protection (Offender Reporting and Offender Prohibition Order) Act 2004* (Qld) when dismissing the appeal.

In *R v RBG*,[65] the appellant was convicted by a jury of attempted penile-oral rape and 3 counts of sexual assault[66] of his wife while they were ending their marriage but still living together. He was sentenced to 3-year partially suspended imprisonment sentence, reduced to 2 years' suspended imprisonment after 12 months served.[67] Davis J considered his 'good character':

> The offending was violent and disgusting. However, it gave rise to the applicant's only convictions. The offending occurred against the context of a marital break-up and the heightened emotions which that brings. While that is by no means any excuse for the offending, it gives force to the applicant's submission that this offending was an aberration by a person who had otherwise established good character over a long period.[68]

In other cases, character references have been used to evidence remorse.[69] In *R v McConnell*,[70] the 18-year-old applicant raped (penile-oral, penile-vaginal), assaulted and deprived the liberty of his 17-year-old ex-girlfriend after they broke up but still lived in the same share house (domestic violence offence). Character references were used to demonstrate remorse:

> Seven favourable references about the applicant, all dated shortly before the sentence hearing, were tendered. Three of the references – by the applicant's mother, his current partner and a close family friend – described the applicant's remorse for his offences. Another reference also referred to the applicant taking responsibility for his behaviour at all levels.[71]

Evidence of 'good character' has also been described as a 'powerful factor' in mitigation. In *R v NH*,[72] the applicant was convicted after trial of 2 digital-vaginal rapes and an indecent treatment of a child under the age of 16. He was a family friend, helping to mind the child victim. The Court noted his higher education, work as a teacher, community service and references tendered on his behalf:[73]

> In the present case, having regard to a number of factors – that the child was only eight, that the applicant was in a position of trust (although not charged as a circumstance of aggravation and thus not giving rise to the higher penalty), that he threatened to tell others about her father's imprisonment if she disclosed what he had done, and that the offences occurred on three different occasions – a significant sentence was warranted. On the other hand, the applicant's previous good character and exemplary working history were powerful factors in mitigation.[74]

Sexual assault

For sexual assault, a court's assessment that behaviour was 'out of character' can be a significant factor when determining if actual imprisonment is required.[75] For example, in *R v Rogan*,[76] with reference to

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65 *RBG* (n 62).

66 All were domestic violence offences. He attempted to forcibly kiss her, force his hands into her pants and try to penetrate her vagina with his fingers before he climbed on top her. He exposed his penis and slapped her in the face with it. He then masturbated and attempted to force his penis into her mouth. The victim gave evidence his penis pushed past her lips but she kept her teeth clenched (the jury found him guilty of sexual assault rather than rape or attempted rape). He continued masturbating until he ejaculated on her face.

67 *RBG* (n 62) [38] (Davis J).

68 Ibid [27] (Davis J, Dalton JA and Kelly J agreeing) citing *R v L; Ex parte A-G (Qld)* [1996] 2 Qd R 63 approved in *R v HCl* [2022] QCA 2 [6]. See also [6], [8] (Dalton JA, Kelly J agreeing)

69 For a discussion on how evidence of remorse may be evidence to infer there is a reduced the risk of reoffending and its relationship to community protection and denunciation see *R v O'Sullivan; Ex parte A-G (Qld)* (2019) 3 QR 196, 237-238 [127]–[130]; *Ruiz* (n 62) [21]–[25] (Sofronoff P, McMurdo and Mullins JJA agreeing); *Theohares* (n 62) (Philippides JA, Holmes CJ and McMurdo JA agreeing).

70 *McConnell* (n 61).

71 Ibid [11] (Fraser J, Sofronoff P and Philippides JA agreeing), also see [12]–[14] and [22]. .

72 *NH* (n 61). We note this was a decision involving a child victim prior to the application of section 9(6A) of the PSA (n 44).

73 Ibid [6].

74 Ibid [13].

75 *Rogan* (n 30) [18] (Sofronoff P, McMurdo JA and Williams J agreeing); *R v Fahey* [2021] QCA 232 [36] and [44] (Fraser JA, McMurdo and Mullins JJA agreeing); *R v Demmery* [2005] QCA 462 [9], [26] (Jerrard JA, Williams JA and Chesterman J agreeing); *R v Owen* [2008] QCA 171 [11] (McMurdo P, Mackenzie AJA and Daubney J agreeing) ('*Owen*').

76 *Rogan* (n 30). Rogan and the victim had known each other for 3 years and both attended a party of a mutual friend. They stayed at the house after the party and slept in the lounge room on pull-out sofa beds. Rogan sexually assaulted the victim

previous cases, the Court found 'a sentence that includes an actual period of imprisonment is not always required', including in a case where the actual imprisonment is for a short term, 'in which an offender's criminal acts are out of character' and 'there is real remorse' in addition to a 'timely plea of guilty'.[77]

In *R v Owen,*[78] a massage therapist was found guilty by a jury of sexual assault against a patient[79] and sentenced to 9 months' imprisonment. The sentence was varied on appeal to the extent that it was suspended after 25 days served. The Court of Appeal found:

> The tendered references demonstrate that he is a man of otherwise good reputation in the local … community. He supports his wife and their four children and his aged mother. The publicity surrounding Mr Owen's court appearances and subsequent conviction and sentence in open court must have been humiliating for him and, indeed, for his innocent family. This has, of course, detrimentally affected his massage business.[80]

More recently, in *R v Singh*,[81] a case involving a taxi driver who sexually assaulted an 18-year-old intoxicated passenger, evidence of 'good character' in the form of character references was used to show 'that he is a devoted husband and father, with a good work ethic, familial support and that he has previously undertaken charity work'. The Court found that this, together with other mitigating factors, did not support his argument that actual imprisonment (4 months to serve before being partially suspended) was manifestly excessive.[82]

Historical sexual offences

In cases of historical sexual offence matters, there is no unanimous agreement on the weight that 'good character' has.[83] For example, in *R v D'Arcy*,[84] the applicant was sentenced for 18 counts of child sexual abuse (including 3 of rape), committed 30 years earlier when he was a primary school teacher. He later became a Member of the Queensland Parliament.[85] At sentence, over 100 references were tendered on his behalf attesting to his 'good character'.[86] Chesterman J found D'Arcy's conduct in the 30 years between the offending and convictions was indicative of rehabilitation,[87] whereas McMurdo P and McPherson JA (in separate reasons) did not consider that his 'unblemished record' or 'good character'

by straddling her, forcing open her dress, pulling out her breast and sucking on it, licking her face and inserting his tongue into her mouth. She protested and tried to push him off but he continued to touch her under her dress between her legs over her underwear. He unzipped his jeans and put his penis onto her pelvic area. She screamed, another person came into the room and the offending stopped. Later, Rogan asked his friend to ask the victim to withdraw her complaint. He was sentenced to 12 months' imprisonment suspended after 2 months for an operational period of 2 years. The appeal was allowed on the basis he should not have been ordered to serve actual imprisonment of 2 months.

77 Ibid [18].

78 *Owen* (n 75).

79 Owen was found not guilty of one rape and two counts of sexual assaults. The facts of the sexual assault were that he was a massage therapist who had been engaged to attend the home of the victim to give a massage. During the massage, she felt his lips brush her pubic hair but they did not touch her skin.

80 *Owen* (n 75) [10]–[11] (McMurdo P, Mackenzie AJA and Daubney J agreeing).

81 [2024] QCA 50.

82 Ibid [39].

83 For a discussion on delay and its relevance to sentencing see *R v Law; Ex parte A-G (Qld)* [1996] 2 Qd R 63, 4–5 (Pincus JA, Davies JA and Demack J); *HYQ* (n 8); *R v Pike* [2021] QCA 285 [48]–[51] (Bradley J, Fraser and McMurdo JJA agreeing)

84 [2001] QCA 325 ('*D'Arcy*').

85 Ibid [2] (McMurdo P).

86 Ibid [133] (McMurdo P). At the sentencing, the judge considered the seriousness of the offending meant the character references could only be 'a small mitigating factor in the sentencing process': [134] However, acknowledged character evidence was an 'advantage' to him when considering the sentences imposed in other cases: [142] comparing the sentence given in *R v Schloss* (1998) 100 A Crim R 80: 'The offences involved only one complainant whereas [D'Arcy] interfered with four children; on the other hand, [D'Arcy] had the advantage of character evidence.'

87 Ibid 34 [164], 36 [169] Chesterman J citing *Duncan v The Queen* [1983] 47 ALR 746, 749 with approval (Chesterman J and McMurdo P agreeing).

carried much weight and, in light of the gravity of the offending, determined that this 'can only be a small mitigating factor'.[88]

Evidence of good character does not always carry a lot of weight

The Council also observed there are cases where evidence of 'good character' does not carry significant weight in sexual offences, based on the nature and seriousness of the offence.[89]

In *R v Sologinkin*,[90] a casino patron who assaulted an employee was convicted after trial and sentenced to four months' imprisonment, wholly suspended. On appeal, the Court discussed evidence of his 'good character' (he was described as a 'committed father of 3 boys' and had 'impressive and extensive involvement in the community through his work with junior rugby league')[91] as needing to be considered in the context of the seriousness of the offence and his lack of remorse:

> The appellant's past good character may be accepted as a fact, but what was conspicuously and seriously lacking was any insight that should have evoked from him, ultimately, an acknowledgment of his wrongdoing after his guilt had been established beyond any reasonable doubt. Her Honour rightly took this into account as a factor.[92]

Evidence of 'good character' is not always accepted.[93] Recently in *R v FVN,*[94] the Court of Appeal noted the sentencing judges' approach to accepting evidence in character references, given the nature and seriousness of the offence:

> In references, his three sisters and a brother-in-law disavowed witnessing any conduct in the nature of the offences. Two sisters described it as completely alien or out of character. However, [the sentencing judge] found:
>
> > 'Your treatment of those [victim] children, to my mind, demonstrates your true character, which you have hidden from other members of your family over many years. Your predatory conduct towards those four young girls over some 22 years for your own sexual gratification suggests that you have a serious sexual deviancy.'[95]

9.2.6 No prior convictions are part of 'character' but is given special treatment

The relevance of having no prior convictions is assessed as part of 'character' but receives special treatment and will usually attract a more lenient sentence.[96] The reason for this was explained in *Ryan:*

> In part, it recognises the fact that a first offender's lapse may be treated as exceptional, atypical and out of character. In part, it also reflects the experience of the criminal justice system that many of those who come before courts for sentencing are repeat offenders who, for that reason, must be treated more seriously because they have been repeatedly shown to be in breach of the law and have repeatedly obliged the mobilisation of the agencies established by society to defend it from crime.

88 *D'Arcy* (n 84) [144] (McMurdo P), [147] (McPherson JA).
89 See e.g. *R v Abdullah* [2023] QCA 189 [12] (Bowskill CJ, Flanagan JA and Buss AJA). For Commonwealth child sex offences and child pornography offences it is well settled that 'good character' carries limited weight: see *R v Horsfall* [2024] QCA 144 [35] (Crowley J, Mullins P and Boddice JA agreeing); *R v KAT* [2018] QCA 306 [41](a) (Morrison JA, Gotterson JA and Henry J agreeing) citing *R v Porte* [2015] NSWCCA 174 [59]-[72] and [126]; *R v Howe* [2017] QCA 7 [25] (Douglas J, Fraser and Philippides JJA agreeing) citing *Mouscas v The Queen* [2008] NSWCCA 181 [37]; *R v Gent* (2005) 162 A Crim R 29 [29] and [43]; *CDPP v D'Alessandro* (2010) 26 VR 477 [21]; *Heathcote (a pseudonym) v The Queen* [2014] VSCA 35 [35].
90 [2020] QCA 271 (Sofronoff P, Philippides JA and Bradley J agreeing).
91 Ibid [24].
92 Ibid [27].
93 See *R v ABG* [2021] QCA 259 [20]–[23], [33] (Holmes CJ, McMurdo and Mullins JJA agreeing).
94 [2021] QCA 88.
95 Ibid [46] (Sofronoff P, Mullins JA and Bradley J).
96 *Weininger* (n 33) [58]–[59] (Kirby J).

> A first offender may, or may not, otherwise have a good character. He or she may simply have been lucky in not having been apprehended before. But this fact does not justify disregard for the separate consideration of a first offender's status as such, apart from any consideration of the character of that offender.[97]

There are 2 circumstances in which an absence of prior convictions generally is not significantly mitigating:

1. where the gravity of the offence overwhelms any significant benefit claimed of prior 'good character'; and
2. where a person's good record is crucial to the commission of the offence. For example, a drug courier is chosen because of their lack of prior history so they will not attract suspicion and be searched.[98]

In sexual violence offences against children, a person's lack of criminal history is relevant but carries limited weight[99] or no weight.[100]

9.2.7 Application of section 9(6A) of the *Penalties and Sentences Act 1992* (Qld)

The Council has not identified any Court of Appeal decision where the application of section 9(6A) of the PSA has been discussed or was a relevant issue considered on appeal for any sexual offence.[101] Only 9 published District Court decisions were identified that referred to this new provision.[102] In *R v Handley*,[103] a 36-year-old police officer committed 2 offences of indecent treatment (described as 'consensual oral sex on each other') against a 15-year-old girl he met who worked at a café he frequented while on duty. The sentencing judge considered his profession was 'an incidental circumstance' and 'there is an insufficient basis to find subsection (6A) is engaged'.[104] While the judge did not consider section 9(6A) applied, there was a discussion on how this might conflict with other sentencing considerations required under the PSA if it did:

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97 Ibid citing *Weininger* (n 33) [58]–[59] (Kirby J). In respect of a conviction appeal: 'People who are mean, greedy, ruthlessly ambitious, devoid of sympathy for the weaknesses or needs of others, exploitative, ungenerous, and unkind, can go through life without any convictions for criminal offences. An absence of them says very little about character'; *R v Soloman* [2006] QCA 244 [24] (Jerrard JA, White and Philippides JJ agreeing), applied in *R v Brisbane Auto Recycling Pty Ltd & Ors* [2020] QDC 113 [71] (Rafter J).

98 *Fox and Freiberg's Sentencing:* Law (n 29) 344–5 [5.20] referring to *R v Leroy* [1984] 2 NSWLR 441, 446–7; *R v Berisha* [1999] VSCA 112 [27]; *Nguyen v The Queen* [2011] VSCA 32 [88].

99 *R v CCT* [2021] QCA 278 [248] (Applegarth J, Sofronoff P and McMurdo JA agreeing); *Commonwealth Director of Public Prosecutions v CCQ* [2021] QCA 4 [8](c), (f) (Morrison JA, Philippides JA and Crow J agreeing) and [197] Philippides JA). It is not an 'unusual' factor in the context of 'exceptional circumstances' see *Fahey* (n 75) [36]–[37]; *R v SDX [No 2]* [2024] QCA 78 [5]–[6] (Mullins P, Crow and Crowley JJ agreeing) cf *R v GAW* [2015] QCA 166; *Theohares* (n 62). It is not identified as a relevant mitigating factor in repeated sexual conduct with a child (s 229B, previously maintaining a sexual relationship with a child) *R v SAG* (2004) 147 A Crim R 301 [20] (Jerrard JA, Atkinson and Philippides JJ agreeing): 'Matters which mitigate the penalty include conduct showing remorse, such as the offender voluntarily approaching the authorities, or seeking help for all the family; co-operation with investigating bodies, admissions of offending, co-operating with the administration of justice, and sparing the victims from any contested hearing.'

100 PSA (n4) ss 9(6A), (7AA).

101 Except in *HCI* (n 61) [40] (Fraser JA, Bond JA and Daubney J agreeing) it was mentioned as a factor to be applied: 'The sentencing judge was obliged to apply the provisions in ss 9(4) – (6A) of the *Penalties and Sentences Act 1992* which are applicable in sentencing an offender for an offence of a sexual nature committed in relation to a child under 16.'

102 A search of '(6A)' and '(7AA)' and 'good character' post 15 September 2020 was undertaken on the Supreme Court Library Queensland website. There were no mention of (7AA) and the following mentioned 6(A) or 'good character', although not all discussed its application: *R v GWS* [2023] QDCSR 773 ('*GWS*'); *R v Pike* [2020] QDCSR 1126 ('*Pike*'); *R v Johnson* [2021] QDCSR 1309 ('*Johnson*'); *R v Manning* [2023] QDCSR 909; *R v Handley* [2023] QDCSR 793 ('*Handley*'); *R v MRS* [2023] QDCSR 850; *R v KCS* [2021] QDCSR 1295; *R v RBR* [2024] QDCSR 520; *R v Elia* [2022] QDCSR 143 ('*Elia*').

103 *Handley* (n 102) (Long DCJ).

104 Ibid 4.

> if [section 9(6A) of the PSA) is] applicable, the consequence is preclusion of attribution of any mitigatory weight upon evidence of good character, including absence of criminal convictions, as a factor in its own right, rather than as circumstances potentially supportive of prospects of rehabilitation or unlikelihood of re-offending.
>
> Such a conclusion would appear to be particularly appropriate in noting the specific application of subsection 6(A) of section 9 of the *Penalties and Sentences Act* to subsection (6)(h), as that provision refers to the offender's antecedents, age and character as a primary consideration to which the Court must have regard in sentencing for an offence of a sexual nature committed in relation to a child under 16 and in otherwise noting the separate reference to prospects of rehabilitation as a further such consideration, in subsection (6)(g).[105]

In another case, 'good character' was taken into account for a 44-year-old man who touched the child's legs just below the buttocks (she was under 12 and was a relative staying at his home).[106] Other District Court decisions illustrate examples of how section 9(6A) of the PSA has been applied. For example, in *R v Pike*[107] the limitation was applied for offending involving 6 victims and in *R v Johnson*[108] it was applied where a guidance councillor sexually offended against a 15-year-old student at the school where she worked.[109] In *R v GWS*,[110] the sentencing judge stated:

> Your good character as a trusted family member did assist you in committing these offences because it facilitated access to the children at your home and in your car and permitted you to be alone with them without arousing suspicion. To that extent your good character is not a matter I have regard to in mitigation.[111]

9.3 What happens in other jurisdictions?

In all Australian jurisdictions, 'character' is a relevant matter that may be taken into account when sentencing any offence.[112] Most Australian jurisdictions have introduced statutory limitations on the use of evidence of 'good character' where this assisted or aided the person in the commission of a sexual offence against a child.[113] For all jurisdictions with a legislative requirement to take 'character' into account, none has removed a court's ability to consider 'good character' evidence without qualification (e.g. limiting its use where it assisted or facilitated the offence). See further **Appendix 16**, Table 1.

In Western Australia, case law provides for the diminished relevance of good character for sexual offending against children.[114] For Commonwealth offences, if a person's 'standing in the community' aided the commission of the offence, this is an aggravating factor.[115] In New Zealand, courts are required to take into account evidence of a person's previous 'good character' as a mitigating factor,[116] although the New Zealand Court of Appeal has said a person may be disqualified from 'any credit for previous good

105 Ibid 3-4.
106 *Elia* (n 102) , 4 (Kefford DCJ).
107 *Pike* (n 102).
108 Johnson (n 102).
109 Ibid 3 (Smith DCJ).
110 *GWS* (n 102).
111 Ibid 11 (Fantin DCJ).
112 *Sentencing Act 1991* (Vic) s 5(2)(f); *Crimes (Sentencing Procedure) Act 1999* (NSW) s 21A(3)(f); *Crimes (Sentencing) Act 2005* (ACT) s 33(m); *Sentencing Act 2017* (SA) s 11(1)(d).
113 *Sentencing Act 1991* (Vic) s 5AA; *Crimes (Sentencing Procedure) Act 1999* (NSW) s 21A(5A); *Crimes (Sentencing) Act 2005* (ACT) s 34; *Sentencing Act 1997* (Tas) s 11A(2)(b); *Sentencing Act 2017* (SA) s 11(4)(c); *Sentencing Act 1995* (NT) s 5(3A) introduced this year: see *Criminal Justice Legislation Amendment (Sexual Offences) Act 2023* (NT) s 29. In the NT, a court may order a non-parole period less than the standard non-parole period if there are exceptional circumstances. 'Good character' and unlikely to reoffend is not to be considered for this purpose: *Sentencing Act 1995* (NT) s 53A(7)
114 See *MAS v The State of Western Australia* [2012] WASCA 36 [86] (Martin CJ, Pullin and Mazza JJA agreeing); *The State of Western Australia v Mojana* [2023] WASCA 189 [32], [57] (Mazza, Vaughan and Hall JJA)
115 *Crimes Act* (1914) (Cth) s 16A(2)(ma). This provision was introduced in 2020 with an intention to 'capture scenarios where a person's professional or community standing is used as an opportunity for the offender to sexually abuse children.' Explanatory Memorandum, Crimes Legislation Amendment (Sexual Crimes Against Children and Community Protection Measures) Bill 2019 (Cth) (2020) [254].
116 *Sentencing Act 2002* (NZ) s 9(2)(g).

character' where sexual offending occurs over an extended period of time, if there are other uncharged offences[117] or if the person has had a trial and 'relied on his good character to give credibility to his lies'.[118]

9.3.1 Case law on the limitation to 'good character' evidence and the evidentiary onus on the prosecution

A review of cases from jurisdictions with a similar legislative limitation to 'good character' to that found in Queensland illustrates how courts have interpreted and applied the provision. In cases where the limitation has applied, the court has held evidence of 'good character' is still considered for other purposes, such as to assess remorse, risk of reoffending and rehabilitation.[119] In South Australia, the Court of Criminal Appeal considered that, even if the court is not allowed to give leniency, 'it does not require the sentencing court artificially to disregard good character when assessing future prospects of rehabilitation'.[120] Sulan J said:

> To prohibit the Court from having any regard to the defendants' prior good character, may have consequences which were never intended. Further to remove one relevant factor of good character, in this case, creates difficulties when considering other relevant factors such as remorse and rehabilitation. When a sentencing judge considers whether an offender is genuinely remorseful for his conduct it is difficult, if not impossible, to disengage that question from his previous good or bad conduct. Similarly, rehabilitation requires a consideration of prior good conduct.[121]

The review of case law from other jurisdictions also illustrates the difficulty of applying the limitation,[122] and cases discuss the evidentiary onus (responsibility) being on the prosecution. For example, in *Director of Public Prosecutions v Ooms*,[123] a female teacher offended against a student and the court found that evidence of 'good character' could be relied on. The Victorian Court of Appeal found the prosecution must show how a person's 'good character' materially contributed and 'could be directly tied to the offending'.[124] The Court said the provision is not solely about whether 'good character' enabled access to the child, but rather 'requires a common sense assessment based on the evidence as to the extent to which good character or an absence of convictions has played in the offending'.[125] Similarly, the NSW Court of Appeal also found that there is an evidentiary onus (responsibility) on the prosecution to point to evidence of how the person's 'good character' 'or lack of convictions will have played some material part in the offender having access to the victim(s)'.[126] In a case involving a family friend who offended against a child while in his care, the Court found there was no evidence led by the prosecution that the person's character or history was considered by the victim's father in allowing the person to care for the child, or actively used to befriend the family or gain access to the child.[127] In another case, the judge considered

117 *King v The Queen* [2015] NZCA 475 [31] (Harrison J, Dobson and Gilbert JJ agreeing). See also *Botha v The Queen* [2015] NZCA 196 [21].
118 Ibid.
119 *Knoote-Parke* (n 29) [2] (Sulan J), [7] (Blue J), [77]–[79] (Doyle J) cited with approval in *Handley* (n 102) 4 (Long DCJ); *DPP v Schulz* [2018] VCC 1058 [88], [74]–[99] (Pullen J).
120 *Knoote-Parke* (n 29) [7] (Blue J).
121 Ibid [2] (Sulan J) considering *Criminal Law (Sentencing) Act 1988* (SA) s 10(3)(ba) (now *Sentencing Act 2017* (SA) s 11(4)(c)).
122 See *R v Hovell* (a pseudonym) [2021] NSWDC 326; *R v NC* [2020] NSWDC 547; *AH v The Queen* [2015] NSWCCA 51 [25] (Hidden J, Beazley P and Fullerton J agreeing) 'Obviously, his relationship with the victim's mother and the trust which that engendered created an environment in which the offences could be committed. It does not appear to me, however, that his good character could be said to have assisted his commission of the offences.'
123 [2023] VSCA 207.
124 Ibid [88] (Niall, Kennedy and Macaulay JJA).
125 Ibid [89].
126 *Bhatia v The King* [2023] NSWCCA 12 [14] (Beech-Jones CJ at CL); [155] (N Adams J).
127 Ibid [128]–[148] (Hamill J); [13]-[15] (Beech-Jones CJ at CL); [155] (N Adams J). In another case, although a court found *Crimes (Sentencing Procedure) Act 1990* (NSW) s 21A(5A) did not apply and 'good character' evidence was lead, it was held to have no weight: *WG v R; KG v R* [2020] NSWCCA 155 [1100] (Bathurst CJ); [1486]–[1494] (Fullerton J); [1718] (Fagan J).

'[the victim] had access to his uncle because he was a relative, not because he was a person of good character'.[128]

9.4 What we know from earlier reviews of 'good character' evidence

9.4.1 NSW Sentencing Council

In 2008, the NSW Sentencing Council considered penalties for sexual assault offences and determined child sexual offences warranted a special approach to 'good character' considerations at sentence.[129] While they found that 'in some circumstances an offender's prior record, standing, reputation and history of positive contributions to the community' can be relevant to risk of reoffending, they considered that 'it is dangerous to draw such a conclusion' for offences involving repeated child sexual abuse, child pornography or to people with paedophilic tendencies.[130] They recommended legislative change to exclude 'good character', reputation and lack of prior history for a child sexual offence and child pornography offence, if it 'better enabled the offender to commit the offence'.[131] They did not consider that there was a need for an exception where the victim was an adult.[132]

9.4.2 The Royal Commission into Institutional Child Sexual Abuse

Consistent with the NSW Sentencing Council recommendation, the Royal Commission into Institutional Child Sexual Abuse (Royal Commission) recommended that evidence of 'good character' should not be mitigating where it facilitated the person to commit a sexual offence against a child.[133]

The Royal Commission noted that the use of 'good character' evidence is distressing for victim survivors.[134] It summarised what it had been told were the problems with evidence of 'good character' in sentencing:[135]

- **Use is based on certain assumptions:** It has been argued that there is no empirical support for the notion that prior good character suggests a low risk of reoffending. Further, prior good character judged by lack of prior convictions can be a fallacy. A lack of prior convictions (especially in child sexual assault) does not necessarily mean a lack of prior bad behaviour.[136]
- **Accepting an offender's otherwise good character may belittle the harm done by the offence:** Acknowledgement of the offender's good character can minimise the 'vindicatory aspects of criminal proceedings if the offender is regarded as not being fully responsible for the offence, and is consequently treated more leniently'. In the eyes of the victim and the community, accepting the offender's good character in mitigation 'potentially deletes the "wrongfulness" message of this crime'.[137]

128 *R v Farrell (a pseudonym)* [2022] NSWDC 695 [59].
129 NSW Sentencing Council, *Penalties Relating to Sexual Assault Offences in New South Wales: Volume 1* (2008) 133 [5.57] (*'Penalties Relating to Sexual Assault Offences in New South Wales: Volume 1'*).
130 Ibid 133–4 [5.58]–[5.59].
131 Ibid 137 recs 38, 39. This led to the amendment in *Crimes Amendment (Sexual Offences) Act 2008* (NSW) inserting *Crimes (Sentencing Procedure) Act 1999* (NSW) s 21A(5A). See also Appendix 16.
132 *Penalties Relating to Sexual Assault Offences in New South Wales: Volume 1* (n 129) 130 [5.48].
133 Royal Commission into Institutional Responses to Child Sexual Abuse, *Criminal Justice Report – Executive Summary and Parts I to II* (2017) 99, rec 74.
134 Royal Commission into Institutional Responses to Child Sexual Abuse, *Criminal Justice Report – Parts VII - X and Appendices* (2017), 296 quoting Transcript of C Hughes-Cashmore, Case Study 46, 28 November 2016, T23886:42-T23887:5 (*'Criminal Justice Report – Parts VII - X and Appendices'*).
135 Ibid 292 (footnotes as in original).
136 *Penalties relating to sexual assault offences in New South Wales- Volume 1* (n 129) 123–5.
137 Arie Freiberg, Hugh Donnelly and Karen Gelb, *Sentencing for Child Sexual Abuse in Institutional Contexts* (Royal Commission into Institutional Responses to Child Sexual Abuse, 2015) 80.

- **Without the offender's good character, the offending would have been less likely to take place:** The offender may have used his or her reputation and good character to facilitate the grooming and sexual abuse of a child and to mask their behaviour. This may be particularly so in matters of institutional child sexual abuse.[138]

The Royal Commission did not recommend legislating 'prior good character' as an aggravating factor.[139] It formed this view having regard to submissions from the NSW Director of Public Prosecutions, New South Wales Young Lawyers Criminal Law Committee and the Law Society of New South Wales, which all submitted that it was unnecessary and may result in a counterintuitive outcome.[140] For example, a person with no criminal history could be dealt with more severely than a person with a criminal history.[141]

While there has not been any formal evaluation on the impacts of the Royal Commission reform, responses to the Council from victim survivor and support and advocacy groups indicate that there is still dissatisfaction with the use of evidence of good character in sexual offending (see section 9.5).

9.4.3 Current petitions to change the treatment of 'good character' evidence in sentencing

The community-led campaign *Your Reference Ain't Relevant* has petitioned for the abolition of character references for people convicted of child sexual abuse in NSW[142] and the ACT.[143] There has been a similar community-led call for 'good character' reform in Tasmania.[144]

9.4.4 Current reviews

The Council is aware that there are other reviews currently underway:

- The Australian Law Reform Commission is currently undertaking a review of Justice Responses to Sexual Violence.[145] They are expected to report to the Attorney-General by 22 January 2025.[146]
- The NSW Sentencing Council is currently considering the use of good character as a mitigating factor in sentencing proceedings in general.[147] It received 84 preliminary submissions and has released a Consultation Paper.[148]

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138 *Penalties Relating to Sexual Assault Offences in New South Wales: Volume 1* (n 129) 131; Sentencing Advisory Council, *Queensland, Sentencing of Child Sexual Offences in Queensland: Final report* (2012) 70.

139 *Criminal Justice Report Parts VII- X and Appendices* (n 134) 299.

140 Ibid.

141 Ibid.

142 E-Petition, '*Remove Good Character References for Paedophiles in the Sentencing Procedure of Child Sexual Abuse Cases*' (web page) <https://www.parliament.nsw.gov.au/lc/pages/closedepetition-details.aspx?q=hjTKTfEbrBjTOpaTYQw-oA>. See also Chantelle Al-Khouri, 'Should character references still be used in Australian courts?' ABC News (Web Page, 13 September 2023) <https://www.abc.net.au/news/2023-09-13/character-witness-harrison-james-sex-violence-danny-masterson/102846370>.

143 Legislative Assembly for the Australian Capital Territory, *Parliamentary Business*, 'Remove the Provision of Good Character References for Paedophiles in the Sentencing Procedure of Child Sexual Abuse Cases' (Web Page, undated) <https://epetitions.parliament.act.gov.au/details/e-pet-02723?_gl=1*12zbbmd*_ga*ODcwNDE1MjQxLjE3MjI1NzUyMTI.*_ga_LWWL3XRS9C*MTcyMjU3NTQ4OC4xLjEuMTcyMjU3NTgzMS40OC4wLjA>

144 Alexandra Humphries, 'Sexual assault victim wants to stop paedophiles from using character references, lawyers' group pushes back', *ABC News* (Web Page, 1 February 2022) <https://www.abc.net.au/news/2022-01-31/paedophile-john-wayne-millwood-victim-battle-characterwitness/100793004>

145 An Issues Paper was recently released: Australian Law Reform Commission, *Justice Responses to Sexual Violence* (Issues Paper, April 2024).

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

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

148 NSW Sentencing Council, *Good character at sentencing* (Consultation Paper, December 2024).

- The Justice and Community Safety Directorate (ACT) is currently consulting with stakeholders.[149]
- The Scottish Sentencing Council is currently preparing guidelines on the offence of rape and the rape of a young child.[150]

9.4.5 Critiques of the use of 'good character' evidence in sentencing

Despite the powerful influence and impact of aggravating and mitigating factors on a sentencing outcome, there has been limited consideration of the theoretical rationale, definition, scope and weight or adjustment that should be given to them in sentencing.[151] Several legal academics have questioned, in particular, the theoretical rationale for some types of 'good character' evidence, such as 'social contributions'. Von Hirsch and others, including Ashworth and Roberts, argue that this can result in 'illegitimate social accounting that weigh a person's lifetime behaviour in the balance rather than punishing them for the crime committed'.[152] These criticisms have been accepted by prominent Australian academics, such as Kate Warner,[153] who suggests such an approach not only constitutes a form of 'moral accounting' but also raises concerns that this factor may promote privilege and infringe equity before the law. She concludes: 'An offender should neither be sentenced more favourably, nor more harshly because of their social status, reputation, respectability or social contributions.'[154]

Warner considers, however, that character references may still serve a useful purpose in respect of a person's prospects of rehabilitation and may benefit a person to know they have support in the community.[155] She argues evidence of 'good character' should be limited in sentencing proceedings to only an absence of prior convictions.[156]

In later research, Warner et al. explored jurors' perceptions of sentencing factors in sex offence cases, including the assessed relevance of 'good character' evidence. The authors concluded:

> While there are strong arguments to support excluding good character as a mitigating factor in all but its negative aspect of a lack of prior convictions, there seems to be public support for leaving judges with a discretion. However, if judges wish to better align their approach to public views, these results suggest there is room for giving good character less weight than judges generally do. In the alternative, these findings may suggest the need for judges to more clearly articulate their rationales for giving this factor significant weight.[157]

149 ABC News, 'ACT Bar Association rejects proposal to scrap good-character references in sentencing convicted child sexual abusers' (web page, 6 February 2024) <https://www.abc.net.au/news/2024-02-06/act-bar-association-child-sexual-abuse-good-character-reference/103429558>

150 Scottish Sentencing Council, *Sentencing rape offences: A Scottish Sentencing Council consultation* (July 2024) 35 [104]. The current draft guidelines do not included evidence of 'good character' as a mitigating consideration for the offence of rape as 'the Council does not consider that is it particularly relevant to the offence of rape.'

151 Allan Mason *'Chapter 3: The Search for Principles of Mitigation: Integrating Cultural Demands'* in Julian V. Roberts (ed), *Mitigation and aggravation at sentencing* (Cambridge University Press, 2015). See also Gabrielle Wolf and Mirko Bargaric, *'Nice or Nasty? Reasons to Abolish Character as a Consideration in Australian Sentencing Hearings and Professionals'* (2018) 44(3) *Monash University Law Review* 567, 582–3.

152 Andreas von Hirsch, 'Forward' in Julian V. Roberts (ed), *Mitigation and Aggravation at Sentencing* (Cambridge University Press, 2011); Ian K. Belton and Mandeep K. Dhami, *'The role of character-based personal mitigating in sentencing judgments*' (2024) 21 *Journal of Empirical Legal Studies* 208, 226–7 citing Andrew Ashworth, *Sentencing and criminal justice* (6th ed, Cambridge University Press, 2005); H. Maslen and J. V. Roberts, *'Remorse and sentencing: An analysis of sentencing guidelines and sentencing practice'* in A. Ashworth & J. V. Roberts (eds.) *Sentencing guidelines: Exploring the English model* (Oxford University Press, 2013).

153 Kate Warner, *'Sentencing review 2008-2009'* (2010) 34 *Criminal Law Journal* 16, 19–20, 23–4.

154 Ibid 23.

155 Ibid 23–4.

156 Ibid.

157 Kate Warner et al, 'Comparing Legal and Law Assessments of Relevant Sentencing Factors for Sex Offences in Australia' (2021) 45 *Criminal Law Journal* 57, 70

Wolf and Bagaric argue that evidence of 'good character' should be abolished as a sentencing consideration.[158] They consider a lack of prior history can still be considered, as long as it is not used as evidence of a person's character.[159] They argue that it is unfair for a sentencing court to determine character based on reputation and character references, which is 'the wholly subjective judgment of one or more laypersons that, in turn, is unrelated to any impartial or legally-determined standards'.[160] They suggest the opinions of others 'do not confirm that an individual has particular intrinsic traits or assist in predicting how he or she might behave in different circumstances'.[161] Similarly, evidence of good deeds or contributions to the community do not predict future behaviour, nor is this a reliable indicator of a person's traits.[162] With respect to assessments of offence seriousness, they suggest:

> Assessments of an offender's character have no role to play in courts' application of the principle of proportionality, which requires them to evaluate only the seriousness of the offender's crime and ensure that the severity of the sanction corresponds to it. In addition, there are sufficient appropriate aggravating and mitigating considerations that help courts to assess the gravity of an offence without judges needing to attempt to undertake the impossible task of ascertaining an offender's character for this purpose.[163]

In suggesting reforms to the law and whether the language 'good character' should change, Wolf and Bagaric acknowledge the risk that 'because character has been such a longstanding and popular concept in Western thought, abolishing references to it in the law will inevitably result in it reappearing in some other guise'.[164] In their view, evidence of character should be assessed by reference to an objective and measurable standard.[165]

Belton and Dhami propose that the underlying principles for using personal factors in mitigation, such as 'good character', should be identified and guidance provided for its use in practice.[166] Similarly, when considering character evidence for white collar offences, Rubinstein considered that 'the most sensible way' to rectify the issue 'is by a clear policy decision, preferably from the legislature, to define and clarify the importance that character and reputation should have on sentencing'.[167]

9.4.6 What does the community think about 'good character' as a factor at sentencing?

There is limited empirical research on how sentencing factors are used in practice, and limited evaluation of community or victims views of the use of 'good character' evidence.[168] A series of Australian studies

158 Gabrielle Wolf and Mirko Bargaric, 'Nice or Nasty? Reasons to Abolish Character as a Consideration in Australian Sentencing Hearings and Professionals' (2018) 44(3) *Monash University Law Review* 567, 598.
159 Ibid 598.
160 Ibid 597.
161 Ibid.
162 Ibid.
163 Ibid 598–9.
164 Ibid 599.
165 Ibid 600.
166 Ian K. Belton and Mandeep K. Dhami, 'The role of character-based personal mitigating in sentencing judgments' (2024) 21 *Journal of Empirical Legal Studies* 208, 227.
167 Ivan Rubinstein, 'The use of character and reputation in sentencing white collar criminals: The ultimate contradiction? (2006) 24 *Company and Securities Law Journal* 223, 223–4.
168 Kate Warner et al 'Aggravating or Mitigating? Comparing judges' and jurors' views on four ambiguous sentencing factors' (2018) 28 *Journal of Judicial Administration* 95, 95; Kate Warner et al, 'Comparing legal and law assessments of relevant sentencing factors for sex offences in Australia' (2021) 45 *Criminal Law Journal* 57, 70; Nicole Stevens and Sarah Wendt, 'The "good" child sex offender: Constructions of defendants in child sexual abuse sentencing' (2014) 24(2) *Journal of Judicial Administration* 95, 95–6.

sought to fill this gap, known as the 'Jury Projects', which included a Tasmanian Jury Sentencing Study, a Victorian Jury Sentencing Study and a National Jury Sentencing Study.[169]

In respect of 'good character', the Victorian study found this factor was open to a subjective interpretation, more than other factors such as the fact that the person was a 'first [time] offender' and 'prospects of rehabilitation'.[170] It also found jurors were less likely than judges to suggest 'good character' should be given 'a lot of weight' and more likely to consider it should be given 'no weight'.[171]

Building on the Victorian study, the National Jury Sentencing Study further explored juror and laypeople's perceptions of sentencing factors, specifically in cases involving sexual offences. One finding was that 'jurors were more than twice as likely as judges to give no weight to good character'.[172] However, it was given some weight by jurors in half of the cases and considered mitigating in cases where the judge did not refer to it.[173] The study concluded on this basis that 'there seems to be public support for leaving judges with a discretion.'[174] They highlighted reducing the weight of 'good character' or 'more clearly articulate their rationales for giving this factor significant weight' to be better aligned with public views.[175]

This conclusion is similar to findings by a recent Scottish study on public perception, in which 'participants thought greater transparency was required to understand which factors were considered during sentencing'.[176] While there were mixed views on whether 'good character' should be considered a factor in sentencing, there was a perception it resulted in 'preferential treatment in sentencing'.[177]

9.5 Stakeholder views

We received several preliminary submissions identifying the use of 'good character' evidence as an issue for Council to consider. In the **Consultation Paper: Issues and Questions**, we invited specific feedback from stakeholders and the community about whether there should be any changes to how 'good character' evidence is considered by courts and how this could be improved (Question 6). We also held consultation events, conducted subject matter expert interviews and consulted with victim survivors. A summary of the feedback is presented below.

9.5.1 Submissions from victim survivor support and advocacy stakeholders

In its preliminary submission to the Council, Full Stop Australia was concerned that character references are 'enabling offenders to avoid custodial sentences',[178] can sometimes be used without the author's

169 See University of Tasmania, *The Jury Projects* (web page, 13 February 2024) <https://www.utas.edu.au/law/research/the-jury-projects#:~:text=The%20jury%20projects%20are%20a%20series%20of%20three%20separate%20studies>. The Victorian Jury Sentencing Study and National Sentencing Study compared the responses of judges and jurors in Victoria to the relevance and weight of common aggravating and mitigating factors in 122 real cases. See Kate Warner et al, 'Aggravating and Mitigating Factors in Sentencing: Comparing the Views of Judges and Jurors' (2018) 92 *Australian Law Journal* 374.

170 Ibid 381.

171 Ibid.

172 Kate Warner et al, 'Comparing Legal and Law Assessments of Relevant Sentencing Factors for Sex Offences in Australia (2021) 45 *Criminal Law Journal* 57, 70.

173 Ibid 71.

174 Ibid.

175 Ibid.

176 Hannah Biggs et al, *'Public Perceptions of Sentencing in Scotland: Qualitative Research Exploring Sexual Offences'* (Scottish Sentencing Council, July 2021) 74.

177 Ibid.

178 Preliminary submission 23 (Full Stop Australia), 4 citing Georgia Roberts, 'Canberra rapist Thomas Earle avoids jail time, sentenced to 300 hours of community service,' *ABC News*, 29 April 2023, <https://www.abc.net.au/news/2023-04-29/rapist-thomas-earle-sentenced-to-three-years-ico/102278630>; Phoebe Hosier and Elise Kinsella, 'Questions arise over character references used to help sex offender Jeffrey 'Joffa' Corfe escape jail time', *ABC News*, 8 March 2023,

knowledge or permission[179] and can 'deny justice to victim-survivors.'[180] Full Stop Australia told us many victim survivors report 'they find it incredibly painful and retraumatising to hear reviews of their offender's "good character" during sentencing.'[181] It suggested removing the use of character references for this particular offence group or, alternatively, requiring the authors of these references to attend court and be cross-examined before the court accepts the evidence.[182]

The *Your Reference Ain't Relevant* Campaign told the Council that evidence of 'good character' minimises the seriousness of the offences and does not ensure the offender is held accountable.[183] It was particularly concerned about the use of character references for convicted child sex offenders during the sentencing process:

> While character references serve the noble purpose of offering insight into an offender's background, they inadvertently diminish the gravity of the offences and undermine the pursuit of justice. In cases of child sexual abuse, offenders may exploit their standing in the community to groom victims and gain access to vulnerable individuals. Good character references, often provided by well-meaning acquaintances who remain unaware of the offender's predatory behaviour, contribute to perpetuating harmful stereotypes and misconceptions about perpetrators. These references present offenders in a favourable light, overshadowing the true nature of their crimes and hindering the pursuit of justice for victims.[184]

It noted that the current statutory limitation does not extend to all people who may have used their 'good character' and standing to commit the offence (for example, those with parental responsibilities, other family members or a neighbour).[185] It considered that, for all people convicted of child sexual offence, the 'good character' of a person is part of the crime, 'a weapon in their extensive arsenal of deceit' and used as a 'tool of deception.'[186] It told the Council how 'good character' evidence impacts victim survivors, who 'often experience re-traumatisation, distress and disappointment with the justice system.'[187] It recommended that the Council consider reforming character references not to be considered at sentencing, to 'recognise that such references serve as further evidence of the grooming process employed by perpetrators to gain trust and access to victims.'[188]

A name withheld from the Council supported the *Your Reference Ain't Relevant* Campaign and supported this being extended to all sex offences, including adult victims:

> A perpetrators 'good' character cannot be separated from the evil they commit upon the most vulnerable victims of all: children. This [*Your Reference Ain't Relevant*] campaign should apply in QLD for all sex [offences] that are perpetrated against adults and children.[189]

Fighters Against Child Abuse Australia also supported changes to the use of 'good character' evidence, submitting:

> Good character should play absolutely no part in rape and sexual abuse cases because … *In particular there should never be character references accepted for sexual abuse and rape cases because no matter who someone was*

<https://www.abc.net.au/news/2023-03-08/court-jeffrey-joffa-corfe-sentence-character-reference-alex-case/102070088>.

179 Ibid citing Phoebe Hosier and Elise Kinsella (n 178).
180 Ibid 4.
181 Ibid.
182 Ibid.
183 Submission 14 (Your Reference Ain't Relevant) 3.
184 Ibid.
185 Ibid.
186 Ibid 5.
187 Ibid 4.
188 Ibid 6.
189 Submission 27 (Name withheld) 2.

> *before they were a rapist once they cross that line and commit a sexual offence, they are no longer a person of good character. People of good character do not commit sexual offences especially not against children!*[190]

Rape and Sexual Assault Research and Advocacy ('RASARA') told the Council that sexual assault and rape '[inflict] irreparable harm upon individuals, families, community and society'[191] and:

> The infrequency with which rape and sexual assault are successfully prosecuted means it is vital that, on the rare occasion when a conviction is secured, courts have the correct tools to impose a sentence which adequately reflects the severity of the offender's conduct, recognises the impact of offending and sends a strong message to the community that sexual violence is not acceptable.[192]

In their view, 'good character' should have 'no role to play in sentencing rape and sexual assault' as a sentencing consideration, regardless of the victim's age.[193] The reasons for this include:

- It is not relevant to rehabilitation: A person's employment history, lack of previous convictions or support in the community from family and friends are not relevant as 'these factors did not prevent commission of the offence in the first place.'[194] Taking it into account 'fails to acknowledge sexual offenders' demonstrated ability to maintain a positive public façade'.[195] Excusing the offence as 'a moment of weakness or a lapse of judgement should speak to a lack of accountability for their actions and a terrifying lack of insight into why an offender broke from their "otherwise good character" to perpetrate an offence.'[196]
- It has a paradoxical application: A person uses their character to distinguish the offence from their usual character (describing the offence as being 'out of character') and then relies on their 'good character' to reduce the severity of the sentence.[197]
- It 'waters down any message of denunciation' by the community where it is used to 'justify the application of a more lenient sentence.'[198]
- It 'may even deter survivors from reporting claims for fear of entering what appears to be a personality contest.'[199]
- It retraumatises the victim: 'After having their credibility attacked during cross-examination during the offender's trial, good character evidence risks further traumatising the survivor by requiring they hear evidence of the good person they have accused.'[200]

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190 Submission 15 (Fighters Against Child Abuse Australia) 10 [6]. Emphasis in original.
191 Submission 18 (RASARA) 1.
192 Ibid.
193 Ibid 2.
194 Ibid.
195 Ibid 6–7.
196 Ibid 7.
197 Ibid 3. RASARA provided the Council with many case examples: offence described as 'out of character', 'uncharacteristic' or 'completely alien': see *R v Sologinkin* [2020] QCA 271; *R v Rogan* [2021] QCA 269. Where lack prior convictions are submitted as being mitigating see *R v Abdullah* [2023] QCA 189; *R v FVN* [2021] QCA 88; *R v McConnell* [2018] QCA 107; *R v Williams; Ex parte A-G (Qld)* [2014] QCA 346; lack of offending between commission of the offence being sentence: see *R v HCI* [2022] QCA 2; *R v SDF* [2018] QCA 316. Submissions about their committed family relationships: see *R v Sologinkin* [2020] QCA 271; *R v McConnell* [2018] QCA 107; *R v Williams; Ex parte A-G (Qld)* [2014] QCA 346. Maintaining stable friendships: *R v Rogan* [2021] QCA 269. Community involvement: *R v Abdullah* [2023] QCA 189; *R v Rogan* [2021] QCA 269; *R v Williams; Ex parte A-G (Qld)* [2014] QCA 346. Demonstrated compassion: *R v Rogan* [2021] QCA 269; Positive character references from family: *R v Downs* [2023] QCA 223. Employment: *R v Fahey* [2021] QCA 232; *R v McConnell* [2018] QCA 107; *R v Williams; Ex parte A-G (Qld)* [2014] QCA 346. Performance at school: *R v McConnell* [2018] QCA 107. Good work ethic: *R v Singh* [2024] QCA 50.
198 Submission 18 (RASARA) 7.
199 Ibid.
200 Ibid citing 'Prosecutors are required by the Queensland *Director of Public Prosecution's Guidelines* to ask survivors to be present during sentencing and to immediately inform the prosecutor of any incorrect assertions regarding the offender's character, such that they can be challenged.'

- An absence of prior convictions 'is converted into a positive presumption to the benefit of the offender.'[201]
- The current limitation under section 9(6A) of the PSA 'offers no utility in remedying the inappropriate use of good character evidence.'[202] It referred to decisions in NSW with an equivalent provision, considering it did not provide 'consistency or coherence' and there was confusion as to its application.[203]
- This evidence is subjective and 'influenced by individual perspective', including by sentencing judges.[204]
- The current NSW provision limiting the use of good character is problematic and there has been conflicting application of the NSW provision.[205]

RASARA noted the difficult task of the sentencing court and considered that it 'would be clearer by barring good character evidence from being considered at all.'[206] RASARA recommended that, rather than clarifying the use of evidence of 'good character', section 11(1) of the PSA be amended to state:

> when sentencing an offender, a court may have regard to:
>
> a. the number, seriousness, date, relevance and nature of any previous convictions of the offender, without considering evidence of the offender's lack of previous convictions; and …
>
> b. ~~any significant contributions made to the community by the offender; and~~
>
> c. such other matters as the court considers are relevant, without considering evidence of the offender's good character.[207]

Basic Rights Queensland told the Council it did not support the use of 'good character' references when sentencing for rape, attempted rape or sexual assault. It considered that, by 'providing the accused to draw upon their social capital, connections, and agency to provide testament to their otherwise good nature reasserts the harmful "good bloke" mythology that continues to excuse their crimes.'[208] It told the Council that evidence of good character embeds privilege, as

> Offenders with strong family connections, social networks, professional associations, wealth, and friends and/or family with high social status or belonging to 'respected' professions are providing praise and reports of *their* positive experiences of the accused through this avenue. The system fails to provide the same opportunities and favour to those accused who are socially disadvantaged, lack economic security or capital wealth, who therefore through no fault of their own, often have less social capital to defend their reputation. This process rewards privilege. By their very nature, these reports are biased, in that they are often written by people who have a vested interest in the penalty being reduced and can be motivated by emotion and/or self-interest.[209]

201 Ibid 3–4.
202 Ibid 4.
203 Ibid 4–6. Referring to *Bhatia v The King* [2023] NSWCCA 12, [144]; *R v Farrell* [2022] NSWDC 695. RASARA said at 6, nn 31 'This was a disturbing reversal of the statutory test, suggesting that it was not the offender's acts but those of the victim that matter for the purposes of s 21A(5A).'
204 Ibid 7–8 citing Elisabeth McDonald, 'From "Real rape" to real justice? Reflections on the efficacy of more than 35 years of feminism, activism and law reform' (2014) 45 *VUWLR* 487, 498 and Veronique Valliere, 'Chapter 3: Myth-information, our misinformed beliefs about sexual offenders', in *Unmasking the Sexual Offender* (Routledge, 2023) 40.
205 Ibid 4–6. RASARA gave the Council case law examples to support this: *R v Farrell* [2022] NSWDC 695; *R v Rose* [2022] NSWDC 705; *Cheung v The Queen* [2022] NSWCCA 168; *BR v The Queen* [2021] NSWCCA 279; *R v A* [2021] NSWDC 232; *R v H* [2021] NSWDC 107; *R v Hamilton* [2019] NSWDC 382; *R v Mollel* [2017] NSWDC 36; *R v ND* [2016] NSWCCA 103; *R v van Ryn* [2016] NSWCCA 1.
206 Ibid 8.
207 Ibid.
208 Submission 19 (Basic Rights Queensland) 6.
209 Ibid 7.

TASC (Legal Services) echoed the views of many others who made submissions calling for reforms to be made, reporting that the use of evidence of 'good character' can be retraumatising and distressing for victim survivors, undermines the severity of the sentence and creates a double standard that limits accountability for the person being sentenced.[210] Its use 'perpetuates a culture of impunity for sexual offenders'.[211] TASC (Legal Services) also questioned the accuracy of character references, given their subjectiveness and the nature of sexual assault and rape, which is often committed 'behind closed doors'.[212]

TASC (Legal Services) advocated for legislation to 'explicitly exclude character references as a mitigating factor in sentencing for sexual assault and rape cases' to ensure the respect and dignity of, and justice for, the victim survivor.[213]

Queensland Sexual Assault Network (''QSAN') 'strongly opposed the use of good character references in any sexual violence matters'[214] and was concerned that this is often 'weaponised to deter the victim survivor reporting and to demean, minimise and dismiss the victim survivor's experience.'[215] Sharing the views of many other victim advocacy and support services, QSAN told the Council that evidence of 'good character' is 'highly distressing.'[216]

QSAN also told the Council that evidence of 'good character' can be used to support a court deciding not to record a conviction. When a court focuses on the future work and opportunities of the sentenced person, this disregards the impact of the offending on victim survivors.

Respect Inc and Scarlet Alliance told the Council that 'good character' evidence has particular impacts on victims who are sex workers and are sexually assaulted, due to the messages this sends, thus reinforcing disadvantage:

> Good character references contribute to reinforcing inequity between sex workers, members of a highly stigmatised community, and other members of the community. Class, race, and cultural divides are reinforced by good character references whereby defendants that are members of a socially privileged group are judged more favourably.[217]

Consultation with victim survivors

The Council consulted with victim survivors.[218] Regarding 'good character', victim survivors told the Council about their experience hearing 'good character' at the sentence:

> His sister gave him a character reference, which really made me angry because they lied in it and it was still used in court. Because they said to the judge, 'Oh he's held jobs all of his life.' He's never worked a day in his life … And then they made the remark that he had a hard upbringing because his father spent eight years in jail for rape. Well, that doesn't say that it gives him a right to do what he done. That's not a very good character reference, if you ask me. (Victim Survivor (rape) Interview 2)

210 Submission 22, Chapter 1 (TASC Legal and Social Services) 7.
211 Ibid.
212 Ibid.
213 Ibid 8 (emphasis removed from original).
214 Submission 24 (QSAN) 10.
215 Ibid.
216 Ibid.
217 Submission 25 (Respect Inc and Scarlet Alliance) 2. It provided examples of what their staff have observed when supporting victim survivors: 2–3.
218 See Chapter 4 for methodology and further details on this consultation activity.

> I think it was all bullsh*t. Because I don't care what he's doing now and how he's fixing himself. I want to hear about how [the court is] going to punish him for what he did. What he did, not what he's doing. (Victim Survivor (intercourse of child under 13) Interview 1)
>
> You know him being spoken about like that, like I was made to feel like [****], yeah. (Victim Survivor (rape) Interview 6)
>
> [Submissions made about the offender's] community connection, his family and that he would likely not be able to practice again and therefore he shouldn't go to prison and that is the biggest misconception. (Victim Survivor (sexual assault) Interview 7)
>
> I mean, you're going to go to the people who you are going to get the character references, it's not like there's a baddie out in the world who is doing all these bad things, it's ... the regular person who then chooses to do this and gets away with it because people say, "he would never do it". So character references sure served him ... It's sort of irrelevant because you're a health practitioner, you're a CEO, you're teaching all about health, you're seeing clients. Ok, so your kids think you're great but you're still, you're sexually assaulting [in] the community. (Victim Survivor (sexual assault) Interview 7)

One victim survivor told the Council she was never given a copy of the character reference to provide her view on whether there were lies. She also said how confusing it was when, after experiencing a trial and her character being 'completely pulled apart. I was called a liar multiple times' and then at sentence the person could 'be put out to be this beautiful person, when really there's nothing?' (Victim Survivor (rape) Interview 2).

A support person told the Council what they had witnessed in court:

> Then she had to sit there listening to all of the things like ... how [a conviction is] going to affect his work ... his promotion ... He was a person that worked for Queensland Health. Senior people in Queensland Health wrote him character references on Queensland Health letterhead, including doctors. And [the victim survivor is] sitting there listening to what a great person he is, after he's already admitted [the offence]. And then [the judicial officer] said 'no conviction recorded'. Wow, there was the screaming and yelling, and we had to get out of court. [The victim survivor] just collapsed straight to the ground screaming ... How can you plead guilty to a crime, say I'm guilty, but not be convicted of that crime? It doesn't fit with what the community thinks happens in the system ... When they get convicted, but it's just not recorded. And there's no history of it that they need to disclose, and it impacts on a lot of things. And [the sentenced person] almost walk[s] out of it feeling like they weren't convicted. (Victim Survivor Support Person Interview 3)

When asked how it could be improved, they did not consider 'good character' references to be relevant:

> [Good character references] can be manipulated and it does depend on, like I don't know how you contain what the content is and who writes that and who's considered. I just struggle to find its relevance. ... 'I know you as a good guy.' It doesn't mean that you're not a rapist, it doesn't mean you didn't rape these people. You just know them to be someone else because they've presented that version of themselves to you ... I just don't think a good character reference is relevant at all in those cases. (Victim Survivor Support Person Interview 3)

Another victim survivor support person questioned the theoretical basis for 'good character' evidence to be relevant in the sentencing process:

> What sort of philosophical position is [accepting 'good character' evidence] based on? Is it like ... A man of such good character would never do such a thing? Some of these other sort of belief systems that continue to exist in the community, maybe not necessarily as strong as what they've been in the past, but I think there's still that element. It's also the timing of doing that. So doing it at the [sentence], when victims are there, is not the appropriate time to do that. (Victim Survivor Support Person Interview 1 – group)

When talking about the standard of proof and process, the victim survivor support worker told the Council:

> When you have evidence, it has to be tangible, it has to be there ... So a character reference is potentially hearsay. Because there's no evidence to say that this person is an upstanding ... just because you said, it's hearsay ... It's almost like it needs to be able to be cross-examined. Yeah. Or substantiated. And if that person is writing a letter, that person should ... they need to be there [to be cross-examined].

> It's the timing of everything in relation to sentencing that is actually challenging for them to get fully across all of that detail … So to be able to really thoroughly think about them and whether or not they need to challenge something, that's quite difficult. (Victim Survivor Support Person Interview 1 – group)

9.5.2 Submissions from legal stakeholders

The Youth Advocacy Centre ('YAC') did not recommend any substantial change to section 9(6A) of the PSA, other than to apply to a victim under 18, unless there were exceptional circumstances, to ensure consistency in the law.[219] In cases where section 9(6A) did not apply, YAC did not consider a person's lack of criminal history should be removed as a consideration.[220] YAC considered the weight evidence of 'good character' more relevant where the person has no criminal history or the offending was not premeditated, and considered that courts 'thoroughly scrutinise the integrity of character references.'[221]

Legal Aid Queensland ('LAQ') did not advocate for any changes to the law with respect to evidence of 'good character'.[222] It considered that taking a lack of prior history into account serves the legitimate need to distinguish people who have reoffended.[223] It provided the Council with a summary of case law supporting 'good character' as:

- a factor balanced against other factors;[224]
- in child sexual offences, 'not without relevance but can have little weight';[225] and
- given weight based on the nature of the offence: 'Some offences are of such a nature and seriousness that the previous good character of the offender is of little weight.'[226]

LAQ observed that it is appropriately scrutinised and taken into account (together with other aggravating factors, including a breach of trust).[227] It told the Council that it is important for the sentencing court to be able to have regard to all the circumstances of the case when imposing a sentence.[228] It considered that section 9(6A) of the PSA provides for where 'good character' cannot be taken into account and warned 'further amendments would curtail further the ability of judges to engage in the process of instinctive synthesis.'[229]

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219 Submission 30 (Youth Advocacy Centre) 4, citing *R v Manser* [2010] QCA 32 and Criminal Justice Legislation (Sexual Violence and Other Matters) Amendment Bill 2024, which proposed an amendment to the *Criminal Code* (Qld) to introduce section 210A: Sexual acts with a child aged 16 or 17 under one's care, supervision or authority and amend section 229B: 'Any adult who has a child of or above the age of 16 under their care, supervision or authority and maintains an unlawful sexual relationship with the child commits a crime.' Defences include if the adult believed the child was at least 18 years of age. At the time of the submission this was a Bill. It has since passed on 19 September 2024: *Criminal Justice Legislation (Sexual Violence and Other Matters) Amendment Act 2024* (Qld).

220 Ibid.

221 Ibid.

222 Submission 23 (Legal Aid Queensland) 4.

223 Ibid 4(iii).

224 Ibid 37 citing *R v Wruck* [2014] QCA 39 [36].

225 Ibid 37–8 citing *Dick v The Queen* (1994) 75 A Crim R 303 citing *R v Petchell* (Unreported, WA Court of Criminal Appeal, No 157 of 1992).

226 Ibid 40 citing *R v Smith* (1981) 7 A Crim R 437.

227 Ibid 4–5. Referring to Annexure 1: *R v Wruck* [2014] QCA 39 [36] (Holmes CJ); *Dick v The Queen* (1994) 75 A Crim R 303; *R v Reid; Ex parte A-G (Qld)* [2001] QCA 301; *R v D'Arcy* [2000] QCA 425; *Ryan* (n 7); *R v Smith* (1981) 7 A Crim R 437.

228 Ibid 4.

229 Ibid.

The Queensland Law Society did not recommend any changes be made to the PSA with regard to 'good character' evidence, considering it relevant to the sentencing purpose of rehabilitation.[230] It did consider that there could be an opportunity to educate the profession on terminology and language used.[231]

Subject matter expert interviews participants

Many participants told us any 'good character' evidence is considered and balanced against other factors in a case and generally doesn't carry much weight.[232] We were told the nature and seriousness of the offending would 'override any good character information'.[233]

Character references

Several participants considered limited weight was placed on references from friends and family members.[234] A reference simply stating the offending was 'out of character' or the person was remorseful 'is of limited value to the court'.[235] Similarly, weight will not be given if the author does not state they are aware of the charges.[236] It was viewed as important that there be 'substantial proof of good character evidence' by 'people independent who are well-informed about the allegations and who have the ability to bring an independent mind to the proceedings'.[237]

Character references were viewed as most relevant to a person's prospects of rehabilitation.[238] The character reference should provide evidence of 'how [the person being sentenced has] conducted themselves' and 'about rehabilitative steps and expressions of remorse, which is different from [suggesting] "He is a good guy"'.[239] References could demonstrate to the court 'the rehabilitation that [the person has] tried to engage in and that is a sign indirectly of good character because it shows how seriously they're taking these matters'.[240] It could be 'objective … from an organisation where they've been doing a program, an anger management program, a domestic violence program, and they say that they were doing really well on the program … [p]ositively contributed and motivated and seemed to be learning.'[241]

No prior criminal history

Generally, participants thought a person was entitled to have a lack of prior criminal history taken into account.[242] We were told that while having no prior history is common for sexual assault and rape, 'it doesn't detract from the gravity of the offending conduct in and of itself. But of course, inevitably someone is going to be sentenced differently to someone who has a significant and relevant history of that sort of offending.'[243] An absence of prior convictions might suggest the person has good prospects of rehabilitation,[244] although this will depend on the individual circumstances of the case.[245] Two

230 Meeting with Queensland Law Society, 9 July 2024.
231 Ibid.
232 SME Interviews 1, 4, 5, 7, 10, 13, 15, 25.
233 SME Interview 4. Similar remarks were made in SME Interviews 1, 5, 7, 13, 15, 16, 21,
234 SME Interviews 3, 5, 6, 7, 9, 11, 14, 16, 22.
235 SME Interviews 2, 3, 4, 11.
236 SME Interviews 8, 10, 11, 16, 17.
237 SME Interview 11.
238 SME Interviews 2, 11, 24, 26.
239 SME Interview 2.
240 SME Interview 24.
241 SME Interview 9.
242 SME Interviews 10, 12, 13,
243 SME Interview 15. Similar remarks were made in SME Interviews 1, 9, 10.
244 SME Interview 7.
245 SME Interview 9. For example, there is a difference between a teenage boy who goes to a party and gets drunk for the first time and commits an offence compared to someone who, in a premeditated way, goes out and targets a victim and commits an offence.

participants thought a lack of prior criminal history should be regarded as 'the absence of an aggravating factor' – that is, as neutral – rather than as mitigating.[246]

Application of section 9(6A) of the PSA and whether to extend the limitation

Many participants told us they had no experience of section 9(6A) of the PSA being applied in practice or discussed on appeal.[247] Four participants discussed the scope and application of the provision. One participant told us it was helpful to have 'legislative force' behind a submission that 'good character' was not relevant.[248] However, another considered the section to have a narrow scope.[249] One participant told us its application was rare and considered it a 'grey area' where the perpetrator was a family friend and it was a 'breach of trust category'.[250] In this situation, it was 'less about the good character and more about access. So, generally, the courts will still place some weight on the mitigating aspects … because it doesn't attach to facilitation.'[251]

Similarly, another participant commented on its mixed application where a perpetrator had access to a child because they were a family member as opposed to access because of their profession.[252] They considered that people committing sexual assault and rape can manipulate situations to enable the offence to occur (for example, creating an opportunity to be alone with the victim, such as waiting for a parent to go to sleep), so did not understand why this was different from where 'good character' had assisted a person in a professional capacity.[253]

Generally, participants were cautious about extending the provision to adult victims as courts always have 'regard to the circumstances in which the offence is committed' and will always take into account 'if a person has abused a position of trust'.[254]

9.5.3 Consultation events

At our consultation events, we were told:

> It's really important to differentiate between the person and the behaviour … While someone's character is relevant, good character shouldn't outweigh the harm.[255]

> You have to separate the person from the offence. The success of rehabilitation is very dependent on whether the offender takes responsibility and believes they've done wrong.[256]

> What makes a 'good character'? … Quite often defendants seek references from those they know will give a good character reference, is quite superficial and sought of people who know them less well.[257]

When asked what should be changed about sentencing for sexual assault and rape, one participant suggested that, 'No character references should be allowed for [defendants] during proceedings.'[258]

246 SME Interview 19. Similar remarks made by SME Interview 1.
247 SME Interviews 11, 12, 15, 16, 17, 22, 26.
248 SME Interview 21.
249 SME Interview 17.
250 SME Interview 23. Similar remarks made in SME Interview 14.
251 Ibid.
252 SME Interview 19.
253 SME Interview 19.
254 SME Interview 10. Similar remarks made in SME Interviews 22, 26.
255 Online Consultation Event, 16 April 2024, Group 2.
256 Ibid.
257 Online Consultation Event, 16 April 2024, Group 1.
258 Online Consultation Event, 3 April 2024 Group 2. Others agreed with this.

9.6 Sentencing remark analysis

9.6.1 Sentencing remarks data analysis

Studies have explored the use of personal mitigating factors in sentencing, which provide a useful insight into how courts approach the issue of good character evidence. Belton and Dhami note that a significant limitation of these studies, however, is that they do not provide detail about how a mitigating factor has been interpreted or applied.[259] Noting the limitation of previous studies, the Council reviewed sentencing remarks to gauge the extent to which evidence of 'good character' was raised and, if so, how this appeared to impact or influence the sentence.

This review of sentencing remarks adopted a similar methodology to that undertaken by Kate Warner et al, which compared legal and lay assessments of relevant sentencing factors for sex offences in Australia, including good character.[260] However, Warner et al did not use a 'neutral' code (discussed below) and, in contrast to Warner et al's approach, the Council was reliant on those factors specifically referred to by the sentencing judge or magistrate at sentence in their sentencing remarks as a basis for considering the extent to which they were considered and taken into account.

Analysing sentencing remark data by reviewing and coding for specific expressed 'factors' can have significant shortcomings and limitations which are discussed in Chapter 4.

The Council reviewed the following sentencing remark data (which differed for each offence):

- **rape:** all sentencing remarks for rape cases (MSO) sentenced from July 2022 to June 2023 in the District Court (n=131);[261]
- **sexual assault:** a selection of 75 cases randomly selected from all sexual assault (MSO) cases sentenced between 2020–21 and 2022–23 across the Magistrates and District Court (n=75).[262]

The Council observed that the common 'good character' factors a judge or magistrate would consider were:

- no criminal history;
- no relevant criminal history;
- a statement the person was of 'otherwise good character';
- a statement the offence was 'out of character';
- employment or employment prospects;
- comment on the person's reputation such as good work ethic, trustworthy, a 'good guy';
- support from family and or friends;
- has made contributions to the community, such as good deeds, volunteer work, community involvement.

259 Ian K. Belton and Mandeep K. Dham, 'The role of character-based personal mitigation in sentencing judgments' (2024) 21 *Journal of Empirical Legal Studies* 208, 213.
260 Kate Warner et al, 'Comparing Legal and Lay Assessments of Relevant Sentencing Factors for Sex Offences in Australia' (2021) 45 *Criminal Law Journal* 57.
261 This was a more robust way to consider 'good character' in rape. It was not possible for the Council to consider all sentencing remarks for sexual assault (MSO) because the Council did not have access to all sentencing remarks, so a sample was used. For the methodology on the sample used, see Chapter 4.
262 For the methodology on the sample used, Chapter 4.

This review considered whether each 'good character' element was present and the weight given (if there was 'a lot of weight', 'a little weight', neutral (no identifiable weight given or weight not apparent) or no weight – where it was expressly stated 'no weight given' (i.e. because of section 9(6A) of the PSA or the person was not considered to be of 'otherwise good character')).

Neutral (no identifiable weight or weight not apparent)

Consistent with the instinctive synthesis approach, it is not a requirement for a sentencing court to precisely explain how all relevant factors were taken into account and what weight they were given. In some matters, the mere presence of a factor may not warrant it being given 'a lot of weight' or 'a little weight' – for example, where the factor is referred to in order to provide additional context. In these cases, the treatment of these factors was coded as 'neutral'. In some cases, the remarks lacked sufficient detail for the coder to clearly understand the weight given, in which case the treatment of these factors was also coded as neutral.

9.6.2 Key sentencing remark data findings

Key sentence remark data findings on 'good character' in sentences for rape (MSO)

Findings based on all rape (MSO) cases sentenced from July 2022 to June 2023 in the District Court (n=131)

1	**Evidence of 'good character' was referred to in most cases of rape.** In most cases (91.6%, n=120/131), at least one type of evidence of 'good character' was mentioned.
2	**A character reference was used in over one in 3 cases, often provided by a family member.** In over one-third of cases (35.9%, n=47/131) at least one character reference was referred to. Where the author was mentioned (n=24), most commonly these references were provided by a family member (e.g. parent, brother, sister or sister-in-law) (n=17, 70.8%), followed by an employer (n=6, 25%).
3	**Evidence of 'good character' appeared to be given 'a lot of weight' in more than one in 4 cases.** In over one in 4 cases (28.2%, n=37/131), it was clear that the person's evidence of 'good character was treated as mitigating and given 'a lot of weight'.
4	**Most commonly, evidence of 'good character' was treated as a neutral factor.** In 60 per cent of cases (n=79/131, 60.3%), some type of 'good character' evidence was mentioned but it was not possible to determine how this was taken into account.
5	**Good employment prospects and the person being described as being 'otherwise of good character' were the most common elements of 'good character' mentioned.** Having good employment prospects was the most commonly mentioned type of 'good character' evidence referred to (n=75/120) and was considered mitigating in 21.3 per cent of cases (n=16/75). Having the support of family and friends was also commonly mentioned (n=70/120) and considered mitigating in 12.9% of cases (n=9/70). Proportionally, the type of 'good character' evidence most commonly treated as mitigating, if it was raised, was the behaviour being described as being 'out of character' (84.6% of mentions where this was mitigating); however, this type of good character was only mentioned in 13 of the 120 cases. The person being described as being 'otherwise of good character' was also commonly considered mitigating if mentioned (76.2% of mentions) but was mentioned in only 21 cases (out of 120).

6	**Where 'good character' was referred to in a way that suggested it was mitigating, the person was significantly more likely to receive a partially suspended prison sentence.** Cases where evidence of 'good character' was treated as mitigating were statistically significantly more likely to result in a partially suspended prison sentence being imposed and less likely to attract an imprisonment order with a parole eligibility date, than those cases where good character was not mentioned as a mitigating factor.[263]
7	**There was no significant difference in imprisonment lengths based on the presence and treatment of good character evidence, but the sample size is small.** While the sample size is small, the data indicates that there was no significant difference in the sentence lengths for either imprisonment or a partially suspended prison sentence, based on the treatment of good character as mitigating or not.

Key sentencing remark data findings on 'good character' in sentences for sexual assault (MSO)

Findings based on a random selection of 75 cases from all sexual assault (MSO) cases sentenced between 2020–21 and 2022–23 across the Magistrates and District Court (n=75).

1	**Evidence of 'good character' was referred to often in sentences of sexual assault.** Evidence of 'good character' was considered often (n=46/75, 61.3%) in sexual assault cases.
2	**A character reference was used in one in 3 cases and often given 'a lot of weight'.** In one-third of cases, a character reference was used (n=25/75, 33.3%). Information contained in these references was often considered mitigating and given 'a lot of weight' (n=19/25, 76.0%).
3	**Most commonly, evidence of 'good character' was treated as a mitigating factor.** In just over 40 per cent of cases, some type of evidence of 'good character' was treated as mitigating and appeared to be given 'a lot of weight' (n=32/75, 42.7%).
4	**No criminal history, having good employment prospects and the person being described as being 'of otherwise good character' were the most common elements of 'good character' referred to.** Having no criminal history was the most commonly mentioned type of 'good character' evidence referred to (n=24/46) and was considered mitigating in 79.2 per cent of these cases (n=19/24). Having good employment prospects was also commonly mentioned (n=21/46) and treated as mitigating in two-thirds of these cases (n=14/21). Proportionally, the type of 'good character' evidence most commonly treated as mitigating was the person being 'of otherwise good character' (100% of mentions); however, this type of good character was only mentioned in 8 of the 46 cases. 'Providing contributions to the community' was also commonly treated as mitigating (85.7% of mentions) but was mentioned in only 7 cases (out of 46).
5	**Where 'good character' was treated as mitigating, the person was significantly more likely to receive a non-custodial penalty.** Cases where 'good character' was treated as a mitigating factor were significantly less likely to receive a custodial penalty and more likely to receive a non-custodial penalty than cases where good character was not referred to in a way that suggested it was treated as mitigating.[264] More than three-quarters of cases

263 Pearson's chi-square test: $\chi 2(3)=26.15$, p <.0001.
264 Pearson's chi-square test: $\chi 2(1)=7.38$, p <.05.

	where good character was not treated as a mitigating factor received a custodial penalty (78.6%), compared with less than half of cases where good character was a mitigating factor (48.5%).
6	**There was a significant difference in custodial sentence length, but the sample size is small.** While the sample size is small, the average custodial sentence length when 'good character' was referred to as a mitigating factor was 0.7 years (median 0.7 years), which is significantly shorter than those cases where good character was not a mitigating factor (average 1.1 years, median 0.8 years). This difference was found to be statistically significant.[265]
7	**Where 'good character' was relied on and treated as mitigating and a non-custodial penalty was ordered, most people had no conviction recorded, but the sample size is small.** Of the 26 cases where a non-custodial penalty was imposed, in 17 cases, the person's 'good character' was referred to as a mitigating factor. Almost all those cases resulted in no conviction being recorded (n=16/17, 94.1%), compared with two-thirds of cases where good character was not referred to as being a mitigating factor (n=6/9, 66.7%). The sample is too small for significance testing.

9.6.3 Discussion

The key findings from the sentencing remark data analysis on rape (MSO) and sexual assault (MSO) provide a useful illustration of how often and how 'good character' is considered and might influence sentences. It suggests to us that evidence of 'good character' is commonly referred to and, where it is mitigating, this appears to be used by the court to determine the person's prospects of rehabilitation and risk of reoffending. For example, for rape this can be relevant to determining what type of imprisonment sentence is most appropriate (for example, whether there is a need for supervision through parole). For sexual assault, this can be relevant to determining whether the purposes of sentences can be met by a non-custodial order and whether a conviction should be recorded. However, taking the discretionary and intuitive nature of sentencing into account, we do not consider that 'good character' alone is determinative or causal regarding whether a sentencing judge orders a sentence of imprisonment to be suspended or not, or whether to make some other type of sentencing order.[266] There are significant limitations to this analysis[267] and we did not control for other factors such as the seriousness of the offence, whether the victim was a child or whether there were more than one victim, number of offences or whether there were prior offences. Even controlling for these factors, this type of analytical approach has limitations.[268]

Sexual violence is widespread and committed by men from all backgrounds, ethnicities and financial positions.[269] However, recent research from the University of New South Wales found men with sexual feelings towards children who had sexually offended against children were well connected, relatively wealthy and had better social supports and relationships than men who did not have sexual feelings or histories of offending with children.[270] The report concluded that its findings have 'validated the

265 Independent Groups T-Test: t(46.36)=2.35, p <0.05, two-tailed (equal variance not assumed).
266 See Cyrus Tata, *Sentencing: A Social Process – Re-thinking Research and Policy* (Palgrave Macmillan, 2020) 43, 147: judicial officers who engage in an intuitive and discretionary decision-making process make sentencing decisions based on 'the recognition and continual recreation of "typified whole case stories"', not the addition and subtraction of independent sentencing 'factors'.
267 See Chapter 4, section 4.3.3 for a discussion of limitations.
268 See Tata, *Sentencing: A Social Process* (n 266) 38–43.
269 For further discussion of the profile of those who use sexual violence and their risk factors, including sexual violence against children, see Queensland Sentencing Advisory Council, *Sentencing of Sexual Assault and Rape: The Ripple Effect – Consultation Paper Background* (March 2024), section 4.3, 38–41.
270 University of New South Wales, *Identifying and Understanding Child Sexual Offending Behaviours and Attitudes Among Australian Men* (November 2023) 31.

observations of countless survivors that the men who abused them are well respected members of the community who enjoy high esteem and the confidence of those around them'.[271] This prevalence study suggests some types of perpetrators may get an added benefit from good character references.

9.6.4 Language

The Council was told by victim survivor and advocacy groups' stakeholders that character references can be deeply distressing and retraumatising for victim survivors, and undermine the sentencing purposes of denunciation (see above 9.5.1). The way 'good character' evidence is conceptualised, and the language used have been criticised in the literature based on the gendered application, link to gender role performances[272] and how it is used to construct 'dominant masculine narratives'.[273] A small study by Taylor based on court transcripts of 4 intrafamilial sex offence trials in Victoria concluded that 'good character' was 'recited like a verse whose meaning is never examined or scrutinized by simply articulated as one of the standard exculpatory homilies used to diminish sexual offending'.[274]

A separate study by Stevens and Wendt of child sexual abuse sentencing transcripts from the District Court in South Australia sought to understand 'the use of language' around good character.[275] They identified frequent use of 3 dominant societal discourses (family, employment and community) and one legal discourse (rehabilitation):

- Family: the language constructed the person as 'a supported or supportive family member, a valued role within the family, and a potential victim; that is, a person that suffered or will suffer harm to his family because of the child sexual abuse conviction.'[276]
- Employment: used to raise the status of person being sentenced, with notions of 'the employee with "good working" characteristics, the supported and desirable employee, and the potential victim; that is, a person whose career has or will be harmed by their child sexual abuse conviction'.[277]
- Community: comments to construct a person as being supported by the community and committed to their community to indicate the person being sentenced was otherwise 'fulfilling their community role within society'.[278]
- Rehabilitation: comments to construct a person as being a 'good' offender by doing the 'right' actions, such as engaging in rehabilitation, acknowledging their offending behaviour, demonstrating remorse, having no previous conviction and being a victim (e.g. has been psychologically harmed by the offence or conviction).[279]

From their analysis, they argue that the language used when discussing 'good character' assists the sentenced person 'to feel as though he was, is and will be a good person within the sentencing context'.[280] They note that the adoption of this narrative serves to minimise the seriousness of the offending,

271 Ibid 35.
272 Stevens and Wendt (n 168) 97 citing Wright MM, *Judicial Decision Making in Child Sexual Abuse Cases* (UBC Press, 2007) 84.
273 Ibid 97, citing Taylor SC, *Court Licensed Abuse: Patriarchal Lore and the Legal Responses to Intrafamilial Sexual Abuse of Children* (Peter Lang, 2004) 77.
274 Ibid.
275 Ibid 99. The sample considered was 8 transcripts between 1997 and 2012.
276 Ibid 101.
277 Ibid.
278 Ibid 101–2.
279 Ibid 102.
280 Ibid 106.

negatively impacts victim survivors and may reduce the impact of the court's denunciation by 'potentially delet[ing] the "wrongfulness" message of this crime'.[281] They point to the many negative consequences arising from its use and its broader implications:

> The language of good character avoids the naming of the defendant and, alarmingly, the child sexual abuse. The defendant's 'goodness' can be used to shift blame to the victim and minimises the seriousness of the child sexual abuse offences. This represents a wider societal practice of silencing discussion about child sexual abuse, which has serious potential implications for victims. The dominance of good character at the sentencing stage can create additional negative experiences within the criminal justice system for victims of child sexual abuse, especially for those who engage with the legal system to assist in their recovery.[282]

Thematic sentencing remark review

To inform our review, we undertook a thematic review of sentencing remarks.[283] We observed many examples where character references were used only to attest to personal character traits, the person's positive role in the family, express an opinion about the person's work ethic or employment, and their contributions to the community. These statements were made in various circumstances, including where the victim was a child, and the offending was not isolated, without tying this to any specific purposes of sentencing.

Language used to describe 'good character': Findings from the thematic sentencing remark analysis[284]

A person found guilty after trial of 2 counts of oral-vaginal and digital-vaginal rape and 3 indecent dealing with a child under 16, under care (his 15-year-old niece) occurring on different occasions when he entered her bedroom at night. Despite being convicted following trial, character references were used which described him as:

> A good father to your son … [and] a good and supportive husband to your wife. He notes that you have always provided well for your family and places their needs ahead of your own, and he notes, perhaps understandably, that the charges for which you are being convicted are, at least in his assessment, totally out of character, and do not reflect your personality.
>
> reliable, hardworking and honest and … great worth ethic … high moral values
>
> A 'kind-hearted, loving father, friend and husband. Hardworking, honest and all-round great person to be friends with'. (Rape, regional/remote, imprisonment < 5 years, #5)

A person who pleaded guilty to 2 counts of oral-penile rape and one count of indecent treatment of a child under 16, under 12, lineal descendent (his daughter) occurring on 3 occasions when the child victim was aged 3, in prep and again at 6 years old. The sentencing judge referred to 'good character' when describing the offences:

> The first count occurred when your daughter was in kindergarten, then aged only three years. You put honey on your penis and told her to suck it … The material to which I will refer a little later puts your behaviour as an aberration for a man otherwise of good character. It may be noted, however, that the offending which I have just described was not the only occasion upon which you preyed on your own daughter. (Rape, major city, imprisonment < 5 years, #22)

A person who pleaded guilty to one count of digital-vaginal rape and 3 counts of indecent treatment of a child under 16, under 12, occurring when he (a private English tutor aged 60) was alone with the child victims (aged

281 Ibid.
282 Ibid.
283 See Chapter 4, section 4.3 for methodology.
284 For a description of the sampling and analysis methodology see Chapter 4, section 4.3.

10 and 5). The sentencing remarks referred to a character reference and his 'previous good character' as in his favour:

> your sister … has provided a character reference for you which speaks of your otherwise positive attributes … She believes that the incident was out of character.
>
> But the sentence will obviously reflect matters in your favour, particularly … your previous good character. (Rape, major city, imprisonment < 5 years, #20)

A person who pleaded guilty to historical offences of penile-vaginal rape, 2 indecent assaults and 2 indecent treatments of a child under 16, under 12, (2 of his biological first cousins). The first victim was aged 10–12 and he was 15–17, the second victim was 11 and he was 20 (penile-vaginal rape). He was 55 at sentence and references described him as:

> Very diligent in his work ethic, good of character and trustworthy … Honest and trustworthy mate.
>
> There are other references that also speak of your good character, and there is no doubt that having regard to the fact that you have spent the last 35-odd years in employment without coming to the attention of the authorities in any way, I have regard to the fact that you are a person of good character and have lived a good life since these events that occurred in the early 1980s. (Rape, regional/remote, imprisonment < 5 years, #12)

A person pleaded guilty to the penile–anal rape of an adult victim, which occurred after a party when the victim was 'very drunk'. They had had consensual penile-vaginal intercourse, but she was saying no in a 'loud and forceful tone' to anal intercourse:

> A number of references have been tendered to this Court, and there are many people in Court supporting you today. Those persons speak highly of you. They state in those references that this offending is out of character, that you are a valuable member of the community in many roles, including as a mentor and volunteer in sporting and other community roles, that you have remorse, insight, and that you have been a high achiever at sport.
>
> I accept this is out of character. I accept that you are otherwise a contributing member of society. (Rape, major city, imprisonment < 5 years, #28)

A person was sentenced for historical offences of a penile–vaginal rape and sexual assault in circumstances where he was a dentist and had sexually offended against his employee (a dental nurse) on separate occasions:

> You have no criminal history. You are a mature man who is otherwise of good character. You obviously have a lot of support in the community. You have had a long and distinguished career in dentistry and orthodontics. And you have done voluntary work. You have been looking after your mother, who, I understand, is old and frail and, no doubt, your incarceration will be difficult on her. I have been given many references who speak of you as otherwise being a person who is regarded as kind and compassionate. I particularly note your daughter's reference, and she is obviously very close to you and she is going to find your incarceration difficult as well.
>
> … These offences did take place a long time ago and I accept that there has been no offending in between then and now, although, as the Crown says, the other side of that coin is that you have been able to live the life that you have as a result of not being held to account for these acts many, many years ago. (Rape, major city, imprisonment > 5 years, #10)

The Council also observed an example where 'good character' was given limited weight. In this case, the person being sentenced pleaded guilty to 27 charges including 4 counts of rape (digital–vaginal and penile–vaginal) and one count of maintaining a sexual relationship with a child:

> Your barrister has tendered a letter from XXX, I read that. You are well regarded by at least her, and it seems to me you are a reliable worker. But limited weight can be attached to this in light of the significant offending here over the long period. (Rape, major city, imprisonment > 5 years, #19)

There was also an example where the court considered the person to not be of 'good character'. In this case, the person being sentenced had been found guilty after a trial for 6 counts of rape and 10 counts of indecent treatment of a child under 16 (under 12 years) involving 5 victims:

> Your evidence was marked by an inflated, if not grandiose, sense of narcissistic self-interest. You were at pains to convince the jury of your limited physical ability to move, your important and time-consuming work and your good strength of character, particularly your caring and giving Christian nature. The latter was particularly offensive … I must not have regard to your good character if it assisted you in committing the offences … I do not think you are a person of any particular good standing in the first place. You may have worked throughout your adult life but you lied about your qualifications or the job that you were doing, on oath. (Rape, regional/remote, imprisonment > 5 years, #13)

This is consistent with the High Court view that evidence of 'good character' should be given limited weight if the offending occurred over a lengthy period instead of being an isolated incident, and a court is not bound to give weight if the person is not of 'good character'. There were no examples of the application of section 9(6A) of the PSA in the sample.

9.7 The Council's view

Key Finding

8. **There is a problem with certain types of 'good character' evidence**

There is a problem with certain types of 'good character' evidence. Many victim survivors find the use of character references and comments made with respect to these references to be deeply distressing and retraumatising.

See **Recommendation 5**.

There is no doubt the proper use and relevance of 'good character' evidence in the context of sentencing for sexual offences is contentious and divisive. While our research demonstrates that evidence of 'good character' can have a legitimate role in the sentencing process, we also observed numerous examples of problematic language being used, particularly when referring to character references. We acknowledge that the use of character references and the language used in the context of sentencing for rape and sexual assault can be jarring when words are used describing the perpetrator as a 'good bloke' or as being a 'loving and kind father and friend', given the nature and seriousness of this offending. We acknowledge that its use can be deeply distressing and retraumatising for victim survivors.

Balancing the concerns raised in consultation, including those shared with us by victim survivors, our review of sentencing remarks and Court of Appeal decisions, against the rationale for why evidence of 'good character' is used in sentencing, we conclude that there is a problem with certain types of 'good character', namely:

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

While we consider these aspects to be problematic and that they should never be used to reduce a person's culpability or the seriousness of the offending, we do not recommend a blanket prohibition on the use of this evidence as it is impossible to disentangle the elements of 'good character' evidence which are problematic from other parts that may serve a legitimate and important purpose in the sentencing

process. We consider there can be greater clarity about the permitted use of this evidence as only being relevant to rehabilitation and risk of reoffending,[285] in addition to reforms to allow a court to give this evidence no weight due to the nature and seriousness of the offending.

9.7.1 Character references can be subjective and contain non-professional opinions which can undermine perpetrator accountability and be distressing for victims

The Council is particularly concerned about the use of character references that comprise subjective, non-professional opinion evidence, purely attesting to the perceived or observed personality traits of the person being sentenced. We have observed that sentencing courts make extensive reference to the sentenced person's positive personal traits, including describing the person as being 'honest', 'kind-hearted', 'reliable', an 'all-round great person', a 'trustworthy mate', a 'valuable member of the community', 'kind and compassionate', and with 'otherwise good education and work ethic', without tying this to any specific purposes of sentencing.[286] We consider subjective opinion evidence from lay persons (without a professional expertise to give opinion evidence, such as a treating psychiatrist) should be scrutinised with greater rigour by a court when sentencing a person for sexual assault and rape.

In this context, we also acknowledge victim survivor concerns that positive statements by a court that a person is of 'otherwise good character' can undermine perpetrator accountability. We have been told that the language used may result in the person seeking to justify their behaviour to themselves and others as simply involving a temporary lapse in judgment. The more serious an offence is, such as rape, the more 'the usual claim to mitigation, and the "concession to human frailty" reasoning looks rather thin'.[287]

9.7.2 Standing in the community can be relevant to context, but generally has no role in assessing a person's culpability and seriousness of the offending

The Council agrees that standing in the community generally has no role to play in reducing a person's culpability or the seriousness of the offending, although it may be a relevant contextual factor.[288] For example, a person with standing might have more to lose by transgressing the boundaries of acceptable behaviour again. This fact may mean they are more likely to be deterred and less likely to reoffend (while noting there is no way to guarantee that they will in fact be deterred and will not reoffend).

9.7.3 Taking contributions to the community into account may be contrary to the principle of proportionality and give inequitable treatment to people who are privileged

Contributions to the community raise similar concerns as taking a person's 'standing in the community' into account. A sexual offence should not be considered less serious, and the person's culpability (blameworthiness) should not be reduced because a person has made significant contributions to the community. However, it may be relevant to assessing a person's prospects of rehabilitation and risk of reoffending.

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285 Similar to the observations made in *R v Knoote-Parke* [2016] 125 SASR 13 [2] (Sulan J), (Blue J), [77]–[79] (Doyle J) considering *Criminal Law (Sentencing) Act 1988* (SA) s 10(3)(ba) (now *Sentencing Act 2017* (SA) s 11(4)(c)). Cited with approval in *R v Handley* [2023] QDCSR 793, 4 (Long DCJ); *DPP v Schulz* [2018] VCC 1058 [88], [74]–[99] (Pullen J).

286 See section 9.6.

287 Andrew Ashworth, *Sentencing and Criminal Justice* (5th ed, Oxford University Press, 2010) 189–90. Ashworth makes this observation with respect to all elements of good character, including the absence of previous convictions.

288 See *R v RAZ; Ex parte A-G (Qld)* [2018] QCA 178 [22]–[25] (Sofronoff P, Gotterson JA and Boddice J agreeing).

We agree with criticisms that taking contributions to the community and 'good deeds' into account involves a strong element of 'social accounting', contrary to the principle of proportionality.[289] It may give rise to the inequitable treatment of people who are privileged with means and an opportunity to have done such deeds.[290] A person's disadvantage in life may not always mitigate, while a person's advantage (evidenced by employment, contribution to the community or family support) can do so.[291] It may also lead to an assumption that the person with advantage has a reduced risk of offending, has more to lose and could be disproportionately punished by a custodial sentence.[292]

9.7.4 Relevance of 'public opprobrium' and loss of reputation as a form of extra curial punishment

Elements of 'good character', such as a person's 'reputation' and 'standing in the community' can result in public shaming, humiliation or 'public opprobrium'.[293] The loss of standing or reputation and its impacts can be relevant to whether a person has experienced 'extra-curial punishment'.[294] We consider that the relevance of, and any weight given to, loss of standing and public humiliation is separate and distinct from a court determining a person is of 'otherwise good character'.[295]

9.7.5 Taking into account a lack of previous convictions is part of 'character' but is a special consideration that should not be further limited

We do not consider that a lack of previous convictions is in the same category as character references, standing and community contributions. We consider that a lack of prior offending goes more directly to assessments of the culpability of the person being sentenced than the other types of character evidence discussed above. It may also support an assessment of the person's rehabilitative prospects and risks of reoffending.[296] We accept, however, that in the context of sexual offending, a lack of previous convictions may not be unusual given the low rates of the reporting, and this may not, in fact, be the first time the person has engaged in this type of conduct. In some circumstances (for example, for offending that has occurred over a lengthy period), a lack of prior criminal history might be better thought of as 'neutral' than mitigating.

289 See Ashworth (n 287) 182.
290 See ibid, 19 citing Robert J, *Punishing Persistent Offenders* (2008) 110.
291 Julian V. Roberts, *Mitigation and aggravation at sentencing* (Cambridge University Press, 2011).
292 Ibid.
293 *Ryan* (n 7) 284 [303]–[304].
294 See *R v Nuttall; Ex parte A-G (Qld)* [2011] 2 Qd R 328 (Muir JA, Fraser and Chesterman JJA agreeing) [63]; *R v Burdon; Ex parte A-G (Qld)* (2005) 153 A Crim R 104, 107 (McMurdo P) referring to *Ryan* (n 7) [284]–[285] (McHugh J); [313]–[314] (Hayne J), [303]–[304] (Kirby J), [319] Callinan J); *R v Sparrow* [2015] QCA 271 [113] referring to *R v Poynder* (2007) 171 A Crim R 544.
295 In some cases, a person's loss of reputation and public humiliation will be of little weight, although there is no settled position as to whether this should be taken into account to reduce the penalty which otherwise would have been imposed: *R v Nuttall; Ex parte A-G (Qld)* [2011] 2 Qd R 328 (Muir JA, Fraser and Chesterman JJA agreeing).
296 Some legal academics who have considered the rationale for evidence of 'good character' in sentencing have argued it's use as a mitigating factor should be limited in sentencing, but a lack of prior criminal history is not included as part of any limitation or restriction: see Kate Warner et al, 'Comparing Legal and Law Assessments of Relevant Sentencing Factors for Sex Offences in Australia' (2021) 45 *Criminal Law Journal* 57; Gabrielle Wolf and Mirko Bargaric, 'Nice or Nasty? Reasons to Abolish Character as a Consideration in Australian Sentencing Hearings and Professionals' (2018) 44(3) *Monash University Law Review* 567, 582–3.

Recommendation

5. **Reforms to the use of 'good character' evidence**

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

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

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

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

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

9.7.6 Applying the Council's fundamental principles

Applying the Council's fundamental principles guiding the review[297] to the issues raised in considering evidence of 'good character' in sentencing and to address **Key Finding 8** guided us in making a recommendation:

- **Principle 1: Reforms to sentencing laws should be evidence-based with a view to promoting public confidence:** We have drawn on observations from sentencing remarks, appeal decisions, past reviews and research, as well as extensive consultation. We note the contrasting views of legal stakeholders (who advocate for no change), victim survivor advocacy and support groups (who advocate for change), the issues identified in past reviews and legal scholars who have also been critical of the use of 'good character' in the sentencing process. Although there is limited community evaluation, the current evidence available suggests there would be public support for leaving judges with discretion, but there is also room for judges to give less weight to 'good character', or more clearly articulate the rationale for giving it significant weight.
- **Principle 2: Sentencing decisions should accord with the purposes of sentencing as outlined in section 9(1) of the *Penalties and Sentences Act 1992* (Qld).** The Council acknowledges that evidence of character can be relevant to the sentencing purposes of rehabilitation and risk of reoffending (community protection). However, we are concerned with the language used when elements of 'good character' are not linked to a sentencing purpose or there is a lack of clarity on how and why it is considered.

297 For a full list of the fundamental principles, see Chapter 3.

- **Principle 3: Sentencing outcomes for sexual assault and rape offences should reflect the seriousness of these offences, including their impact on victims, while not resulting in unjust outcomes.** While the Council has observed that evidence of 'good character' is usually considered neutral, it can be mitigating, and some examples of the language used when referring to evidence in character references may reduce how the seriousness of the offence is perceived and negatively impact victims. The use of positive language when referring to character references which purely attest to personality traits, family role and work ethic can minimise the seriousness of the conduct, undermine perpetrator accountability and be distressing and retraumatising for a victim. We consider that subjective opinion evidence from lay persons (without professional expertise to give opinion evidence, such as a treating psychiatrist) should be scrutinised with greater rigour by a court when sentencing a person for sexual assault and rape.
- **Principle 5: Sentencing inconsistencies, anomalies and complexities should be minimised.** The Terms of Reference focus on sentencing practices for sexual assault and rape. A potential inconsistency would arise if our recommendation were limited to these two offences. We have been asked to ensure our advice on the use of 'good character' evidence is given in respect to *all* sexual offences (that is, not be limited to sexual assault and rape). The Attorney-General referred to other reviews underway in NSW and the ACT and to national-level discussions by the Standing Council of Attorneys-General. While we do not know the outcome of other reviews, we consider there could be merit in having a harmonised, nationally consistent approach, given that concerns with the use of 'good character' evidence are not unique to Queensland.
- **Principle 7: The circumstances of each person being sentenced, the victim survivor and the offence are varied. Judicial discretion in the sentencing process is fundamentally important.** The Council recognises that the circumstances of each person being sentenced, each victim and each offence are varied. It is therefore important that information about a person, including their character, antecedents and reputation, is considered alongside other information to assist the court in arriving at an appropriate sentence that is just in all the circumstances. We are mindful that legislation should allow a court to consider a person being sentenced as 'a whole person and not solely under the shadow of their crimes'.[298] When considering whether to further limit information available to a sentencing court, the Council is mindful that sentencing approaches that promote individualised justice applied within a framework of broad judicial discretion are generally more likely to support positive outcomes than a 'one size fits all' or 'one size fits most' approach.[299]
- **Principle 9: Sentencing decisions for sexual assault and rape should be informed by the best available evidence of a person's risk of reoffending.** We recognise that character references refer to the person having the support of their family or community, or speak to their engagement with education, employment or steps taken to rehabilitate, may be highly relevant in the sentencing process in assessing the person's risks of reoffending and rehabilitative prospects. However, as discussed above under Principle 3, an over-reliance on information contained in personal references should be avoided, given their subjective and often untested nature. In our view, information contained in such statements should be scrutinised with greater rigour by a court when sentencing a person for sexual assault and rape. Importantly, this information should

298 *Ryan* (n 7) 299 [108] (Kirby J).

299 See Andrew Day, Stuart Ross and Katherine McLachlan, *The Effectiveness of Minimum Non-Parole Period Schemes for Serious Violent, Sexual and Drug Offenders and Evidence-Based Approaches to Community Protection, Deterrence and Rehabilitation* (Literature Review, University of Melbourne, August 2021) 12–13.

not be used as substitute for professional assessments while accepting these may not be available in all cases (see further **Chapter 12**).

- **Principle 10: Any reforms should aim to be compatible with the rights protected and promoted under the *Human Rights Act 2019* (Qld) or be reasonably and demonstrably justifiable as to limitations.** If evidence of the admissibility of 'good character' is restricted, the Council acknowledges that this may be inconsistent with the principles of natural justice and may limit a person's human rights, such as 'rights in criminal proceedings'.[300] The Council is mindful of ensuring that, if a right is limited, it is reasonable and justifiable under the *Human Rights Act 2019* (Qld).

Identifying the types of 'good character' evidence which are problematic while maintaining judicial discretion

Consistent with **Key Finding 8**, the Council recommends the PSA should be amended to provide:

- evidence in the form of a character reference that contains subjective and a non-professional opinion about a sentenced person's personality traits;
- evidence of a person's standing in the community; and
- evidence of contributions to the community;

should not be taken into account unless it is relevant to assessing the person's prospects of rehabilitation or risk of reoffending.

This recommendation is made in conjunction with **Recommendations 14, 17, 18, 19 and 20** for training on trauma-informed practices and resources and training to members of the legal profession on language. Language changes regarding how evidence of 'good character' is communicated in court may assist a victim survivor and the community to understand how it is being taken into account, promoting transparency and public confidence. While language is an issue, and we agree the word 'good' is problematic and should be changed, our concerns go beyond this. Even if 'good character' is changed to 'prior character' and extensive training is delivered, in conjunction with the updating of resources, such as the Supreme and District Court's *Benchbook* on Sentencing, it is highly unlikely that this will result in a change to the use of this evidence and how it is relied on for sentencing purposes. In the absence of legislative reform, character references will most likely continue to be used and communicated in a way that indicates to victim survivors that evidence that the person is a 'good person' justifies a lesser penalty no matter how serious the offending. A legislative change will therefore serve an important purpose in directing courts and practitioners to link the use of this evidence to specific sentencing purposes rather than taking it into account 'in a general sense' – and this will direct courts to exercise greater caution when articulating their reasons for taking it into account. Such a change will not be merely symbolic, as it is intended to perform an instrumental purpose (being a mechanism to change legal practitioners' and judicial officers' treatment of such evidence).[301] The proposed change is not intended to dictate the weight given or affect 'instinctive synthesis', but rather to promote the synthesising task, which 'is

300 *Human Rights Act 2019* (Qld) s 32(2)(h) which provides a person is entitled 'to obtain the attendance and examination of witnesses on the person's behalf under the same conditions as witnesses for the prosecution'.

301 See, for example, how evidence of 'good character' is relevant to rehabilitation in *R v Knoote-Parke* [2016] 125 SASR 13 [2] (Sulan J), (Blue J), [77]–[79] (Doyle J) considering *Criminal Law (Sentencing) Act 1988* (SA) s 10(3)(ba) (now *Sentencing Act 2017* (SA) s 11(4)(c)). Cited with approval in *R v Handley* [2023] QDCSR 793, 4 (Long DCJ); *DPP v Schulz* [2018] VCC 1058 [88], [74]–[99] (Pullen J).

conducted after a full and transparent articulation of the relevant considerations including an indication of the relative weight to be given to those considerations in the circumstances of the particular case'.[302]

The Council considers that there should be greater rigour when sentencing courts consider the quality of (and any potential bias in) character evidence – for example, whether this information is from an independent source or someone who has a strong vested interest in the outcome. To improve the quality of character evidence, we recommend that funding is required in support of defence-commissioned pre-sentence reports for Legal Aid-funded persons (see **Recommendation 11** on information available to courts).

A court can choose to give elements of 'good character' no weight because of the nature and seriousness of the offence

We recognise that, under the common law, if a sentencing judge considers a person to be of 'otherwise good character' (without regard to the offences being sentenced), they are bound to take this into account in some way.[303] We recommend courts should be provided with an express legislative discretion not to mitigate the sentence for the person's 'otherwise good character' based on character references, standing or contributions to the community. This discretion should be exercised having regard to the nature and seriousness of the offence, including the physical, mental or emotional harm done to a victim and the vulnerability of the victim. While this overturns the majority decision in *Ryan*,[304] it elevates the common law approach that the nature of the offence 'is a countervailing factor of the utmost importance'[305] and the current considerations under the PSA requiring a court to consider the nature and seriousness of the offence.[306] It maintains judicial discretion and promotes public confidence.

If a sentencing court exercises its discretion, this is different from section 9(6A) of the PSA, as it does not exclude all elements of 'good character' evidence (for example, a lack of prior criminal history can still be considered). Also, the limitation is based on the nature and circumstances of the offence rather than 'if it assisted the person to commit the offence', which the Council notes has had a narrow and inconsistent application.

This recommendation should be consistent with any national approach

We are mindful of the other reviews currently underway, and implementing this recommendation should be consistent with any national approach.

Although initially our review of the use of this evidence was limited by the Terms of Reference to the offences of sexual assault and rape, we were later asked to 'have regard to the use of good character evidence in sentencing for [all] sexual offences and, if appropriate, recommendations for reform'.[307] This request was made in light of reviews underway in the ACT and NSW, and discussions occurring at a national level by the Standing Council of Attorneys-General.

We consider that the nature of sexual offences and the role of 'good character' evidence in sentencing deserve a special approach to sentencing, given the nature of this offending. The way 'good character' is used by those who commit sexual offences is different from how this evidence is used generally. Sexual

302 *Markarian* (n 60) 390 [84] (McHugh J).
303 *Ryan* 267 (McHugh, Kirby and Callinan JJ, Gummow and Hayne JJ dissenting).
304 Ibid.
305 Ibid 278 [33] (McHugh J).
306 PSA (n 4) ss 9(2)(c), (3)(d)–(e), (6)(c), (7)(a)–(ab).
307 Letter from The Hon Yvette D'Ath MP (Attorney-General and Minister for Justice) to the Hon Ann Lyons AM (Chair, Sentencing Advisory Council, 25 September 2024.

offences are, by their nature, usually committed in private with the victim survivor being the only witness to this offending. Understanding the true 'character' of a person as this relates to sexual conduct is therefore a far more complex and fraught exercise, given the typically hidden nature of this offending. It is not intended for this recommendation to apply to all offences generally.

While the PSA defines a 'sexual offence' by reference to schedule 1 of the *Corrective Services Act 2006* (Qld) ('CSA') for the purpose of the parole provisions,[308] the courts have found that, for the purposes of section 9(4)–(6A) of the PSA, an 'offence of a sexual nature' captures a broader range of offences beyond the definition of a 'sexual offence'.[309] We suggest the application of the changes we recommend should operate consistently with section 9(6A), which applies to all offences of a sexual nature in circumstances where these offences are committed against children.

The Council does not consider any legislative changes should be made to the admissibility process or procedural requirements of the court receiving 'good character' evidence, for example, mandatory cross-examination or changes to section 132C of the *Evidence Act 1977* (Qld). The Council considers that if this recommendation is legislated, courts will be directed to apply more rigour when considering elements of character.

Systemic disadvantage considerations

Our recommendation aims to reduce systemic disadvantage and promote equity in the law for disadvantaged groups. We were told 'good character' evidence embeds privilege,[310] as a person with strong family support, professional connections and wealth are able to provide positive evidence of their character. The same opportunities are not available to a person who is socially and economically disadvantaged, and less able to defend their reputation. This would affect marginalised groups such as people with a disability, culturally and racially marginalised people and people from LGBTIQA+ communities.

We also acknowledge Aboriginal and Torres Strait Islander peoples may experience intersecting forms of disadvantage, such as having a disability, living in poverty, having low socioeconomic status, experiencing a lack of employment and having a limited education. We were told during consultation that where a person was from a First Nations community (either a victim survivor or a person being sentenced), 'there was this deeply entrenched culture of you just do not talk about it. It's very – it's considered a very shameful thing to talk about'.[311] If a person is reluctant to discuss the offence and experiences shame, they may be less likely to ask family members, friends and work colleagues to provide character references. If a person has experienced, or is experiencing, poverty and homelessness, they may be unable to show evidence of contributions to the community, work ethic or caring responsibilities.

We consulted with the Aboriginal and Torres Strait Islander Advisory Panel on the recommendation to limit evidence of good character evidence. The Panel agreed that a preferred approach was to tease out the purposes of the use of this evidence rather than remove it entirely as a consideration. Panel members considered that there can be a connection between character evidence and rehabilitation. However, the Panel considered that, in most cases of sexual violence, character references should have minimal weight.

308 PSA (n 4) pt 9 div 3; *Corrective Services Act 2006* (Qld) sch 1.
309 See *R v HYQ* [2024] QCA 151 (Bowskill CJ, Dalton JA and Wilson J agreeing).
310 Submission 19 (Basic Rights Queensland) 7.
311 SME Interview 4. Similar comments made in SME Interviews 7, 24.

Human rights considerations

If evidence of good character is restricted, there is potential for a person's 'rights in criminal proceedings' to be limited.[312] A statutory provision is compatible with rights if it does not limit a right; or, if it does, that the limitation 'is reasonable and demonstrably justifiable'.

In 2019, when section 9(6A) of the PSA was introduced, the explanatory notes justified a breach of a fundamental legislative principle[313] 'to align with contemporary community standards and affords justice and dignity to victims rather than rewarding offenders for a factor enabling their offending behaviour'.[314] Similarly, our recommendation promotes victims' rights. Greater recognition of victims' experiences in the sentencing process is consistent with the right enshrined within the Charter of Victims' Rights to be treated with 'courtesy, compassion, respect and dignity, taking into account the victim's needs'.[315]

The Council has considered the important purpose of the limitation. Elements of 'good character' evidence are only limited where it is not relevant to a sentencing purpose of rehabilitation or risk of reoffending, or if the nature and seriousness of the offence mean it is not an appropriate factor for mitigation. The intention is to:

- ensure information before the sentencing court is appropriate, relevant and reduces subjectivity;
- improve the quality of information before the court;
- address any unfair advantage by a person who is privileged to have standing or contribute to the community;
- reduce the potential for a victim survivor to experience further distress; and
- encourage the court to articulate their rationale for giving this factor weight more clearly, to minimise victim trauma and align with contemporary community standards promote public confidence.

The Council considered whether there was a 'less restrictive and reasonably available way' to achieve this purpose. For this reason, the limitation to the use of good character evidence is proposed to be restricted to sexual offences committed by a person as an adult in circumstances where section 9(6A) of the PSA does not apply. The Council also considered whether this limitation should only apply to sexual offences sentenced in the higher courts; however, as the recommendation provides a discretion based on the nature and seriousness of the offence, any further limitation on this basis is considered unnecessary. The use of 'good character' evidence for cases sentenced in the Magistrates Courts is no less distressing for victim survivors than it is for matters sentenced in the higher courts, and the guidance regarding its use for magistrates is just as warranted.

Other options considered, but not recommended

The Council considered several other options including:

- **Option 1:** No legislative amendment and/or recommending further investigation.

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312 *Human Rights Act 2019* (Qld) s 32(2)(h) which provides a person is entitled 'to obtain the attendance and examination of witnesses on the person's behalf under the same conditions as witnesses for the prosecution'. This right may be relevant to sentencing laws and policies, which affect the admissibility of evidence and restrict access to information and material to be used as evidence.

313 As this was prior to the *Human Rights 2019* (Qld) being in force, a breach of fundamental legislative principles under the *Legislative Standards Act 1992* (Qld) s 4(2)(a) was considered.

314 Explanatory Notes, Criminal Code (Child Sexual Offences Reform) and Other Legislation Amendment Bill 2019 (Qld) 17.

315 *Victims' Commissioner and Sexual Violence Review Board Act 2024* (Qld) sch 1, 1.

- **Option 2:** Recommend legislative amendment by
    - not allowing evidence of 'good character' to be used and/or treated as mitigating; or
    - not allowing evidence of 'good character' to be used and/or to be treated as mitigating 'if it assisted the person to commit the offence' (mirroring the current section 9(6A) of the PSA (thereby extending this to all sexual offences against children aged 16 and 17 as well as committed against an adult victim).
- **Option 3:** Recommend legislative amendment for a court to treat evidence of 'good character' as an aggravating factor.

The reasons for not adopting the above options are explained below.

Option 1 would not address the problems with 'good character' identified as part of this review or, even with a commitment to professional development and training, be likely to change current sentencing practices in a meaningful way. Further consideration by way of a future review was also not recommended, given the high public interest in having this issue addressed as a matter of priority. At the same time, we are mindful of the benefits of adopting a harmonised nationally consistent approach to the use of 'good character' evidence in sentencing and the need to take the outcomes of other current reviews into account.

Option 2 is not an appropriate approach as 'good character' can have a legitimate purpose. The option to limit the use of evidence of 'good character' in sexual offences entirely or in a similar way to section 9(6A) of the PSA where 'it assisted the offender to commit the offence',[316] in our view may go too far in removing reliance on the evidence for any reason. We do not consider it appropriate to completely limit evidence of 'good character' as a blanket approach in all cases because aspects of character evidence can be legitimately relevant to rehabilitation and risk of reoffending.

With respect to applying a similar section 9(6A) of the PSA to adult victims, we note that this amendment was introduced to address concerns with child abuse in an institutional context[317] and are concerned that this provision may not easily apply to adult victims. Due to the limited case law in Queensland on the application of section 9(6A) of the PSA, we are not able to form an informed view in respect of its utility. However, from what we were told by victim survivors and support services, the current provision in other jurisdictions has a narrow application and is inconsistently applied, suggesting there is still dissatisfaction despite the introduction of such provisions.

Option 3 is not necessary as elements of 'good character' are currently considered aggravating. The option to establish 'good character' as a legislative aggravating factor[318] was also not supported. We note that this was considered by the Royal Commission, which was 'satisfied that it is unnecessary to … specifically allow prior good character to be raised as an aggravating factor in cases where it has facilitated the offending'.[319] We acknowledge the submissions made to the Royal Commission regarding

316 PSA (n 4) s 9(6A).
317 Royal Commission into Institutional Responses to Child Sexual Abuse, *Criminal Justice Report Parts VII - X and Appendices* (2017) 299.
318 Under Commonwealth law, 'if the person's standing in the community was used by the person to aid in the commission of the offence--that fact as a reason for aggravating the seriousness of the criminal behaviour to which the offence relates': *Crimes Act 1914* (Cth) s 16A(2)(ma). In England and Wales good character is aggravating if it was used to facilitate a historical sexual offence.
319 Royal Commission into Institutional Responses to Child Sexual Abuse, *Criminal Justice Report Parts VII - X and Appendices* (2017) 299.

the position in Queensland of considering betrayal and breach of trust as aggravating,[320] and agree with the Royal Commission's finding that a legislated aggravating factor is not necessary.

We are also aware that the NSW Department of Communities and Justice invited submissions relating to a review of section 21A(5A) of the *Crimes (Sentencing Procedure) Act 1999* (NSW) (equivalent to section 9(6A) of the PSA). In a recent submission to the NSW Sentencing Council, the NSW Office of the Director of Public Prosecutions identified the potential approaches on which the Department sought feedback.[321] These included:

1. expressly stating that a court may infer from all the circumstances that, when sentencing an offender for a child sexual offence, the offender's prior 'good character' assisted them to commit the offence;
2. imposing a burden on offenders who are to be sentenced for child sexual offences to establish that their 'good character' did not assist them to commit the offence;
3. creating a presumption of inadmissibility of 'good character' evidence in sentencing proceedings for child sexual offences that may be displaced – for example, in exceptional cases only;
4. imposing a requirement for leave to be granted before evidence of 'good character' can be adduced in sentence proceedings for child sexual offences;
5. considering whether courts should be prohibited from taking good character into account as a mitigating factor in all cases involving child sexual offences.

Having considered these alternative options and approaches to amending 'good character' evidence, we consider that **Key Finding 8** is best addressed through **Recommendation 5**, which identifies the elements of 'good character' evidence that are problematic, limits their application only if it is appropriate to assess prospects of rehabilitation or risk of reoffending (community protection) and gives a judicial discretion to give no weight to types of 'good character' evidence (despite the person being of 'otherwise good character') if it is not appropriate to do so because of the nature and seriousness of the offence. The Council also considers that this reform option best aligns with the fundamental principles guiding the review.

320 See PSA (n 4) s 9(6)(e); *R v WBM* [2020] QCA 107 [11], [47]–[49] (Applegarth J with Fraser and Mullins JJA agreeing) citing *R v BBP* [2009] QCA 114; see also *R v SAG* [2004] QCA 286 (Jerrard JA, Atkinson and Philippides JJ agreeing) [19] referring to a 'parental or protective relationship'.

321 Officer of the Director of Public Prosecutions, Submission to NSW Sentencing Council (19 July 2024) Annexure A. Available from <https://sentencingcouncil.nsw.gov.au/documents/our-work/good-character/PGC83.pdf>.

Chapter 10 – Other forms of sentencing guidance

10.1 Introduction

The Terms of Reference expressly ask us whether there is a need to make 'any legislative or other changes … to ensure the imposition of appropriate sentences for sexual assault and rape offences'.[1]

In this chapter, we consider other forms of sentencing guidance, including:

1. case law guidance on relevant general sentencing principles and the treatment of specific sentencing factors;
2. the identification by appeal courts of sentencing 'ranges'; and
3. alternative approaches to sentencing guidance – in particular, the use of formal guideline judgments.

The resources available to judicial officers and legal practitioners also constitute a form of sentencing guidance. We consider the current availability of these resources, including benchbooks, sentencing manuals, practitioner guidelines, case summaries and schedules, as well as resources developed and used in other jurisdictions.

10.2 Case law and sentencing 'ranges'

10.2.1 Case law as a non-legislative form of sentence guidance

The most significant form of non-legislative sentencing guidance in Australian jurisdictions is case law. This guidance not only plays a significant role in assisting lower courts to apply legislation in a consistent way, but also in understanding the broader approach to be taken in sentencing.[2]

Appellate court decisions correct errors, interpret legislation and set out principles and factors to provide guidance to lower courts.[3] Sentencing principles established by case law are applied alongside the legislative factors and are equally important. They are referred to as the 'common law' and courts have a duty to follow them.

The following sentencing principles apply to all cases in the Queensland courts, for example:

1. **Proportionality:** A sentence must be proportionate to the objective seriousness of the offence. This means a court must not impose a sentence that is more severe than is warranted based on

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1 See Appendix 1, Terms of Reference.

2 Michael Kirby, 'Sentencing Reform: Help in the Most Painful and Unrewarding of Judicial Tasks' (1980) 54 *Australian Law Journal* 732, 741. Arie Freiberg, *Fox and Freiberg's Sentencing: State and Federal Law in Victoria* (Law Book Co., 3rd ed, 2014) 20 [1.50] ('*Fox and Freiberg's Sentencing Law*'). See also *Griffiths v The Queen* (1977) 137 CLR 293, 310 (Barwick CJ); and *Malvaso v The Queen* (1989) 168 CLR 227, 234 as cited in *DPP (Vic) v Dalgliesh (a Pseudonym)* (2017) 262 CLR 428, 448 [62]; *R v Osenkowski* (1982) 30 SASR 212, 213; *Wong v The Queen* (2001) 207 CLR 584, 591–2 [8] as cited in *DPP (Vic) v Dalgliesh (a Pseudonym)* (2017) 262 CLR 428, 448 [62] ('*Dalgliesh*').

3 *Fox and Freiberg's Sentencing Law* (n 2) 20 [1.50]. See also *Griffiths v The Queen* (1977) 137 CLR 293, 310 (Barwick CJ); and *Malvaso v The Queen* (1989) 168 CLR 227, 234 as cited in *Dalgliesh (a Pseudonym)* (n 2) 448 [62]; *R v Osenkowski* (1982) 30 SASR 212, 213; *Wong v The Queen* (2001) 207 CLR 584, 591–2 [8] as cited in *Dalgliesh* (n 2) 448 [62].

the objective circumstances of the offence to meet other sentencing purposes (such as community protection).[4]

2. **Parity:** There should not be a marked disparity (difference) in the sentences given to people who are parties to the same offence, but matters that create differences must be taken into account.[5]
3. **Totality:** The court must consider the totality of all criminal behaviour when dealing with multiple offences at once (for instance, multiple assaults on different people in one incident) or when sentencing for an offence and the person is already serving another sentence.[6]
4. **De Simoni principle:** A sentencing judge cannot take into account factors if they would establish: (a) a separate offence that consisted of, or included, conduct that did not form part of the offence for which the person was convicted; (b) a more serious offence; or (c) a circumstance of aggravation that had not been charged if it would mean the person was liable to receive a greater punishment.[7] This can be relevant to sexual offences if there are allegations of other unlawful sexual conduct which has not been charged.[8]

The Council has undertaken a comprehensive analysis of Queensland Court of Appeal case law, as well as relevant legal jurisprudence by the High Court and Court of Appeal decisions in other states and territories relating to sexual violence offences, which is discussed in detail in **Chapter 6**, as well as in Chapter 7 of our **Consultation Paper: Background**. This section discusses case law guidance as a mechanism of setting and changing sentencing standards.

It has been recognised that the proper function of a Court of Appeal in the context of prosecution appeals against sentence is 'to lay down principles for the governance and guidance of courts having the duty of sentencing convicted persons',[9] to 'maintain adequate standards of punishment for crime … and … to correct a sentence which is so disproportionate to the seriousness of the crime as to shock the public conscience'.[10]

For a defence appeal, a sentence may be reviewed '[i]f the judge acts upon a wrong principle, if he allows extraneous or irrelevant matters to guide or affect him, if he mistakes the facts, [or] if he does not take into account some material consideration'.[11] A sentence may also be reviewed, 'if upon the facts, [the result] is unreasonable or plainly unjust'.[12]

The types of guidance that appellate courts provide vary, but such guidance often involves the court identifying sentencing considerations that are, or are not, relevant in a given case, and clarifying matters of principle or statutory interpretation.[13] For example, the Queensland Court of Appeal has clearly

4 *Markarian v The Queen* (2005) 228 CLR 357, 385 [69] (McHugh J) ('*Markarian*'); *Veen v The Queen (No 2)* (1988) 164 CLR 465, 473–4. The *Penalties and Sentences Act 1992* (Qld) ('PSA') s 9(11) expressly applies this principle to previous convictions.

5 *R v Smith* [2022] 10 QR 725, 740 [68] citing *Postiglione v The Queen* (1997) 189 CLR 295, 325-326, following *Lowe v The Queen* (1984) 154 CLR 606, 609 (Gibbs CJ) ('*Lowe*').

6 *Mill v The Queen* (1998) 166 CLR 59, 62-3 (Wilson, Deane, Dawson, Toohey and Gaudron JJ) quoting Thomas, *Principles of Sentencing* (Heinemann, 2nd ed, 1979) 56–7; *R v LAE* (2013) 232 A Crim R 96, 104-5, [32]–[37] (Martin J, Muir and Fraser JJA agreeing).

7 *R v De Simoni* (1981) 147 CLR 383, 389 (Gibbs CJ, Mason and Murphy JJ agreeing).

8 *R v D* [1996] 1 Qd R 363.

9 *Griffiths v The Queen* (1977) 137 CLR 293, 310 (Barwick CJ); and *Malvaso v The Queen* (1989) 168 CLR 227, 234 as cited in *Dalgliesh (*(n 2) 448 [62].

10 *R v Osenkowski* (1982) 30 SASR 212 at 213; *Wong v The Queen* (2001) 207 CLR 584, 591–2 [8] as cited in *Dalgliesh* (n 2) 448 [62].

11 *House v The King* (1936) 55 CLR 499, 505 (Dixon, Evatt and McTiernan JJ).

12 Ibid.

13 For example, in the Victorian Court of Appeal decision of *DPP v Jurj* [2016] VSCA 57 [79]–[80], the Court considered relevant case authorities referred to in the Judicial College of Victoria's *Sentencing Manual* in setting out a non-exhaustive list of factors relevant to assessing the objective gravity of rape offences including: premeditation, in company, duration, number

expressed that the sentencing purposes of punishment, denunciation, deterrence and community protection should be given significant weight in sentencing sexual assault and rape offences.[14] Indeed, the Court of Appeal has acknowledged the community expectation that the courts will denounce sexual offending through the sentencing process:

> It is important not to fall into the trap of excusing inexcusable behaviour. Sexual assault is a very grave and serious affront to human dignity and personal space. It is unacceptable behaviour. It is essential that the courts reflect community sentiment, in a general way, by the sentences which are imposed for offences of this kind[15]

In *R v Al Aiach*,[16] the Court found that

> considerations of denunciation and deterrence are of such importance in cases of sexual offences by adults against children that it will only be in exceptional cases that the balancing process involved in fixing upon an appropriate sentence will not result in a sentence involving actual imprisonment.[17]

In respect of sexual offending against a child in the context of domestic violence, the Court of Appeal has stated:

> Taking advantage of a child, particularly your own child, is offending of the most serious order which undermines the fabric of society and is the ultimate betrayal of trust for the child concerned. Any sentence imposed must reflect the gravity of that offending and act as an appropriate deterrent and denunciation, as well as accounting for other considerations relevant to sentencing in terms of mitigation and rehabilitation.[18]

10.2.2 Appellate court guidance does not generally extend to setting sentencing standards

However, this form of guidance generally does not extend to setting sentencing standards to be followed by sentencing courts. While the Court of Appeal may indicate a sentencing range for a type of offence, it has been careful to highlight the limitations of an over-reliance on such sentencing 'ranges'. Generally, the role of Australian appeal courts is on the identification of whether there was an error and/or a sentence imposed was manifestly excessive or inadequate.[19]

On appeal, the sentence may be 'unreasonable or plainly unjust' when regard is had to other comparable cases, but this is the only factor and is not determinative.[20] A 'range' is generally based on an analysis by

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of rapes, additional violence or threat of violence, weapon use; risk of pregnancy or sexually transmitted disease (whether a condom was used); whether the victim's warnings or protests were ignored and factors in respect of the victim including injury, vulnerability, humiliation or degradation. See also *Marrah v The Queen* [2014] VSCA 119 [25] (Redlich and Tate JJA), in respect of rape in a domestic violence context: 'The sentences must convey the unmistakeable message that male partners have no right to subject their female partners to threats or violence. The sentences must be of such an order as to strongly denounce violence within a domestic relationship'.

14 See for example *R v Misi; Ex parte A-G (Qld)* [2023] QCA 34 [4] (Mullins P, Dalton and Flanagan JJA); *R v Pham* [1996] QCA 3; *R v GAW* [2015] QCA 166; *R v H* (1993) 66 A Crim R 505; *R v Williams; Ex parte A-G (Qld)* [2014] QCA 346 [58], [73] (McMeekin J, Henry JJ agreeing); *R v McConnell* [2018] QCA 107 [22] (Fraser JA, Sofronoff P and Philippides JA agreeing); *R v Ruiz; Ex parte A-G (Qld)* [2020] QCA 72 [19] (Sofronoff P, McMurdo and Mullins JJ); *R v Teece* [2019] QCA 246 [38] (Philippides JA, Morrison and McMurdo JJA agreeing). In respect of domestic violence, see also *R v Fairbrother; ex parte Attorney-General (Qld)* [2005] QCA 105 [23]; *R v Major; Ex parte A-G (Qld)* [2011] QCA 210.

15 *R v Daniel* [1998] 1 Qd R 499, 519–20 (Fitzgerald P, McPherson JA agreeing) ('*Daniel*'), quoting *R v Russell* (1995) 84 A Crim R 386, 391, 395 (Kirby ACJ). See also *R v Hardie* [2008] QCA 32 [29] (McMurdo P, Holmes JA and Mackenzie AJA agreeing).

16 *R v Al Aiach* [2007] 1 Qd R 270.

17 Ibid [45] (Keane JA). See also *R v Quick; Ex parte A-G (Qld)* (2006) 166 A Crim R 588: (de Jersey CJ): 'It may be unlikely the respondent would re-offend, but the primary considerations in sentencing for this sort of offending, apparently rife, are general deterrence and, in plain terms, community denunciation' cited in *R v Stable (a pseudonym)* [2020] 6 QR 617 [59] (Sofronoff P and Fraser and Philippides JJA) ('*Stable*').

18 *R v BDQ* [2022] QCA 71 [54] (Brown J, Morrison and McMurdo JJA agreeing).

19 Sarah Krasnostein and Arie Freiberg, 'Pursuing Consistency in an Individualistic Sentencing Framework: If You Know Where You're Going, How Do You Know When You've Got There?' (2013) 76 *Law and Contemporary Problems* 265, 275. For the test on appeal see *House v King* (1936) 55 CLR 499, 504–5 (Dixon, Evatt and McTiernan JJ).

20 *R v SDS* [2022] QCA 106 [78]–[79] (Morrison JA, Sofronoff P and Mullins JA agreeing) citing *Wong v The Queen* (2001) 207 CLR 584 [58]; *R v MCT* [2018] QCA 189 [240]. See also *Munda v Western Australia* (2013) 249 CLR 600 [39].

Courts of Appeal of sentences imposed for similar offending. These cases may indicate the type and length of sentence that is in 'range', while recognising that courts have a wide sentencing discretion.

Importantly, the use of past appellate decisions to determine a sentencing 'range':

- is not a binding precedent: it is a 'historical statement of what has happened in the past';[21]
- is not fixed: '[t]hat history does not establish that the range is the correct range, or that the upper or lower limits to the range are the correct upper and lower limits';[22]
- may change over time:[23] particularly if there has been changes in community attitudes and understanding of the long-term harm experienced by the victim survivor;[24] or if there have been legislative changes;[25]
- 'must be viewed in the context of the particular circumstances':[26] because '[s]entencing is not a process that leads to a single correct answer arrived at by some process admitting of mathematical precision';[27]
- should be flexible and not too prescriptive: 'While an appellate court usefully provides indicative ranges, they must be flexible enough to accommodate varying factual situations and never presented or approached as if prescriptive';[28] and
- if dismissed appeals are included in the range, caution should be exercised: where an appeal was dismissed this 'is not the same as an endorsement that the sentence imposed … would be one that the members of the Court might have imposed'.[29] This is because a court of criminal appeal cannot substitute a sentence merely because it would have decided differently.[30]

While a sentencing 'range' is one factor to be taken into account, it does not solely determine whether a sentence is manifestly inadequate or excessive.[31] Appellate review seeks to ensure consistency in the application of relevant principles rather than a numerical equivalent in sentencing outcome.[32]

From a review of case law, the Council has observed the Court of Appeal provides a 'range' for some types of rape and sexual assault, which is discussed in detail in **Consultation Paper: Background** sections 7.3.2 and 7.3.3. The Court of Appeal has also cautioned there is 'no rule of thumb'[33] and 'each case falls to be considered by reference to its particular facts and to cite ranges for offending can be problematical'.[34]

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21 *Dalgliesh* (n 2) 454 [83] (footnotes omitted). See also *Barbaro v The Queen* (2014) 253 CLR 58 [41] cited in *R v Mogg* [2024] QCA 125 [8] (Boddice JA, Bond JA agreeing) ('*Mogg*').

22 *Dalgliesh* (n 2) 454 [83] (footnotes omitted).

23 See PSA (n 4) s 9(4)(a) For an offence of sexual nature committed in relation to a child under 16 years or a child exploitation offence 'the court must have regard to the sentencing practices, principles and guidelines applicable when the sentence is imposed rather than when the offence was committed'.

24 *R v Kilic* (2016) 259 CLR 256.

25 *Stable* (n 17) [38], [45], [58] (Sofronoff P and Fraser and Philippides JJA); *R v Free; Ex parte Attorney-General (Qld)* [2020] QCA 58 [66] (Philippides JA, Bowskill and Callaghan JJ).

26 *Mogg* (n 21) [9] (Boddice JA, Bond JA agreeing).

27 *Hili v The Queen* (2010) 242 CLR 520, 543 [74] ('*Hili*') cited in *Mogg* (n 21) [9] (Boddice JA, Bond JA agreeing).

28 *R v Saltmarsh* [2007] QCA 25, 8 (de Jersey CJ, Williams and Keane JJA agreeing) repeated in *R v Hodges; ex parte A-G (Qld)* [2008] QCA 335, 5 (de Jersey CJ, White AJA and McMeekin J agreeing).

29 *R v Cox* [2011] QCA 277 [25] (McMeekin J, Fraser J and Margaret Wilson AJA agreeing); *R v EO* [2019] QCA 145, 5–6 (McMurdo JA, Gotterson JA and Philippides JA agreeing).

30 *Lowndes v The Queen* (1999) 195 CLR 665 [15] (Gleeson CJ, Gaudron, McHugh, Gummow, Kirby, Hayne and Callinan JJ)

31 See *Munda v Western Australia* (2013) 249 CLR 600 [39]; *Mogg* (n 21) [9] (Boddice JA, Bond JA agreeing); *R v Goodwin; Ex parte Attorney-General (Qld)* [2014] QCXA 345 [5] (Fraser J).

32 *Hili* (n 27) 527 [18] (French CJ< Gummow, Hayne, Crennan, Kiefel and Bell JJ).

33 *R v GAR* [2014] QCA 30 [29] (Muir JA, Fraser and Morrison JJA agreeing).

34 *R v Tory* [2022] QCA 276 [38] (Kelly J, McMurdo and Dalton JJA agreeing)

10.2.3 Appellate courts can comment on the adequacy of current sentencing practices and direct sentences be adjusted upwards

As discussed in **Chapter 8**, section 9(4)(a) of the PSA requires that when sentencing an offence of a sexual nature against a child aged under 16 years, 'the court must have regard to the sentencing practices, principles and guidelines applicable when the sentence is imposed rather than when the offence was committed'.[35] Victoria has a similar provision,[36] which was considered in *Director of Public Prosecutions (Victoria) v Dalgliesh (a Pseudonym)*.[37] The High Court noted that the Victorian Court of Appeal's observation on past sentencing practices for the offence of incest revealed an error and that they were not proportionate to the nature and seriousness of the offending:

> [C]urrent sentencing for incest reveals error in principle. The sentencing practice which has developed is not a proportionate response to the objective gravity of the offence, nor does it sufficiently reflect the moral culpability of the offender. Sentences for incest offences of mid-range seriousness must be adjusted upwards. That is a task for sentencing judges and, on appeal, for this Court. The criminal justice system can be – and should be – self-correcting.[38]

The High Court found it was an error for the Victorian Court of Appeal to feel bound by previous sentencing practices and the matter was remitted to be resentenced.[39] The Victorian Court of Appeal resentenced Dalgliesh to 7.5 years for the offence of incest, which was a 4-year increase from the original sentence imposed (a new total effective sentence of 9.5 years' imprisonment).[40]

A review by the Victorian Sentencing Advisory Council found that in 2016 (pre-the *Dalgliesh* decisions), the average charge-level prison sentence was about 4 years, and by 2019 this had increased to almost 7 years.[41] This was attributed to a combination of factors, including the various *Dalgliesh* decisions.[42]

A similar statement regarding the adequacy of sentences with respect to digital rape was made by the Victorian Court of Appeal in *Shrestha v The Queen*.[43] The appeal was made by Shrestha based on error and manifest excess; it was not a DPP appeal to increase the sentence. However, the Court of Appeal considered past sentencing practices (on the Director's request).[44] The Victorian Court of Appeal concluded 'there must be an upward adjustment':[45]

> It is clear that the general run of sentences for digital rape is well below what is necessary to reflect the objective gravity of that offence, and the moral culpability of the offender.[46]

Using appellate court guidance to increase sentencing practices relies on:

1. an appropriate case being appealed;[47]
2. the adequacy of current sentencing practices being raised and discussed during submissions and sentence;

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35 PSA (n 4) s 9(4)(a). This also applies to a child exploitation offence.
36 *Victorian Sentencing Act 1991* (Vic) s 5(2)(b).
37 *Dalgliesh* (n 2).
38 *DPP (Vic) v Dalgliesh (A Pseudonym)* [2016] VSCA 148 [128] cited in *Dalgliesh* (n 2) 440–1 [35].
39 *Dalgliesh* (n 2) Ibid 452 [76]–[77] (Kiefel CJ, Bell and Keane JJ), 454 [84]–[86] (Gageler and Gordon JJ).
40 *DPP (Vic) v Dalgliesh (A Pseudonym)* [2017] VSCA 360 (7 December 2017).
41 Sentencing Advisory Council (Victoria), *Sentencing Sex Offences in Victoria: An Analysis of Three Sentencing Reforms* (June 2021) x, 38 [5.9].
42 Ibid.
43 *Shrestha v The Queen* [2017] VSCA 364 ('*Shrestha*').
44 Ibid [26]. An additional reason was there should not be a discernible gap in the current sentencing practices for rape and incest: [27] referring to *Dalgliesh* (n 2).
45 *Shrestha* (n 43) [31].
46 Ibid [30].
47 It does not need to be limited to an Office of the Director of Public Prosecutions or an Attorney-General appeal, see *Shrestha* (n 43) [26].

3. a view by the primary judge that current sentencing practices are inadequate; and
4. the primary judge noting they are constrained when imposing an appropriate sentence because of the current sentencing practices.[48]

A decision by an appellate court in respect of the adequacy of current sentencing practices will only apply to 'circumstances that are broadly similar in objective gravity to the offence of which the appellant was convicted'.[49]

Reforms in Queensland and sentencing adequacy

In Queensland, legislation expressing regard to current sentencing practices is limited to an offence of a sexual nature against a child under 16 years or a child exploitation offence.[50] The Council is not aware of any decisions in Queensland that have considered the adequacy of current sentencing practices for sexual assault and rape.[51]

However, the Court of Appeal has cautioned against the use of dated comparative sentences, particularly in the context of suggesting these set a sentencing 'range'. For example, in the recent 2024 decision of *R v Mogg,*[52] the Court said, with reference to the 2010 decision of *R v Baxter*:[53]

> To the extent that *R v Baxter* may have had points of similarity, that sentence was imposed 14 years ago and the observation that a starting point of six years' imprisonment for the offence of rape was "at the top of the range" must be viewed, having regard to contemporary sentencing principles as to 'ranges'.[54]

A court may take into account community attitudes, standards and expectations as part of the exercise of judicial discretion (as required by the sentencing purpose of denunciation).[55] Changes in community attitudes and expectations might be reflected in a change of sentencing practice:

> The requirement of currency recognises that sentencing practices for a particular offence or type of offence may change over time reflecting changes in community attitudes to some forms of offending. For example, current sentencing practices with respect to sexual offences may be seen to depart from past practices by reason, inter alia, of changes in understanding of the long-term harm done to the victim. So, too, may current sentencing practices for offences involving domestic violence depart from past sentencing practices for this category of offence because of changes in societal attitudes to domestic relations.[56]

48 Ibid.
49 Ibid [31].
50 PSA (n 4) s 9(4)(a). In comparison, in Victoria this is a general sentencing consideration: *Victorian Sentencing Act 1991* (Vic) s 5(2)(b).
51 Cf the offence of taking a child under 12 years for an immoral purpose which was considered in the decision in *R v Free; Ex parte A-G (Qld)* [2020] QCA 58 discussed the prior decisions of *R v Cogdale* [2004] QCA 129 as being too low: 'However, in our respectful view, what that bare comparison does not address is the legislative changes which have taken place since *Cogdale*, mirrored by changing attitudes within the community, and a greater understanding by courts of the impact of child sexual abuse. All of this supports the view that what might have been regarded as an appropriate penalty for this kind of offending in 2004 is not necessarily what should be considered appropriate now. We say this without question in relation to the head sentence ultimately imposed of *Cogdale*, of five years imprisonment, which in our respectful view would be regarded as an affront to the community if imposed today. But even the "starting point", that is, the notional penalty that might be imposed after a trial, of eight years' imprisonment, is in our view simply too low': [66] (Philippides JA, Bowskill and Callaghan JJ).
52 *Mogg* (n 21).
53 *R v Baxter* [2010] QCA 235.
54 *Mogg* (n 21) [12] (Boddice JA, Bond JA agreeing) cf [51]–[52] (Callaghan J in dissent) (citation omitted).
55 *R v O'Sullivan; Ex parte A-G (Qld); R v Lee; Ex parte A-G (Qld)* [2019] QCA 300 [101]–[103] (Sofronoff P and Gotterson JA and Lyons SJA).
56 *R v Killic* (2016) 259 CLR 256, [21] (Bell, Gageler, Keane, Nettle and Gordon JJ) cited in *R v O'Sullivan; Ex parte A-G (Qld); R v Lee; Ex parte A-G (Qld)* [2019] QCA 300 [103] (Sofronoff P, Gotterson JA and Lyons SJA).

The issue for a court in using changes in community attitudes is identifying '*legitimate* community expectations'.[57] Community attitudes to sentencing are further discussed in **Chapter 5**.

The Queensland Court of Appeal has acknowledged with reference to statements made by the High Court the need for sentencing practices to change in response to changing community attitudes about the seriousness of certain types of offending conduct.[58] Relevant to the sentencing of rape, the Court has explicitly directed that the 'rigid compartmentalisation' of rape offences based on penetration type is to be avoided within the sentencing context. In refusing an appeal that relied on the argument that a sentence for an offence of digital rape may be expected to be less severe than other forms of rape, the Court of Appeal[59] reinforced principles outlined in *R v Wark*[60] that

> there is no rigid compartmentalisation of rape offences into two categories, firstly digital rape and secondly penile rape. In each case "it is the particular circumstances which will determine the level of criminality and together with other facts the sentence to be imposed". Accepting as a general proposition that penile rape will attract a higher sentence than digital rape or oral rape, there may be cases calling for punishment as great or exceeding those involving penile penetration. [61]

This principle has been endorsed in subsequent decisions of the Court.[62]

To assess the extent to which the Court of Appeal guidance is being applied in practice, the Council conducted a review of the transcripts of sentencing submission and remarks for 24 cases involving sentences (at first instance) for offences of rape involving either digital or oral rape. In doing so, the Council sought to better understand the submissions and supporting cases being put forward by the prosecution regarding the appropriate sentencing range for digital and oral rape offences, and whether there were any cases in which the prosecution had suggested that the current sentencing levels were not appropriate and should be lifted on the basis of those decisions.

The findings revealed that the most common decisions relied upon by the prosecution in these cases were *R v Smith,*[63] *R v Kelly*[64] and *R v GAP*.[65] While the relevant decisions of *R v RGB*[66] and *R v Wallace*[67] are not often cited in submissions, nor in the remarks of judicial officers at sentence, *Smith* is often used, and refers to the earlier relevant decision of *Wark*.

Concerningly, *GAP* and *Kelly* both appear to advance the proposition that sentences for rape should be distinguished by conduct. For example, in *GAP*, Fryberg J (in obiter) referred to comments in *R v Bull*[68] and agreed that:

> In assessing the cases I have borne in mind what was written by this court in *R v Colless*[69] where '[vaginal] rape accomplished digitally may generally be seen as somewhat less grave than a rape accomplished by penile penetration'. While I would not wish to lay down any rule, I think it may also be said that penile rape effected in the

57 *R v O'Sullivan; Ex parte A-G (Qld); R v Lee; Ex parte A-G (Qld)* [2019] QCA 300 [104] (*emphasis* in original) (Sofronoff P, Gotterson JA and Lyons SJA). See further discussion [105]–[109] (Sofronoff P, Gotterson JA and Lyons SJA).
58 See, for example, *Stable* (n 17) [45] referring to earlier statements made by the High Court *R v Kilic* (2016) 259 CLR 256, 267 [21]..
59 *R v Smith* [2020] QCA 23 [37] ('*Smith*').
60 [2008] QCA 172, [36]–[38] (Cullinane J) ('*Wark*') .
61 Ibid.
62 See, for example, *R v RGB* [2022] QCA 143 ('*RGB*'); *R v Wallace* [2023] QCA 22 ('*Wallace*').
63 *Smith* (n 59).
64 *R v Kelly* [2021] QCA 134.
65 *R v GAP* [2013] 1 Qd R 427 ('*GAP*').
66 *RGB* [(n 62).
67 *Wallace* (n 62).
68 *R v Bull* [2012] QCA 74.
69 [2010] QCA 26 [17].

> mouth of the victim may generally be seen as somewhat more grave than vaginal rape, particularly where there is ejaculation in the mouth or throat.[70]

As discussed in **Chapter 6**, we found a reliance on cases that were very dated.

While it was not possible to undertake the same analysis of submissions made on sentence in sexual assault cases, the same issues are likely to arise in these cases. For example, the case of *R v Demmery*[71] was referred to by some subject expert interview participants as a case against which the seriousness of other sexual offences was benchmarked, despite this being a decision handed down in 2005 – close to 20 years ago.

In *R v Demmery*,[72] the Court of Appeal allowed an appeal against a sentence of 2 years' imprisonment suspended after 6 months served for an operational period of 2 years on the basis it was manifestly excessive. They substituted this for a sentence of 12 months' imprisonment suspended after 25 days (time already served in custody) for an operational period of 12 months. The 27-year-old applicant had pleaded guilty to one count of sexual assault of a 16-year-old girl in which 'he pulled her underwear to the side and then masturbated and ejaculated over her vulval area. She was asleep while he did that.'[73] The Court of Appeal found the sentencing judge's description that 'the offence was another instance of a situation where a female in a very vulnerable situation had been taken advantage of for the self-gratification of a male, albeit a person of generally good character and standing' was 'quite accurate'.[74]

From a review of more recent Court of Appeal decisions, we have observed that this decision is still referred to. For example, in the 2021 case of *R v Rogan*,[75] the applicant had sexually assaulted the complainant after they had been drinking together at a party. The offending behaviour involved the applicant straddling himself over the victim, unwanted touching, forcing her top open, exposing her breast and sucking on it, licking her face and inserting his tongue into her mouth. The victim told him to stop and tried to push him off but he did not stop and touched her under her dress between her legs and over her underwear. He unzipped his jeans, exposed his penis and put it onto her pelvic area. The victim screamed, the party host entered the room and the offending stopped. After the applicant learned the victim had reported the matter to the police, he asked his friend to ask the victim to withdraw her complaint. He pleaded guilty and was originally sentenced to 12 months' imprisonment, to be suspended after serving two months. On appeal, the sentence was varied to be suspended after time served (approximately 12 days). The Court said:

> In my respectful opinion, previous cases such as *R v Owen*[76] and *R v Demmery*[77] show that a sentence that includes an actual period of imprisonment is not always required in cases like the present, in which an offender's criminal acts are out of character, in which there is real remorse, and in which there has been a timely plea of guilty.[78]

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70 *GAP* (n 65) [138] (Fryberg J) (footnotes in original). Gotterson JA 'refrain[ed] from expressing any view on the comparative gravity of different types of penile rape: [82]. Muir JA, in dissent, would have allowed an appeal against conviction so did not consider the sentence.
71 *R v Demmery* [2005] QCA 462 ('*Demmery*').
72 Ibid.
73 Ibid [7].
74 Ibid [26].
75 *R v Rogan* [2021] QCA 269.
76 *R v Owen* [2008] QCA 171.
77 *Demmery*(n 71).
78 *R v Rogan* [2021] QCA 269 [18] (Sofronoff P, McMurdo JA and Williams J agreeing).

Demmery was also among the cases relied upon by the applicant in two more recent unsuccessful appeals:

- In *R v Singh*,[79] a 2024 appeal decision, *Demmery* was relied upon in conjunction with 2 other cases[80] as a basis for submitting the sentence was manifestly excessive because it required him to serve actual time in custody.[81] The applicant, who was an Uber driver, was convicted of 3 counts of sexual assault against a passenger and sentenced to 10 months' imprisonment suspended after 4 months for an operation period of 15 months. He pleaded guilty on what would have been the first day of his trial and had no prior criminal history. The Court of Appeal, in dismissing the appeal, found that: 'While the authorities relied upon by the applicant's counsel suggest the period of actual custody could have been for a lesser period, the period of four months was not outside the proper exercise of a discretion.'[82]
- In *R v Abdullah*,[83] a 2023 appeal decision, *Demmery* was referred to alongside 4 other cases[84] as a basis for arguing a sentence of 18 months' imprisonment suspended after 5 months was manifestly excessive. The applicant submitted that the sentence imposed 'did not recognise the low level of offending and that a sentence of no more than nine months, wholly suspended, was warranted' (noting this was less than had been submitted by the applicant's counsel at sentence).[85] The Court found that '[a] review of the authorities does not support the conclusion that the overall head sentence of 18 months' imprisonment … was manifestly excessive, given the circumstances of this case' and nor was the requirement that he serve 5 months of that time in custody prior to the balance being suspended 'unjust or unreasonable'.[86] The applicant was a tow-truck driver who committed sexual assaults against young women on two separate occasions – the second while on bail for the first offence. He pleaded guilty and had no prior criminal history.

In the 2022 decision of *R v Kane; Ex parte Attorney-General (Qld)*[87] the Court of Appeal noted the prosecutor at first instance relied on *Demmery* and other cases decided in 2005 and 2007:[88]

> as supporting a range of imprisonment of 12 to 18 months for similar offending where there was with no violence and that was the basis for the prosecutor's submission that imprisonment for 18 months was the appropriate head sentence for the respondent.[89]

Despite the prosecutor's submissions at first instance, the Attorney-General's appeal was allowed as the Court found the authorities relied on by the prosecutor before the primary judge 'could not be characterised properly as yardsticks'.[90] The sentence at first instance, of 18 months' imprisonment, suspended after 282 days for an operational period of 3 years, was increased on appeal to 3 years' imprisonment, suspended after 282 days for an operational period of 3 years:[91]

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79 *R v Singh* [2024] QCA 50.
80 *R v Rogan* [2021] QCA 269; *R v Sologinkin* [2020] QCA 271.
81 *R v Singh* [2024] QCA 50, [39] (Brown J, Morrison and Dalton JJA agreeing);
82 Ibid.
83 *R v Abdullah* [2023] QCA 189, [29] ('*Abdullah*').
84 *R v Hatch* [1999] QCA 495; *R v Murphy* [2011] QCA 363 *R v Al Aiach* [2007] 1 Qd R 270; and *R v Baldwin* [2014] QCA 186. The cases submitted by the applicant at first instance were: *R v Bradford* [2007] QCA 293; *R v Murray* [2005] QCA 188; and *R v Quinlan* [2012] QCA 132;
85 *Abdullah* (n 83) [29].
86 Ibid [46]–[47] (Bowskill CJ, Flanagan JA and Buss AJA agreeing).
87 *R v Kane; Ex parte A-G (Qld)* [2022] QCA 242.
88 Ibid [12] (Mullins P and Dalton and Flanagan JJA) referring to *R v Murray* [2005] QCA 188; *R v Bradford* [2007] QCA 293.
89 Ibid.
90 Ibid [19] citing *Barbaro v The Queen* (2014) 253 CLR 58 [41].
91 Ibid [28]–[29].

> When account is taken of Mr Kane's conduct in targeting a woman walking by herself in a public place, removing her to a secluded area to commit the assault, putting his hand inside her pants to press his finger against her anus (as well as squeezing one breast), overcoming her resistance and protests, and not desisting until a passer-by approached, the extent and nature of the assault made the offending significantly more serious than the offending in the comparable authorities relied on by the prosecutor before the primary judge. As Mr Heaton of King's Counsel submitted on behalf of the appellant, the circumstances of the subject offence, including the respondent's prior history for offending which included the use of violence, was such that community protection and denunciation warranted a significant penalty that had to be determined in the context of an offence. The appellant succeeded in showing that the sentence that was imposed by the primary judge failed to reflect the seriousness of the subject offence in relation to the maximum penalty and having regard to the circumstances of the respondent and was therefore also manifestly inadequate. A sentence of imprisonment of at least three years was called for in respect of Mr Kane's guilty plea. Mr Kane's criminality and the relevance of his criminal history were not reduced in any way by his problem with alcohol.[92]

Guideline judgments

Guideline judgments are used in some jurisdictions as 'a mechanism for the courts to provide broad sentencing guidance beyond the specific facts of a particular case'.[93] Generally, guideline judgments are seen as an alternative way to increase sentencing outcomes without significantly restricting the sentencing discretion of the court (as opposed to mandatory sentencing schemes).[94]

Guideline judgments may take various forms – for example, clarifying any aggravating or mitigating features that should be considered in particular circumstances, providing indications of appropriate penalties or an appropriate starting point for sentences.[95]

In Queensland, the Court of Appeal may provide a guideline judgment on its own initiative or on application by the Attorney-General, the Director of Public Prosecutions or the Chief Executive of Legal Aid Queensland.[96] In deciding whether to issue a guideline judgment, the Court must consider the need to promote consistency of approach in sentencing offenders and to public confidence in the criminal justice system.[97] In considering its position and whether to issue a judgment, the Court of Appeal can also receive advice from the Council about the giving or reviewing of a guideline judgment (upon its request).[98] Despite their availability, there have been no guideline judgments given in Queensland.

For the reasons discussed below, even in those jurisdictions that have previously made use of these judgments in the past as a useful form of sentencing guidance, they have largely fallen into disuse.

What do other jurisdictions do?

New South Wales was the first jurisdiction in Australia to introduce a statutory guideline judgment scheme and to issue a guideline judgment. The NSW Court of Appeal found the role of a guideline judgment as simply a matter 'to be "taken into account only as a "check" or "sounding board" or "guide" but not as a "rule" or "presumption"'.[99]

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92 Ibid [27].
93 Sentencing Advisory Council (Victoria), *Sentencing Guidance in Victoria, Report* (2016) 22, 130.
94 Sentencing Advisory Council (Tasmania), *Sentencing of Driving Offences that Result in Death or Injury: Final Report No 8* (2017) 124.
95 Beth Crilly, 'Guideline Judgments in Victoria: An Examination of the Issues' (2005) 31(1) *Monash University Law Review* 37, 38.
96 PSA (n 4) pt 2A.
97 Ibid s 15AH.
98 Ibid s 199(1)(a).
99 *R v Whyte* (2002) 55 NSWLR 252 [113] (Spigelman CJ).

Since 2004, no new guideline judgments have been issued in New South Wales.[100] Commentators consider that this is because of a series of High Court decisions that cautioned against numerical guidelines and emphasised that sentencing 'is an instinctive and individualistic exercise'.[101] Further, in 2002 a new standard non-parole period scheme was introduced into sentencing legislation, which overrode any existing and potential future guideline judgments issued for offences falling with that scheme.[102]

A review of two guideline judgments[103] issued in New South Wales revealed that they appeared to successfully 'reinforce public confidence in the integrity of the process of sentencing'[104] by increasing making sentencing 'more comprehensible and transparent'.[105] While the judgments appeared to raise sentencing levels at first instance, they also resulted in larger numbers of successful appeals on the basis of the initial sentence being too severe.[106] Concerns were also raised regarding whether guideline judgments will impact sentences in a consistent way.[107]

In Victoria, the Victorian Court of Appeal issued its first (and only) guideline judgment in 2014, which related to the use of a new order called a 'community corrections order'.[108] In that decision, the Court of Appeal noted that while the development of case law had the advantage of the development of legal principles informed by the practical realities of individual cases, equally the 'great advantage of a guideline judgment is that it enables [the Court of Appeal] to deal systematically and comprehensively with a particular topic or topics relevant to sentencing, rather than being confined to the questions raised by particular appeals', while not fettering the discretion of the sentencing court in any way.[109]

10.3 Alternative models for sentencing guidelines

Sentencing guidelines are non-legislative sources of guidance, which identify sentencing purposes and matters relevant to sentence that the court should consider in sentencing particular offences, including aggravating and mitigating factors. They have heavily influenced sentencing in England and Wales, where guideline judgments and Sentencing Council guidelines exist alongside legislative instruments to provide structure to the exercise of judicial discretion.

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100 High Range PCA, *Road Transport (Safety and Traffic Management) Act 1999* (NSW) s 9(4): *Application by the Attorney General under Section 37 of the Crimes (Sentencing Procedure) Act for a Guideline Judgment Concerning the Offence of High Range Prescribed Content of Alcohol Under Section 9(4) of the Road Transport (Safety and Traffic Management) Act 1999 (No 3 of 2002)* (2004) 61 NSWLR 305 [146]; Form 1: *Attorney General's Application under s 37 of the Crimes (Sentencing Procedure) Act 1999 No 1 of 2002* (2002) 56 NSWLR 146 [9]; Guilty plea *(Crimes (Sentencing Procedure) Act 1999* (NSW) s 22): *R v Thomson & Houlton* (2000) 49 NSWLR 383 [160]; Break, enter and steal (*Crimes Act 1900*, s 112(1)): *Attorney-General's Application (No 1), R v Ponfield* (1999) 48 NSWLR 327, 337–338 [48]; Armed robbery (*Crimes Act 1900* (NSW) s 97): *R v Henry and Ors* (1999) 46 NSWLR 346. Dangerous driving (*Crimes Act 1900* (NSW), s 52A): *R v Jurisic* (1998) 45 NSWLR 209 ('*Jurisic*'), as reformulated in *R v Whyte* (2002) 55 NSWLR 252 [252]. The High Court overruled the guideline for drug importation (*Customs Act 1901* (Cth), s 233B): *Wong v The Queen* (2001) 207 CLR 584 overruling *R v Wong & Leung* (1999) 48 NSWLR 340.

101 Sarah Krasnostein, 'Boulton v the Queen: the Resurrection of Guideline Judgments in Australia' (2015) 27(1) *Current Issues in Criminal Justice* 41 citing *Fox and Freiberg's Sentencing: Law* (n 2) 251, 971. The relevant High Court decisions are: *Barbaro v The Queen* 2014] HCA 2 (12 February 2014) [27]; *Wong v The Queen* (2001) 207 CLR 584; *Hili* (n 27) 544–5; *Markarian* (n 4) 371.

102 Krasnostein (n 101) 41 citing NSW Sentencing Council, *Standard Non-Parole Periods: Report* (2013).

103 *Jurisic* ((n 100); *R v Henry* (1999) 46 NSWLR 346.

104 *Jurisic* (n 100) 220 (Spigelman CJ).

105 Beth Crilly, 'Guideline Judgments in Victoria: An Examination of the Issues' (2005) 31(1) *Monash University Law Review* 37, 48–9.

106 Ibid 45–9.

107 Ibid 46.

108 *Boulton v The Queen* (2014) 46 VR 308 ('*Boulton*').

109 Ibid 316 [26].

For example, the Sentencing Council for England and Wales[110] produces sentencing guidelines for the judiciary through a formal consultation process.[111] Under this scheme, courts are legislatively required to follow guidelines developed by the Sentencing Council unless satisfied it would be contrary to the interests of justice to do so,[112] but the guidelines themselves are not legislated.

The Sentencing Council for England and Wales produces both specific guidelines for offences, as well as general guidelines that apply to all offences.

The Scottish Sentencing Council,[113] in comparison to the English model, acts in more of an advisory role. Any guidelines the Council develops must be approved by the High Court,[114] and are not binding. Scottish sentencing courts are therefore only required to 'have regard to any sentencing guidelines which are applicable in relation to the case' and, if they decide not to follow the guidelines or to depart from them, to state the reasons for doing so.[115] These guidelines are approved through a staged approval process that includes consultation with members of the judiciary at an early stage. Once approved, all guidelines are monitored and reviewed. To date, the High Court in Scotland has endorsed 4 guidelines produced by the Scottish Sentencing Council.[116] The Scottish Sentencing Council is currently developing guidelines for both sexual assault and rape and is in the process of consulting on the guideline for rape.[117]

These guidelines reflect a much more structured approach to sentencing than in Australia, as they require courts to engage in a two-step process to determine, first, the seriousness of the offence and, second, the effect of any aggravating and mitigating factors on the categorisation of the offence.[118] As intended, the presumptive sentencing guidelines developed by sentencing councils have been found to be the most effective way to improve consistency and reduce disparity within a jurisdiction.[119]

In May 2017, the Victorian Government announced an intention to establish a Sentencing Guidelines Council with a similar role to the UK Council.[120] In May 2018, the Victorian Sentencing Advisory Council made 22 recommendations about the most appropriate features of a Sentencing Guidelines Council for Victoria and the sentencing guidelines such a council would create.[121] Under the recommended model, the development of sentencing guidelines would be on the council's own motion or at the request of the Attorney-General.[122] In many respects, the guidelines model proposed is similar to that operating in the United Kingdom.

The Victorian Government is yet to establish a Guidelines Council as proposed.

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110 The current Sentencing Council was established in 2010 under the *Coroners and Justice Act 2009* (UK) as an independent body. The President of the Sentencing Council is the Lord Chief Justice of England and Wales, and the Council has both judicial and non-judicial members.
111 *Sentencing Act 2020* (UK) pts 2–13, constitute the 'Sentencing Code': s 1.
112 Ibid s 59(1); *Coroners and Justice Act 2009* (UK) s 125(1).
113 Scotland has established a Scottish Sentencing Council comprising judicial and non-judicial members under the *Criminal Justice and Licensing (Scotland) Act 2010* (Scot).
114 *Criminal Justice and Licensing (Scotland) Act 2010* (Scot) s 2.
115 Ibid s 6(1)–(2).
116 Scottish Sentencing Council 'Guidelines in development', <https://www.scottishsentencingcouncil.org.uk/sentencing-guidelines/guidelines-in-development>.
117 Ibid.
118 Sentencing Council (UK) 'Using Sentencing Council guidelines', <https://www.sentencingcouncil.org.uk/explanatory-material/magistrates-court/item/using-the-mcsg/using-sentencing-council-guidelines>.
119 Michael Tonry, 'Fifty Years of American Sentencing Reform–Nine Lessons' (2019) 48 *Crime and Justice* 1, 3–6.
120 Premier of Victoria, 'Victorian Community To Have Its Say on Sentencing' (Media Release, 25 May 2017) .
121 Sentencing Advisory Council (Victoria), *A Sentencing Guidelines Council for Victoria, Report* (2018).
122 Ibid rec 5.

The benefits of this form of guidance have been argued to include that:

- sentencing councils or commissions can help detect sentencing disparities, and modify sentencing guidelines to correct for excessive variability in punishment;
- by consulting with a broad range of stakeholders, sentencing councils or commissions can 'better incorporate the community's views within penal policy'; and
- sentencing councils or commissions can 'improve transparency and expand the public's knowledge about sentencing and increase their confidence in it'.[123]

10.4 Sentencing resources

Other forms of sentencing guidance include resources such as judicial benchbooks, practitioner guidelines, case law summaries and sentencing statistics. These other forms of sentencing guidance are discussed briefly below.

10.4.1 Why sentencing resources are important

Sentencing resources are vital to assist legal practitioners to understand sentencing theory and provide guidance on case law and legislation as well to as to stay up to date with legal developments. These resources may also be beneficial for newly appointed judicial officers who were not criminal law practitioners prior to their appointment.

There are frequent changes to sentencing laws, and sentencing laws continue to evolve, both with respect to developments in the common law and legislation. As discussed in **Chapter 8**, the PSA has been amended on numerous occasions and this applies not only to section 9 changes, but other reforms to the PSA and other factors that impact sentencing, such as relevant maximum penalties and the introduction of new circumstances of aggravation.

Having clear, accessible and central sentencing resources that are appropriately funded to enable regular updates to be made can assist members of the legal profession to have the appropriate knowledge to place all relevant, available information before the courts to inform sentencing decisions. It may also improve public confidence by enabling transparency and limit the need for appeals on points of law.

10.4.2 Judicial benchbooks

Benchbooks are produced or endorsed by members of the judiciary to guide sentencing practices and decisions. In Queensland, resources issues by the courts relevant to the sentencing of adults include:

- the *Benchbook on Sentencing,*[124] last updated in 2017;
- the *Equal Treatment Benchbook,* with a chapter on gender in sentencing; [125]
- the *Domestic and Family Violence Protection Act 2012 Bench Book*;[126]
- the *Chief Magistrate's Notes*.[127]

123 Terry Skolnik, 'Criminal Justice Reform: A Transformative Agenda' (2022) *Alberta Law Review Society* 631, 653 citing these arguments in support of the establishment of a permanent sentencing commission in Canada.
124 Michael Shanahan AM, *Benchbook on Sentencing* (April 2017) <https://www.sclqld.org.au/collections/main-research-collections/texts-journals-commentaries-andreference/benchbook-on-sentencing>.
125 Chapter 7, Sentencing in Supreme Court of Queensland, *Equal Treatment Benchbook* (2nd ed, 2016) .
126 Magistrates Court of Queensland, *Domestic and Family Violence Protection Act 2012 Bench Book* (2021).
127 Court Services Queensland, Chief Magistrate's Notes <https://www.courts.qld.gov.au/__data/assets/pdf_file/0009/656613/mc-cm-notes.pdf>

Although not specific to sentencing, the former Queensland Government provided in-principle support for a recommendation made by the Women's Safety and Justice Taskforce to develop and implement a specific benchbook to guide criminal trials involving sexual violence.[128] In making this recommendation, the Taskforce suggested that the benchbook could include 'relevant procedural requirements and timeframes, data and statistics, information about community attitudes and rape myths, information about the impacts of trauma on victims of sexual violence and relevant laws'.[129] To date, no benchbook on sexual violence has been progressed.

What do other jurisdictions do?

Other jurisdictions have produced and freely published sentencing specific resources.

- New South Wales: The Judicial Commission of NSW has published a *Sexual Assault Trials Handbook*[130] and *Trauma-informed Courts: Guidance for Trauma-informed Judicial Practices*, which discuss trauma, its impact on particular groups and practical considerations for embedding trauma-informed practice.[131] The *Bugmy Bar Book* is a free, evidence-based resource for criminal legal practitioners and judicial officers, as well as policy-makers and other professionals, to promote improved understanding of the experiences of people who come into contact with the criminal justice system. It collates published research and government reports and findings surrounding the impacts of experiences of trauma (including childhood sexual abuse), socioeconomic inequality, structural disadvantage and rehabilitation, and is intended to support legal advocates and decision-makers within the criminal sentencing context. The Queensland District Court has acknowledged its value as a resource.[132]
- Victoria: The Judicial College of Victoria maintains the Victorian *Criminal Charge Book* and *Victorian Sentencing Manual*, both of which include dedicated sections on sexual offences.[133] The *Victorian Sentencing Manual* is a consolidated summary of the relevant sentencing provisions and applicable case law, both generally and for specific sentences.[134] It provides links to 'Sentencing Snapshots' prepared by the Sentencing Advisory Council[135] and a table of relevant cases, and highlights important principles to consider when sentencing an offender. It is consistently updated and reviewed for accuracy, ensuring that it remains a reliable, complete source of guidance for all criminal justice stakeholders. The Judicial College of Victoria has also developed a resource *Victims of Crime in the Courtroom: A Guide for Judicial Officers,* which includes advice for judicial officers on understanding trauma and information about victims of

128 Queensland Government response to the report of the Queensland Women's Safety and Justice Taskforce, *Hear Her Voice – Report Two* (2022) 25.
129 Queensland Women's Safety and Justice Taskforce, *Hear her voice – Report Two – Women and Girls' Experiences Across the Criminal Justice System* (2022) vol 1, 310.
130 Judicial Commission of New South Wales, Sexual Assault Trials Handbook (2007) - last updated November 2023.
131 Judicial Commission of New South Wales, *Trauma-Informed Courts: Guidance for Trauma-Informed Judicial Practices* (November 2023).
132 See *Pamtoonda v Commissioner of Police* [2021] QDC 207 [66], fn 20; 5 (Smith DCJ).
133 Judicial College of Victoria, *Criminal Charge Book*, pt 7.3 <https://resources.judicialcollege.vic.edu.au/article/1053858> and Judicial College of Victoria, *Victorian Sentencing Manual* (4th ed), Pt 24 <https://resources.judicialcollege.vic.edu.au/article/669236>.
134 Judicial College of Victoria, *Bench Book/Victorian Sentencing Manual* (4th ed, 2024) <https://resources.judicialcollege.vic.edu.au/article/669236/section/2168>.
135 See, for example, Sentencing Advisory Council, 'Sentencing Snapshot 279: Sentencing Trends for Rape in the Higher Courts of Victoria 2017–18 to 2021–22, 3 October 2023, <https://www.sentencingcouncil.vic.gov.au/snapshots/279-rape>.

sexual offences and victims who are Aboriginal and Torres Strait Islander people or from CALD backgrounds.[136]

- Western Australia: The *Aboriginal Bench Book for Western Australia Courts* was commissioned by the National Indigenous Cultural Awareness Committee of the AIJA in response to the disproportionate representation of Aboriginal and Torres Strait Islander peoples in Australia's criminal justice system.[137] The benchbook includes a chapter on sentencing.
- South Australia: the Legal Services Commission publishes a *Law Handbook* online.[138]
- Commonwealth: Commonwealth Director of Public Prosecutions publishes *Sentencing of Federal Offenders in Australia: a guide for practitioners*.[139] This has been updated yearly since 2020 and includes particular guidance on child sex offences.[140]
- The National Judicial College of Australia: The National Judicial College publishes articles and publications such as how to craft clear decisions and oral decisions.[141]
- The Australasian Institute of Judicial Administration: in partnerships with the Australian Government's Attorney-General Department and the University of Melbourne, the Australasian Institute of Judicial Administration has produced a *National Domestic and Family Violence Bench Book*, which includes a dedicated section on sentencing,[142] and has also released a report on specialist approaches to managing sexual assault proceedings.[143]
- The Judicial Council on Diversity and Inclusion: produced the *Interpreters in Criminal Proceedings: Benchbook for Judicial Officers* setting out information for the assistance of judicial officers where an interpreter is required. It is a companion document to the *Recommended National Standards for Working with Interpreters in Courts and Tribunals.*[144] The benchbook provides general guidance for all criminal offences, including about cultural assumptions, stereotypes and subconscious bias.

10.4.3 Practitioner guidelines, handbooks and other resources

Various other resources are available that are relevant to sentencing. They include:

- Caxton Legal Centre Inc publishes *The Queensland Law Handbook*, which includes a chapter on 'Sentencing' that is freely available online.[145]
- Thomson Reuters, *Queensland Sentencing Manual*.

136 Judicial College of Victoria, *Victims in the Courtroom: A Guide for Judicial Officers* (2019).
137 Stephanie Fryer Smith, *Aboriginal Benchbook for Western Australia Courts* (AIJA, 2nd ed, 2008).
138 Legal Services Commission South Australia, *Law Handbook, Court – Criminal Matters*, 2024, <https://lawhandbook.sa.gov.au/ch13.php>.
139 Commonwealth Director of Public Prosecutions, *Sentencing of Federal Offenders in Australia: A Guide for Practitioners* (July 2024, 7th ed).
140 Ibid [7.3] 315–25.
141 National Judicial College of Australia, *Judicial Decisions - Crafting Clear Reasons* (2008); National Judicial College of Australia, *Oral Decisions - Delivering Clear Reasons* (2011).
142 Australasian Institute of Judicial Administration, *National Domestic and Family Violence Bench Book* (last updated July 2024), section 9.3 'Sentencing'.
143 Amanda-Jane George et al. *Specialist Approaches to Managing Sexual Assault Proceedings: An Integrative Review*, Attorney-General's Department and Australasian Institute of Judicial Administration (August 2023).
144 Judicial Council on Diversity and Inclusion, *Recommended National Standards for Working with Interpreters in Courts and Tribunals* (Second Edition, March 2022).
145 See Caxton Legal Centre Inc, Sentencing (Web Page, 23 September 2024) <https://queenslandlawhandbook.org.au/the-queensland-law-handbook/offenders-and-victims/sentencing>.

- Thomson Reuters, *Ross on Crime.*
- LexisNexis Australia, *Carter's Criminal Law of Queensland*.

The Queensland *Director of Public Prosecution*s also issues *Director's Guidelines* that are 'designed to assist the exercise of prosecutorial decisions to achieve consistency and efficiency, effectiveness and transparency'.[146]

The Women's Safety and Justice Taskforce has recommended the *Director's Guidelines* be reviewed and additional guidance provided on the prosecution of sexual violence cases:[147]

> More 'practice focused' guidance should be included in specific guidance documents to support the operation of the Guidelines. Any additional guidance documents should be made publicly available to maintain public confidence, transparency and accountability.[148]

The implementation of this and other recommendations is underway.[149]

10.4.4 Case law summaries and sentencing tables

Case law summaries provide an overview of the circumstances of offence and the sentence outcome in a given case.

Case law summaries can assist members of the legal profession by helping to identify cases that identify relevant statements of law or principle. On the Supreme Court of Queensland Library's website, summaries produced by judicial officers are publicly available and usually done in respect of cases that are complex and high profile to assist with understanding the judgment. They are not produced in every case, are not authoritative and are not a substitute for the Court's reasons.[150]

Some organisations have internal databases to assist practitioners to identify relevant sentencing principles and comparable cases to indicate a possible range of sentences. For example:

- The Queensland Office of the Director of Public Prosecutions (DPP) produces an internal compendium of relevant Court of Appeal case summaries (known as the 'Appeals Register' or 'Appeals Schedule') to guide legal officers and prosecutors when making submissions on sentence at first instance. The Appeals Register provides a brief overview of the factual matrix of the case, the characteristics of person being sentenced (including their age and whether they have a relevant criminal history), any aggravating or mitigating features considered by the sentencing judge, the initial sentence and the outcome of any appeal. The DPP Appeals Register is updated with summaries of relevant court of appeal decisions to ensure that the DPP continues to make appropriate and relevant submissions on sentence. This resource is not publicly available.
- Legal Aid Queensland maintains an 'adult comparable sentencing decisions database' and a 'criminal judgments database' within their in-house library to assist preferred suppliers.[151] The 'Adult comparable sentencing decisions database' contains decisions about sentencing of adults.

146 Office of the Director of Public Prosecutions Queensland, *Director's Guidelines* (as at 30 June 2023) 23, 1.
147 Queensland Women's Safety and Justice Taskforce, *Hear Her Voice – Report Two*: *Women and Girls' Experiences Across the Criminal Justice System* (2022) vol 1, 240 rec 47.
148 Ibid 238.
149 Office of the Director of Public Prosecutions Queensland, *2022-23 Annual Report* (18 March 2024) 40.
150 See Supreme Court Library, Case Summaries (Web Page, 2023) <https://www.sclqld.org.au/collections/caselaw/case-summaries?facets=%257B%2522sort%2522%253A%2522%2522%252C%2522dates%2522%253A%257B%257D%252C%2522facets%2522%253A%257B%257D%257D&page=1>.
151 Legal Aid Queensland, Tools and Resources, Library services for preferred suppliers (Web Page, 20 August 2024)

It can be searched based on offence, person's age, employment history and criminal history, but is not a full-text database meaning it does not search the attached PDF record.[152] Similarly, the 'criminal judgments database' contains criminal decisions in a central location to allow searches for procedural and evidence issues, legal concepts and new *Criminal Code* (Qld) charges.[153] This is also not a full-text database meaning it does not search the attached PDF record.[154] These resources are only available to in-house lawyers and preferred suppliers, as opposed to all criminal justice stakeholders.

What do other jurisdictions do?

In other Australian jurisdictions, there are published summaries and sentencing tables. For example:

- South Australia: the DPP publishes 'cases of interest'.[155]
- Western Australia: the DPP produces 'Comparative Sentencing Tables'.[156]
- New South Wales: the Public Defenders publishes 'Sentencing Tables'.[157]
- Victoria: the Judicial College of Victoria produces a comprehensive *Sentencing Manual of Case Summaries* – including for sexual violence sentences.[158] In addition to these summaries, the Supreme Court of Victoria also produces and publishes summarised sentences on its website.[159]

10.4.5 Sentencing databases

Sentencing databases collect and disseminate sentencing information, providing the legal profession with a preliminary overview of sentencing practices and outcomes in other cases.[160] This information may include information about the offence/offending, data relating to these variables, the sentence outcome, and a link to a copy of the remarks from the decision.[161] Sentencing databases may assist in locating cases which establish a sentencing 'range'. The High Court has found numerical tables, bar charts and graphs, of themselves, should be interpreted with caution:

> Presentation in any of these forms suggests, wrongly, that the task of a sentencing judge is to interpolate the result of the instant case on a graph that depicts the available outcomes. But not only is the number of federal offenders sentenced each year very small, the offences for which they are sentenced, the circumstances attending their offending, and their personal circumstances are so varied that it is not possible to make any useful statistical analysis or graphical depiction of the results.[162]

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152 Legal Aid Queensland, *Adult comparable sentencing decisions database: Tip Sheet*. Available from <https://www.legalaid.qld.gov.au/files/assets/public/v/1/for-lawyers/library-factsheets/criminal-judgments-database/laq_00155-adult-comparable-sentencing-decisions-database-tip-sheet.pdf>

153 Legal Aid Queensland, Criminal judgments database: Tip Sheet. Available from <https://www.legalaid.qld.gov.au/files/assets/public/v/2/for-lawyers/library-factsheets/criminal-judgments-database/laq_00155-criminal-judgments-database-tip-sheet-web.pdf>

154 Ibid.

155 https://www.dpp.sa.gov.au/prosecuting-crimes/cases-of-interest.

156 Government of Western Australia, Sentencing: From 1 January 2014 to 31 December 2020 (Web Page, 10 January 2023) <https://www.wa.gov.au/government/document-collections/sentencing-1-january-2014-31-december-2020>

157 The Public Defenders, Sentencing Tables (Web Page, 11 June 2024) <https://www.publicdefenders.nsw.gov.au/Pages/public_defenders_research/Sentencing%20Tables/Public_Defenders_Sentencing_Tables.aspx>

158 https://resources.judicialcollege.vic.edu.au/article/679573

159 https://www.supremecourt.vic.gov.au/areas/case-summaries/recent-sentences

160 The Honourable Justice Brian J Preston, *'A judge's perspective on using sentencing databases'* (Conference Paper, Judicial Reasoning: Art or Science? Conference, 7-8 February 2009) 2–4.

161 Ibid 3.

162 *Hili* (n 27) 535 [48] (French CJ, Gummow, Hayne, Crennan, Kiefel and Bell JJ) cited in *R v Pham* (2015) 256 CLR 550, 561, [32] (French CJ, Keane and Nettle JJ)

The intention of promoting consistency is not to achieve uniform sentence outcomes for all offences, but rather, to ensure principles of fairness and equal justice prevail across and within a jurisdiction.[163] To achieve this, it is important that a sentencing judge is made aware of, or has access to, information surrounding sentence outcomes imposed by other judicial officers in similar cases.[164] Through a process of continuously reviewing and understanding the comparability of prior sentences, the ability of a sentencing judge to determine the appropriate sentence is improved.[165]

In Queensland, responsibility for collecting, maintaining and disseminating this information rests with the Queensland Supreme Court Library through its management of the Queensland Sentencing Information Service ('QSIS'). The purpose of QSIS to create a free online resource of sentencing information (the QSIS database) to improve the administration of justice, including through enhanced consistency in sentencing.[166] Access to QSIS is available to judicial officers, government entities involved in the justice system and criminal legal practitioners,[167] and includes statistical graphs of sentencing trends and copies of sentencing hearing transcripts.

Information provided through QSIS has previously been relied upon by members of the judiciary as a tool to consider the conduct and range of sentences previously imposed for similar cases.[168] In 2023, QSIS underwent a significant change with the launch of the QSIS platform. The intention was to create a more intuitive user experience and user-friendly search functionality, as well as improving data security. Despite this intention, it is understood that the new platform has some functionality challenges, and its collection of relevant cases and information is currently incomplete.

The value of courts and practitioners having access to a reliable sentencing database has been recognised within the context of appellate reviews by the NSW Court of Appeal, who noted that such a resource can assist with determining whether a sentence was manifestly excessive or inadequate, and monitoring sentencing practices and outcomes within the lower courts.[169]

Victoria[170] and Queensland[171] also each publish statistical information through their respective sentencing councils. These statistics include sentencing outcomes for specific offences, sentencing snapshots and sentencing trends. However, the data is anonymised, and the databases do not provide access to the relevant transcripts. These statistical databases are intended to promote a greater understanding of sentencing outcomes across the wider community.

163 *Lowe* (n 5) 610–11.
164 The Honourable Justice Brian J Preston, *'A judge's perspective on using sentencing databases'* (Conference Paper, Judicial Reasoning: Art or Science? Conference, 7-8 February 2009) 4, referring to the Sentencing Commission for Scotland, *Report: The Scope to Improve Consistency in Sentencing* (2006) 35.
165 Ibid 4–5.
166 *Supreme Court Library Act 1968* (Qld) pt 3.
167 Ibid s 19.
168 See *R v Cooney; Ex parte A-G (Qld)* [2008] QCA 414 [27], [31] (McMurdo P, White AJA and McMeekin J agreeing); *HGT v Queensland Police Service* [2021] QDC 186 [32] (Dearden DCJ); *R v LAL* [2018] QCA 179 [74] n 57 (Ryan J, Sofronoff P and Crow J agreeing); *R v Seaton* (District Court of Queensland, Judge Baulch SC, 21 October 2010) 3.
169 *R v Maguire* (Unreported, 30 August 1995, NSWCCA); *R v Bloomfield* (1998) 44 NSWLR 346, 371; *R v Giordano* [1998] 1 VR 544, 549.
170 Sentencing statistics in Victoria are published on the Sentencing Advisory Council Statistics (SACStat) database. The SACStat database was last updated in July 2024.
171 Sentencing statistics in Queensland are published on the Sentencing Advisory Council's Sentencing DataHub. The DataHub reflects data for those cases sentenced up to 30 June 2023.

10.5 Stakeholder views

10.5.1 Views from submissions

In our Consultation Paper, we invited feedback on:

1. whether current forms of sentencing guidance are adequate to guide sentencing for rape and sexual assault, and any problems or limitations with these (Q.4); and
2. whether the current approach to sentencing for sexual assault and rape committed against children is appropriate. What about for other people who are vulnerable? (Q.5).

Most feedback received from stakeholders focused on the issue of whether additional legislative guidance was required, rather than on other models for responding to any issues they identified regarding the appropriateness and adequacy of current sentencing practices.

Some suggested changes to practice independently of the need for legislative reform. For example, Basic Rights Queensland, in addition to legislative changes that would require certain factors to be treated as aggravating, supported inclusion of greater cultural considerations in sentencing.[172] It observed that while these factors do not excuse rape and sexual assault, 'there are circumstances where it *may* be considered relevant in the context of sentencing for these offences.'[173] It was stressed that these circumstances are only of relevance where they relate to the experience of trauma or other psychological factors.[174]

The Queensland Sexual Assault Network generally considered that 'sentencing practice should be more aligned to community expectations and the gravity and impact of these crimes on victim survivors and a sentencing uplift be considered', supporting the development of 'stronger sentencing guidelines'.[175]

A submission from an PhD candidate considered that, 'The public tends to disagree with judicial decisions due to a lack of accurate knowledge of the sentencing framework'.[176] She recommended that judges should publish their summing-up process to give greater transparency to the public about why some charges did not proceed to sentence.[177] In respect of sentencing decisions, it was recommended that:

- More consistent publishing of sentence remarks in lower courts, such as District and Magistrate courts. One can refer to the publishing mechanisms adopted by superior courts, namely the Supreme Courts and Courts of Appeal, which consistently produce and publish written decisions.
- All the documents should communicate judicial decision-making processes and outcomes to the public in a simple, jargon-free, clear and consistent manner.[178]

Legal Aid Queensland referred us to Western Australia, which published an *Aboriginal Benchbook for Western Australian Courts* in May 2022. They considered:

> It may be a similar resource developed for Queensland courts will assist ensure the amendment of the *Penalties and Sentences Act* is given real effect. The Supreme Court of Queensland Equal Treatment Benchbook published in 2016 … does not identify specific considerations on sentencing Aboriginal and Torres Strait Islander persons or reference to *Bugmy* or the principles established in that and other cases. Ultimately, a sentencing court can recognise, be sympathetic to, and endeavour not to compound the effects of systemic disadvantage and intergenerational trauma but has no capacity to address those issues. Addressing those issues requires investment in social infrastructure and

172 Submission 19 (Basic Rights Queensland) 6–8.
173 Ibid 8.
174 Ibid.
175 Submission 24 (QSAN) 13.
176 Submission 4 (Rita Lok) 3.
177 Ibid 2.
178 Ibid.

supports best managed outside the criminal justice system. A lack of appropriately funded infrastructure and support particularly in regional and remote communities means that even a well-intentioned sentence designed to give full effect to section 9(oa) may operate to compound disadvantage.

10.5.2 Subject matter expert views

In our subject matter expert interviews, reliance on older or dated cases was viewed by some participants as being problematic and as impacting sentencing practices.

Some participants told us that legal practitioners are still using 'comparable cases from decades ago … despite the Court of Appeal having said in a number of cases … that legislative changes need to be taken into account when sentencing people.'[179] Another participant noted that 'there is still a heavy reliance upon older cases that have a tendency to have much less serious penalties'.[180]

One example given was the case of *Demmery,* decided in 2005,[181] which was frequently used as a 'yardstick' or benchmark against which the seriousness of every other case was judged.[182] One participant reflected that 'everyone compares that case. They say, well this is not as bad, so how can you send [the accused] to jail?'[183]

Our brief examination of the how this case is applied in the Court of Appeal is discussed above in section 10.2.3.

Another participant considered that there had not been 'any great change with the authorities, or the gravamen of offending, substantially changing what the applicable range is'.[184]

We were also told the recent changes to QSIS have made it challenging for a practitioner to find relevant cases to rely upon at sentence.[185] Acknowledging this gap in sentencing resources, the participant considered that having access to a comprehensive sentencing resource, such a sentencing benchbook that summarises relevant case law and principles, would be beneficial so all stakeholders know what the important and relevant decisions are.[186]

One participant indicated that it would be beneficial to have summaries of Court of Appeal decisions - like those produced by the DPP or LAQ - made more widely available to support all criminal practitioners and members of the judiciary.[187] It was noted that this would benefit smaller law firms, which do not have the same resources to establish and maintain such a resource.[188]

One participant told us of the value of *Carter's Criminal Code*, which includes commentary and was described as 'very user-friendly'.[189]

Another participant considered that there is nothing currently lacking in sentencing guidance,[190] with yet another considering Queensland practitioners and members of the judiciary are 'pretty spoiled' already.[191]

179 SME Interview 10.
180 SME Interview 15.
181 *Demmery* (n 71).
182 SME Interviews 14, 15, 16, 19.
183 SME Interview 14.
184 SME Interview 25.
185 SME Interview 7.
186 Ibid.
187 SME Interview 7.
188 Ibid.
189 Ibid.
190 SME Interview 6.
191 SME Interview 7.

10.5.3 Consultation events

At our consultation events, comments included that:

- Most victim survivors consider the sentence given it not sufficiently reflective of the harm they have suffered and want more punitive sentences. However, there was agreement that most victim survivors just want to be believed more than anything.[192]
- There needs to be better genuine recognition/acknowledgement of the victim from both the court and the offender during the sentence (including, what has happened to them, the impact the offending has had on their lives and how their life trajectory has changed).[193]

We were told that there is an opportunity to enhance sentencing resources to enable the sentencing court to better recognise the complexities of sexual assault and rape cases in sentencing and also strong support for the establishment of specialist sexual assault and rape courts in Queensland, which are able to more appropriately recognise and respond to the prosecution of these offences.[194]

10.6 The Council's view

We have concluded that there are opportunities for non-legislative forms of sentencing guidance to be enhanced. Agencies require appropriate resources to ensure these forms of guidance are updated on a regular basis and made more accessible (**Key Finding 9**).

Key Finding

9. **Non-legislative forms of sentencing guidance need to be updated and enhanced**

Non-legislative forms of sentencing guidance need to be updated and enhanced. Agencies require appropriate resources to ensure these forms of guidance are updated on a regular basis and made more accessible.

See **Recommendation 6**.

Taking into consideration the information and evidence gathered, including our analysis of relevant sentencing practices, Court of Appeal and first instance sentencing decisions and submissions, feedback provided during subject matter expert interviews and by stakeholders during our consultation process, we have concluded that existing forms of legislative sentencing guidance can be enhanced, acknowledging that agencies require appropriate resources to ensure these forms of guidance are updated on a regular basis and made more widely accessible.

Recommendation

6.1 **Resources for courts and legal practitioners**

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

192 Cairns Consultation Event, 21 March 2024.
193 Ibid.
194 Ibid.

	The department also should explore alternative options for the development of resources for use by legal practitioners in consultation with relevant legal professional bodies, criminal justice agencies and victim survivor legal and support services. Any resources developed might identify principles to be applied drawn from Queensland case law as well as relevant statements made by the High Court of Australia, and links to any useful resources – such as research relating to the impacts of childhood sexual abuse developed as part of the *Bugmy Bar Book*. Specific information relevant to the sentencing of offences against children, Aboriginal and Torres Strait Islander people and those from other culturally and racially marginalised groups, people with a mental illness or cognitive impairment (as victims and offenders), LGBTQIA+ people and people with disabilities should be included in any resources developed.
6.2	The Queensland Government ensures the Office of the Director of Public Prosecutions and Legal Aid Queensland are appropriately funded and resourced to ensure that relevant sentencing information and resources, such as the Appeal Register maintained by the Office of the Director of Public Prosecutions, are maintained and are able to be updated on a regular basis. The Department of Justice should consult with Legal Aid Queensland and the Office of the Director of Public Prosecutions regarding what additional funding is required to make this information publicly accessible so it can be used by other legal practitioners and legal and policy decision-makers, as well as by researchers and other professionals [see, for example, the Comparative Sentencing Tables published by the WA Office of the Director of Public Prosecutions Sentencing (www.wa.gov.au) and information maintained by the NSW Public Defenders Office Resources (nsw.gov.au)]. See also **Recommendation 28** regarding QSIS enhancements.

10.6.1 Applying the Council's fundamental principles

Applying the Council's fundamental principles guiding the review[195] to the issues raised in considering sentencing guidance and to address **Key Finding 9** guided us in making a recommendation:

1. **Principle 3: Sentencing outcomes for sexual assault and rape offences should reflect the seriousness of these offences, including their impact on victims, while not resulting in unjust outcomes.** All lawyers and judicial officers should have a current understanding of sexual violence, its prevalence, long-term harm, and the myths and misconceptions about sexual violence. Having a clear, accessible and central sentencing resource can assist members of the legal profession to have the appropriate knowledge to place all relevant, available information before the courts. It may improve public confidence by enabling transparency. It may also limit the need for appeals on points of law. We consider that there is an opportunity to better support the legal profession with more developed and freely available sentencing resources to improve sentencing processes and outcomes. The judiciary should be involved in developing resources that it considers relevant to sentences for rape and sexual assault in Queensland.
2. **Principle 5: Sentencing inconsistencies, anomalies and complexities should be minimised.** Developed, updated and accessible sentencing resources can minimise inconsistencies, anomalies and complexities. As discussed in **Chapter 6**, we reviewed some sentencing submissions for rape and observed generally legal practitioners submit 2 or 3 cases that were factually similar to the matter being sentenced and involved the same penetrative conduct. The

195 For a full list of the fundamental principles, see Chapter 3.

comparable offence focus meant relevant general appellate guidance on compartmentalisation (which applies to all sexual offences regardless of the victim) was only mentioned in cases of an adult victim and not a child.

3. **Principle 6: Reforms should take into account likely impacts on the disproportionate representation of Aboriginal and Torres Strait Islander peoples in the criminal justice system.** Sentencing resources can include empirical research surrounding the impacts of sexual violence offending on victim survivors, as well as specific information relevant to sentences involving offences against children, Aboriginal and Torres Strait Islander persons and those from other culturally and racially marginalised (CARM) groups, people with a mental illness or cognitive impairment (as victims and offenders), LGBTQIA+ people and people with disabilities – similar to the *Bugmy Bar Book*.[196] Providing legal practitioners with the appropriate resources and knowledge to place all relevant, available information before the courts can improve sentencing processes and outcomes for these disadvantaged groups.
4. **Principle 7: The circumstances of each person being sentenced, the victim survivor and the offence are varied. Judicial discretion in the sentencing process is fundamentally important.** The development and maintenance of relevant sentencing resources is consistent with the principles of individualised justice, providing courts and legal practitioners with information in support of this objective. As discussed above, we recommend any resources developed expressly consider factors which are relevant to the sentencing of offences committed against vulnerable groups, as well as those factors impacting on those being sentenced for committing such offences.

10.6.2 Benefits of access to current comprehensive sentencing resources

As highlighted in **Key Finding 3**, discussed in **Chapter 6**, we acknowledge that, in the case of rape, unhelpful distinctions are often made when determining offence seriousness based on the type of conduct alone, contrary to a clear direction by the Queensland Court of Appeal to the contrary that the seriousness of each individual case must be determined based on its own particular circumstances.[197]

This reflects the tendency of prosecutors and defence practitioners, in making submissions on sentence, to rely on comparative cases involving the same type of rape conduct (for example, cases involving digital-vaginal rape of an adult in making submissions on sentence in a case involving a digital-vaginal rape), rather than focusing on other factors relevant to the assessment of offence seriousness. This appears to have resulted in the development of accepted sentencing 'ranges' based on penetration type alone, with other considerations, such as victim vulnerability, being treated as secondary considerations.

The Court of Appeal has provided clear guidance that such 'compartmentalisation' of rape conduct is to be avoided.

Given the significant impact this current approach has on sentencing levels for rape, we have identified a need for the current focus on conduct type as the principal or a primary determinant of offence seriousness as an issue that should be monitored over time following the delivery of this report (**Recommendation 7**). Our intention is to enable a change in practice to occur in response to Court of Appeal guidance rather than recommending a short-term legislative 'fix' that, in practice, would be very difficult to implement. Further, the additional step of recommending changes to legislation in our view

196 The Public Defenders (NSW), *The Bugmy Bar Book* < https://bugmybarbook.org.au>.
197 See *Wark* [2008] (n 60) [2] (McMurdo P) [13]–[14] (Mackenzie AJA), [36] (Cullinane J), referred to with approval in *Wallace* (n 62) 5 [13] (Bowskill CJ). See also *RBG* (n 62) [4] (Dalton JA) referring to *Smith* (n 59) [34]–[37] (Morrison JA).

should only be taken where it is not possible to achieve the desired change to sentencing practice without legislative reform.

The development and enhancement of existing resources for prosecutors, defence practitioners and judicial officers is important in support of these practice changes to ensure that Court of Appeal guidance is more consistently applied and that recent case law is relied upon to ensure submissions made on sentence reflect current sentencing practices (**Recommendation 6**).

This is also important in the case of sexual assault, where we identified that there may be insufficient recognition of the seriousness of these offences rand reliance on dated case authorities. While we did not undertake an analysis of a sample of sentencing submissions, as we did for rape, it is clear that from feedback provided by some subject matter expert interview participants, there are concerns that the seriousness of this form of offending is not always appropriately acknowledged and that reference is being made to dated Court of Appeal decisions.

There is also an opportunity for the Queensland Government to signal the serious nature of sexual violence offending to members of the legal profession, as well as recognising the significant and lifelong impacts caused to victim survivors of rape and sexual assault through further resourcing of sentencing information. If this approach is not supported, or is not feasible, we recommend that the Queensland Government explore alternative options for the development of resources for use by legal practitioners in consultation with relevant legal bodies, criminal justice agencies, and victim survivor legal and support services.

In addition to the development of these resources, we recommend ensuring training and resources for prosecutors and criminal defence practitioners to promote recognition of the objective seriousness of this form of offending and the significant impacts it has on victim survivors (**Recommendations 19 and 20**), and to ensure judicial officers have access to ongoing professional development focused on sexual violence (**Recommendation 18**).

10.6.3 Monitoring the impacts of any reforms over time

Recommendation

7. Monitoring the impacts of the recommended reforms

The Attorney-General and Minister for Justice ask the Council, or other appropriate entity, to monitor and report on court sentencing practices for rape and sexual assault within 5 years of implementation of the recommended reforms to assess whether sentencing levels have increased in response to these changes, relevant Court of Appeal and High Court statements and community views about the seriousness of this form of offending. This review should consider:

- whether sentencing levels for offences of rape committed against children have increased relative to offences committed against adults, including for digital–vaginal, digital–anal and penile–oral rape assessed against the penile–vaginal and penile–anal rape of an adult;
- the extent to which sentencing practices are continuing to 'compartmentalise' rape conduct rather than assess offence seriousness based on the individual circumstances of the case; and
- sentencing levels for rapes occurring in an intimate partner or family relationship relative to those committed by strangers or acquaintances.

In line with fundamental **Principle 1: Reforms to sentencing laws should be evidence-based with a view to promoting public confidence**, we have a strong commitment to evidence-informed policy development and law reform. For this reason, we consider it important that any recommended reforms that are implemented are monitored to ensure they are meeting their intended objectives and are not having any unintended impacts. We suggest 5 years as a reasonable period of time to undertake this initial assessment.

A further review should also consider relevant Court of Appeal and High Court statements and community views about the seriousness of this form of offending and:

- whether sentencing levels for rape of a child have increased relative to sentences for rape of an adult, including for digital-vaginal, digital-anal and penile-oral rape assessed against penile-vaginal and penile-anal rape of an adult;
- the extent to which sentencing practices are continuing to 'compartmentalise' rape conduct rather than assess offence seriousness based on the individual circumstances of the case; and
- sentencing levels for rapes occurring in an intimate partner or family relationship relative to those committed by strangers or acquaintances.

In addition to an analysis of sentencing remarks and administrative data, we suggest that further consultation should occur with victims and survivors, advocacy and support organisations and legal stakeholders as part of conducting a monitoring review. This will also provide an opportunity to review the impact of any changes on Aboriginal and Torres Strait Islander peoples and other groups from a background of disadvantage.