PART D:
Sentencing options and processes

Chapter 11

Penalty and parole options (and other orders)

Chapter 12

Information for courts to inform sentence

Chapter 13

Victim survivor role, rights and justice needs

Chapter 14

Victim impact statements and recognition of harm at sentence

Chapter 15

Other issues relevant to sentence

Chapter 16

Alternative and complementary approaches

Contents

PART D: Sentencing options and processes

Chapter 11 — Penalty and parole options (and other orders) 340
11.1 Introduction 340
11.2 Previous Council reviews and recommendations 340
11.3 Overview of sentencing outcomes 345
11.4 How Queensland compares with other jurisdictions 353
11.5 Problems identified during this review 355
11.6 The Council's view 412

Chapter 12 – Information available to courts to inform sentence 429
12.1 Introduction 429
12.2 The current situation 430
12.3 Previous Queensland reviews 437
12.4 The position in other jurisdictions 440
12.5 Evidence of impacts 443
12.6 Stakeholder views 445
12.7 Issues and options 455
12.8 The Council's view 460

Chapter 13 – Understanding victim harm and justice needs 468
13.1 Introduction 468
13.2 The role, justice needs and rights of victim survivors within sentencing 471
13.3 Navigating the criminal sentencing process and hearings 477
13.4 Delays within the sentencing context 487
13.5 Reforms underway in Queensland to improve the sentence hearing experience for victim survivors 488
13.6 Stakeholder views 493
13.7 What we know from earlier research and reviews 508
13.8 The Council's view 514

Chapter 14 – Victim impact statements and recognition of harm at sentence 528
14.1 Introduction 528
14.2 Assessment of harm 528
14.3 Victim impact statements 529
14.4 Support for writing a victim impact statement 540
14.5 Stakeholder views 543
14.6 Sentencing remarks analysis on acknowledgement of victims and the impact of the offence at sentence 557
14.7 Relevant reforms underway in Queensland 566
14.8 What we know from earlier research and reviews 567
14.9 The Council's view 571

Chapter 15 – Other issues relevant to sentence 592
15.1 Introduction 592
15.2 Reducing a sentence to recognise a guilty plea 592
15.3 Cumulative vs concurrent sentences 617
15.4 Language used in sentencing 629

Chapter 16 – Alternative and complementary justice models 645
16.1 Introduction 645
16.2 Alternatives to the adversarial system of criminal justice 645
16.3 Restorative justice for sexual violence offences 645
16.4 Transformative justice and other alternative justice models 675
16.5 The Council's view 684

List of Figures

Figure 11.1: Custodial penalty type imposed for rape (MSO), by year of sentence (grouped) 347
Figure 11.2: Penalties imposed for non-aggravated sexual assault (MSO) in the Magistrates Courts, by year of sentence (grouped) 350
Figure 11.3: Penalties imposed for non-aggravated sexual assault (MSO) in the higher courts, by year of sentence (grouped) 351
Figure 11.4: Parole application outcomes for prisoners sentenced for rape (MSO) 384

List of Tables

Table 11.1: QCS sexual offending programs in custody 395
Table 11.2: QCS violence offending programs in custody 397
Table 13.1: High level overview of information provided to victim survivors by agencies 478
Table 14.1: Examples of sentencing submissions and acknowledgement of harm in sentencing remarks 562
Table 15.1: New South Wales plea of guilty discount scale for indictable offences 602
Table 16.1: Youth Restorative Justice Conferencing Referral Types 653

Chapter 11 — Penalty and parole options (and other orders)

11.1 Introduction

The Terms of Reference ask us to 'advise on options for reform to the current penalty and sentencing framework to ensure it provides an appropriate response to this type of offending'.[1]

In this chapter, we examine the sentencing and parole options in the *Penalties and Sentences Act 1992* (Qld) ('PSA') as these are commonly applied to offences of sexual assault and rape to assess whether they support adequate and appropriate sentencing outcomes by meeting the important purposes of sentencing and whether they reflect the seriousness of these offences.

We present a high-level summary of current sentencing practices based on our data findings and consider how sentencing outcomes meet the purposes of sentencing and their effectiveness. We also explore what other jurisdictions do regarding sentencing.

We further consider how courts approach issues relevant to sentence, such as the recording of a conviction, and orders made in addition to a sentence, such as non-contact orders.

Evidence in support of the reforms we recommend is based both on work undertaken for this review and our earlier reviews.[2] We have also drawn on findings of other previous Queensland-based justice system reviews.[3]

11.2 Previous Council reviews and recommendations

Two of the Council's previous reviews considered reforms relevant to this current review. These reviews and their findings are summarised below.

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1 See Appendix 1, Terms of Reference.

2 This includes literature reviews commissioned by the Council for previous reviews - Karen Gelb, Nigel Stobbs and Russell Hogg, *Community-based Sentencing Orders and Parole: A Review of Literature and Evaluations across Jurisdictions* (Prepared for the Queensland Sentencing Advisory Council by Queensland University of Technology, 2019) ('*QUT Literature Review*'), informed by an earlier report prepared by Michelle Sydes, Elizabeth Eggins and Lorraine Mazerolle on 'what works' in corrections for Queensland Corrective Services (2018, unpublished); 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* (Prepared for the Queensland Sentencing Advisory Council by The University of Melbourne, August 2021) ('*University of Melbourne Literature Review*'); Lacey Schaefer et al, *Sentencing Practices for Sexual Assault and Rape Offences: Literature Review* (Griffith University for Queensland Sentencing Advisory Council, Final Report, February 2024) ('*Griffith University Literature Review*').

3 Queensland Productivity Commission, *Inquiry into Imprisonment and Recidivism: Final Report* (Report, 2019) rec 17 ('*Inquiry into Imprisonment and Recidivism*'); Women's Safety and Justice Taskforce, *Hear Her Voice – Report Two: Women and Girls' Experiences Across the Criminal Justice System* (2022) rec 127 ('*Hear Her Voice, Report Two*').

11.2.1 Community-based Sentencing Orders, Imprisonment and Parole Options report

In our 2019 *Community-based Sentencing Orders, Imprisonment and Parole Options: Final Report* ('*Community-based Sentencing Orders and Parole Options Report*'),[4] the Council recommended reforms to the existing mix of community-based sentencing orders in Queensland designed to achieve greater flexibility in sentencing and expand the sentencing 'toolbox' for courts. We also recommended that changes be made to parole.

At the time of the 2019 report, we observed that the unintended consequence of excluding sex offenders from court-ordered parole is that it has resulted in many sex offenders being subject to sentences that do not involve supervision.[5] This has also been evident during this review.

We concluded that this was partly due to sexual offences not being eligible for court-ordered parole, meaning that when sentencing a person for a sexual offence, a court can only set an eligibility date, not a release date.[6]

The Queensland Parole System Review noted similar issues, raising concerns that:

> it may be that the effect of not allowing the court-ordered parole regime to apply to sex offences is to make it less likely that an offender who commits a sex offence is sentenced to a period of imprisonment with subsequent effective supervision and rehabilitation on parole.[7]

It recommended, as we also did in the 2019 review, that court-ordered parole should apply to a sentence imposed for a sexual offence, given evidence that a period of supervision reduces the risk of reoffending, thereby supporting the objective of community safety.[8]

Specific recommendations made by the Council in our 2019 report included:

- the introduction of a new form of community-based order – a 'community correction order' ('CCO') – which can be tailored through the conditions imposed to meet the various purposes of sentencing, while also responding to the individual factors contributing to offending (recommendation 9);
- reforms to intensive correction orders ('ICOs') to increase their flexibility, drawing on reform models adopted in other jurisdictions (recommendation 8);
- allowing courts to combine a suspended prison sentence with a CCO when sentencing a person for a single offence and, until such time as the CCO was fully operational, allowing a court to combine a suspended prison sentence with a probation order or community order when sentencing a person for a single offence (recommendations 17 and 37);[9]

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4 Queensland Sentencing Advisory Council, *Community-based Sentencing Orders, Imprisonment and Parole Options: Final Report* (July 2019) ('*Community-based Sentencing Orders, Imprisonment and Parole Options Report*').
5 Ibid 377.
6 Ibid 397–98.
7 Walter Sofronoff, *Queensland Parole System Review: Final Report* (Report, November 2016) 102–3 [507] ('*QPSR Report*').
8 Ibid 103 [508]–[509], rec 5; *Community-based Sentencing Orders, Imprisonment and Parole Options Report* (n 4) rec 47.
9 *Community-based Sentencing Orders, Imprisonment and Parole Options Report* (n 4). See also rec 42 on recommended guidance when setting the operational period for a combined suspended imprisonment sentence and community-based sentencing order.

- the investigation of whether, once the new order was operational, there may be benefit in providing courts with additional powers on breach of a CCO where combined with a suspended prison sentence, such as a power to activate a limited number of days of imprisonment due to non-compliance (recommendation 44);
- providing courts with a dual discretion to set either a parole release date or a parole eligibility date when sentencing a person for a sexual offence (recommendation 47) with potential for this to be extended to sentences of up to 5 years following a recommended review of the effectiveness of court-ordered parole (recommendations 49 and 50); and
- removal of parole as an option for sentences of imprisonment of 6 months or less for any offence, except in limited circumstances (activation of a suspended prison sentence in whole or in part and sentences imposed for offences committed on Board-ordered or court-ordered parole). This was subject to the implementation of other reforms recommended and them being operational (recommendation 51), including the availability of CCOs as an alternative (either used on their own or made in combination with a suspended prison sentence).

In our 2019 report, we noted that several other reviews had recommended a CCO model be considered for adoption; these included the 2016 Queensland Parole System Review,[10] the 2016 Queensland Drug and Specialist Courts Review[11] and the 2017 Australian Law Reform Commission ('ALRC') inquiry into the incarceration rate of Aboriginal and Torres Strait Islander peoples ('*Pathways to Justice Report*').[12]

As discussed in section 11.5.1, CCOs have now been introduced in NSW, Victoria, NT and Tasmania. The introduction of this generic form of order with a range of conditions that can be imposed drew on developments in England and Wales, which first introduced a new form of community sentence in 2003.[13] Other reviews similarly have supported the adoption of this model, including the 2019 Queensland Productivity Commission inquiry into imprisonment and recidivism,[14] and the Women's Safety and Justice Taskforce ('WSJ Taskforce') which recommended the 'Queensland Government respond to and implement' the Council's earlier recommendations with particular reference to 'the need to expand suitable, gender-specific services that support women being sentenced to community-based orders rather than short periods of imprisonment'.[15]

The former Queensland Government indicated its in-principle support for this recommendation, noting that it was 'considering the recommendations of the Queensland Sentencing Advisory Council's Community-based sentencing orders report as part of the work of the Criminal Justice Innovation Office' (now Justice Reform Office in the Department of Justice).[16] These reforms are yet to be implemented.

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10 *QPSR Report* (n 7) 97–8. The second proposal deserving consideration was introducing the ability to impose a combined suspended prison sentence and probation order as a sentence: at [477].
11 Arie Freiberg et al, *Drug and Specialist Courts Review: Final Report* (November 2016) 38, rec 8.
12 Australian Law Reform Commission, *Pathways to Justice — An Inquiry into the Incarceration Rate of Aboriginal and Torres Strait Islander Peoples* (Report No. 133, 2017) 234, rec 7-2.
13 See *Criminal Justice Act 2003* (UK). These orders became operation on 4 April 2005 and relevant provisions are now contained in the *Sentencing Act 2020* (UK). For more information on their history, see George Mair, Noel Cross, Stuart Taylor, *The Use and Impact of the Community Order and the Suspended Sentence Order* (Centre for Crime and Justice Studies, 2007).
14 *Inquiry into Imprisonment and Recidivism* (n 3) vol 1, 303, rec 9.
15 *Hear Her Voice, Report Two* (n 3) vol 2, 572, rec 127.
16 Queensland Government, *Queensland Government Response to the Report of the Queensland Women's Safety and Justice Taskforce, Hear Her Voice–Report Two: Women and Girls' Experiences Across the Criminal Justice System* (November 2022) 39 ('*Response to Hear Her Voice, Report Two*').

For reasons discussed in section 11.2.1, we continue to consider that these recommendations have strong merit and would result in better sentencing outcomes for sexual violence offending, including more people being subject to supervision and having access to relevant program and treatment conditions.

11.2.2 Serious violent offence scheme and parole options for sexual offences

In **Chapter 7**, we presented our finding that sentences are not adequate for rape, particularly as this applies to offences against children (**Key Finding 4**). We consider that the operation of the serious violence offences ('SVO') scheme may be contributing to this inadequacy.

The SVO scheme requires a person sentenced in the District or Supreme Courts and convicted of the relevant listed offences[17] to serve 80 per cent of their sentence (or 15 years, whichever is less) in prison before being eligible for release on parole.[18] The making of a declaration is mandatory for sentences of imprisonment of 10 years or more and discretionary for sentences of imprisonment greater than 5 years and less than 10 years. There is also discretion to make a declaration for any offence, or for a listed offence that results in a sentence of less than 5 years, if the offence involved the use or attempted use of serious violence, or resulted in serious harm to another person.[19]

Just over one in 10 sentences for rape (MSO) involved the making of an SVO declaration, and most were made on a mandatory basis. However, sentences falling just below this level are also likely to be impacted by the SVO scheme. There were no SVO declaration for sexual assault (MSO).

In our 2022 report, *The '80 Per Cent Rule': The Serious Violent Offences Scheme in the Penalties and Sentences Act 1992 (Qld)* ('*The "80 Per Cent Rule*"'),[20] we found it restricts the maximum period an offender can be subject to supervision in the community and may discourage offenders from applying for parole.[21] We also found evidence of the scheme having a 'distorting effect'[22] on head sentences, reducing the sentence that might otherwise have been imposed had it not applied.[23]

We concluded that the reduction of sentences to take the making of a declaration into account did not mean sentencing judges were deliberately 'avoiding' or intentionally subverting the scheme. It was simply a consequence of the fixed nature of the non-parole period that applies under the scheme, and its mandatory application once a sentence of 10 years is imposed, as a court must take the making of the declaration into account as part of the integrated approach to sentencing.[24]

---

17 *Penalties and Sentences Act 1992* (Qld) ss 161A–161B, sch 1 ('PSA'). Also includes 'counselling, procuring, attempting or conspiring to commit such an offence': s 161A(a)(i)(B).
18 *Corrective Services Act 2006* (Qld) s 182 ('CSA').
19 PSA (n 17) s 161B(4). While the court also has discretion to declare rape or sexual assault as an SVO where a sentence of less than 5 years' imprisonment, if it involved the use, or attempted use, of serious violence or resulted in serious harm to another person, provided the offence is dealt with on indictment, we found no sentencing outcomes where this occurred since 2011.
20 Queensland Sentencing Advisory Council, *The '80 per cent Rule': The Serious Violent Offences Scheme in the Penalties and Sentences Act 1992 (Qld): Final Report* (Report, May 2022) ('*The "80 per cent Rule"*').
21 Ibid 120, key finding 1.
22 See *R v Sprott; Ex parte A-G (Qld)* [2019] QCA 116 [41] (Sofronoff P, Gotterson JA and Henry J agreeing).
23 *The '80 per cent Rule'* (n 20) 253.
24 Ibid 120, key finding 3.

We also acknowledged that it was unclear whether, and if so by how much, head sentences might increase if the SVO scheme did not exist at all and courts instead had full discretion to set parole eligibility. It is not usual for courts to specify the reduction given in this way.[25]

While we found that the current SVO scheme may achieve its sentencing purposes of punishment, denunciation and, at least in the short-term, community protection, we determined that it only achieves this in part. Meeting these sentencing purposes is compromised by the fixed non-parole period at 80 per cent and its mandatory application to sentences of 10 years or more. We did not find evidence that the SVO scheme supported long-term community protection; to the contrary, it was found that it may be counter-productive to achieving this objective. This is because a person under the scheme will spend less time in the community under supervision or be released at the end of their sentence without supervision.[26] A review of the research literature found that more, rather than less, time under parole supervision supports the objective of community safety.[27]

We were also concerned about the low number of declarations made below the 10-year mandatory threshold. Victim survivors during our 2022 review told us that the minimum time a person is required to serve in custody prior to parole eligibility matters to their sense of justice being done and the person having received an adequate punishment.[28] They also told us that when the parole eligibility date is very close to the date of sentence, this can cause them significant anxiety and distress and that deferral of this date as long as possible would support their recovery and ability to get on with their lives.[29]

Similar concerns were expressed during the current review. For example, Queensland Sexual Assault Network ('QSAN') told us that victim survivors 'have overwhelming fear when the offender is released' from custody and 'a sense of injustice if this occurs immediately after the trial'.[30] However, a victim survivor told us that more time under supervision is important from a community safety perspective.[31] This suggests that a balance must be struck between the minimum time spent in custody and the time available to be spent under supervision in the community.

Following our earlier review, we recommended significant reforms to the SVO scheme (which we also recommended be renamed 'serious offences scheme').[32] We recommended that the SVO scheme be changed to a presumptive scheme for sentences of greater than 5 years with discretion when a declaration is made to set the parole eligibility date between 50 and 80 per cent.[33] We proposed that rape and aggravated sexual assault should be retained as offences to which the reformed scheme applies.

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25 Ibid key finding 4. There are, however, some examples of this. See, for example, *R v O'Sullivan and Lee; Ex parte A-G* (Qld) [2019] 3 QR 196 ('*O'Sullivan*'). The Court noted: 'It is usually wrong to attempt to try to put forward a mathematical formula to explain the degree to which factors in mitigation of sentence have affected a penalty that would otherwise have been imposed in their absence'. However, this was viewed as being 'necessary to explain as fully as possible the effect of … legislative changes' discussed in that judgment 'upon the range of sentences that have been wrongly accepted as a basis for sentencing'. It found that, taking into account the factors in mitigation, particularly his early guilty plea, the sentence should be one of 12 years for manslaughter reduced from a 15-year sentence that would have otherwise been appropriate: at 247 [163].

26 *The '80 per cent Rule'* (n 20) xvi–xvii.

27 See *University of Melbourne Literature Review* (n 2) 11–14.

28 *The '80 per cent Rule'* (n 20) 181–2.

29 Ibid.

30 Submission 24 (QSAN) 8.

31 Victim Survivor Interview 4.

32 *The '80 per cent Rule'* (n 20) rec 3.

33 Ibid recs 2, 9. Note, for listed drug offences we recommended the presumption apply when sentences are 10 years or more (rec 8).

Under our proposals, once a declaration is made, a court would have a discretion to set the parole eligibility date between 50 and 80 per cent of the head sentence. We recommended that flexibility because it would limit head sentences being reduced to make proper allowance for a person's plea of guilty and other factors in mitigation, which would otherwise (under a fixed model) only be able taken into account by reducing the head sentence.

This recommendation was made noting all examples of sentenced serious offences, including rape and aggravated sexual assault, that attract sentences of 5 years or more are serious and therefore a substantial proportion of the sentence should be required to be served in custody in support of just punishment and denunciation regardless of whether the person has pleaded guilty (which in Queensland, often results in parole eligibility being set at one-third below the usual statutory parole eligibility date of 50%).[34]

A court would retain the ability not to make a declaration where not doing so was considered to be in the interests of justice. This reflected our concern about the importance of achieving a just sentence in all the circumstances — which has been recognised by the Queensland Court of Appeal as 'the paramount objective of sentencing'.[35]

The expected outcomes of our reforms, if adopted, including for rape and aggravated sexual assault, were:

- more SVO declarations being made for sentences of imprisonment of 5 years or more, and less than 10 years. That would mean more people sentenced for these offences being required to serve a greater proportion of their sentence in custody (at a minimum, 50 to 80%) before being eligible for release on parole;
- the potential to achieve longer head sentences in Queensland as the mandatory declaration for sentences of 10 years or more would be removed and courts would have the ability to set parole eligibility within a range of 50 to 80 per cent to recognise mitigating factors.

These reforms are yet to be legislated.

11.3 Overview of sentencing outcomes

As discussed in **Chapter 4**, the Council undertook a detailed review of sentencing trends for rape and sexual assault based on cases sentenced over an 18-year period (2005–06 to 2022–23). The findings are detailed in **Appendix 4.** This section presents a high-level summary of some of these findings.

11.3.1 Rape: Key sentencing trends

Penalty types

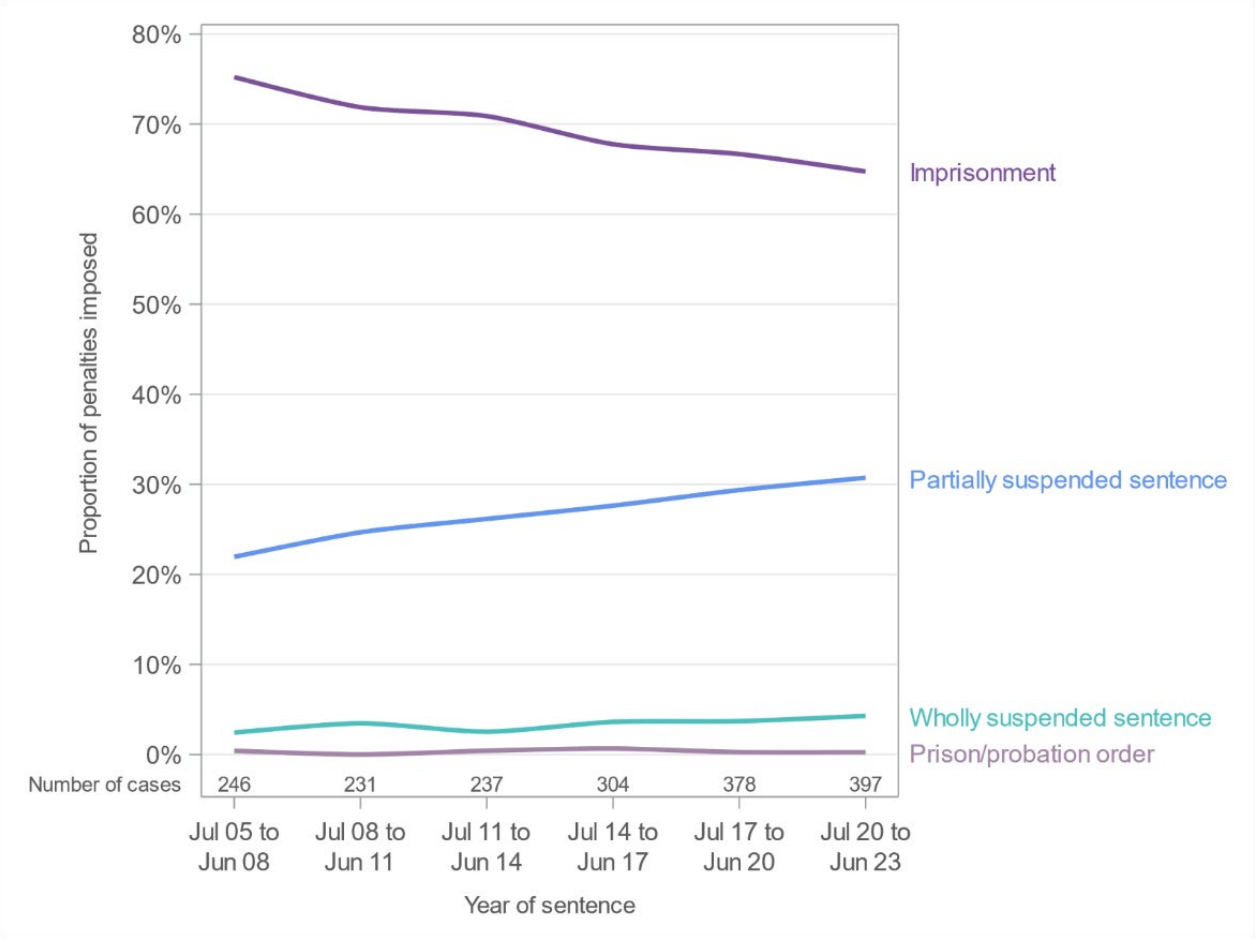
The Council's analysis identified the following key trends in the sentencing of rape offences in Queensland over an 18-year period (2005–06 to 2022–23):

34 CSA (n 18) s 184(2). There are some legislative exceptions to this, such as prisoners sentenced for an offence with a serious organised crime circumstance of aggravation.
35 *R v Randall* [2019] QCA 25 [37] (Sofronoff P and Morrison JA and Burns J).

1	**Almost all people sentenced for rape had to serve time in prison as part of their sentence:** Over the 18 years, 98.7 per cent of all penalties imposed for rape were custodial and of those; 96.5 per cent required the person to serve time in prison.
2	**The use of partially suspended sentences is increasing:** The proportion of prison sentences with a parole eligibility date decreased as the proportion of partially suspended sentences increased.
3	**Suspended sentences were commonly ordered alongside probation where this option was open:** Nearly three-quarters of cases resulting a partially suspended sentence had a co-sentenced offence sentenced at the same court event (73.5%). The most common co-sentenced penalty was another partially suspended prison sentence (75.6%), followed by imprisonment (38.0%) and probation (31.3% – representing 23% of all partially suspended sentences for rape (MSO)).
4	**Aboriginal and Torres Strait Islander people were more likely to be given a sentence of imprisonment than non-Indigenous people:** Aboriginal and Torres Strait Islander people were no more or less likely than non-Indigenous people to receive a custodial penalty (98.8% v 98.6%), though were more likely to receive a sentence of imprisonment (80.0% v 65.0%), and less likely to receive a partially suspended sentence (16.2% v 31.1%) than non-Indigenous people. These findings are statistically significant. There was no statistical difference in custodial sentence length.

As shown in Figure 11.1, in the most recent 3-year period examined, partially suspended prison sentences represented just under one-third of custodial sentences imposed (30.7%) while imprisonment sentences represented close to two-thirds of penalties (65.7%).

Figure 11.1: Custodial penalty type imposed for rape (MSO), by year of sentence (grouped)



Data notes: MSO, adults, higher courts, 2005–06 to 2022–23. Intensive correction orders (n=1) were included in the calculations but have not been presented in the figure.
Source: Queensland Government Statistician's Office, Queensland Treasury – Courts Database, extracted September 2023.

Sentence lengths and time in custody

Over the same 18-year data period (2005–06 to 2022–23):

5	**Custodial sentence lengths remained relatively stable:** The median custodial sentence length for rape ranged each year between 5.0 and 6.0 years (with the average ranging between 5.1 and 6.3 years) (this takes into account the combined length of all types of custodial penalties imposed for rape (MSO) each year).
6	**For those sentenced to imprisonment, most people had parole eligibility fixed at or below 50 per cent of their head sentence, although additional time was often spent in custody beyond a person's parole eligibility date prior to release:**[36] Three-quarters of people who pleaded guilty (74.4%) had their parole eligibility set below 50 per cent and more than half (55.8%) had it set at or below one-third of the head sentence. In contrast, for people who were found guilty following a trial, only 17.6

[36] This data is reported for a shorter data period and includes an analysis of cases sentenced between July 2011 and June 2023.

	per cent had parole eligibility set below 50 per cent of the head sentence.[37] The median time served in prison beyond the parole eligibility date before being released was 211.5 days, or approximately 7 months (average 267.8 days).[38]
7	**The median time to serve prior to release for partially suspended prison sentences was one-third of the head sentence:** The median sentence length for partially suspended prison sentences was 3.0 years, with a median time to serve prior to release of 1.0 years. There were no differences by gender or Aboriginal and Torres Strait Islander status. The median operational period was 4.0 years (3 years longer than the median time to serve and one year longer than the imprisonment term).
8	**For cases sentenced between July 2011 and June 2023 resulting in imprisonment, over two-thirds of cases involved pre-sentence custody declared as time served under the sentence with additional time to serve**: The median time declared was just over 10 months (313.0 days).
9	**For cases sentenced between July 2011 and June 2023 resulting in a partially suspended prison sentence, just under one in 3 (32.7%) involved declared pre-sentence custody with additional time to serve in custody prior to suspension:** In just over one in ten cases (12.4%) time was declared with no additional time to serve prior to suspension. The median time declared was just over 6 months (189 days).

11.3.2 Sexual assaults: Key sentencing trends

Penalty order types

The pattern of sentencing outcomes for sexual assault offences was very different from rape, taking into account the lower maximum penalty that applies to non-aggravated forms of offending, which are the most common, and the type of conduct involved – much of which involves acts of non-consensual indecent touching.

The Council's analysis identified the following key trends over the 18-year data period (2005–06 to 2022–23):

10	**The use of custodial sentences has increased in the Magistrates Courts while remaining relatively stable in the higher courts:** In the Magistrates Courts, sentences of imprisonment and wholly suspended sentences both increased over the 18-year period, while the use of monetary penalties decreased. In the higher courts, the use of wholly suspended sentences for non-aggravated assault has increased over time while the use of imprisonment has decreased.

37 Note these findings are for a shorter data period than other date reported in this table. They involve cases sentenced over a 12-year data period (1 July 2011 to 30 June 2023), as data regarding parole eligibility was not available prior to this time.

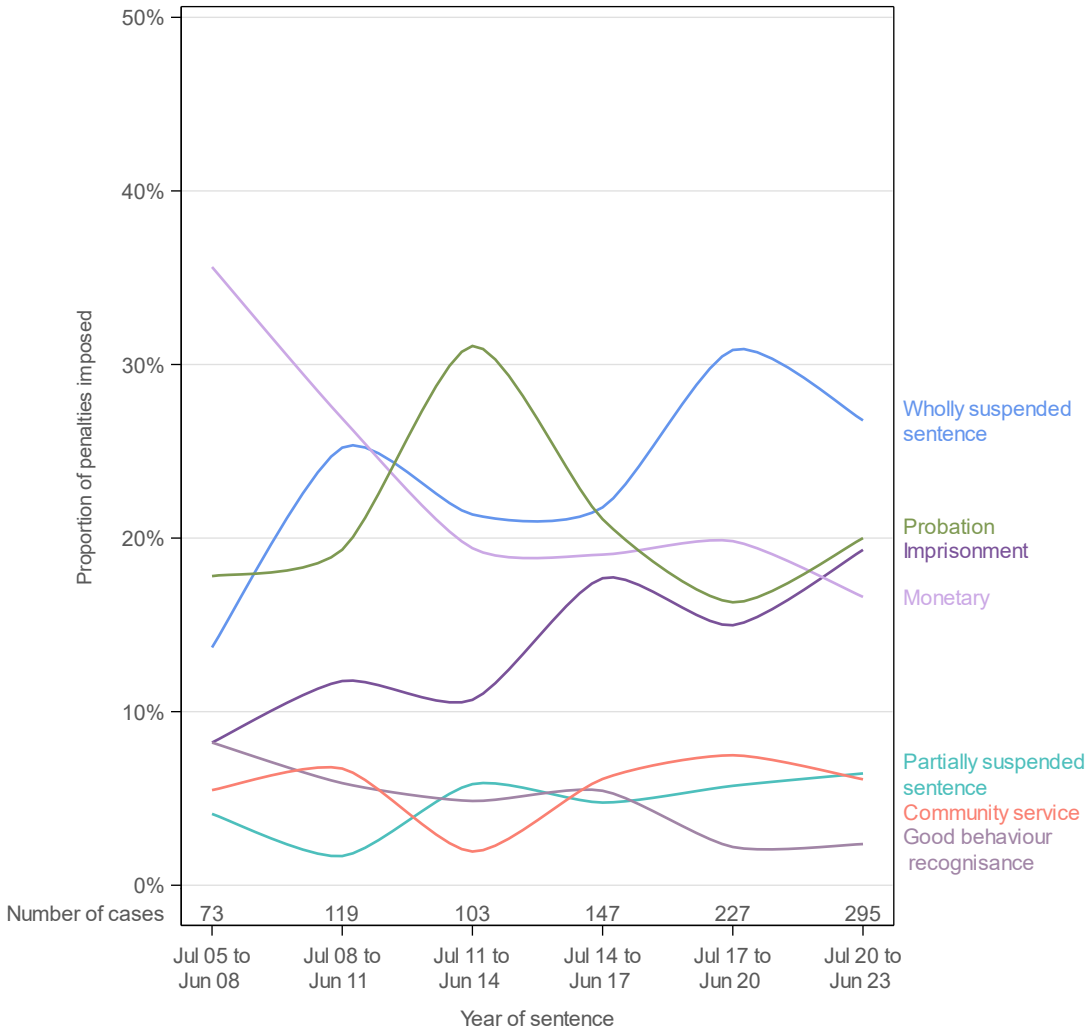
38 In *The '80 per cent Rule'* (n 20), we found that for people sentenced to 5 years or more but less than 10 years' imprisonment (with no SVO declaration), rape was one of the least likely categories for a parole application to be approved (62% compared to deal or traffic in illicit drugs 91% and grievous bodily harm 81%): at 114–15, fig 34.

11	**Wholly suspended sentences were the most common penalty imposed for non-aggravated sexual assault in both the higher and lower courts:** Wholly suspended sentences were ordered in just over one-quarter of all cases in the Magistrates Courts (25.2%) with a median sentence length of 6 months. Just over one-third of all sentences in the higher courts (37.4%) had a wholly suspended sentence imposed, with a median sentence of 9 months.
12	**Almost all aggravated sexual assaults received custodial penalties:** A custodial penalty was imposed in 95.1 per cent of sexual assault (aggravated) and 96.3 per cent of sexual assault (aggravated life) cases. The most common penalties were partially suspended sentences and imprisonment.
13	**Aboriginal and Torres Strait Islander people were more likely to receive a custodial penalty than non-Indigenous people:** One in 5 sexual assault cases were committed by an Aboriginal and Torres Strait Islander person and the overwhelming majority were for non-aggravated sexual assault (95.1%). The majority of Aboriginal and Torres Strait Islander people sentenced received a custodial penalty (81.8%) compared with under two-thirds of non-Indigenous people sentenced (60.2%).
14	**Over half of all people sentenced to a custodial penalty were sentenced for another offence:** Over half (55.2%) of all cases with a custodial penalty were sentenced for another offence at the same hearing. It was more common to combine a suspended sentence with a probation order for sexual assault and other sexual offences, in comparison to other offence types.

Sentences of imprisonment and wholly suspended sentences both increased over the data period in the Magistrates Courts, while the use of monetary orders decreased (see Figure 11.2).

For cases sentenced over the most recent 3-year period (July 2020 to June 2023), the most common penalty imposed for non-aggravated sexual assault cases sentenced in the Magistrates Courts was a wholly suspended sentence (26.8%), followed by probation (20.0%), imprisonment (19.3%) and monetary penalties (16.6%).

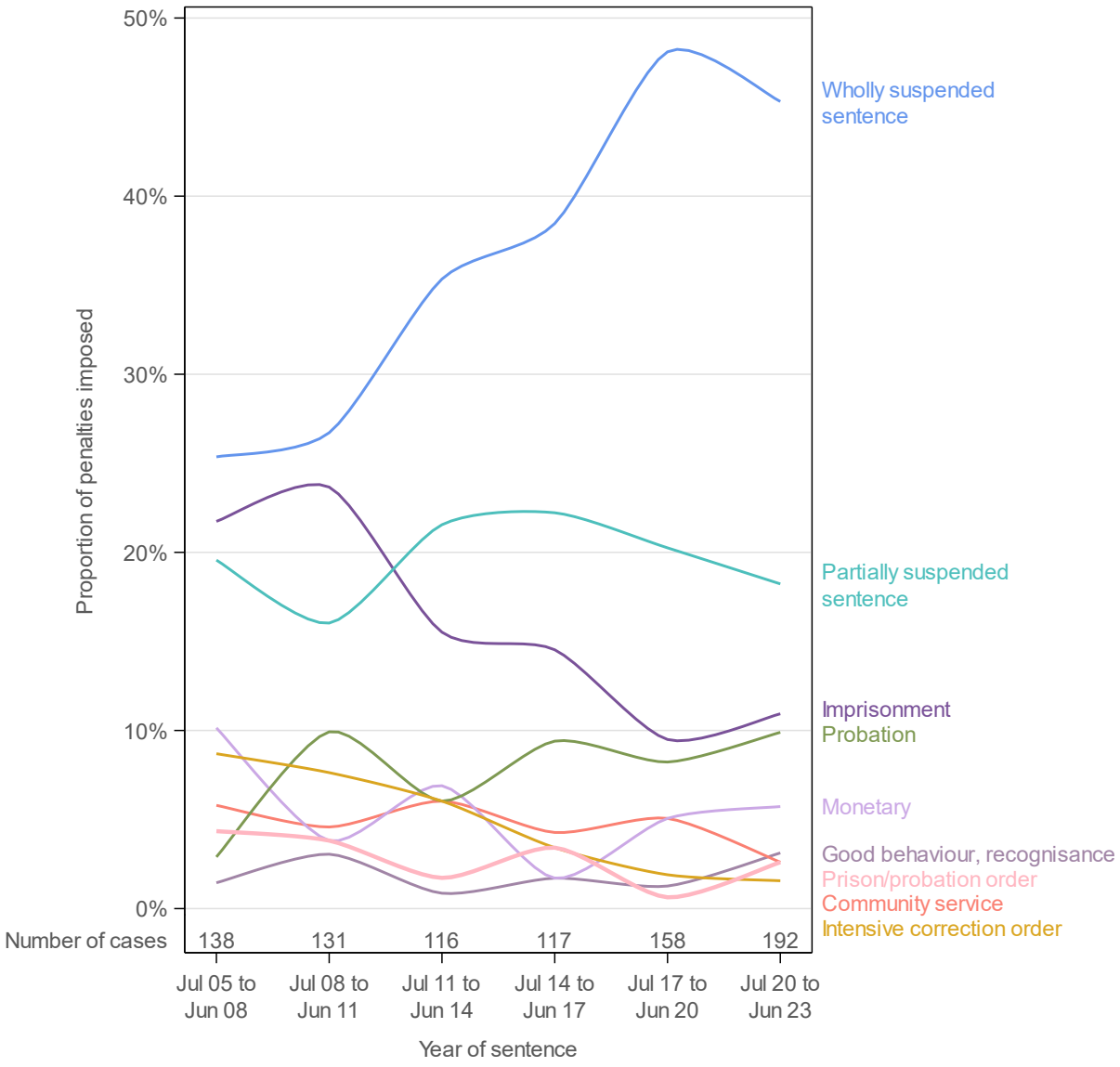
Figure 11.2: Penalties imposed for non-aggravated sexual assault (MSO) in the Magistrates Courts, by year of sentence (grouped)



Data notes: Non-aggravated sexual assault (MSO), adults, Magistrates Courts, 2005–06 to 2022–23. Rising of the court (n=1), Convicted – not further punished (n=7), intensive corrections order (n=8), and combined prison/probation orders (n=15) were included in the calculations but have not been presented in the figure. See the supplementary data table for more detail regarding the data underlying this figure.
Source: Queensland Government Statistician's Office, Queensland Treasury – Courts Database, extracted September 2023.

As shown in Figure 11.3, over the most recent 3-year period (July 2020 to June 2023), the most common penalty imposed for non-aggravated sexual assault cases sentenced in the higher courts was a wholly suspended sentence (45.3%), followed by partially suspended sentences (18.2%) and imprisonment (10.9%).

Figure 11.3: Penalties imposed for non-aggravated sexual assault (MSO) in the higher courts, by year of sentence (grouped)



Data notes: Non-aggravated sexual assault (MSO), adults, higher courts, 2005–06 to 2022–23. Rising of the court (n=1) and convicted not further punished (n=1) were included in the calculations but have not been presented in the figure. See the supplementary data table for more detail regarding the data underlying this figure.
Source: Queensland Government Statistician's Office, Queensland Treasury – Courts Database, extracted September 2023.

Sentence lengths, time to serve, time declared and operational periods

We also analysed sentence lengths, operational period for suspended prison sentences and time to serve in custody finding:

15	**Sentence lengths for orders involving actual imprisonment are consistent, but differ by court level.** Over the 18-year data period, the median imprisonment sentence length for non-aggravated sexual assault offences in the higher courts was 15 months, and 9 months in the Magistrates Courts.

	For partially suspended sentences, the median sentence length for cases sentenced in the higher courts was 15 months, and 9 months for partially suspended sentences imposed in the Magistrates Courts.
16	**For cases sentenced between July 2011 and June 2023 resulting in imprisonment, the median time to serve before being eligible for release on parole varied by court level and plea.** For non-aggravated sexual assault sentenced in the Magistrates Courts (plea of guilty), the median time to serve prior to parole eligibility was just under 2.5 months (0.2 years). In the higher courts, those sentenced for sexual assault (both aggravated and non-aggravated) who pleaded guilty were eligible for release on parole after serving a median of just over 9.5 months (0.8 years). Those who did not plead guilty had to serve a median of 6 months (0.5 years) prior to parole eligibility with an average time to serve of just over 7 months (0.6 years).
17	**The median time to serve under a partially suspended prison sentence also varied by court level.** In the Magistrates Courts, the median time to serve was just under 3 months (2.9 months), ranging from about 12 days (0.4 months) to just under 10 months (9.7 months). In the higher courts, for those sentenced after pleading guilty the median time to serve was 4 months, ranging between about 15 days (0.5 months) to just over 1 year and 5 months (17.5 months) prior to release. For those who did not plead guilty, the median time to serve was also 4 months, ranging from about 1 month and 17 days (1.6 months) to 18 months.
18	**For cases sentenced between July 2011 and June 2023, 3 in 5 sentences of imprisonment (58.2%) had pre-sentence custody declared as time served under the sentence, while this was also the case for close to half (48.7%) of partially suspended sentences.** For sentences of imprisonment: over one in 4 (42.6%) had time declared that was less than the time spent already in custody, while 15.6 per cent had time declared that equalled the sentence length. The median time declared was just under 4 months (116 days). For partially suspended sentences, one in 5 (20.1%) had time declared that was less than the time to be served prior to release, while more than one in 4 had time declared which equalled the time to serve before release (28.6%). The median days declared pre-sentence custody for a partially suspended sentence was just over 3 months (92.5 days, average was about 4 months and 15 days (139.1 days)).
19	**Probation orders were longer than time required to be spent in custody under imprisonment or a partially suspended prison sentence**: Across the 18-year data period, the median length of probation orders imposed in the Magistrates Courts

	was 15 months (average 16.2 months). For cases sentenced in the higher courts, the median length of a probation order was 18 months (1.5 years).
20	**The length of wholly suspended sentences, the median sentence length varied by court level:** For cases sentenced in the higher courts, the median sentence length for wholly suspended prison sentences was about 9.5 months (0.8 years). In the Magistrates Courts, the median sentence length for wholly suspended prison sentences was 6 months.
21	**For suspended sentences, the median operational period varied by sentence type:** Across both court levels, median operational periods were highest for partially suspended prison sentences at 2 years, and lowest for wholly suspended prison sentences at 18 months.

11.4 How Queensland compares with other jurisdictions

As discussed in **Chapter 7**, there are challenges in comparing sentencing outcomes across jurisdictions. While there are many similarities between the types of sentencing orders available, there are also important differences.

Acknowledging these limitations, we present a high-level overview of how Queensland compares with the use of imprisonment and sentencing outcomes for sexual assault offences.

We also discuss differences in the range of sentencing orders available to courts and the setting of non-parole periods where relevant throughout this chapter. More information can be found in our **Consultation Paper: Background**.[39]

11.4.1 Number of people in prison and community corrections

The 2023 *Prisoners in Australia* report produced by the Australian Bureau of Statistics ('ABS'), which reported on prisoners in custody as at 30 June 2023, found that Queensland had the second highest number of sentenced prisoners (n=6,488) and unsentenced prisoners (n=3,686) of all states and territories.[40]

When considering 'sexual assault and related offences' as the most serious offence/charge and Aboriginal and Torres Strait Islander status, Queensland had the second highest number of Aboriginal and Torres Strait Islander prisoners (n=396)[41] and the third highest number of non-Indigenous prisoners (n=1,021).[42]

Based on data for the September 2024 quarter published by the ABS,[43] Queensland prisoners numbers remain high. For this quarter, Queensland reported 10,858 prisoners, of whom 6,676 were sentenced.[44]

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39 Queensland Sentencing Advisory Council, *Sentencing of Sexual Assault and Rape: The Ripple Effect - Consultation Paper: Background* (March 2024) ('*Consultation Paper: Background*').
40 Australian Bureau of Statistics, *Prisoners in Australia 2023* (25 January 2024) Table 14 ('*Prisoners in Australia 2023*'). NSW was the highest with 7,499 sentenced prisoners and 4,818 unsentenced prisoners.
41 Ibid. NSW had 408.
42 Ibid. NSW had 1,903 and Victoria had 1,035.
43 Australian Bureau of Statistics, *Corrective Services Australia – September Quarter 2024* (28 November 2024).
44 Ibid Table 7.

Queensland's sentenced prisoners rate per 100,000 population was 154.0 – higher only than Western Australia and the Northern Territory.[45] NSW had a sentenced prisoners rate much lower than Queensland (110.0), as did Victoria (70.8).[46] The rate of remand prisoners in Queensland was also higher in Queensland (95.1) than in NSW and Victoria (85.6 and 36.1 respectively).

The number of people in community corrections in the September 2024 quarter in Queensland was just over half the number in NSW (18,903 compared with 36,642 in NSW).[47] This count includes people on parole, but excludes people on suspended sentences in Queensland who are not subject to QCS supervision.

11.4.2 Sentencing practices for 'Sexual assault and related offences'

While we have not attempted a detailed quantitative comparison of sentencing outcomes with other jurisdictions, given jurisdictional differences, the data published by the ABS based on a standardised offence classification scheme provides a high-level indication on types of sentencing outcomes commonly imposed by jurisdiction. However, as noted above, a direct comparison by offence type is not possible and there is variation across jurisdictions regarding the types of sentencing orders given.

The standardised offence classification scheme that is used is broad in scope, rather than reporting on sentencing outcomes for specific offences, such as rape and sexual assault. There are also differences in the types of penalties available in individual jurisdictions and how these are mapped to the standard ABS sentence type classification. For more information see **Appendix 9**.

Despite these limitations, we note that for the broad category of 'Sexual assault and related offences' based on higher courts data, compared with New South Wales, Victoria and Western Australia, Queensland had:

- the lowest proportion of sentences involving custody in a correctional institution (67%) the definition of which includes partially suspended prison sentences, compared with just under three-quarters of penalties in Victoria (73%) and Western Australia (74%), and 81 per cent in New South Wales;
- the second highest proportion of fully suspended prison sentences (17%) behind Western Australia (19%) where, in contrast to Queensland, conditions can be ordered, while NSW had none following the abolition of these orders;
- the highest proportion of 'moderate penalty in the community' orders (11%), with NSW having the equivalent percentage of 'intensive penalty in the community' orders;
- the equal lowest use of community service/work orders, with Western Australia representing just 1 per cent of penalties, compared to Victoria, for which 10 per cent of orders involved community work.[48]

At the Magistrates Court level, in comparison to NSW, Victoria and Western Australia, Queensland had:

45 Ibid Table 8.
46 Ibid.
47 Ibid Table 14.
48 See Appendix 9, Cross-jurisdictional analysis of sentencing outcomes (Queensland, NSW, Victoria and Western Australia).

- the second highest proportion of sentences involving custody in a correctional institution, (including imprisonment and partially suspended prison sentences (26%), second only to NSW (29%);
- the highest proportion of fully suspended prison sentences (18%) followed by Western Australia (12%) noting that NSW and Victoria have removed this as a sentencing option for state offences;
- the second highest use of 'moderate penalties in the community' (e.g. in Queensland, orders such as probation) (22%), although NSW in particular had a far greater proportion overall of community-based penalties (described as 'intensive penalty in the community', 'community service/work' and 'moderate penalty in the community') (49% of penalties in NSW compared to 27% in Queensland);
- the second highest use of fines (25%) behind Western Australia, which made extensive use of monetary penalties/fines (52% of penalties). A relatively small percentage of orders in NSW (6%) involved monetary orders while 18 per cent of penalties in Victoria were monetary penalties;
- the lowest use of good behaviour orders/bonds (4% of penalties) behind Western Australia which reported none. In comparison, good behaviour orders were much more commonly used in Victoria (19% of penalties) and NSW (15% of penalties). Victoria also had a significant proportion of 'nominal and other penalties' (14%).[49]

11.5 Problems identified during this review

An exploration of key sentencing trends, and the issues raised by stakeholders regarding current sentencing practices, suggests that penalty and parole options may not provide the best framework to achieve the intended objectives in sentencing for sexual assault and rape.

In the following sections, we discuss the problem identified, what stakeholders have told us, what we know about the purpose of the sentencing orders examined and their effectiveness, and what other jurisdictions do.

11.5.1 Issue 1: Supervision, parole and the use of suspended sentences

Introduction

Following our earlier 2019 *Community-based Sentencing Orders and Parole Options Report*, we concluded that there is a lack of flexibility in the current mix and range of penalty options in Queensland.[50] We found this was contributing to the high use of suspended prison sentences for sexual offences, including sexual assault and rape.[51] As a consequence, orders were being made that did not involve the person being actively supervised or required to engage with treatment and other forms of interventions in the community. Examples of restrictions included:

- There is an inability to order a suspended prison sentence with probation when sentencing a person for a single offence; this is only an option when sentencing a person for two or more offences.

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49 Ibid.
50 *Community-based Sentencing Orders, Imprisonment and Parole Options Report* (n 4).
51 Ibid.

- For sentences of 3 years or less, a court is not permitted to set a parole release date when sentencing a person for a sexual offence.[52]

As discussed in section 11.5.4, this also related to the flexibility of the current suite of community-based orders which we recommended be reformed.

The reason why court-ordered parole was restricted for sexual offences and the unintended impacts

When court-ordered parole was introduced in 2006, the reason for excluding people sentenced for sexual and (declared) serious violent offences from the scheme was due to their higher level of risk.[53] The 'provision of programs to sex offenders and violent offenders to address criminogenic needs and reduce recidivism risk' was identified by the minister as of primary importance in the management of these offenders.[54] The Queensland Court of Appeal observed, 'The evident intent [of excluding these offenders from the scheme] is that each offender would be considered individually with respect to suitability for early release into the community'.[55]

In practice, restricting the availability of this option has resulted in other orders being made to achieve certainty of release. For example, it may result in a decision by the court to suspend a prison sentence, taking into account the substantial time that person might already have spent in custody on remand, the potential delays they may experience in having their application for parole determined by the Parole Board and issues regarding program access, including the times of the year when these are offered and their length (see further section 11.5.3).

Many stakeholders told us the availability of court-ordered parole for sexual offences would be a preferable option to the use of combination orders (where open) or suspended prison sentences, given the powers of Queensland Corrective Services ('QCS') officers to immediately respond to issues of non-compliance and escalating risk for people on parole.

Nature of suspended sentences of imprisonment

Suspended sentences of imprisonment in Queensland can be of one of two types: a wholly suspended prison sentence (in which case no time is spent in custody under the sentence, although they may have served a substantial period on remand) or a partially suspended prison sentence (in which case the person must spend some time in custody prior to rest of the sentence being suspended).[56] The period of time for which the sentence is suspended is called the 'operational period' and must be not less than the term of imprisonment imposed and not more than 5 years.[57]

The process of imposing a suspended prison sentence involves a two-step process. A court must first determine that a sentence of imprisonment is appropriate and then it must decide whether it is appropriate for the sentence to be suspended in whole or in part.[58] In making this determination, all the circumstances relevant to both the offence and the person sentenced must be considered and should

52 PSA (n 17) s 160D.
53 Queensland, *Parliamentary Debates*, Legislative Assembly, 29 March 2006, 941 (Judy Spence, Minister for Police and Corrective Services).
54 Ibid.
55 *R v Waszkiewicz* [2012] QCA 22, 7 [32] (White JA, de Jersey CJ and Atkinson J agreeing).
56 PSA (n 17) s 144.
57 Ibid s 144(6).
58 *Dinsdale v The Queen* (2000) 202 CLR 321, 346 [55] (Kirby J).

not be limited 'to the effect which suspension would have on rehabilitation of the offender'.[59] The court may consider whether the person requires supervision in the community under a parole order or can be 'left to [their] own guidance' based on their assessed level of risk.[60]

A suspended imprisonment sentence can serve various sentencing purposes, as explained in *R v Nona*:[61]

> a wholly suspended sentence serves the proper purposes of denunciation and general deterrence through the imposition of the term of imprisonment, rehabilitation through the opportunity for reform provided by its suspension and personal deterrence through the suspension being conditional upon the offender not committing another offence punishable with imprisonment.[62]

The courts have long recognised that a suspended sentence of imprisonment is a significant punishment in itself[63] and not a mere exercise in leniency.[64] It is often described in terms of a person having the 'sword of Damocles' hanging over their head during the operational period of the order.[65] The punitive and denunciatory aspects of the sentence include:

- its status as a custodial (prison) sentence requiring the person to serve additional time in custody (in the case of a partially suspended sentence) or being liable to serve time in custody (in the case of a wholly suspended sentence) if they commit further offences during the operational period of the order; and
- the fact that a conviction must be recorded,[66] meaning the court has no choice about whether to do so, which may have potential consequences for the person's future employment, ability to obtain certain licences (such as a security or firearms licence) and to be permitted to travel to some countries.[67]

If the person subject to a suspended imprisonment sentence commits an offence punishable by imprisonment during the operational period, a court must order the person to serve the whole of the term of suspended imprisonment unless it considers it would be unjust to do so, and particular factors in the PSA assist courts to make this determination.[68] Other options include extending the operational period of the sentence for up to 12 months or ordering that the person serve all or part of the suspended imprisonment.[69] The consequences of breaching a suspended prison sentence are therefore very different from a person on a parole order as it is the sentencing court, not the Parole Board, that decides how to respond to the breach.

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59 Ibid 348–9 [84]–[86] (Kirby J, Gaudron and Gummow JJ agreeing at [26]). See also [18] (Gleeson CJ and Hayne J).

60 *R v Wano; Ex parte A-G (Qld)* [2018] QCA 117, 6 [34] (Henry J). In this case, the Court noted that the sentencing judge 'was left unassisted by any submissions by the prosecution below in respect of this important point': ibid.

61 [2022] QCA 26.

62 Ibid 17 [83] (Henry J, Bond JA and Boddice J agreeing but giving separate orders) citing Heather Douglas and Suzanne Davina Harbidge, *Criminal Process in Queensland* (Thomson, 2008) 276 [12.150]; Mirko Bagaric, *Ross on Crime* (Thomson Reuters, 8th ed, 2018) 1398 [19.2350]; Mirko Bagaric, Theo Alexander and Richard Edney, *Sentencing in Australia* (Thomson Reuters, 6th ed, 2018) 684 [700.3500].

63 *Elliot v Harris (No 2)* (1976) 13 SASR 516; *DPP (Cth) v Carter* [1998] 1 VR 601; *Sweeney v Corporate Security Group* (2003) 86 SASR 425 [92]–[99].

64 *Reilly v The Queen* [2010] VSCA 278 [36]; *DPP (Cth) v Carter* [1998] 1 VR 601, 607-8; *DPP v Buhagliar and Heathcote* [1998] 4 VR 540, 547 (Batt and Buchanan JJA).

65 See, for example, statements to this effect by McMurdo P in *R v Harrison* [2015] QCA 210, 8; and *R v Moxon* [2015] QCA 65, 9 [33]; and Fryberg J in *R v Alvin* [2004] QCA 422, 11.

66 PSA (n 17) s 143.

67 It may also result in a person becoming a reportable offender under the *Child Protection (Offender Reporting and Offender Prohibition Order) Act 2004* (Qld).

68 PSA (n 17) ss 147(2)–(3). Factors the court must have regard to include the seriousness of the original offence, including any physical or emotional harm done to a victim and any damage, injury or loss caused by the offender: s 147(3)(b).

69 Ibid s 147.

The determination of the breach involves another significant court hearing (usually involving the original sentencing court), during which submissions are made and evidence is led regarding what action should be taken, including whether the whole of the suspended prison term should be activated (that is, required to be served).

It has been suggested that the efficacy of a suspended prison sentence as a punitive sanction is necessarily tied to the first aspect regarding the nature of this sanction and whether it is activated on breach.[70] Otherwise, 'if the conditions imposed on the offender are fairly minimal and courts react to breaches of those conditions with indulgence, the [suspended] sentence may be no more severe than a term of probation'.[71]

In *Dinsdale v The Queen*,[72] Kirby J described the tension between the suspended sentence of imprisonment's status at law as a significant penalty and community views as to its practical effect:

> The question of what factors will determine whether a suspended sentence will be imposed, once it is decided that a term of imprisonment is appropriate, is presented starkly because, in cases where the suspended sentence is served completely, without reoffending, the result will be that the offender incurs no custodial punishment, indeed no actual coercive punishment beyond the public entry of conviction and the sentence with its attendant risks. Courts repeatedly assert that the sentence of suspended imprisonment is the penultimate penalty known to law and this statement is given credence by the terms and structure of the statute. However, in practice, it is not always viewed that way by the public, by victims of criminal wrong-doing or even by offenders themselves. This disparity of attitudes illustrates the tension that exists between the component parts of this sentencing option: the decision to imprison and the decision to suspend.[73]

This is supported by research into community views, which has found that while judicial officers rank suspended sentences quite highly in terms of the severity of this sanction, community members do not, with this sanction being ranked in some studies below probation or a financial penalty.[74]

Case law: Suspension of imprisonment vs imprisonment with parole

The comparatively high use of partially suspended prison sentences for rape, and trends in the use of both partially suspended and wholly suspended prison sentences for non-aggravated sexual assault suggests the inability of courts to fix a parole release date is impacting sentencing practices. In particular, this appears to have resulted in a displacement effect away from the use of imprisonment to other forms of orders to achieve certainty of release and to reflect mitigating factors such as a plea of guilty.

For example, in *R v Lloyd*,[75] the applicant was sentenced to 3 years' imprisonment for child exploitation material offences with parole eligibility after 12 months. The applicant had spent 301 days in pre-sentence custody (approximately 10 months), in which he was not able to enrol in suitable programs or courses.[76] It was argued that this made the parole eligibility date set 2 months post the date of sentence 'illusory'.[77] The Court found that as the applicant was unlikely to be released before substantially serving his sentence, it 'would not give requisite credit to his pleas of guilty to an ex-officio indictment. It would

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70 Law Reform Commission of Ireland, *Suspended Sentences: Report* (2020) 38 [2.19] ('*Suspended Sentences Report*').
71 Julian V Roberts and Thomas Gabor, 'Living in the shadow of the prison: Lessons from the Canadian experience in decarceration' (2004) 44 *British Journal of Criminology* 92, 93–4.
72 (2000) 202 CLR 321.
73 *Dinsdale v The Queen* (2000) 202 CLR 321, 346–7 [80].
74 For a review of some of these studies, see *Suspended Sentences Report* (n 70) 36–8; and Arie Freiberg and Victoria Moore, 'Disbelieving suspense: Suspended sentences of imprisonment and public confidence in the criminal justice system' (2009) 42(1) *The Australian and New Zealand Journal of Criminology* 101, 110.
75 [2011] QCA 12.
76 Ibid 2 [2], 4–5 [17] (Chesterman JA, de Jersey CJ and White JA agreeing).
77 Ibid 2 [3].

be unjust and was not what was intended by the primary judge.'[78] In allowing the appeal the Court also noted the inability to order a prison/probation order because, at the time of appeal, he had been in custody for over 12 months.[79] Given these circumstances, the Court ordered that the sentence be immediately suspended with an operational period of 3 years, in addition to setting aside an order for imprisonment on one count and ordering instead that the applicant be sentenced to 2 years' probation, during which time he should undertake appropriate courses to address his reoffending risks.

A court will not always allow an appeal and may decline to order that an unsuspended prison sentence be suspended even if it is unlikely that the person will be released on, or soon after, they reach their parole eligibility date,[80] as there may be reasons for the sentencing court making this determination. For example, in *R v Sutton*,[81] the 54-year-old appellant was convicted after trial on one count of indecent assault of a 16-year-old boy.[82] He was sentenced to 2 years' imprisonment with a parole eligibility after 4 months (being one-sixth of the sentence).[83] On appeal, the Court noted it was open to suspend the imprisonment, but

> [as] there is nothing to prevent the appellant resuming his occupation upon his release from custody, it is desirable that he should undergo some assessment before his release on parole and some ongoing supervision in the community for a time thereafter in order to increase the prospects of his rehabilitation and to reduce the risk of further offending. His Honour may well have taken the view that a substantial period of supervision of the appellant on parole was desirable to ensure that he refrained from succumbing to the inclination to use his occupation as an opportunity to obtain illicit sexual gratification. In my respectful opinion, it cannot be said that it was not reasonably open to his Honour to act upon this view.[84]

Recently the High Court held that 'the general principle is that the prospect of securing release on parole or of obtaining remissions is not relevant to the judicial task of sentencing' and the prospect of release on parole is a matter for the executive branch of government.[85] In *R v Ponsonby*,[86] the Court of Appeal found it was an error for the original sentencing court to take into account 'the irrelevant consideration of the applicant's parole prospects'.[87] President Mullins noted:

> A sentencing judge may have available two or more alternative sentencing structures in exercising the instinctive synthesis approach to sentencing in imposing an appropriate sentence for the offender's offending and circumstances … Provided the sentencing judge does not stray into taking account of considerations irrelevant to the sentencing process, the decision in *Hatahet* does not preclude the sentencing judge's selection of an available sentencing structure that is appropriate in all the circumstances for the sentencing of the offender.[88]

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78 Ibid 5 [20]–[22].
79 Ibid.
80 *R v Waszkiewicz* [2012] QCA 22, 2 [5], 5 [24], 6–7 [28]–[31], 8 [35] (White JA, de Jersey CJ and Atkinson J agreeing).
81 [2008] QCA 249.
82 *R v Sutton* (2008) 87 A Crim R 231. The offending occurred while the appellant, who ran a massage business from his home, was giving the victim survivor a massage. The appellant had directed the child to undress completely and locked the door of his premises. During the massage he touched the victim survivor's penis with his hand and masturbated him for 15 to 20 minutes. He was acquitted of another count of indecent assault (touching the victim's penis with his mouth) and the jury were unable to reach a verdict on rape (inserting a finger into the victim's anus). The issue at trial was whether the victim consented to what occurred: 233–4 [10], [19] (Keane JA, Fraser JA and Fryberg J agreeing).
83 Ibid 232–3 [1].
84 Ibid 242–3 [59]–[60].
85 *R v Hatahet* (2024) 98 ALJR 863; [2024] HCA 23 [21], [27] (Gordon ACJ, Steward and Gleeson JJ), citing *Hoare v The Queen* (1989) 167 CLR 348. Cited in *R v Ponsonby* [2024] QCA 229, 2 [2] (Mullins P).
86 [2024] QCA 229.
87 Ibid 8 [34] (Callaghan J, Mullins P and Bond JA agreeing).
88 Ibid 2 [3] (Mullins P).

Rape

Much of the Court of Appeal commentary surrounding the decision about whether to impose a parole eligibility date or suspend a sentence relates to the nature of the offence, whether the offender requires supervision in the community, their risk of reoffending, other prospects of rehabilitation, how to appropriately reflect mitigating factors and the need to protect the community. In certain cases, depending on the imprisonment length, there may be no discretion for the judge to suspend the imprisonment (for example, if it is more than 5 years).

In *R v Wano; Ex parte Attorney-General (Qld)*,[89] the respondent pleaded guilty to burglary and stealing, rape, sexual assault in company, and attempted burglary in the night in company and was sentenced to 3 years' imprisonment, suspended after 323 days (the amount of pre-sentence custody declared as time served) with an operational period of 3 years. The Attorney-General appealed the sentences on grounds of manifest inadequacy. The Court of Appeal found:

> A curious feature of the sentence proceeding is that no-one identified any basis at all as to why a partly suspended sentence was preferable to one which would involve at least some ongoing supervision on the respondent's release, as for example occurs when a prisoner is released on parole. The respondent was a long remanded teenager, without tangible rehabilitative progress or family support, whose continued burglary offending had disturbingly escalated to accompanying sex offending. The need for him to be under supervision when released back into the community was compelling.[90]

The Court allowed the appeal, setting aside the original sentence and imposing a head sentence of 3.5 years' imprisonment on the rape offence with a parole eligibility date after 12 months had been served.

In *R v Cunningham*,[91] the court rejected the argument that a suspended sentence should be imposed instead of a parole eligibility date because the period of incarceration would be so short that the offender would not be able to benefit from programs, and may be detrimental from having to apply for parole without the opportunity to undertake programs. Jones J observed:

> It is generally accepted that an important use to be made of prisoner time to be served by sexual offenders is the completion of various programmes which address such offending. There is nothing in the applicant's background or the circumstances of the case which suggests that the substitution of a suspended sentence is warranted if its effect is to relieve him of the obligation to undertake such a course. Alternative measures might include the linking of probation orders with suspended terms of imprisonment. But such considerations are outside the scope of this application which is to determine whether the sentence imposed is manifestly excessive.[92]

In *R v Ruiz; Ex parte Attorney-General (Qld)*,[93] the Attorney-General appealed a sentence of 3 years' imprisonment suspended after 12 months for an operational period of 3 years for rape and 18 months' imprisonment (concurrent) for 2 counts of indecent treatment of child under 16, under 12. A consequence of the sentence was the respondent would be a reportable offender under the *Child Protection (Offender Reporting and Offender Prohibition Order) Act 2004* (Qld) ('CPOROPOA'). It was argued that the sentence was manifestly inadequate because it was a partially suspended sentence and should have been a parole eligibility date after 12 months served in prison or, alternatively, a probation

89 [2018] QCA 117.
90 *R v Wano; Ex parte A-G (Qld)* [2018] QCA 117, 8 [44] (Henry J).
91 [2008] QCA 289.
92 Ibid 6 [18]–[20] (Jones J, Mackenzie AJA, Cullinane J agreeing).
93 [2020] QCA 72.

order should be made for a co-sentenced offence, because a suspended sentence 'failed to give any effect to the factor of community protection'.[94]

The Court of Appeal found that, when defence counsel submits for suspended imprisonment at sentence, 'if that course is regarded by the prosecution as beyond the scope of the sentencing discretion, then it is a duty of prosecuting counsel to submit as much to the judge'.[95] The Court found the reporting obligations under the CPOROPOA 'are very onerous and designed to assist in preventing reoffending' and there was no submission to the sentencing judge that 'something more severe was required.'[96]

In *R v Smith*,[97] the Court of Appeal reduced a sentence of 3 years' imprisonment (parole eligibility date after 9 months) for 2 counts of rape and 5 counts of sexual assault of an adult woman, to be 2 years and 6 months, suspended immediately for an operational period of two and a-half years. The Court noted that 'the very serious nature of the offending' called 'for a sentence that reflects the need to deter others who might be inclined to violate a woman sleeping in her own bed'[98]. However, the applicant's youth, genuine remorse, cooperation and 'willingness to take steps towards treatment' should moderate his head sentence and time to be served in prison.[99]

Sexual assault

The Queensland Court of Appeal has found that general deterrence can be a paramount consideration for sexual assault, and a suspended imprisonment sentence can meet this purpose.[100]

In *R v Kane, Ex parte Attorney-General (Qld)*,[101] the Court of Appeal found the sentence of 18 months' imprisonment, suspended after serving 282 days for an operational period of 3 years, was manifestly inadequate for sexual assault. The Court found that

> 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.[102]

The Court ordered that the respondent be sentenced to 3 years' imprisonment, but maintained the previous sentence structure that it was partially suspended after 282 days, to reflect the seriousness of the offending. The appeal was heard over 7 months after the respondent had originally been sentenced and released in the community and the Court of Appeal considered 'it would be undesirable to return him to custody immediately with the potential of disrupting his reintegration into the community'.[103]

In *R v Banda*,[104] the applicant pleaded guilty and was sentenced to 3 years' imprisonment for burglary and 2 years' imprisonment for sexual assault, to be served concurrently (at the same time), suspended after 12 months with an operational period of 3 years. Among other factors, the primary judge recognised

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94 Ibid 4 [14] (Sofronoff P, McMurdo and Mullins JJA agreeing).
95 Ibid 5 [18]
96 Ibid 6 [25].
97 [2020] QCA 23.
98 Ibid 10 [51] (Morrison JA, Holmes CJ and McMurdo JA agreeing).
99 Ibid.
100 See *R v Al Aiach* [2006] QCA 157 [46]–[49]; *R v Downs* [2023] QCA 223 [55]; *R v Quinlan* [2012] QCA 132 [27], [30]; *R v SDF* [2018] QCA 316 [9], [26].
101 [2022] QCA 242.
102 Ibid 8 [27] (Mullins P and Dalton and Flanagan JJA).
103 Ibid 8–9 [28], see also [29]–[30].
104 [2021] QCA 171.

the consequences of the *Migration Act 1958* (Cth) (deportation on release), which was the reason why he partially suspended the sentences.[105]

The Court of Appeal has provided guidance on when a term of actual imprisonment is required rather than a wholly suspended sentence. For example, in *R v Abdullah*,[106] Chief Justice Bowskill said:

> In addition, the requirement for this applicant to serve five months of that in custody, before the balance was suspended, is not unjust or unreasonable. The circumstances of the offending and this offender – notably, the further offending whilst on bail, his minimisation evident from the psychologist's report and the failure yet to have taken any therapeutic steps to address the offending – are such that appropriate punishment, deterrence, strong denunciation of the conduct and community protection all justified an order that he serve part of the sentence in actual custody. This was not a case in which a wholly suspended sentence was appropriate. The portion required to be served reflects the orthodox approach, on a plea of guilty, of requiring an offender to serve around one-third of the sentence imposed. That another judge may have suspended the sentence at an earlier time is not such as to demonstrate error.[107]

In *R v Rogan*,[108] the court considered the objective nature of the sexual assault called for a sentence of imprisonment (to meet the purposes of general deterrence and denunciation), but as actual imprisonment was not mandatory and it would be a short term of imprisonment, the court considered whether the personal circumstances of the applicant justified actual imprisonment:

> 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.[109]

Suspended imprisonment and conditions

A person under a suspended sentence of imprisonment in Queensland is not supervised in the community by QCS officers as part of their sentence and nor are they subject to other conditions, such as program engagement. This is in contrast to most other jurisdictions which have retained this order as a sentencing option (discussed further below). The only type of conditional suspended sentence in Queensland is a Drug and Alcohol Treatment Order, but sexual offences are excluded.[110]

In some cases, courts may order a suspended prison sentence alongside a community-based order, such as probation, but this is not possible when sentencing an offender for a single offence,[111] or the person is required to spend longer than 12 months in prison.[112] For multiple offences, combined orders may be used, for example, to enhance the person's prospects of rehabilitation through access to treatment.[113] However, this assumes the second offence is one that is less serious than the offence for which the

105 Ibid 4 [11]. For the relevance of deportation in sentencing, see *R v Norris; Ex parte A-G (Qld)* [2018] 3 Qd R 420.
106 [2023] QCA 189..
107 Ibid 11 [47] (Bowskill CJ, Flanagan JA, Buss AJA agreeing).
108 [2021] QCA 269.
109 Ibid 4 [16]–[17] (Sofronoff P, McMurdo JA, Williams J agreeing).
110 PSA (n 17) pt 8A. Sexual assault offences are excluded from these orders: at s 151F. They also are only available to offenders sentenced by the Queensland Drug and Alcohol Court in Brisbane who meet other suitability and eligibility criteria set out under the PSA.
111 In some Australian jurisdictions with suspended sentence orders, the court can attach additional supervisory, program or community service orders.
112 A probation order must commence on the date of sentence: PSA (n 17) s 92(2) and cannot be ordered if the person is sentenced to imprisonment for a term longer than 1 year: s 92(1)(b).
113 See, for example, *R v MCB; Ex parte A-G (Qld)* [2014] QCA 151, 13 [65].

suspended prison sentence was imposed and is also a sexual offence (to ensure supervision, programs and interventions are directed to factors associated with that person's sexual offending).

Evidence of effectiveness

Evidence about the effectiveness of suspended sentences has primarily been based on research undertaken in NSW, but there are significant gaps and further research is required.[114] On the available evidence,

> wholly suspended sentences may have a small but statistically significant effect for at least some offenders, particularly when compared with terms of imprisonment. One explanation for this effect may be that the suspended sentence avoids the negative consequences of imprisonment, allowing offenders to maintain family and community ties, continue any employment and avoid losing accommodation.
>
> Although the evidence is sparse, it appears that wholly suspended sentences might be more likely to be completed by older offenders and those convicted of property offences.[115]

In respect of Aboriginal and Torres Strait Islander peoples, and other vulnerable cohorts, there is no evidence about its effectiveness.[116] However, suspended sentences are considered useful to those living in rural and remote areas and are seen as less onerous, making them more suitable for women who may have kinship, parental, caring and cultural obligations to comply with.[117]

Breach of suspended sentences

An examination of data for variations of suspended sentences found that the majority of partially suspended sentences for sexual assault (76.7%) were not varied, suggesting that the person had not committed another offence punishable by imprisonment during the operational period of the order. An even higher proportion of wholly suspended sentences for sexual assault (86.2%) were not varied.

Overall, this suggests that these orders are being appropriately targeted. However, this assumes that any further offending is reported, prosecuted and results in the person being convicted. With respect to sexual offending, as noted throughout this report, there are high rates of under-reporting and low rates of conviction.

The Council's analysis found that, of the 60 cases where a wholly suspended sentence had been imposed for sexual assault and the person dealt with for a breach, more than half of those sentenced received an extension to the operational period of the order (n=33/60; 55.0%). In 23 cases, the person was ordered to serve all or part of the suspended imprisonment, and a further 4 cases had a very small portion activated (rising of the court). Similar trends were found for partially suspended sentences, with the most common outcome being the operational period of the order being extended, followed by the suspended imprisonment being ordered to be served in whole or in part.

As discussed above, action on breach is an important aspect of promoting community confidence in the use of this order and the 'sword of Damocles' will in fact fall in the event of (even minor) forms of reoffending. However, a full analysis of the circumstances in which these breaches had occurred was not possible within the timeframes for this review. There are likely good reasons why the court chose to extend the operational period rather than to activate the suspended imprisonment.

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114 *QUT Literature Review* (n 2) xiii.
115 Ibid 112.
116 Ibid 117.
117 Ibid 114.

For more information, see **Appendix 4**.

Supervision as a condition can be useful in reducing reoffending provided it is supported by rehabilitation services and support

In contrast to suspended sentences, parole orders (discussed above), and other types of sentencing orders such as ICOs and probation, involve supervision. Relevant findings based on research evidence include:

- 'Evidence shows mixed support for the effectiveness of supervised release. Supervision without adequate rehabilitation services and support – that is focused on enforcement – does not reduce recidivism.'[118] However, when used in combination with rehabilitation programs and services, such as mental health and drug treatment, and housing assistance, supervision is effective in achieving reduced rates of reoffending.[119]
- 'Community supervision best reduces recidivism when [it] adheres to the principles of effective correctional intervention and core correctional practices. Supervision that emphasises relapse prevention and assists offenders to identify, avoid, and resist crime opportunities may be more useful for individuals who have sexually offended.'[120]

Findings based on the intensity levels of supervision also suggest these forms of supervision can be beneficial under the right conditions, with a previous literature review of the research evidence concluding:

- 'The evidence on high-intensity supervision is mixed, with much of the evidence indicating that its heightened surveillance acts to increase both recidivism and technical violations.'[121] But 'when coupled with therapeutic interventions, high intensity supervision can be effective, especially for high-risk offenders'.[122]
- 'Although the evidence is sparse, low-intensity supervision, used for low-risk offenders, does not appear to increase recidivism, so may be a cost-effective tool for managing large, low-risk offender cohorts.'[123]

Wholly suspended prison sentences have a small effect on reducing reoffending compared to immediate imprisonment

Wholly suspended prison sentences have been found in some studies to have a small effect on reducing recidivism compared with imprisonment, especially for repeat offenders (although this finding is not specific to those sentenced for sexual offences) and of being of potential benefit for those who are unable to access other orders, such as due to living in rural and remote areas.[124] However, this evidence is not specific to Queensland's suspended imprisonment order and includes evaluations of orders that include conditions, such as supervision.

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118 Ibid xvi.
119 Ibid.
120 *Griffith University Literature Review* (n 2) 53.
121 Ibid.
122 Ibid.
123 *QUT Literature Review* (n 2) xvi.
124 Ibid 115

Reoffending rates for partially suspended prison sentences may be higher than for wholly suspended prison sentences

There is 'no robust research on the effectiveness of partially suspended sentences' and '[w]hat little research exists finds that recidivism rates are higher following a partially suspended sentence than after a wholly suspended sentence'.[125] There is a lack of research on the impact of partially suspended prison sentences among vulnerable offenders and '[r]ecidivism rates following a partially suspended sentence appear to be lower among older offenders and those with no criminal history, but the evidence for this is weak'.[126]

Intensive correction orders are no more effective than supervised suspended prison sentences in reducing reoffending but are more effective than short terms of imprisonment

ICOs have been found to be of equal benefit as suspended prison sentences in reducing recidivism, with evidence suggesting that they are more effective than short terms of imprisonment. However, there is no evidence on the effectiveness of ICOs among vulnerable cohorts.[127] Although not specific to people convicted of sexual offences, for individuals on these orders, 'reoffending following an intensive correction order appears to be more likely among men, Indigenous [people], those with criminal histories and those classified as high risk'.[128]

ICOs are very different in nature to suspended sentences of imprisonment as the person is subject to a structured set of conditions, including supervision, and the prison sentence is not in this case suspended, but rather ordered to be served in the community.[129] In Queensland, these orders can only be made for 12 months or less.[130] If the person breaches the order, they are only liable to serve the portion of the prison sentence remaining to be served at the time of breach.[131]

What sentencing outcomes tell us

The key sentencing trends indicates that courts generally set longer operational periods than the length of the sentence (the minimum period the courts must set),[132] meaning that people whose prison sentence is suspended are 'at risk' of having the sentence activated in whole or in part for an extended period.

The use of a combined sentence of a wholly or partially suspended prison sentence ordered alongside probation is significant as it means the person will be under supervision in the community. As discussed above, supervision may be an important means of responding to potential risks of reoffending for some offenders, with the quality and type of supervision being particularly important in reducing the likelihood of reoffending for those at higher risk of committing serious, violent crimes.[133]

The Council's research found that, compared with other sexual offences and all sentenced offences, the proportion of cases receiving probation order with a co-sentenced suspended prison sentence for rape (MSO) was far higher. Almost one-third of partially suspended prison sentences (31.3%) and over half of wholly suspended prison sentences (56.5%) were imposed where the person was sentenced for another offence and received a probation order, compared with 20.9 and 31.1 per cent for orders made across all sexual offences and 13.6 and 13.1 per cent across all sentenced offences.

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125 Ibid xii.
126 Ibid.
127 Ibid xiii.
128 Ibid.
129 PSA (n 17) pt 6.
130 Ibid s 112.
131 Ibid s 127.
132 Ibid s 144(6)(a).
133 *University of Melbourne Literature Review* (n 2) 14.

The findings are similar for sexual assault cases. A substantial proportion of sexual assault cases that resulted in partially or wholly suspended prison sentences had co-sentenced offences, ranging from 38.0 per cent of wholly suspended prison sentences in the higher courts, to 74.0 per cent of partially suspended prison sentences in the Magistrates Courts.[134] For partially suspended prison sentences, probation orders were made in just under a quarter (24.3%) of cases sentenced in the Magistrates Courts with co-sentenced offences and 29.1 per cent of those cases sentenced in the higher courts. For wholly suspended prison sentences, the proportions were slightly lower (22.9% and 21.9% respectively). However, unlike rape, the proportion of wholly suspended prison sentences made alongside a probation order was lower compared with all sexual offences (31.1%).

Considered together, these findings suggest in certain cases courts want to ensure people sentenced for sexual assault and rape are subject to supervision in the community as part of their sentence, but do not always consider this is best achieved by imposing a sentence of imprisonment with a parole eligibility date.

The data discussed above also illustrates the unintended consequence of excluding sexual offences from court-ordered parole. Courts have also made use of combined orders, such as the use of a suspended prison sentence and probation, where this option is available to provide certainty of release but with the added component of supervision. For the same reasons, where appropriate, the court may make a combined imprisonment/probation order.[135]

What do other jurisdictions do?

Imprisonment

Some jurisdictions, such as the Northern Territory[136] and Victoria,[137] have a mandatory requirement for courts to impose actual imprisonment for rape and other specified sexual offences.[138] There is usually greater sentencing discretion for sexual assault equivalent offences where they are committed against an adult victim. In NSW, when sentencing a person found guilty of a domestic violence offence (including a sexual offence committed in the context of domestic violence),[139] a court must impose either a sentence

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134 See *Consultation Paper: Background* (n 39) 144, fig 27 for more information.

135 PSA (n 17) s 92(1)(b). A sentence of up to one year can be imposed in combination with a probation order of not less than 9 months, or more than 3 years: ibid ss 92(1)(b), (2)(b).

136 *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 includes offences against *Criminal Code Act 1983* (NT) sch 1 ('*Criminal Code* (NT)') Part VIA (Sexual offences) (excluding s 208NA - public masturbation). This part includes a wide range of sexual offences including rape (s 208H, called 'sexual intercourse without consent'), acts of gross indecency without consent (s 208HB) and indecent touching or act without consent (s 208HC) in addition to sexual offences against children. 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.

137 *Sentencing Act 1991* (Vic) s 5(2G) ('*Sentencing Act* (Vic)').

138 See Chapter 8 for more information.

139 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 (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).

of full-time detention or a supervised order[140] unless satisfied that a different sentencing option is more appropriate in the circumstances.[141]

Suspended imprisonment sentences

Several jurisdictions have suspended imprisonment as a sentencing option (the Australian Capital Territory ('ACT'), the NT, South Australia ('SA'), Tasmania, Western Australia ('WA') and the Commonwealth).[142] The maximum term of imprisonment generally ranges from 2 years to 5 years, although in some jurisdictions imprisonment of any length may be suspended.[143]

Suspended sentences are also a sentencing option in England and Wales.[144]

Most jurisdictions also allow for conditions[145] to be ordered, either as part of the order itself or in making a good behaviour order alongside the order for suspension; in some cases, this is mandatory.[146] In SA, a sentence of imprisonment cannot be suspended if the person is being sentenced as an adult for a 'serious sexual offence', including rape.[147] In WA, and in England and Wales, there is no power to partially suspend a sentence at all.

Suspended sentences are no longer a sentencing option in NSW, Victoria and New Zealand. Victoria abolished suspended sentences in 2014 after implementing broader sentencing reforms such as introducing the Community Corrections Order ('CCO').[148] NSW removed the ability to suspend a sentence of imprisonment in 2018, at the same time that a number of other reforms came into effect, including the introduction of CCOs and an enhanced form of ICO.[149]

A recent review of sexual offences in the ACT recommended introducing a legislative presumption that ICOs and suspended sentences are not to be imposed for serious sexual offences.[150] The ACT

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140 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), (A)(3).

141 Ibid s 4A(2).

142 Australian Capital Territory, Northern Territory, South Australia, Tasmania, Western Australia and England and Wales. For Commonwealth offences, an equivalent order exists called a recognizance release order. See *Crimes Act 1914* (Cth) s 20(1)(b). The Tasmanian Government had a policy intention to phase suspended sentence out. See Sentencing Advisory Council (Tasmania), *Review under Section 2 of the Sentencing Amendment (Phasing Out of Suspended Sentences) Act 2017* (2021) and Tasmania, *Parliamentary Debates,* House of Assembly, Estimates Committee B, 4 June 2023, 40–1, (Elise Archer, Attorney-General).

143 For example, this is the case under the *Criminal Justice Act 2006* (Ireland) s 99. This is subject to the person entering into a good behaviour bond/recognisance.

144 *Sentencing Code* (UK) ch 4.

145 Called 'requirements' in England and Wales: ibid ch 5.

146 See *Crimes (Sentencing) Act 2005* (ACT) ss 12(3), 13; and *Sentencing Act 2017* (SA) s 96(1). The core (mandatory) conditions in the ACT go beyond not committing an offence punishable by imprisonment and include keeping Corrective Services advised if their contact details change, and to comply with any directions given in relation to the order, as well as other conditions with which the person must comply if other conditions are ordered (for example, a probation condition or a community service work condition): *Crimes (Sentence Administration) Act 2005* (ACT) s 86.

147 *Sentencing Act 2017* (SA) ss 96(3)(ba), (9).

148 Following an extensive review of suspended sentences and other intermediate sentencing orders, the Victorian Sentencing Advisory Council (by a majority) recommended the phasing out of suspended sentences in conjunction with broader sentencing reforms: Sentencing Advisory Council, Victoria, *Suspended Sentences and Intermediate Sentencing Orders: Suspended Sentences Final Report Part 1* (2006). Recommendations are at xxv–xxvi. The Council's recommendation was adopted, with suspended sentences being progressively phased out from 2011, and abolished for all offences committed from 1 September 2014: *Sentencing Amendment (Abolition of Suspended Sentences & Other Matters) Act 2013* (Vic).

149 *Crimes (Sentencing Procedure) Amendment (Sentencing Options) Act 2017* (NSW) assented to 24 October 2017, date of commencement 24 September 2018 (s 2 and 2018 (534) LW 21 September 2018 — commencement proclamation).

150 The Sexual Assault Prevention and Response Steering Committee, *Listen. Take Action to Prevent, Believe and Heal* (December 2021) 80, rec 23(c). A serious sexual offence is a sexual offence involving physical contact, and which carries a maximum penalty of more than 10 years imprisonment.

Government response to this recommendation was to note this recommendation for further consideration.[151]

[151] ACT Government, *Government Response to the Listen. Take Action to Prevent, Believe and Heal Report* (2022) 23–4.

What is an intensive correction order ('ICO')?

An ICO is a sentence of imprisonment served in the community under conditions. At law, an ICO is treated as being a custodial (prison) sentence and the court must order a conviction be recorded.

An ICO is available as a sentencing option in the ACT, NSW, NT (called an 'intensive community correction order'), Qld and SA.[152] The maximum term varies from 12 months (in Qld) to up to 4 years (in the ACT).[153]

In NSW, an ICO can be ordered where a sentence of imprisonment of up to 3 years is imposed (or 2 years if the person is sentenced for a single offence).[154] A court must not make an ICO if sentencing a person for several listed offences, including sexual offences against a child under 16 years or against a person of any age if the elements of the offence include sexual intercourse.[155]

After an offender is sentenced by the sentencing court, conditions of an ICO in NSW are imposed, varied or revoked by the Parole Authority rather than the court.[156] The Parole Authority can also make an order suspending the ICO and, if the person is not then in custody, issue a warrant for the person's arrest.[157] The suspension ceases to have effect after 28 days, unless revoked sooner.[158] A community corrections officer also may suspend specific conditions for a period or periods of indefinitely.[159]

In Queensland, [160] a court, not the Parole Board, must deal with the person on the conditions of the order being breached. The court in this case can revoke the order and order the person to serve the unexpired portion as at the time of breach in prison.[161]

The conditions of the Queensland order are that the person must:

- not commit another offence during the period of the order;
- report to, and receive visits from, an authorised corrective services officer at least twice in each week for the period the order is in force;
- take part in counselling and satisfactorily attend other programs as directed by the court or an authorised corrective services officer (up to 12 hours per week) during the period of the order;
- perform in a satisfactory way community service that an authorised corrective services officer directs during the period of the order;

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152 *Crimes (Sentencing) Act 2005* (ACT) s 11, ch 5, pt 5.4; *Sentencing Act 1995* (NT) pt 3, div 5, subdiv 2; *Crimes (Sentencing Procedure) Act 1999* (NSW) s 7, pt 5; PSA (n 17) pt 6; *Sentencing Act 2017* (SA) pt 3, div 7, subdiv 2. Western Australia also has an intensive supervision order although this is not treated as a custodial order. See *Sentencing Act 1995* (WA) pt 10.
153 *Crimes (Sentencing) Act 2005* (ACT) s 11(3).
154 *Crimes (Sentencing Procedure) Act 1999* (NSW) s 68.
155 Ibid s 67. See definition of 'prescribed sexual offence' in s 67(2). The definition of 'sexual intercourse' is broader than acts captured by the offence of rape in Queensland. See *Crimes Act 1900* (NSW) s 61HA.
156 See *Crimes (Sentencing Procedure) Act 1999* (NSW) s 72; *Crimes (Administration of Sentences) Act 1999* (NSW) pt 3.
157 *Crimes (Administration of Sentences) Act 1999* (NSW) s 91.
158 Ibid s 91(7).
159 Ibid s 82A.
160 PSA (n 17) s 112.
161 Ibid ss 120, 127.

- live at community residential facilities for periods (not longer than 7 days at a time) if directed to do so by an authorised corrective services officer;
- notify an authorised corrective services officer of every change of the offender's place of residence or employment within 2 business days after the change happens; and
- not leave or stay out of Queensland without permission; and
- comply with every reasonable direction of an authorised corrective services officer.

Unless otherwise directed, the person must attend programs for one-third of the time directed, and perform community service for two-thirds of the time directed.[162] Additional conditions can also be ordered.[163]

Non-custodial orders

Most jurisdictions have similar orders to those that exist in Queensland, although there are also important differences.

NSW, Victoria, NT and Tasmania have introduced CCOs, which are intended to provide courts with a more flexible form of order that is tailored to meet the purposes of sentencing and address the underlying causes of offending. The form of the CCO and permitted combinations of sentencing orders differ by jurisdiction.

In Victoria, a court can combine a sentence of up to one year's imprisonment with a CCO when sentencing a person for one or more than one offence (with some exclusions). VSAC has reported that, in the higher courts, sex offences (MSO) represented 9.1 per cent of all cases attracting a combined order of imprisonment with a CCO, over the period 2012 to 2020, representing 170 cases.[164] This compared with 18.5 per cent of all sentenced cases in the higher courts that involved a sexual offence.[165]

However, mandatory imprisonment (which must not be imposed in addition to making a community correction order)[166] applies to 23 'Category 1 offences' (including rape, rape by compelling sexual penetration, and sexual penetration of a child offences),[167] providing the offence was committed by a person aged 18 years or more at the time it was committed.[168]

162 Ibid s 112(2A).
163 Ibid s 115.
164 Paul McGorrery and Paul Schollum, *Combined Orders of Imprisonment with a Community Correction Order in Victoria* (Sentencing Advisory Council, Victoria, 2023) 6.
165 Ibid 7, n 34.
166 *Sentencing Act* (Vic) (n 137) s 5(2G). There are some limited exceptions to this: see ss 5(2GA), 10A.
167 Ibid s 3(1) (definition of 'Category 1 offence').
168 Ibid.

What is a community correction order ('CCO')?

A CCO is a non-custodial order served in the community under conditions set by the sentencing court, with or without a conviction being recorded. It was first introduced in Victoria and commenced operation on 16 January 2012.[169]

The Victorian Court of Appeal, following the introduction of this new order, observed:

> The availability of the CCO dramatically changes the sentencing landscape [in Victoria]. The sentencing court can now choose a sentencing disposition which enables all of the purposes of punishment to be served simultaneously, in a coherent and balanced way, in preference to an option (imprisonment) which is skewed towards retribution and deterrence.[170]

The ability of a CCO to be tailored to meet a range of purposes, including rehabilitation and punishment, has been identified as one of its advantages.[171] Its 'robustness and flexibility' also mean 'it can be imposed in a wide variety of circumstances'.[172]

The maximum duration of a CCO is 2 years in the NT,[173] 3 years in NSW and Tasmania[174] and up to 5 years in Victoria.[175] In Victoria, it can be made in combination with imprisonment, which may not exceed one year following the deduction of any period of pre-sentence detention.[176]

A CCO comprises standard conditions, as well as additional option conditions. In NSW, the only standard conditions of the order are that the person no commit any offence and appear before the court if called on to do so.[177] In the NT, the mandatory conditions similarly are limited to being of good behaviour while the order is in force and not committing an offence punishable by imprisonment.[178]

In Victoria, the person must comply with a greater number of 'standard conditions', including – in addition to not committing an offence punishable by imprisonment during the period of the order – to:

- report to and receive visits from the Secretary during the period of the order;
- report to the community corrections centre specified in the order within two clear working days after the CCO comes into force;
- notify the Secretary of any change of address or employment within two clear working days after the change;
- not leave Victoria without the permission of the Secretary; and

169 *Sentencing Amendment (Community Correction Reform) Act 2011* (Vic).
170 *Boulton v The Queen* [2014] 46 VR 308 [113].
171 Ibid [91]–[98], [128]–[130], [186].
172 Ibid [116].
173 *Sentencing Act 1995* (NT) s 32.
174 *Crimes (Sentencing Procedure) Act 1999* (NSW) s 85; *Sentencing Act 1997* (Tas) s 42AQ (referred to as the 'operational period' of the order).
175 *Sentencing Act* (Vic) (n 137) ss 38(1)(a)–(b).
176 Ibid s 44(1). However, see s 44(1A) which provides that a sentence of any length imposed for an arson offence may be combined with a CCO if the person is sentenced in the higher courts.
177 *Crimes (Sentencing Procedure) Act 1999* (NSW) s 88.
178 *Sentencing Act 1995* (NT) s 33.

- comply with any direction given by the Secretary to ensure the offender complies with the order.[179]

Additional conditions that a court may order in NSW include:

- a curfew condition imposing a specified curfew (not exceeding 12 hours in any period of 24 hours);
- a community service work condition (not exceeding 500 hours or the number of hours prescribed by the regulations);
- a rehabilitation or treatment condition requiring the offender to participate in a rehabilitation program or to receive treatment;
- an abstention condition requiring abstention from alcohol or drugs or both;
- a non-association condition prohibiting association with particular persons;
- a place restriction condition prohibiting the frequenting of or visits to a particular place or area;
- a supervision condition requiring the offender to submit to supervision by a community corrections officer.[180]

In Victoria, the court must impose at least one additional condition similar to those in NSW, although more options are listed, including:

- a residence restriction or exclusion condition (that the person must live at a certain place or not live at a certain place;
- a judicial monitoring condition, which can be made if the court is satisfied that it is necessary for the court to review (during the course of the order) the person's compliance with the order;
- an electronic monitoring condition (ordered in conjunction with a curfew condition or a place or area exclusion condition and only by the higher courts);
- a bond (payment of an amount of money that is forfeited if the person fails to comply with the order).[181]

Under the NSW and Victorian models, a sentencing court may attach any other conditions considered necessary;[182] however, in NSW an electronic monitoring condition, home detention condition or curfew condition in excess of 12 hours in any 24-hour period must not be imposed.[183] These can only be ordered in NSW if the person is placed on an intensive correction order.

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179 *Sentencing Act (*Vic) (n 137) ss 45(1)(a)–(f).
180 *Crimes (Sentencing Procedure) Act 1999 (*NSW) s 89.
181 *Sentencing Act* (Vic) (n 137) ss 47, 48C–48LA. A court may also attach a justice plan condition for people with an intellectually disability: ibid s 47, div 2 of pt 3BA.
182 Ibid s 48, except for one related to the making of restitution, or the payment of compensation, costs, or damages or the same subject matter of a condition otherwise permitted to be made for a CCO under the Act; *Crimes (Sentencing Procedure) Act 1999* (NSW) s 90(1), provided these are not inconsistent with the standard conditions or any additional conditions ordered and must not include prohibited conditions (electronic monitoring, home detention, or a curfew of greater than 12 hrs in a 24-hour period).
183 *Crimes (Sentencing Procedure) Act 1999* (NSW) s 89(3).

In Victoria, courts must take into account the principles of proportionality in setting the conditions of the order as well as the purposes of sentence and of the order.[184] The Victorian Court of Appeal has said that if asking for a CCO, defence counsel has a duty to inform the sentencing court about the types of conditions that 'will address the offender's particular needs, and the causes of the offending, and which will promote the necessary changes in the offender's life to reduce the risk of reoffending'.[185]

In both NSW and Victoria, courts may limit the duration of specific or additional conditions. In Victoria, if the CCO is for a period of 6 months or longer, the court may specify an intensive compliance period, during which time specific conditions must be completed.[186] A sentencing court in NSW may also limit the time during which an additional conditions is in force (that is, it need not be the same duration as the order).[187]

If the person fails to comply without the conditions of the order, the person must appear before a court to be dealt with for the breach. In NSW, if satisfied the person has failed to comply with the conditions, the court may revoke the order and re-sentence the person, vary or revoke any conditions (other than standard conditions) or impose further conditions on the order, or take no action.[188] In Victoria, the court can similarly confirm the order made, cancel it and re-sentence the person, or vary the order or conditions.[189]

In both NSW and Victoria, if a person is making positive progress under the order, changes can be made. For example, in Victoria the order can be discharged or varied by a court,[190] while in NSW a community corrections officer may suspend a supervision condition for a period, periods or indefinitely, which may be unconditional or subject to conditions. [191]

What we know from earlier reviews in other jurisdictions

Tasmania

Following its review of sentencing for sexual offences in 2015, the Tasmanian Sentencing Advisory Council (TASC) recommended the establishment of new aggravated forms of offences against children (aggravated sexual intercourse with a young person and maintaining a sexual relationship with a young person in circumstances of aggravation).[192]

No changes were recommended to the penalty options available. TSAC did, however, comment on the use of suspended prison sentences, finding that these 'are generally inappropriate for the offence of sexual intercourse with a young person' except where factors such as closeness in age were present.[193]

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184 *Sentencing Act (*Vic) (n 137) s 48A. The stated purpose of a community correction order is 'to provide a community based sentence that may be used for a wide range of offending behaviours while having regard to and addressing the circumstances of the offender'. The Act also provides that it may be an appropriate sentence where, before the ability of the court to impose a suspended sentence was abolished, the court may have imposed a wholly suspended sentence.
185 *Boulton v The Queen* [2014] 46 VR 308, 333 [101].
186 *Sentencing Act* (Vic) (n 137) s 39(1)–(2).
187 *Crimes (Sentencing Procedure) Act 1999* (NSW) s 89(5).
188 *Crimes (Administration of Sentences) Act 1999* (NSW) ss 107C(5), 107D.
189 *Sentencing Act* (Vic) (n 137) ss 48M(2)(a)–(h).
190 Ibid s 48M.
191 *Crimes (Administration of Sentences) Act 1999 (*NSW) ss 107E(2), (4).
192 Sentencing Advisory Council (Tasmania), *Sexual Offence Sentencing* (Final Report, August 2015).
193 Ibid vii.

The TSAC review took place in the context of a commitment made by the Tasmanian Government to phase out the use of these orders.

Victoria

In an earlier review, the Victorian Sentencing Advisory Council ('VSAC') recommended the phasing out of suspended sentences, while also making other recommendations prior to this occurring.[194] The recommended reforms included setting out a non-exhaustive list of factors to guide courts in determining whether the sentence should be suspended and creating a legislative presumption against suspending a sentence in full for listed serious offences unless it was in the interests of justice due to the existence of exceptional circumstances.[195] VSAC noted that many of the concerns expressed during consultation about the use of suspended prison sentences appeared to relate to their use in cases involving serious offences against the person, such as rape and intentionally causing serious injury.[196] The review followed a high-profile case in the media in which the Court of Appeal dismissed an appeal by the DPP against a wholly suspended prison sentence imposed for aggravated burglary, two counts of rape and indecent assault.[197]

VSAC also reported on the impact of sentencing reforms for sexual offences, one of which was the classification of some serious sex offences as Category 1 offences, meaning the court is required to impose imprisonment.[198] VSCA found that, as rape already attracted very few non-custodial sentences prior to sentencing reform, 'the reform did not have any discernible influence on sentencing outcomes'.[199] When considering some sentencing remarks prior to these reforms, they found non-custodial sentences were being imposed either as a direct result of the Court of Appeal's guideline judgment in *Boulton v The Queen*[200] or involved a finding that there were exceptional circumstances justifying this outcome.[201] In VSAC's view, this raised 'genuine questions about whether a reform designed to prevent undue leniency in the sentencing of serious sex offenders might also result in the detention of people who may have otherwise warranted a more merciful sentence'.[202]

Legal commentators have been critical of these and other Victorian sentencing reforms, arguing that they have not achieved their objective of greater deterrence and community protection.[203]

New South Wales

The 2018 NSW domestic violence sentencing reforms (which also apply to DV sexual offences) were evaluated by the NSW Bureau of Crime Statistics ('BOCSAR') in 2020 alongside other sentencing reforms. BOCSAR found some shifts in sentencing practices.

At the Local Court level (the equivalent of Queensland's Magistrates Courts), there was a small decrease in the percentage of DV offenders sentenced to imprisonment, an increase in the use of supervised

194 Sentencing Advisory Council (Victoria), *Suspended Sentences – Part 1* (Final Report, May 2006).
195 Ibid recs 3, 5.
196 Ibid 63.
197 *Director of Public* Prosecutions (Vic) *v Sims* [1999] VSCA 25 (Winneke P, Brooking and Ormiston JJA).
198 Sentencing Advisory Council (Victoria), *Sentencing Sex Offences in Victoria: An Analysis of Three Sentencing Reforms* (June 2021) ('*Sentencing Sex Offences in Victoria*').
199 Ibid 18 [3.6].
200 [2014] 46 VR 308. Guideline judgments are discussed in Chapter 10.
201 *Sentencing Sex Offences in Victoria* (n 198) 19–20 [3.8]–[3.9].
202 Ibid xi.
203 Michael D Stanton, 'Instruments of injustice: The emergence of mandatory sentencing in Victoria' (2022) 48(2) *Monash University Law Review* 1.

community orders and a reduction in the proportion of offenders sentenced to an unsupervised order, fine or other penalty.[204]

For cases sentenced in the higher courts, the percentage of DV offenders who received a supervised community order declined and there was an increase in the use of prison sentences, but this change was found not to be statistically significant.[205] The percentage of sentenced persons receiving a prison sentence of 36 months or less also declined and there was an increase in sentences of greater than 36 months.[206]

A subsequent evaluation by BOCSAR in 2022 found that the increased use of supervised community sentences, including for domestic violence offenders, did not appear to have translated into reduced short-term reoffending rates. The study concluded that the 'abundance of evidence to support the effectiveness of community supervision in reducing recidivism suggests further research into the extent and quality of supervision following the sentencing reforms may be worth pursuing'.[207] Subsequently, in 2021, the NSW Government announced an investment of $33 million to increase the supervision of offenders in the community and enable greater access to rehabilitation programs,[208] contributing to the government's broader aim of reducing reoffending by 5 per cent by 2023.[209]

Stakeholder views

Submissions from victim survivors and support and advocacy stakeholders

Victim survivors and support and advocacy organisations raised concerns about the use of options such as suspended prison sentences as an inappropriate response given the extent of harm caused by these offences. For example, noting the increasingly common use of these orders, the Queensland Sexual Assault Network ('QSAN') said they 'can feed into a community perception that sexual offences have minimal consequences, even after going through the entire criminal justice process'.[210] QSAN said:

> We received feedback from victim-survivors that suspended prison sentences do not adequately reflect the level of fear, the financial cost, the trauma experienced, and the years of counselling and trauma work required to [recover from acts of sexual assault and rape] and be able to fully participate in our community. The impact of the crime will stay with them forever even if they can get themselves back on track.[211]

QSAN recommended that 'stronger sentencing guidelines be developed specifically in response to the making of suspended sentences in sexual violence matters' and that 'access [to] vulnerable people by the offender be considered and mitigated'.[212]

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204 The percentage of DV offenders receiving a prison sentence declined from 14.0% to 11.8%, while the percentage sentenced to supervised community orders increased from 27.4% to 43.6%. The percentage receiving an unsupervised order, fine or other penalty declined from 58.6% to 44.5%: N Donnelly, 'The Impact of the 2018 NSW Sentencing Reforms on Supervised Community Orders and Short-Term Prison Sentences' (Crime and Justice Statistics Bureau Brief No 148, NSW Bureau of Crime Statistics and Research, 2020) 8.

205 Ibid 14.

206 Ibid. The use of supervised orders, unsupervised orders, fines and other penalties also declined.

207 Ibid 20.

208 NSW Government, 'Investing in Community Supervision and Safety' (Media Release, Communities and Justice, 22 June 2021) <https://dcj.nsw.gov.au/news-and-media/media-releases-archive/2021/investing-in-community-supervision-and-safety.html>.

209 For further information on progress made in reaching this target, see Corrective Services NSW, 'Targets', Reducing Reoffending (web page, 11 May 2023) <https://correctiveservices.dcj.nsw.gov.au/reducing-re-offending/targets.html>. BOCSAR is next due to publish an update to its data series on reoffending rates in March 2025 – see <https://bocsar.nsw.gov.au/topic-areas/re-offending.html>

210 Submission 24 (QSAN) 8.

211 Ibid.

212 Ibid 13.

In a supplementary submission, QSAN referred to Victoria's approach providing for judicial monitoring as one that should be considered, suggesting that this 'may be an appropriate option in some high-risk sexual violence matters, where judicial oversight might assist compliance, accountability and hopefully rehabilitation of offenders'.[213]

DV Connect referred to victim survivors' views 'that sentencing is not commensurate to the crime and fails to meet the intent of punishment' with reference to 'the long term, wide reaching, detrimental impact of sexual violence'.[214]

DV Connect told us that current sentencing 'fails to serve as a deterrent to offending', also 'acting as a deterrent to victim/survivors coming forward' and 'victim/survivors do not feel that sentences adequately denounce the crime'.[215]

With respect to the sentencing purpose of denunciation, Fighters Against Child Abuse Australia ('FACAA') suggested that meeting this objective is 'completely unravelled when rapists are given non-custodial sentences with suspended sentences or community corrections orders'.[216] It suggested: 'The very simple solution to this is to make a mandatory custodial sentence for anyone found guilty of a penetrative rape offence particularly against a child'.[217]

Submissions from research institutions, professional bodies and community advocacy organisations

The Justice Reform Initiative raised concerns that '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'. It was concerned this would 'subject victims to further trauma' and that such an approach 'is not a trauma-informed framework that will benefit victims of crime'.[218] Instead, it recommended that the review should consider 'the potential to develop appropriate, victim-centred restorative justice processes for sexual offences'.[219]

A submission made by academics from the QUT School of Justice jointly with researchers from the Bravehearts Foundation told us that, based on their research, victim survivors of sexual violence supported perpetrators receiving rehabilitative interventions such as parole supervision and psychological support to address their offending behaviour 'so that they do not harm others', but only if the person 'had already served an appropriate custodial sentence'.[220] They also referred to the importance of remorse in influencing victim survivors' views and support for post-custodial interventions as '[o]verwhelmingly, [victim survivors] saw only remorseful perpetrators as capable of change'.[221]

Individual submissions

The Council also received a small number of submissions from other members of the community.

One submitter suggested that wholly suspended sentences and intensive correction orders, along with fines, 'do not deter perpetrators of such offences and should not be handed out as a first resort'.[222]

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213 Submission 24 (Addendum) (QSAN) 1.
214 Submission 20 (DV Connect) 4.
215 Ibid 5.
216 Submission 15 (FACAA) 9.
217 Ibid 9.
218 Submission 13 (Justice Reform Initiative) 1.
219 Ibid 2.
220 Submission 12 (QUT - School of Justice) 4.
221 Ibid 4–5.
222 Submission 27 (Name withheld) 1.

Another community member recommended that the options considered should include 'mandatory personal development for all convicted perpetrators of crimes related to sexual violence', such as therapy, counselling and support groups, as well as 'mandatory community service'.[223]

[223] Submission 35 (C Murphy) 2–3.

Consultation with victim survivors

Consultation with victim survivors

One of the victim survivors of sexual assault we met with viewed a wholly suspended sentence as an inadequate outcome.[224]

> [The] majority of the sentences [for sexual assault] are wholly suspended, so it's like, oh, I could send you to prison. But actually, what we usually do is just tell you: 'I could, but it's wholly suspended … You need to be good.' (Victim survivor (rape), Interview 6)

This victim survivor suggested that a sentence that would involve community service with 'some form of accountability' would have been preferable, in conjunction with psychological treatment/support.[225] She contrasted the position with a neighbour who had lost their driver's licence for speeding and talking on the phone:

> My neighbour lost his driving licence for speeding and talking on his phone. His lost his driving licence for 10 months. He has to move. It impacts him being able to take his kid to school. It impacts so many aspects of his life. I feel like he's been more affected than the perpetrator of sexual violence.

Submissions from legal stakeholders

In considering the effectiveness of various options, Legal Aid Queensland ('LAQ') suggested that '[s]entencing options which target factors contributing to offending are more likely to be effective' than imprisonment, which 'provides temporary protection of the community'.[226]

This view was shared by the Youth Advocacy Centre,[227] which supported 'having a broad sentencing discretion' with 'flexibility to fashion sentences that reflect the individual circumstances of the case and the nature of offending'.[228] It considered it 'important that the sentencing orders should include dual orders such as combined suspended sentences and community-based orders to allow Courts to incorporate punishment, deterrence and rehabilitation within a sentence'.[229] The Youth Advocacy Centre supported implementation of the Council's 2019 recommendations (discussed at section 11.2.1),[230] as did LAQ.[231]

LAQ was particularly supportive of establishing a dual discretion to set either a parole eligibility date or a parole release date when sentencing a person to 3 years or less for a sexual offence, and providing legislative guidance regarding whether a parole release date or parole eligibility date should be set in such circumstances.[232] It told us:

> This change would enable a sentencing court to give certainty of release in appropriate cases where a suspended sentence might otherwise have been preferred. Such an option would be justified either to properly give effect to the

224 Victim Survivor Interview 7.
225 Ibid.
226 Submission 23 (Legal Aid Queensland) 20.
227 Submission 30 (Youth Advocacy Centre) 7.
228 Ibid.
229 Ibid.
230 Submission 30 (Youth Advocacy Centre) 7.
231 Submission 23 (Legal Aid Queensland) 19.
232 Ibid.

> sentencing purpose of rehabilitation or where, despite recognising the purposes of denunciation and deterrence, the court cannot reflect the purpose of rehabilitation in sentencing without giving certainty of release.[233]

The following example was provided to illustrate the point, with the view that the scenarios described are 'undesirable as they provide for a reduced or no period supervised in the community following release from prison':

> A sentencing court faced with an offender whose sexual assault offending, for example, justifies a two-year sentence of imprisonment may, in the ordinary course, consider requiring the offender to spend eight months incarcerated. However, in circumstances where that offender has 10 months of presentence custody, the court is often called on to decide between two options: immediate suspension of any further term of imprisonment or an immediate parole eligibility date. The latter option would require a parole application to be made an assessed. Such applicants have generally not undertaken any courses addressing sexual offending as they are not available to remand prisoners. With lengthy wait lists for such programs, setting a parole eligibility date becomes an unattractive sentencing option for a court where there is a real risk the offender will serve a much lengthier period incarcerated than considered appropriate. There is even the risk the offender will serve the entirety of the sentence in custody.[234]

With respect to sentences for sexual assault LAQ's view was:

> The seriousness of this type of offending is recognised by sentencing courts. Significantly, the imposition of monetary penalties and good behaviour recognisance orders for such offending has fallen over time … The imposition of imprisonment for such offending has increased, more than doubling in 18 years.[235]

The Aboriginal and Torres Strait Islander Legal Service (Qld) ('ATSILS') similarly was of the view that:

> 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 the rehabilitation of the individual such that the individual is less likely to reoffend.[236]

It told us that, for 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.[237]

It referred to there being 'a significant paucity of culturally safe rehabilitation/healing programs throughout the state, particularly in rural and remote areas', which suggests a need for further funding to expand the delivery of these programs.

Queensland Corrective Services ('QCS') indicated that it 'continues to be generally supportive of an expansion of [court-ordered parole] as a penalty option for sexual offending … noting that any change would be subject to Government consideration processes around policy and policy implementation'.[238] It referred to 'a central purpose of QCS's business' as being 'to ensure those who come into the correctional system are less likely to return to crime'.[239] It told us that it

> delivers a range of targeted programs in correctional centres that aim to reduce sexual offending recidivism. These include group based cognitive behavioural programs to address sexual offending, including preparatory, medium

233 Ibid.
234 Ibid 19–20.
235 Ibid 18.
236 Submission 28 (ATSILS) 4.
237 Ibid.
238 Submission 31 (Queensland Corrective Services) 2.
239 Ibid 1.

> intensity, high intensity and maintenance programs. There are also specific programs for First Nations individuals and individuals with low cognitive and/or low social/emotional abilities.[240]

Subject matter expert interview participants

The suspension of a prison sentence of 5 years or less was generally described by subject matter expert interview participants as involving a choice between delivery of the certainty of release that a suspended prison sentence would provide versus parole eligibility, which might mean the person spends a longer period in custody.

The assessed risk posed by the person being sentenced and the importance of community protection were referred to by many participants as critical to this assessment. For example, one practitioner told us that whether there was a view the person should do sex offender courses in prison in the interests of community protection was highly relevant:

> With child sex offenders there [are] programs that can only be done in prison, and I've definitely made submissions around that, well it should be eligibility because they should do the high intensity sex offender program in jail and they should prove to the Parole Board that they should be released and they're not a risk to the community. If that takes longer than one-third of the sentence, so be it, community protection is a big principle here .[241]

Several participants referred to factors such as whether the person had 'set themselves on the path to rehabilitation' – in which case a suspended sentence might be justified – as relevant.[242] If rehabilitation was required, then imprisonment with parole was generally viewed as being more appropriate.[243]

A lack of previous history and young age were also referred to by some as supporting suspension,[244] as was the person living in a remote or isolated location because of the difficulties of having that person on parole.[245]

Exclusion from court-ordered parole

Many expert interview participants thought supervision was important for sexual offences,[246] and the exclusion of court-ordered parole for sexual offences was impacting sentencing practices due to limited judicial discretion.[247] The fact that court-ordered parole is not available as an option in sentencing was also viewed as affecting the willingness of people to plead guilty.[248]

In the absence of other options, courts may choose to suspend the sentence to ensure certainty of release (or, alternatively, make use of prison-probation orders where this option is available). Several expert interview participants remarked that this results in people on suspended prison sentences potentially not being under any supervision in the community.[249] One participant, for example, told us:

> There are sexual assault cases where … they'd be prime candidates for a parole release date to get that supervision, that intense supervision by way of parole. But they can't get a parole release date, they can only get an eligibility date and with all that comes the problems of making an application for parole, the delay in that. So there are many cases,

240 Ibid.
241 SME Interview 19.
242 For example, SME Interviews 3, 10, 19, 22.
243 For example, SME Interviews 4, 5, 7.
244 For example, SME Interviews 13, 14.
245 SME Interview 17.
246 SME Interview 14, 16.
247 For example, SME Interviews 6, 11, 13.
248 SME Interview 25.
249 SME Interviews 1, 4, 11, 25.

> I would imagine, where a judge is sentencing for a sexual assault where they'd like to be able to sentence to, say, 18 months to two years with a parole release date immediately and they know the person's supervised.[250]

The risk of the person serving their whole sentence in custody in the case of shorter sentences was also referred to as problematic when a court is faced with a decision of whether to suspend the sentence.[251]

Several interview participants told us the exclusion of sexual offences from court-ordered parole causes problems and constrains sentencing options.[252] This would ensure the person was supervised in the community but would still also have certainty of release.

There was also some support for courts having more flexibility in sentencing options, including a dual discretion to set either a parole release date or parole eligibility date (as previously recommended by the Council)[253] and for the release of those given a parole release date, with release being conditional on the completion of relevant courses while in custody.[254] It was considered that this certainty of release (even if conditional) might translate into more people pleading guilty.[255]

Problems with existing orders and permitted combinations

The ability to combine a suspended prison sentence with a probation order or immediate imprisonment of more than 12 months with probation for a single charge was suggested by some participants as potentially beneficial, providing courts with greater flexibility in sentencing.[256]

Current restrictions were viewed by some as making the situation 'unfair' because if a person is sentenced for one offence and pleads guilty, the only option is a suspended prison sentence or imprisonment with parole eligibility, while for someone sentenced for two offences, they might be placed on a suspended prison sentence for one offence and a probation order for the second offence to achieve 'what we now don't have'.[257] The option of imposing a suspended sentence on one count and a combined prison probation order on another to provide some supervision was also noted.[258]

Another barrier to the use of combined orders is legal considerations. If the nature of the offending is too serious (for example, where the co-sentenced offences are counts of rape), then imposing a probation order for one count and a partially suspended prison sentence for the other would not be appropriate.[259]

Consultation events

Many participants were surprised that partially suspended prison sentences were being used so commonly for rape offences as well as by the high use of wholly suspended sentences for sexual assault.[260]

Similar to some of the views expressed by subject matter expert participants, the use of partially suspended prison sentences was viewed as a result of the current legislative framework/restrictions

250 SME Interview 22.
251 SME Interview 1.
252 For example, SME Interviews 3, 7, 9, 10, 14, 15, 16, 20, 21, 22, 24, 26.
253 SME Interviews 3 7, 14, 20, 21, 24.
254 SME Interview 7. See also SME Interview 4.
255 SME Interview 7.
256 SME Interviews 1, 7, 26.
257 SME Interview 9.
258 SME Interview 10.
259 SME Interview 11.
260 Cairns Consultation Event, 21 March 2024.

around the availability of court-ordered parole, with some participants supporting reforms to extend this to sexual offences.[261]

The comment was made that victim survivors often view a suspended prison sentence as 'weak' or 'disappointing', and as if it was not worth going through the process at all, particularly as there is no requirement for the person to participate in any programs or comply with any conditions (other than not to reoffend).[262] They were described as 'a bit of a "nothing" sentence'.[263]

The lack of supervision involved in suspended prison sentences was raised by several participants as problematic, which was not considered conducive to a person's rehabilitation and to holding perpetrators accountable.[264] The view was the community may expect a sexual offender to receive supervision and a wholly suspended prison sentence in its current form does not deliver this.

There was some support for courts to have the ability to attach other conditions to suspended prison sentences.[265]

It was acknowledged there are more options available to QCS to respond to a non-compliant offender who is on parole, compared with a person subject to a suspended prison sentence unsupervised.[266]

There were concerns that having a longer operational period on a suspended prison sentence does not assist with rehabilitation as it just extends the 'good behaviour period' (although a representative of the Family Responsibilities Commission at a subsequent meeting expressed support for even longer operational periods to be considered).[267]

For young first-time offenders, it was suggested that judges often do not want to risk that someone will spend longer in custody than is equitable if they set a parole eligibility date, as completing courses will often be a condition of parole and they may need to wait a long time to complete these courses.[268] Judges will sometimes instead choose a wholly suspended prison sentence as the legislation does not allow enough discretion.

Reliance on the making of dual orders – for example, the ordering of a suspended sentence for one offence with probation for another – was not only noted as reliant both on the offences being of an appropriate level of seriousness and both offences being sexual offences. Otherwise, the conditions of supervision and program engagement for the non-sexual offence would be tailored around that type of offending. Not the person's sexual offending.[269]

Previous Council recommendations

As discussed in section 11.2.1, the Council has previously recommended significant reforms to sentencing orders in Queensland. Of relevance to the use of suspended sentences, this included allowing a court to order a suspended sentence alongside a community-based order (probation, community service

261 Brisbane Consultation Event, 11 March 2024.
262 Cairns Consultation Event, 21 March 2024.
263 Ibid.
264 Brisbane Consultation Event, 11 March 2024.
265 Cairns Consultation Event, 21 March 2024; Online Consultation Event, 16 April 2024.
266 Brisbane Consultation Event, 11 March 2024.
267 Ibid.
268 Ibid.
269 Ibid.

or, once established, a community correction order) when sentencing a person for a single offence/charge[270] (recommendation 37).

The introduction of conditional forms of orders would allow supervision and compliance with program and treatment conditions to be ordered as part of the sentence where such conditions are warranted.

11.5.2 Issue 2: Non-parole periods in Queensland and adequacy

The current approach

Most people sentenced to imprisonment will be eligible for release on parole. The sole purpose of parole 'is to reintegrate a prisoner into the community before the end of a prison sentence to decrease the chance that the prisoner will ever reoffend. Its only rationale is to keep the community safe from crime'.[271]

The High Court of Australia, in characterising the approach to be taken to the setting of the non-parole period, has said that '[t]he non-parole period is imposed because justice requires that the offender serve that period in custody'.[272] It 'is a minimum period of imprisonment to be served because the sentencing judge considers the crime committed calls for such detention'.[273] Both punishment and deterrence are relevant to this determination,[274] together with other purposes of sentencing, such as community protection.[275]

It is common practice in Queensland for factors in mitigation (including a timely plea of guilty) to be reflected in setting parole eligibility at approximately one-third of the head sentence (representing a one-third reduction from the statutory 50 per cent ordinarily required to be served if no parole eligibility date is set).[276] The current approach in Queensland is discussed in more detail in **Chapter 15**.

There are mandatory sentencing provisions that are exceptions to the usual practice, including where the person is declared convicted of a serious violent offence (discussed below) or sentenced to life imprisonment.[277] In these cases, a court can set a later parole eligibility date (but not an earlier one).[278]

A special form of imprisonment, known as an indefinite sentence, can be ordered in place of imprisonment where certain criteria are met. It has no fixed date for when the sentence will end[279] and the person cannot apply for parole.[280]

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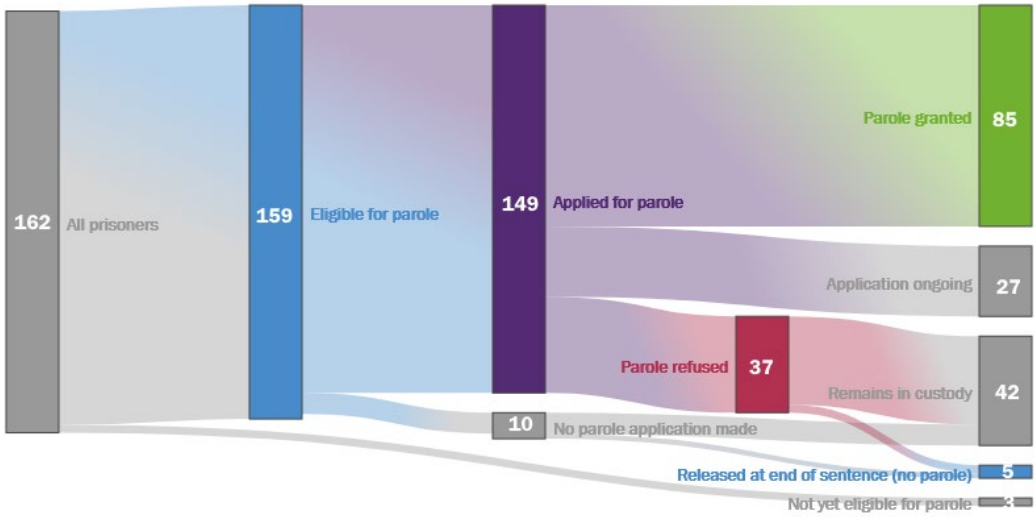
270 *Community-based Sentencing Orders, Imprisonment and Parole Options Report* (n 4) rec 37.
271 *QPSR Report* (n 7) 1 [3] (emphasis in original).
272 *Muldrock v The Queen* (2011) 244 CLR 120 [57].
273 *Power v The Queen* (1974) 131 CLR 623, 628–9 [7].
274 Ibid.
275 *Bugmy v The Queen* (1990) 169 CLR 525, 537.
276 *R v Hoad* [2005] QCA 92; *R v Norton* [2007] QCA 320; *R v Blanch* [2008] QCA 253; *R v Ungvari* [2010] QCA 134; *R v Hyatt* [2011] QCA 55; *R v Lockley* [2021] QCA 77; *R v Crouch* [2016] QCA 81; *R v DAC* [2023] QCA 53. Note, however, the Queensland Court of Appeal has increasingly noted the 'one-third reduction for a plea of guilty is not a rule' but rather a 'starting point, to be adjusted up or down, depending on the particular circumstances of each case: *R v WBV* [2023] QCA 79 [6] (Boddice JA). See also *R v Granz-Glenn* [2023] QCA 157 [12] (Bond, Flanagan JJA and Bradley J agreeing); *R v Randall* [2019] QCA 25 [37].
277 For life imprisonment, the person must serve a mandatory minimum period of 15 years before being eligible for release on parole: CSA (n 18) s 181(2)(d). The mandatory minimum period of 20 years applies if the sentence is imposed for a repeat 'serious child sex offence': s 181A.
278 Ibid s 181(3). See, for example, *R v Cowan; Ex parte A-G (Qld)* [2016] 1 Qd R 433; *R v Griffith* [2024] QDC 207.
279 PSA (n 17) s 162.
280 CSA (n 18) s 179(2)(a)(iii).

What data tells us about parole eligibility

As discussed above in section 11.3.1 on key sentencing trends for rape, most people had parole eligibility fixed at or below 50 per cent of their head sentence, although additional time was often spent in custody beyond a person's parole eligibility date prior to release.

From a review of a sample of cases for those sentenced to imprisonment for rape (MSO) who were expected to be able to apply for parole between 1 July 2021 and 30 June 2023, we found that just over half of people were granted parole and one-quarter were refused. A small number of prisoners were released after serving the full sentence, meaning they spent no time on parole.[281]

Figure 11.4: Parole application outcomes for prisoners sentenced for rape (MSO)



Data notes: Parole outcomes for imprisonment penalty for rape (MSO) with a parole eligibility date between 1 July 2021 and 30 June 2023. If more than one parole application was made, the earliest outcome or the earliest outcome that resulted in parole being granted has been counted.
Source: QCS unpublished data, extracted May 2024.

For the 3 people in the 'not yet eligible parole' category, two were subject to *Dangerous Prisoners (Sexual Offenders) Act 2003* (Qld) ('DPSOA') orders.[282]

From the sample, of the people who had been released on parole (n=84),[283] the median time served in prison beyond the parole eligibility date before being released was approximately 7 months (211.5 days, average 267.8 days).[284]

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281 A sample of cases were selected to analyse parole outcomes for those sentenced to imprisonment for rape. This data was from Queensland Corrective Services (QCS). The sample comprised of all prisoners who were sentenced to imprisonment for rape (MSO) and were expected to be able to apply for parole between 1 July 2021 and 30 June 2023.

282 A DPSOA is not a parole order, but a post sentence civil application by the Attorney-General. This order can be made by the Supreme Court towards the end of a prisoner's sentence and requires additional set periods of incarceration and/or community supervision to be served after the person has completed their sentence. In our SVO scheme report, we found, of prisoners sentenced with an SVO declaration, the proportion of DPSOA orders was much higher for rape (28.4%), compared to maintaining a sexual relationship with a child (11.7%). Both offences had similar rates of successful parole applications, with around one-third of prisoners granted parole (38.1% for rape, 35.1% for maintaining). See *The '80 per cent Rule'* (n 20): section 9.2.1.

283 One person was excluded from the analysis as they had been granted parole but had not yet been released when the data was extracted (June 2024) therefore did not yet have a discharge date.

284 Ibid.

In our 2022 report, *The '80 Per Cent Rule'*,[285] we found that people sentenced for rape with an SVO declaration served the longest period beyond their parole eligibility date compared with other offences.[286] For people sentenced to 5 years or more but less than 10 years (with no SVO declaration), rape was one of the least likely categories for a parole application to be approved.[287]

How the SVO scheme impacts non-parole periods

Just over one in 10 sentences for rape (MSO) involved the making of an SVO declaration, and most of these were made on a mandatory basis. However, sentences falling just below this level are also likely to be impacted by the SVO scheme. There were no SVO declarations for sexual assault (MSO).

As discussed in section 11.2.2, when a declaration is made, this means a person must serve 80 per cent of their sentence or 15 years (whichever is less) before being eligible for release on parole.

What other jurisdictions do

The general approach taken to the fixing of non-parole periods in other jurisdictions differs. Some jurisdictions identify a minimum statutory ratio of the non-parole period to the head sentence (and the reverse in NSW), while others leave this to be determined by the court as a matter of discretion.

In other states and territories, sentencing and parole legislation provides guidance about the required minimum, or recommended proportion between the non-parole period and the head sentence. This ranges from 50 per cent in the Northern Territory, Tasmania, and Western Australia (in this case, limited to sentences of 4 years), to 75 per cent in NSW.[288] In WA, for sentences of more than 4 years, a person is eligible for parole after serving all but two years of the term of imprisonment imposed in custody.[289]

In a number of these jurisdictions, a court is either not permitted to set a non-parole period that is less than the statutory ratio specified,[290] or is allowed to depart from this only if special circumstances apply.[291] This is different from the position in Queensland, where the usual requirement that a person serve 50 per cent of their sentence before being eligible for release on parole only applies if the court does not set an earlier (or later) parole eligibility date.[292]

Special schemes apply in some cases, requiring a higher proportion of the sentence to be served in custody prior to parole eligibility; these are either presumptive or mandatory, and also apply to some sexual offences – for example:

- In the NT, for sentences of imprisonment of 12 months or longer, the non-parole period must not be less than 70 per cent of the head sentence for offences of sexual intercourse without consent,

285 *The '80 per cent Rule'* (n 20).
286 Ibid 113, fig 33.
287 Ibid, 114 fig 34: parole applications for rape were granted in 67% of cases (only behind attempted murder 62%) compared to deal or traffic in illicit drugs 91% granted, and grievous bodily harm 81% granted). Rape were the most likely to have a parole application refused (14% of applications were refused, slightly more than maintaining at 13% refused).
288 See *Sentencing Act 1995* (NT) ss 55, 55A; *Sentencing Act 1997* (Tas) s 17(3); *Sentencing Act 1995* (WA) s 93 (for aggregate sentences see s 94); *Crimes (Sentencing Procedure) Act 1999* (NSW) s 44, unless there are special circumstances for the balance of the sentence to be more. A court can also decline to set a non-parole period: s 45.
289 *Sentencing Act 1995* (WA) s 93 (for aggregate sentences see s 94).
290 See, for example *Sentencing Act 1997* (Tas) s 17(3).
291 See *Crimes (Sentencing Procedure) Act 1999* (NSW) s 44.
292 CSA (n 18) s 184(2). There are some legislative exceptions to this.

certain other sexual offences and violent offences, and certain offences committed against people under 16 years of age.[293]

- In SA, a minimum non-parole period of four-fifths (80%) of the head sentence applies to people convicted of a serious offence where the offender is, or has been, declared to be a serious repeat offender[294] unless there are exceptional circumstances.[295]
- In Victoria, for a 'standard sentence offence' (which includes rape), the non-parole period must be fixed at least 60 per cent of the head sentence when less than 20 years; at least 70 per cent of the head sentence when 20 years or more; and 30 years if life imprisonment is imposed, unless the court finds it is in the interests of justice not to do so.[296]

Stakeholder views

Submissions from victim survivors and support and advocacy stakeholders

As discussed throughout this report, victims survivors and support and advocacy organisations generally told us they consider that sentences for sexual assault and rape inadequate and do not sufficiently reflect the seriousness of these offences and the harm caused to victim survivors.

QSAN referred to both short non-parole periods and time spent in pre-sentence custody affecting release dates as impacting victims, submitting:

> If a person is on remand because they are a risk to the community and/or the victim-survivor and were unable to convince a court of ways to mitigate this risk, it seems at odds that with no further mitigation of risk, they can benefit from a quick/immediate release taking into account time already served.[297]

With respect to serious violent offence (SVO) declarations, the Queensland Network of Alcohol and Other Drug Agencies Ltd ('QNADA') submitted: 'It seems strange to us that [SVO] declarations are more common for drug trafficking than for sexual offending.'[298]

Submissions from legal stakeholders

LAQ considered 'sentencing for sexual assault and rape offences adequately reflect[s] the purposes of sentencing and the seriousness of these offences and no changes to sentencing options on this basis should be made'.[299] It raised concerns that any strengthening of sentencing responses could disincentivise pleas of guilty, with more cases being taken to trial and a larger proportion of such matters resulting in no convictions:

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293 *Sentencing Act 1995* (NT) ss 55, 55A.
294 *Sentencing Act 2017* (SA) ss 53, 54. This is triggered if the person has committed at least 3 serious offences on separate occasions or at least 2 serious sexual offences committed on separate occasions. 'Serious offence' and 'serious sexual offence' are defined in s 52. For more information, see Queensland Sentencing Advisory Council, *Minimum Non-parole Period Schemes for Serious Violent Offences in Australia and Select International Jurisdictions: Background Paper 2* (2021) section 2.7.3.
295 *Sentencing Act 2017* (SA) ss 48(2), 54(2). In the case of the serious repeat offender provisions, the person must also satisfy the court it is in all the circumstances not appropriate that they be sentenced as a serious repeat offender: ibid s 54(2)(b).
296 *Sentencing Act* (Vic) (n 137) s 11A.
297 Submission 24 (QSAN) 8–9.
298 Submission17 (QNADA) 4.
299 Submission 23 (Legal Aid Queensland) 16.

> In LAQ's experience, cases where comments are made that sentences can be 'low and inconsistent' are often explained by an incomplete knowledge of the relevant facts of the case and the circumstances of the victim or offender.[300]

LAQ noted its objection to 'mandatory minimums and legislative changes that would narrow sentencing discretion', cautioning that such an approach 'risks unjust sentences being imposed'.[301] It agreed with statements made by Sisters Inside in its preliminary submission that 'an introduction in mandatory sentencing or an increase to penalties is unlikely to address the causes of such offending and therefore is unlikely to affect rates of like reoffending'.[302]

Subject matter expert interview participants

One participant commented on what they considered the significant differences between Queensland and NSW regarding the setting of non-parole periods/parole eligibility dates.[303] They noted the common practice of setting parole eligibility at one-third if the person pleads guilty, which was in contrast to NSW, where there is less discretion and a percentage-based system to encourage early resolution of cases. This practitioner suggested the percentage of cases committed for sentence was far lower than in NSW for this reason, which they considered was a better outcome for victims in having matters resolved more quickly, as well as for those sentenced. Explaining to community members how a 9-year sentence can result in parole eligibility set at 3 years was viewed as challenging: 'I think the sentiment from the community is that it's not enough on that level.'[304]

Participants raised concerns about the mandatory nature of SVO declarations (for sentences of 10 years or more) which limited the ability of a court to reflect the seriousness of the offence in setting the head sentence, but structuring the time in custody to reflect a plea of guilty and other factors in personal mitigation.[305] In its current form, there were concerns that it does not incentivise a person to plead guilty.[306]

At the upper end of offending (around the 10-year mark), this was viewed as having an impact, with submissions noting that there was a significant likely difference in a 9-year sentence, with parole eligibility set at one-third or fixed at half, compared with a 10-year sentence to serve 8 years (80% under the scheme).[307]

Even if made on a discretionary basis, if there was a plea the comment was made that any reduction 'has to come from the top', meaning the head sentence would be reduced as a consequence.[308]

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300 Ibid 18.
301 Ibid 17.
302 Ibid 18.
303 SME Interview 19.
304 Ibid.
305 SME Interview 26.
306 Ibid.
307 SME Interviews 11, 19.
308 SME Interviews 15, 16.

Consultation with victim survivors

Consultation with victim survivors

The Council consulted with victim survivors.[309] Several victim survivors with whom the Council met raised concerns about perpetrators being eligible for parole so soon after sentence – often due to the person having spent significant time in pre-sentence custody that was declared.[310] This issue was also raised in a submission made by a person with lived experience of sexual violence.[311]
One victim survivor referred to statements made by the sentencing judge that it was an eligibility date only and not a certainty that the person would be released.

> So … He has to finish a sex course or something in [custody]. But the judge says he probably won't get it [parole]. (Victim survivor (rape and sexual assault of a child), Interview 4)

In some cases, these victim survivors considered that the person should be supervised for life (and be electronically monitored)[312] and/or spend their whole sentence (or life) in custody due to significant impacts of offending and from a community safety perspective.[313] In a submission, a person with lived experience of sexual violence was concerned about the need to protect children:

> Every time you allow these predators out of jail children are harmed, for those children it is a life sentence, and there is no parole.[314]

The perpetrator in the first case was sentenced for engaging in penile intercourse with a child under 16 years (she was 13 at the time) in circumstances where the perpetrator was a child at the time of the offending and received an 18-month probation order and a community service order to complete 70 hours of community service work. The victim survivor indicated that she supported a longer period of supervision rather than a longer prison sentence with a shorter period of supervision on community protection grounds:

> In response to a question about what is more important, longer time in prison and short supervision or long supervision and short time in prison: short time in prison. Because supervision … protects other kids.

In general, however, those interviewed were of the view those convicted of sexual offences should spend a longer time in custody.[315] The comment was made even a small increase in sentences would 'make a big difference' to their view of the sentence.[316]

Previous Council recommendations

As discussed in section 11.2.1, the Council has previously recommended significant reforms to community-based sentence orders and parole options in Queensland. Of relevance to the current review

309 See Chapter 4 for methodology and further details on this consultation activity.
310 For example, Victim Survivor Interviews 4, 6
311 Submission 1 (Name withheld).
312 Victim Survivor Interview 4.
313 For example, Victim Survivor Interviews 2, 4, 6. The perpetrator in Victim Survivor 2's case received an SVO declaration and she indicated that she did not consider the requirement to serve 80 per cent of the sentence to be enough 'You do the crime, you do the time'. But if released, he should be supervised for life.
314 Submission 1 (Name withheld).
315 For example, Victim Survivor Interviews 1, 4.
316 Victim Survivor Interview 4.

are the recommended reforms to the SVO scheme (which we recommended be renamed 'serious offence declarations').[317]

We recommended the SVO scheme be changed to a presumptive scheme for sentences of greater than 5 years with discretion when a declaration is made to set the parole eligibility date between 50 and 80 per cent.[318] We proposed that rape and aggravated sexual assault should be retained as offences to which the reformed scheme applies.

The expected outcomes of our reforms, if adopted, including for rape and aggravated sexual assault, were more SVO declarations being made for sentences of imprisonment of 5 years or more and less than 10 years. That would mean more people sentenced for these offences being required to serve a greater proportion of their sentence in custody (at a minimum, 50% up to 80%) before being eligible for release on parole.

These reforms are yet to be legislated.

11.5.3 Issue 3: Program availability, length and resourcing issues

For people sentenced to imprisonment (including as part of a partially suspended prison sentence), there are limited opportunities for program engagement and completion prior to release or eligibility for release from custody. In the case of sexual assault, this is due primarily to the short sentence lengths and, in the case of both sexual assault and rape, extended periods spent by some sentenced persons on remand. Lengthy periods of pre-sentence custody impact in a variety of ways, including by reducing the time the person is under parole supervision due to difficulties accessing programs on remand and delays in accessing these programs once sentenced due to program availability in circumstances where the Parole Board Queensland might consider program completion an important precondition for the person's release.

Parole eligibility, time under supervision and program engagement

During our consultations, we were told that for people in custody, there is limited opportunity for program engagement and completion prior to people reaching their parole eligibility dates.[319] This is particularly a problem for those people serving short sentences of 12 months or less.

Data compiled for this review on median sentences for sexual assault and rape, median time declared as time served for a person who has spent time on remand and the median time to serve before being eligible for release on parole provides a high-level measure to assess the extent to which pre-sentence custody might impact opportunities for program completion and supervision in the community.

For rape, we found the following:

- The median imprisonment sentence was 6.5 years.[320]
- The median time to serve before parole eligibility was 2.5 years.[321]

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317 *The '80 per cent Rule'* (n 20).
318 Ibid recs 2, 9. Note, for listed drug offences we recommended the presumption apply when sentences are 10 years or more (rec 8).
319 This issue was raised by several subject matter expert interview participants: SME Interviews 4, 12, 15, 21.
320 See Appendix 4 section 4.7.1 analysing data from July 2005 to June 2023.
321 See Appendix 4 section 4.7.7 analysing data from July 2011 to June 2023.

- The median time on remand for an imprisonment sentence was 10 months,[322] meaning the person would have one year and 8 months of additional time to serve prior to reaching their parole eligibility date.
- For those who applied for and were granted parole, the median time served beyond their parole eligibility date was 211.5 days (about 7 months).[323] This would still leave about 3 years under parole supervision based on median sentence lengths and parole eligibility dates.
- People sentenced for rape with an SVO declaration served the longest beyond their parole eligibility date compared with other offences.[324]
- For people sentenced to 5 years or more but less than 10 years (with no SVO declaration), rape was one of the offence categories least likely to have a parole application approved (62% compared with 91% of deal or traffic in illicit drugs offences and 81% of assault occasioning grievous bodily harm offences).[325]

For non-aggravated sexual assault, we found:

- For a case sentenced in the higher courts, a sentence of one year and 3 months, assuming a parole eligibility date set at one-third, as is the common practice in Queensland when a person pleads guilty, would mean the person would have to spend 5 months prior to parole eligibility, of which a substantial portion may have been spent on remand.
- For a case sentenced in the Magistrates Courts, the median imprisonment sentence was 9 months[326] and the time to serve before being eligible for parole was 2.5 months. As is the case for cases sentenced in the higher court, some of this time may have been spent on remand.

The median time on remand across both court levels and including both aggravated and non-aggravated sexual assault offences was 3.8 months (116 days) – noting that cases where pre-sentence custody was declared had longer median sentence lengths compared with those that did not (1.0 years vs 0.75 year).[327]

These findings support the conclusions:

- There is limited time for a person to complete programs in custody prior to reaching their parole eligibility date, given that many programs have historically not been offered to prisoners on remand and the length of many of these programs and waiting lists.
- For sexual assault in particular, very limited time is likely to be spent under parole supervision.

322 See Appendix 4 section 4.7.10 analysing data from July 2011 to June 2023.
323 See Appendix 4 section 4.7.8 analysing data from July 2021 to June 2023.
324 *The '80 per cent Rule'* (n 20) section 9.2.2, 113 fig 33.
325 Queensland Corrective Services uses different offence categories to the legislative offences. See Queensland Sentencing Advisory Council, *The '80 per cent Rule': The Serious Violent Offences Scheme in the Penalties and Sentences Act 1992 (Qld): Final Report – Appendices* (2022) App 5, Table A4 for how they correspond (*'80 per cent Rule' – Appendices*).
326 See Appendix 4 section 4.8.2 analysing data from July 2005 to June 2023.
327 See Appendix 4 section 4.8.11 analysing data from July 2011 to June 2023.

Availability of programs on remand

The Queensland Productivity Commission, in its 2019 *Inquiry into Imprisonment and Recidivism: Final Report*, recommended reforms to ensure prisoners on remand are able to access suitable programs and other activities likely to aid their rehabilitation.[328]

While the Productivity Commission's recommendation was not specific to sexual offending, the additional 7 months (median) that prisoners sentenced for rape serve in custody beyond their parole eligibility date before they are released on parole (assuming they apply for and are granted parole) suggests additional time is required to be spent post the person's parole eligibility date to complete required programs in custody prior to release. This impacts parole release and therefore the time the person is under supervision in the community prior to the expiry of the sentence.

In *R v Waszkiewicz*,[329] the Court of Appeal noted that: 'Parliament has legislated that neither remand prisoners nor offenders seeking leave to appeal their sentences may receive relevant rehabilitation treatment in prison.'[330] Atkinson J observed:

> it appears counterproductive that the beneficial rehabilitation effect of treatment programmes in prison are denied to prisoners who do not seek to deny their guilt but do seek to exercise their right to seek leave to appeal against sentence. Rehabilitation of such prisoners undoubtedly benefits the offender but more importantly it protects the community by reducing the risk of reoffending, perhaps the most fundamental justification for incarceration.[331]

Contextual factors

Several broader contextual factors impact sentencing practices in Queensland and the services, programs and interventions available to people sentenced for sexual assault and rape. They include:

- substantial increases in prisoner numbers between 2013 and 2024,[332] and increase in Aboriginal and Torres Strait Islander imprisonment rates;[333]
- service delivery, staff attraction and retention and resourcing challenges across all parts of the criminal justice system; and
- broader social issues, such as the lack of affordable and accessible housing and limited availability of support services in the community such as mental health services and drug and alcohol services.

While these factors operate independently of the sentencing framework, they can nevertheless impact sentencing in important and significant ways, including:

- whether a person charged with an offence is released on bail;
- for those people held on remand, increased time between being charged, convicted and sentenced, meaning some people may spend long periods in pre-sentence custody prior to sentence;

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328 *Inquiry into Imprisonment and Recidivism* (n 3) rec 17.
329 [2012] QCA 22.
330 *R v Waszkiewicz* [2012] QCA 22, 8 [35] (White JA, Chief Justice de Jersey and Atkinson J agreeing) citing CSA (n 18) s 180(2)(b).
331 Ibid 8 [37].
332 *Prisoners in Australia 2023* (n 40) Table 15. Queensland prisoners increased from 6,079 in 2013 to 10,226 in 2023. The percentage of unsentenced prisoners increased from 22.1% in 2013 to 36% in 2023.
333 Ibid, percentage of Aboriginal and Torres Strait Islander persons in prison in Queensland was 31.2% in 2013 and increased to 37.2% in 2023. See ibid Table 30 for data on sentenced and unsentenced and male and female.

- making the conditions under which people are held in custody more onerous due to issues such as prison overcrowding, correctional centre lockdowns and suspension of in-person family visits – for example, in response to the COVID-19 pandemic;
- limiting the ability of QCS and other service providers to deliver programs and other interventions in custody and in the community;
- placing additional pressure on QCS to ensure operational staff are appropriately skilled and trained to work effectively with people on probation and parole to reduce their reoffending risks and increasing caseloads of community corrections officers;[334]
- increasing the workload of the Parole Board which may limit its ability to determine applications for parole in a timely way.[335]

We acknowledge that many of these issues go beyond those we have been asked to review, but they are still relevant to our assessment of options for reform.

The management of sexual offenders

How people under sentence are managed in custody and in the community can influence whether sentencing orders made by a court meet their intended objectives. In this section, we provide a brief overview of assessment and screening tools that guide the level of service and interventions offered, and the types of program interventions available to prisoners in custody and on parole. More information about how people are managed by QCS can be found on the QCS website.[336]

Assessments and screening tools

In our **Consultation Paper: Background**,[337] we identified the range of screening and assessment tools used for people in custody. We noted that people who are serving a term of imprisonment less than 12 months may not undertake the same assessments as those serving terms of imprisonment greater than 12 months (such as the Rehabilitation Needs Assessment). For a person with a term of imprisonment of 12 months or less, a Progression Plan and case management process may be initiated if special needs have been identified, such as 'at risk, dysfunctional and intellectual disability'. This is determined on a case-by-case basis.[338]

We also discussed the use of specialised risk assessment tools for people who have been convicted of sexual offences. Men sentenced to a period of 12 months or more for relevant sexual offences (including sexual assault or rape)[339] must undergo a Specialised Assessment with the STATIC 99-R. This is an actuarial assessment tool designed to predict sexual offending recidivism. In addition to the STATIC 99-R, QCS also

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334 See, for example, Australian Government Productivity Commission, *Report on Government Services 2024* (2024) Part C, Section 9 'Corrective services', Table 8A.9 which reports that Queensland's community corrections offender-to-operational staff ratio was 24.3 in Queensland compared to a national average of 18.6.

335 For example, in 2023–24, the Parole Board Queensland reported it had received 4, 794 parole applications and considered 7, 952 applications (noting applications can be considered more than once. It estimated that close to 70% were decided within the statutory timeframes (meaning that 30% were not): Parole Board Queensland, *Annual Report 2023–24* (2024) 13. The number of applications received and considered was an increase from the previous year: see Parole Board Queensland, *Annual Report 2022–23* (2023) 14.

336 See Queensland Corrective Services (web page) <https://corrections.qld.gov.au>.

337 See *Consultation Paper: Background* (n 39).

338 See 'Placement Considerations' in Queensland Corrective Services, *Sentence Management: Classification and Placement, Custodial Operations Practice Directive* (03/08/2023: Public version) 6 ('QCS Sentence Management').

339 As defined in Schedule 1 of the CSA (n 18). Offenders sentenced for child exploitation material offences including possession, making or production, or procurement of minors for objectional computer games, films or publications are not assessed using this assessment tool.

uses STABLE-2007, which measures sexual offending risk factors that can change over time.[340] It is typically used as part of the treatment and management process of men convicted of a sexual offence who have completed the Getting Started Preparatory Program, and prior to their engagement in a treatment.

As part of its new case management framework, QCS has been phasing in the use of a new suite of validated assessment tools. The Level of Service Inventory – Revised: Screening Tool (LSI-R:SV) has been introduced as an initial screening assessment for eligible prisoners at locations involved in the End-to-End Case Management Project (see below). Similar to the Risk of Reoffending (RoR) score currently in use in Queensland, the LSI:R:SV measures static factors such as age and criminal history but also takes into account potential criminogenic needs such as family relationships, peers, attitude, emotional wellbeing and substance abuse history.

Case management

The Case Management Custodial Operations Practice Directive outlines QCS's approach to managing people in custody. It requires each corrective services facility to allocate relevant staff members as case officers. Case management is 'shared between case officers drawn from nominated intervention specialists and corrective services officers from the prisoner's accommodation area whose combined efforts will contribute to the overall case management of the individual prisoner'.[341]

Case officers are involved in the 'day to day management and supervision of the prisoner' and have several responsibilities, including to:

- manage prisoner behaviour;
- ensure the prisoner's risks and needs are managed and documented;
- facilitate the prisoner's attendance at interventions, courses and activities;
- liaise with other staff/case workers to ensure the implementation of the prisoner's Progression Plan;
- provide reports as required;
- facilitate referrals; and
- act as a positive role model.[342]

End-to-End Case Management and End-to-End Offender Management Framework

In early 2019, QCS initiated End-to-End ('E2E') Case Management as an improved way to manage and support people in custody to achieve behavioural change.[343] The E2E Offender Management Framework provides a single, evidence-based framework for all QCS officers across the state.[344] The framework encompasses five fundamental principles: risk and need; desistance; responsivity; evidence-based; and

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340 STABLE-2007 is administered for those individuals motivated to engage in treatment, regardless of their STATIC 99-R risk, to assess a person's treatment needs and inform their most suitable treatment pathway.

341 Queensland Corrective Services, *Daily Operations – Case Management, Custodial Operations Practice Directive* (3 February 2023) 6.

342 Ibid.

343 The approach aims to respond to various recommendations in the *QPSR Report* (n 7) and is informed by extensive research undertaken by the Offender Management Renewal Program in 2017 and 2018: The approach aims to respond to various recommendations in the QPSR and is informed by extensive research undertaken by the Offender Management Renewal Program in 2017 and 2018.

344 Queensland Corrective Services, *Annual Report 2020-21* (Report, 2020-21) 31–2 ('*QCS Annual Report 2020-21*').

governance. It aims to provide a consistent pathway, beginning at the point of entry to the correctional system, and supports:

- progression through the correctional system;
- improving preparedness and readiness for release into the community; and
- continuity of service delivery.

Critically, E2E Case Management aims to ensure there is front-end assessment when a person enters custody to provide them with a targeted plan for their time under QCS management.

Under the E2E Case Management Framework, eligible persons and supervised persons at select locations are assessed for their level of service needs using validated tools.[345] Intensity of service delivery is scaled in accordance with sentence length, legal status and assessed risk and need.[346]

The E2E pilot commenced at the Townsville Correctional Complex in December 2020 and was expanded to South-East Queensland women's correctional centres in 2022. E2E has also been utilised for all women under the supervision of Community Corrections since 2023.[347] Further rollout of this model continues to be evaluated.[348]

Sexual offending programs and interventions

QCS delivers a range of targeted programs in correctional centres that aim to reduce sexual offending recidivism – see Table 11.1. These include group-based cognitive behavioural programs to address sexual offending, including preparatory, medium-intensity, high-intensity and maintenance programs. There are also various specific programs for Aboriginal and Torres Strait Islander persons and those with low cognitive social emotional abilities.

All those who participate are required to complete the preparatory program first, prior to transitioning to a higher intensity program. There is no differentiation in QCS's sexual offending programs between those who committed offences against children or adults as all sexual offending programs are considered suitable for both cohorts.

Participation in and completion of a sexual offending program is taken into consideration by the Parole Board when assessing a prisoner's application for parole.

During 2022–23, there were a combined 407 completions of sexual offending programs in custody and in community corrections.[349] There were also '165 sexual offenders who were also offered individual intervention, safety planning or assessment to address sexual offending in circumstances where they could not access group-based treatment'.[350]

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345 QCS uses the Level of Service Inventory - Revised: Screening Tool (LSI-R:SV) as an initial screening assessment and the Level of Service/Risk, Need, Responsivity (LS/RNR). These tools are validated and guided by the Risk-Need-Responsivity model of offender management and cover: criminal history, education/employment, family/marital and peer relationships, leisure/recreation activities, substance abuse, pro-criminal attitudes and antisocial patterns: Correspondence from Queensland Corrective Services to Queensland Sentencing Advisory Council, 3 November 2023

346 Similar to the RoR score, the LSI-R:SV measures static factors (such as age and criminal history), as well as criminogenic needs (such as family relationships, peers, attitude, emotional wellbeing and substance abuse history). The LSI-R:SV score does not determine a person's eligibility for parole: Correspondence from Queensland Corrective Services to Queensland Sentencing Advisory Council, 3 November 2023.

347 Queensland Corrective Services, *Annual Report 2022-23* (Report, 2023) 11 ('*QCS Annual Report 2022-23*').

348 *QCS Annual Report 2020–21* (n 344) 33.

349 *QCS Annual Report 2022-23* (n 347) 21.

350 Ibid.

A 2019 review of sex offender treatment programs then delivered by QCS found that engaging in these programs 'appears to be effective in reducing sexual and non-sexual recidivism'.[351] They found that around 4.5 per cent of the total sample reviewed returned to custody for a new sexual offence, which was consistent with an earlier 2010 study.[352] Youthful offenders and Aboriginal and Torres Strait Islander males being the 'least likely to complete programs', suggesting possible difficulties engaging with the QCS programs available at the review period.[353]

The review found that:

> Current best-practice evidence, and program logic for the suite of QCS intervention programs, suggests that the completion of all three components of the QCS SOTP [sex offender treatment program], in addition to a reintegration program, may produce the best outcomes.[354]

In light of this finding, the available time to complete programs was found to be particularly important, with the authors of this research finding that 'shorter sentences may therefore limit important intervention opportunities, including whether an offender is given the change to complete all intervention components'.[355]

Since that evaluation was completed, QCS has piloted a new First Nations sexual offending program called Solid Spirit between July 2022 and March 2023; it was delivered in the 2023–24 financial year, adopting recommendations made as a result of the pilot.[356] QCS reports the program takes 'an average of six months to complete, with participants undertaking a mixture of individual and group-based intervention with a focus on successful community reintegration and risk management'.[357]

More information about the research findings on the effectiveness of sexual offending programs, including programs delivered by QCS, is provided in our **Consultation Paper: Background**, section 9.6.[358]

Table 11.1: QCS sexual offending programs in custody

Program name	Details
Getting Started Preparatory Program (GSPP)	A 24-hour introductory, motivational program designed to assist people to reduce barriers and responsivity factors known to inhibit further intensive sexual offending programs. A person must have sufficient time on their sentence to complete the program with their current sexual offence conviction. Available at: Lotus Glen, Townsville, Capricornia, Maryborough, Woodford, Wolston, Far Northern Community Corrections, Brisbane Community Region Community Corrections, and Southern/South Coast Community Corrections.

351 *University of Melbourne Literature Review* (n 2) 87.
352 Ibid 88, citing findings of 4.9% by Stephen Smallbone and Meredith McHugh, *Outcomes of Queensland Corrective Services Sex Offender Treatment Programs* (Final Report, February 2010) 37.
353 Nadine McKillop et al, 'Effectiveness of Sexual Offender Treatment and Reintegration Programs: Does Program Composition and Sequencing Matter?' (2022_ 55(2) *Journal of Criminology* 195 ('*The Effectiveness of Sexual Offender Rehabilitation Programs*').
354 USC Sexual Violence Research and Prevention Unit, The *Effectiveness of Sexual Offender Rehabilitation and Reintegration Programs: Integrating Global and Local Perspectives to Enhance Correctional Outcomes* (Research Report, August 2019) 48.
355 Ibid.
356 Queensland Corrective Services, *Annual Report 2023–24* (2024) 30.
357 Ibid.
358 See *Consultation Paper: Background* (n 39).

Medium Intensity Sexual Offending Program (MISOP)	A 78- to 132-hour program for people assessed as low to moderate risk of sexual reoffending. A person must have sufficient time to complete the program with their current sexual offence conviction. Available at: Lotus Glen, Townsville, Capricornia, Maryborough, Woodford, Wolston, Far Northern Community Corrections, Brisbane Region Community Corrections, and Southern/South Coast Community Corrections.
High Intensity Sexual Offending Program (HISOP)	A 351-hour program for people assessed to be at high risk of sexual reoffending. A person must have sufficient time on their sentence to complete the program with their current sexual offence conviction. Available at: Wolston
Inclusion Sex Offending Program (ISOP)	A 108-hour program for people with low cognitive and/or low social/emotional abilities, that have been assessed as requiring support to participate in a sexual offending program. A person must have sufficient time on their sentence to complete the program with their current sexual offence conviction. Available at: Wolston
Strong Solid Spirit – First Nations	A 6-month intervention program specifically designed for First Nations men who have been convicted of a sexual or sexually motivated offence. The program is a mixture of group based and individual intervention sessions with a focus on successful community integration and risk management. A person must have sufficient time on their sentence to complete the program with their current sexual offence conviction. Available in: Lotus Glen
Sexual Offending Maintenance Program (SOMP)	A 16- to 24-hour program to build on and strengthen people's cognitive, emotional and behavioural skills linked with living an offence free lifestyle. A person must be sentenced and have sufficient time on their sentence to complete the program with their current sexual offence conviction, and must have completed a previous sexual offending intervention. Offenders can participate in SOMP multiple times, commencing 12 months after completing an intervention program. Available at: Wolston, Brisbane Region Community Corrections and Southern/South Coast Community Corrections.

Source: Queensland Corrective Services, Annual Report 2021-22, 17-19 with details about the programs taken from the Queensland Parole System Review, Appendix 12; with delivery location information sourced from Correspondence from Queensland Corrective Services to Queensland Sentencing Advisory Council, 3 November 2023.

Violence programs and interventions

Some people serving a custodial sentence for a sexual violence offence may also need interventions that address violence offending. There are very few programs addressing violent offending offered by QCS – see Table 11.2.

Table 11.2: QCS violence offending programs in custody

Program name	Details
Disrupting Family Violence Program (DFVP)	A 75-hour moderate intensity program targeted at perpetrators of domestic and family violence. A person must have sufficient time to complete the program and a history of domestic violence ('DV') offending/current Domestic Violence Order. This program is not suitable for high risk DV offenders. Available at: Woodford, Maryborough, Wolston and Capricornia
Living Without Violence (LWV)	LWV is a 135-hour program delivered to people who are assessed as being at moderate risk of violent re-offending and have a moderate level of rehabilitative need. LWV addresses various criminogenic needs including, but not limited to, factors corelated to violent behaviour such as substance misuse and relationships. Available at: Woodford, Townsville Correctional Complex (Mens)

Source: Queensland Corrective Services, Annual Report 2021-22, 16-17 with details about programs taken from the Queensland Parole System Review, Appendix 12; with delivery location information sourced from Correspondence from Queensland Corrective Services to Queensland Sentencing Advisory Council, 3 November 2023.

Stakeholder views

Submissions from victim survivors and support and advocacy stakeholders

QSAN consulted with Murrigunyah (a sexual assault support service for Aboriginal and Torres Strait Islander people)[359] regarding relevant impacts of intergenerational trauma and cultural considerations. It submitted that a range of issues impact Aboriginal and Torres Strait Islander people sentenced for these offences, including:

> Lack of access to cultural supports and resources, art or other creative/expressive outlets … no access to local Elders to assist with level of advocacy whilst serving sentences. The inability of the offender to access culturally appropriate interventions and culturally safe practices such as traditional ways of healing and little diversion to local Traditional Owner healing groups or Elders who provide Spiritual Healing. Racist treatment from Correctional staff and others who work in the system at times exacerbates stress.[360]

The 'lack of culturally appropriate and safe interventions, programs and access to Elder advocates who visit the correctional centres' and a 'lack of connection to culture, family and other significant people in community' was highlighted in the context of a need to consult with community and engage with Elders as part of the sentencing process.[361]

Murrigunyah submitted: 'The most important priority in sentencing is the safety of the victim/survivor and accountability of the offender'.[362]

Submissions from research institutions, professional bodies and community advocacy organisations

The Royal Australian and New Zealand College of Psychiatrists advocated for 'enhanced mental health services in custody' in recognition of 'the significant short fall in adequate care for people with substance use disorders and those living with intellectual and developmental disability'.[363] It noted that the current High Security Inpatient Service, 'The Park' at Wacol, 'can only take a proportion of high-risk classified persons', with other persons needing to be managed in 'a general adult mental health ward'. It advocated for an additional unit to be established to service 'highly complex and high-risk persons'.[364]

It told us another concern of the Queensland Branch was that, 'despite having a well-developed mental health system for people in custody, the growth of the custodial population has well outstripped the capacity of these services to meet the needs of people with complex mental health problems transitioning into the community', placing them 'at a higher risk of re-offending or having a relapse'.[365] They highlighted the need for 'appropriate and adequate resourcing' as well as 'integration of mental health services, effective funding of drug and alcohol services, care co-ordination and addressing social determinants of health like homelessness'.[366]

Submissions from legal stakeholders

In response to a separate question regarding sentencing guidance, LAQ submitted that there was a need for court to be 'provided with information on the availability of specific targeted sex offender courses that could be ordered' to better allow courts to tailor their orders to meet the purposes of sentencing.[367] It

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359 Murrigunyah Family & Cultural Healing Centre is a community based sexual assault support service. For more information, see <https://www.murrigunyah.org.au/about-us>.
360 Submission 24 (QSAN) 5 (directly referencing feedback provided by Murrigunyah).
361 Ibid.
362 Ibid.
363 Submission 33 (The Royal Australian & New Zealand College of Psychiatrists) 3.
364 Ibid.
365 Ibid.
366 Ibid.
367 Submission 23 (Legal Aid Queensland) 20.

commented that sentencing purposes were not 'mutually exclusive' and consideration should be given to changes to improve access to programs, including when prisoners are on remand:

> In considering the sentencing purposes, rehabilitation and imprisonment for example are not mutually exclusive. If focus is on the cohort of offenders who are not granted bail, this group falls under the management of the prison system and provides a unique opportunity for early intervention and to commence rehabilitation. However, to support early intervention and rehabilitation, changes would need to be made to improve prisoner access to programs where they are on remand in particular circumstances.
>
> Treatment and services should be delivered in a consistent fashion across the correctional centres. This would require a commitment and 'buy in' from government to secure adequate financial resources, and commitment from the correctional centres themselves. There will always be a cost in the administration of new innovations. However, if change would achieve better guidance in informing sentencing orders such costs should be catered for.[368]

It signalled 'an opportunity for future research into what type of pre-and post-release services can best address outcomes' to 'provide a strong evidence base to show what works and what is ineffective'.[369]

Subject matter expert interview participants

Several participants referred to the length and availability of some programs in custody, noting the impact on parole release decisions. For example, comments included:

> if people are required to do the sex offenders, high intensity sexual offenders program before getting out of jail, they're just not going to get out of jail. There's already enough people in there that need to do that course without adding all these other people in there and just clogging up the system because [Queensland Corrective Services] just don't have enough, they don't have the ability to offer the course any more often than they are given the intensity of it.[370]
>
> I know that to do the high intensity sexual offenders' program in prison, you've got to be in prison for... The program takes 18 months once you get on the program. And before you get on the program you've got to do the pre-program to get on to the program. And that's .. two months or something. Six weeks I think. And then you've got to get on that program. So anyone who's going to be sentenced to something less than two years of actual custody...realistically they're not going to be able to do any sexual offenders program. And if they don't do the program that makes it difficult for them to get parole.[371]

When the person was in custody prior to sentence, it was noted that they do not have the ability to have access to sexual offender programs, which was viewed as being 'a significant issue in the court's assessment and considerations' regarding whether to give the person a parole eligibility date.[372] The lack of access to programs during this pre-custody phase was viewed as being a 'major problem', as 'how do you assess whether somebody has any capacity for rehabilitation if they've been in pre-sentence custody for nine months and they haven't done any programs?'[373] It was noted that the need for an admission of guilt prior to program participation was often a barrier, together with uncertainty about how long the person would spend on remand prior to sentence.[374]

For those sentenced for sexual assault, it was noted that imprisonment would be viewed as not appropriate for many people as they would not get access to a sex offenders program, and may just need

368 Ibid.
369 Ibid 21.
370 SME Interview 13.
371 SME Interview 14.
372 SME Interview 15. Similar comments were made in other interviews, for example SME Interviews 8, 13, 17, 21.
373 SME Interview 8.
374 SME Interviews 8, 17.

to be deterred rather than requiring them to attend psychologists or other services, which might be an 'unnecessary use of resources'.[375]

Broader concerns were expressed about the lack of options and funding with respect to rehabilitative programs for those on probation or parole.[376]

More investment in rehabilitation options, both with prisons and in the community, was seen as one way that sentencing could be improved for these offences.[377]

The Queensland Productivity Commission Report

The Queensland Productivity Commission, in its 2019 *Inquiry into Imprisonment and Recidivism: Final Report*, recommended reforms to ensure prisoners on remand are able to access suitable programs and other activities likely to aid their rehabilitation.[378] While this recommendation was not specific to sexual offending, the additional period of 7 months (median) that prisoners sentenced for rape serve in custody beyond their parole eligibility date before they are released on parole (assuming they apply for and are granted parole) also suggests that additional time is required to be spent post the person's parole eligibility date to complete required programs in custody prior to release, which impacts parole release and therefore the time the person is under supervision in the community prior to the expiry of the sentence.

11.5.4 Issue 4: Flexibility of community-based orders and ability to tailor to individual circumstances support by services

Probation and community service orders were rare sentencing outcomes for rape (MSO).[379]

For sexual assault, the second most common type of penalty for non-aggravated sexual assault (MSO) sentenced in the Magistrates Courts was a probation order.[380]

The purpose of probation is primarily rehabilitative, although it can also serve a number of additional purposes, including community protection (by virtue of the supervisory component in the first instance, and longer-term protection by reducing the risks of the person reoffending).

By contrast, community service orders are viewed as more punitive,[381] requiring a person to undertake unpaid work in their own time.[382] In Western Australia and Victoria, this punitive element is recognised in legislation.[383] Western Australia also recognises rehabilitation as an alternative purpose.[384]

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375 SME Interview 3.
376 SME Interviews 4, 25.
377 SME Interview 24.
378 *Inquiry into Imprisonment and Recidivism* (n 3) rec 17.
379 In the 18 year data period there were 17 probation orders and 3 community service orders. In all except 1 case, the offender committed the offence as a child but was sentenced as an adult.
380 See Figure 11.2.
381 Geraldine Mackenzie and Nigel Stobbs, Principles of Sentencing (Federation Press, 2010) 163 citing Tasmania law Reform Institute, Sentencing, Final Report No 11 (Report, June 2008).
382 Ibid 166.
383 *Sentencing Act 1995* (WA) s 67(1); and *Sentencing Act* (Vic) (n 137) s 48C(2).
384 *Sentencing Act 1995* (WA) s 67(1).

Evidence of effectiveness

Probation appears to be effective for those who commit sexual offences.

While probation appears to be effective for those who commit sexual offences, the evidence is weak.[385] Factors associated with a higher risk of committing a new criminal offence have been found to include age and prior criminal history: 'older offenders were slightly less likely to be rearrested, while those with a prior arrest as an adult were more likely to reoffend'.[386] 'Sex offenders on probation who had a current substance abuse problem were five times more likely to commit a new offence.'[387] 'Being married, having social supports and being employed full-time were positively associated with remaining successful on probation for longer.' 'Failure appears to be more likely among those with a criminal history or substance abuse issues and may be more likely with low-level supervision and fewer treatment conditions.'[388]

Community service appears to reduce reoffending more effectively than a term of imprisonment and a bond, but is not as effectively as a fine

Community service appears to reduce recidivism more effectively than a term of imprisonment and a bond, but is not as effectively as a fine – although, importantly, this finding is based on studies of those convicted of non-sexual offences.[389] 'There is no evidence on the mechanisms that underlie the effectiveness of this order, and none on the factors that contribute to successful order completion.'[390] There are also 'substantial concerns around the availability of this order among Aboriginal and Torres Strait Islander communities and [people] in rural and remote areas'.[391]

The effectiveness of community correction orders in reducing reoffending may depend on the type and quality of supervision and other conditions

A 2017 study by the Victorian Sentencing Advisory Council ('VSAC') on CCOs found:

- People sentenced in the higher courts for whom the CCO was imposed for a sexual offence had a relatively high rate of contravention by further offending (44%), 'most commonly by failing to meet the reporting obligations of being on the Sex Offender Register'.[392]
- Those who were subject to CCOs for 2 years or longer sentenced in the higher courts were 1.7 times more likely to contravene them by further offending than those on shorter CCOs.[393] Factors associated with an increased risk of contravention by further offending were having a prior conviction (with those with prior convictions being 5 times more likely to contravene) and age (with those aged 18 to 24 years nearly twice as likely to contravene by further offending than older offenders).[394]

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385 *QUT Literature Review* (n 2) 112.
386 Ibid 141.
387 Ibid.
388 Ibid 146 [4.6.5].
389 Ibid xiv. The study referred to in support of this finding was focused on adult offenders convicted of aggravated drink-driving (a third or subsequent conviction), drink driving (first or second offence), shoplifting (estimated value under $500) and common assault: see Michelle Morris and Charles Sullivan, The Impact of Sentencing on Adult Offenders' Future Employment and Re-offending: Community Work Versus Fines (New Zealand Treasury Working Paper 15/04, June 2015).
390 Ibid xiv.
391 Ibid.
392 Ibid 149 citing Sentencing Advisory Council (Victoria), *Contravention of Community Correction Orders* (2017) 44–5.
393 Ibid.
394 Ibid.

- There were no differences based on gender or whether the CCO was the principal sentence or combined with imprisonment.[395]
- The findings for CCOs imposed by the Magistrates Court were largely consistent with those for cases sentenced in the higher courts, although in this case offenders whose CCO was combined with imprisonment were more than twice as likely to contravene by further offending than those who CCO was not combined with imprisonment.[396]

The longer-term impact of CCOs on recidivism in Victoria has not been evaluated.

The use of CCOs in New South Wales was explored as part of a New South Wales Bureau of Crime Statistics and Research ('BOCSAR') study, which examined the impact of that jurisdiction's 2018 sentencing reforms.[397] The study found while the 2018 reforms had significantly increased the proportion of individuals sentenced to supervision in the community, there was no evidence this was associated with a reduction in reoffending or time to reoffend. However, given '[t]he abundance of evidence to support the effectiveness of community supervision in reducing recidivism', its authors concluded 'further research into the extent and quality of supervision following the sentencing reforms may be worth pursuing' – with acknowledgment that the New South Wales Government had announced additional funding in support of supervising offenders in the community and ensuring greater access to rehabilitation programs.[398]

Stakeholder views

Limited feedback was provided in submissions specifically on the use of probation or community services orders – which most relevantly apply in the case of sentencing for sexual assault but also, in exceptional cases, to rape.

Submissions from research institutions, professional bodies and community advocacy organisations

Sisters Inside referred to the work of Professor Leigh Goodmark in concluding that 'there is no evidence that the criminal punishment system is creating safety, preventing violence or holding people accountable'.[399] Instead, 'What the criminal justice system does efficiently and effectively is to deploy violence to exert control', which is to the detriment of 'those in marginalised communities, particularly First Nations people'.[400]

Referencing a report published by the Centre for Innovative Justice, Sisters Inside raised concerns:

> Using punishment and social isolation as the primary responses to sexual violence means that most people who cause harm will deny their behaviour, which makes the process of seeking redress more traumatic for victim-survivors.[401]

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395 Ibid.
396 Ibid 148.
397 Neil Donnelly, Min-Taec Kim, Sara Rahman and Suzanne Poynton, Have the 2018 NSW Sentencing Reforms Reduced the Risk of Re-offending? (Crime Research Bulletin No 246, NSW Bureau of Crime Statistics and Research, March 2022), Other reforms included the abolition of suspended sentences and home detention orders and introduction of a new type of Intensive Correction Order.
398 Ibid 20. BOCSAR's Executive Director also identified another reason as being the reforms only had a small impact on the actual rate at which offenders were supervised in the community given the practice of NSW Community Corrections of prioritising supervision for higher-risk offenders: BOCSAR, 'The Impact of the 2018 Sentencing Reforms on Reoffending' (Media Release, 22 March 2022).
399 Submission 32 (Sisters Inside Inc) 2.
400 Ibid..
401 Ibid 3.

It saw this as a reason to 'reimagine how responses to sexual violence could look', with reference to the concept of transformative justice.[402]

TASC (Social Advocacy) supported a reconsideration of current responses and cautioned that in all likelihood 'the criminal justice system cannot punish or deter its way out of the challenge presented by rape and other forms of sexual assault', pointing to evidence that deterrence through punishment may not be effective, and 'imprisonment itself and punishment more generally is fundamentally criminogenic'.[403]

It made several recommendations for reform, including:

- Assessing lengths of incarceration based on the understanding that less punishment and not more may aid in efforts towards rehabilitation.
- Increased use of community orders where programs are invested in ideas of therapeutic justice and offender related prehabilitation …
- Use of rehabilitation programs that stress accountability while also acknowledging the ways in which criminal behaviour develops in people.[404]

Submissions from legal stakeholders

LAQ provided the following two case examples to illustrate why the retention of sentencing discretion, even for rape, was important in the context of the operation of section 9(4) of the PSA (the requirement that the person be ordered to serve a term of actual imprisonment for offences of a sexual nature against children under 16 years):

> In *R v Rainbow*, the defendant was convicted and sentenced for an offence of rape and received 3 years' probation with the conviction recorded. A special condition was imposed, to submit and comply with any medical, psychiatric, or psychological examination or treatment, as is directed by your probation officer. The features that demonstrated and given weight to amounting to 'exceptional circumstances' related to the defendant and the offence. The defendant was either 18 or 19 years old at the time of the offence. The discovery of the offence and the only basis in which the defendant was charged, were the defendant's admissions he made to a psychologist, to the defendant's partner and eventually to the police … to inserting his penis momentarily into his child's mouth. The child was 3 months of age. Other considerations were the psychiatric evidence which confirmed a disadvantaged background. The defendant was a victim of sexual abuse between the ages of 8 and 14 years. It was found this abuse had a profound effect on the defendant's sexual development. The defendant had longstanding mental health issues and presented with a type of symptomology indicative of several psychiatric disorders. It was noted there was a history of self- harm and suicide attempts. Further, the defendant had developed insight into his conduct.
>
> In *R v OYJ* [2020] QDCSR 379, the defendant was convicted and sentenced to a 2-year probation order for five (5) counts of indecent treatment of a child under 16, under 12, and one count of rape. The conviction was not recorded. There were a number of features considered, with the Court finding that exceptional circumstances existed. In this matter that defendant was aged 13 to 15 years of age at the time of the offences but charged and sentenced at 21 years of age. The offending conduct was noted as serious, the complainant was the defendant's half-sister, he touched her inappropriately, caused the complainant to watch him masturbate, forcing the complainant to perform oral sex. Other features considered were that there was no victim impact statement and no re-offending. There was a suggestion the defendant did necessarily present a risk to young children. In this example it was a combination of features and no evidence of adverse impacts on the complainant that exceptional circumstances were made out.[405]

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402 Ibid. This concept is discussed in more detail in Chapter 16.
403 Submission 22, Chapter 2 (TASC Legal and Social Justice) 14 (citations omitted).
404 Ibid 16.
405 Submission 23 (Legal Aid Queensland) 13–14 referring to *R v Rainbow* [2018] QDCSR, 13 December 2018 and *R v OYJ* [2020] QDCSR 379.

Several stakeholders supported alternatives to imprisonment but without expressly referring to probation or similar forms of orders. For example, the Queensland Mental Health Commission supported taking a trauma-informed approach to sentencing, both in support of better outcomes for people who have experienced sexual violence and to support effective rehabilitation of perpetrators.[406] Adopting this approach, it told us that sentencing 'should be flexible, taking into account the victim survivor's needs and wishes' while also being 'proportionate to the crime' and stated that sentencing options 'might include therapeutic interventions, education on sexual violence, and community service, in addition to or instead of incarceration, tailored to encourage rehabilitation and reduce recidivism'.[407]

As discussed above, victim survivor stakeholders considered orders that involve a requirement for the person to be under supervision and require them to engage with treatment and interventions to be preferable to the imposition of a suspended prison sentence, which does not.

Subject matter expert interviews

Some subject matter expert interviews commented on probation for sexual assault only being considered if it was at the lower end of offence seriousness,[408] such as a momentary touch or unwanted kiss,[409] particularly if coupled with the person who committed the offence having a cognitive or intellectual impairment.[410]

More commonly, this was mentioned in the context of an order involving a combined prison-probation order, which was viewed as useful in some cases,[411] or a suspended sentence imposed for one offence and probation for the other.

The very different consequences of probation and community service orders compared with parole orders was also noted, given that a court rather than the Parole Board had to deal with the breach, with the person having the opportunity, via their legal representative, to explain the circumstances and the opportunity for the order to be extended.[412]

One participant suggested an order 'in between' an ICO and probation be considered, which 'requires some portion of it to be treatment or rehabilitation or programs about sexual violence'.[413]

There was also support by some for the previous proposals of the Council to introduce a community correction order, including increasing discretion and the ability to tailor orders and conditions.[414] What services, courses and counselling were available might be important in informing this decision[415]

For those sentenced for sexual assault, it was noted that imprisonment would be viewed as not appropriate for many people, as they would not gain access to a sex offenders program, and may just need to be deterred rather than requiring them to attend psychologists or other services, which might be an 'unnecessary use of resources'.[416]

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406 Submission 29 (Queensland Mental Health Commission) 1.
407 Ibid 2.
408 SME Interviews 5, 24.
409 SME Interview 24.
410 SME Interview 5.
411 For example, SME Interview 11.
412 SME Interview 22.
413 SME Interview 6.
414 SME Interviews 12 and 23.
415 SME Interview 12.
416 SME Interview 3.

The availability of programs was also a problem noted in regional and remote areas regarding the utility of probation, which might be 'in the sentencer's mind' regarding the benefit to be gained in ordering probation if no courses are likely to be offered.[417] Inconsistency was noted between regions about what programs, courses and resourcing are available,[418] with broader concerns expressed about the lack of options and funding with respect to rehabilitative programs for those on probation or parole.[419]

Some participants were unaware of whether sex offence programs were available in the community, having not heard Queensland Corrective Services refer to these,[420] or, while they were aware of them, had not seen one completed as part of a probation order.[421]

A potential disconnect between what legal stakeholders consider is involved and the reality of service provision was also mentioned by one participant, who told us that while, if the person is low risk, the level of contact might be quite low or occur via phone, probation orders are often imposed as a punishment and to meet other purposes of sentence, not just for rehabilitation.[422]

More investment in rehabilitation options, both within prisons and in the community, was seen as one way that sentencing could be improved for these offences.[423]

Consultation events

Some participants in our consultation events thought having more sentencing options available (versus imprisonment) may assist victims who want the offender to learn from their behaviour, but not necessarily go to prison, to come forward.[424]

Some participants thought current sentencing options were not working and alternatives were needed. Concerns were raised that successful pilots are often discontinued due to lack of funding.[425]

There was support by some for alternative supervised options (such as intensive correction orders or another form of tailored order, such as the CCO model previously recommended by the Council), as well as the greater use of compensation orders for victim survivors.[426]

Probation was highlighted as potentially unsuitable for some sexual offenders as it does not allow corrections officers to mitigate immediate risks.[427]

It was noted that the current order enables a court, in addition to core conditions, such as reporting to and receiving visits from a community corrections officer and not leaving the state without permission,[428] to order additional conditions – such as that the person submit to medical, psychiatric or psychological treatment, abstain from the use of dangerous drugs or other illicit substances while subject to the order

417 SME Interviews 5, 12.
418 SME Interview 5.
419 SME Interviews 4, 25.
420 SME Interview 1.
421 SME Interview 13.
422 SME Interview 17.
423 See, for example SME Interviews 17 and 24.
424 Brisbane Consultation Event, 11 March 2024.
425 Ibid.
426 Ibid.
427 Ibid; and Cairns Consultation Event, 21 March 2024.
428 PSA (n 17) s 93.

(without lawful excuse) and undergo drug testing as required by an authorised corrective services officer.[429]

However, in contrast to parole orders, there is no ability under a probation order for conditions to be quickly varied if a corrective services officer reasonably believes the person has failed to comply with the conditions of the order or poses an unacceptable risk of committing an offence (e.g. by imposing a curfew condition),[430] or for the person to be placed in custody.[431] This is because any decisions to vary or cancel a probation order must be made by a court rather than by the Parole Board on the application of a corrective services officer.[432]

There was a view that longer community-based orders would be beneficial, rather than short terms of imprisonment,[433] with the view that 'rehabilitation won't be achieved if the order is not long enough' to provide for program completion.[434] Programs carried out in the community, it was suggested, are more 'reality based' and give offenders the opportunity to practise the concepts they are learning.[435]

There was support for additional investment in programs and interventions, and for this funding to be 'quarantined' from the funding required to meet QCS's operational requirements.[436] Ensuring greater access in regional, rural and remote areas of the state was also viewed as important, as was the development of culturally appropriate programs and interventions for Aboriginal and Torres Strait Islander persons.[437] Generally, it was considered that programs should be developed by community-controlled organisations and that more needed to be done to ensure all aspects of the system operate in a way that is culturally appropriate.[438]

Participants acknowledged that there were significant barriers to achieving more service coverage and increasing access to programs and services, including skills shortages and service delivery shortages, as well as accommodation issues in regional, rural and remote areas of the state.[439]

Previous Council reports and recommendations

As discussed in section 11.2.1, in its *Community-based Sentencing Options and Parole Orders Report*, the Council's recommendations included the introduction of a new intermediate sanction – a CCO – that can be tailored through the conditions imposed to meet the various purposes of sentencing while also responding to the individual factors contributing to offending.[440] We recommended that probation (in the

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429 Ibid s 94. Additional conditions are those that a court considers necessary (i) to cause the offender to behave in a way that is acceptable to the community; or (ii) to stop the offender from again committing the offence for which the order was made; or (iii) to stop the offender from committing other offences.

430 See *Corrective Services Act 200*6 (Qld) s 201. This order made by the chief executive of QCS lasts for up to 28 days unless cancelled earlier by the Parole Board: ibid s 202. The Parole Board can also amend, suspend or cancel a parole order for these reasons or if the person is preparing to leave Queensland without permission or poses a serious risk of harm to someone else: s 205,

431 Through the cancellation or suspension of parole: see CSA (n 18) ch 5, pt 1, div 5, subdiv 2 & 2A..

432 PSA (n 17) ss 120, 121, 122. The offender and the Director of Public Prosecutions can also apply to have the order varied or revoked: ibid s 122(1).

433 Brisbane Consultation Event, 11 March 2024.

434 Cairns Consultation Event, 21 March 2024.

435 Brisbane Consultation Event, 11 March 2024.

436 Ibid.

437 Cairns Consultation Event, 21 March 2024.

438 Ibid.

439 Brisbane Consultation Event, 11 March 2024.

440 *Community-based Sentencing Orders, Imprisonment and Parole Options Report* (n 4) rec 9.

form of 'supervision') and community service should be subsumed within the CCO as conditions of a CCO, rather than existing as separate forms of sentencing orders.[441]

We identified that QCS might identify relevant 'packages' of conditions targeting different risks and needs, and recommended that the new order not be introduced until such work had been completed, appropriate service delivery models for services linked to these conditions developed, and required resourcing and staffing levels put in place.[442]

Under our model, there is no reason why special packages of conditions could not be developed to respond to sexual offending.

We also identified scope within this framework to recognise the need to develop, over time, culture-specific programs that could either be a separate program condition or fall within a broader rehabilitation condition.[443]

We acknowledged resourcing issues and service delivery challenges, which were also at that time subject to investigation by the Queensland Productivity Commission.

11.5.5 Issue 5: Other issues with penalty types – fines, no conviction recorded and non-contact orders

The types of sentencing orders commonly imposed for sexual assault may not appropriately or adequately reflect the nature of the person's offending and its seriousness. This section will discuss the use of fines as a penalty option as well as two orders that can be made in addition to sentence: recording no conviction and non-contact orders.

A fine is a monetary order payable to the state and its primary purpose is punishment.[444]

The maximum fine for a sentence of sexual assault or rape in the Magistrates Courts is $26,614.50; in the District Court it is $673,247.50 (with no limit in the Supreme Court).[445] A fine can be ordered in addition to, or instead of, any other sentence with or without a conviction being recorded.[446]

Fines have been suggested to be the 'ideal penal measure'[447] because:

- they can easily be adjusted to reflect different levels of offence seriousness and culpability,[448] and to meet relevant sentencing principles, such as proportionality, consistency, parity, totality and deterrence;[449] and
- they are non-intrusive and do not involve supervision or loss of a person's time[450] and costs associated with supervision.[451]

441 Ibid rec 11.
442 Ibid rec 13.
443 Ibid 188–9.
444 *Sgroi v The Queen* (1989) 40 A Crim R 197, 200 ('*Sgroi*').
445 PSA (n 17) ss 45, 46. Current value of a penalty unit is $161.30 as at 31 October 2024: *Penalties and Sentences Regulation 2015* (Qld) s 3.
446 PSA (n 17) ss 44–5.
447 Andrew Ashworth, *Sentencing and Criminal Justice* (Cambridge University Press, 5th ed, 2010) 327.
448 Ibid 327–8.
449 Mackenzie and Stobbs (n 381) 152.
450 Ashworth, *Sentencing and Criminal Justice* (n 447) 328.
451 Mackenzie and Stobbs (n 381) 152.

When imposed, a fine must be proportionate and take into account the person's ability to pay.[452]

Sentencing outcomes for sexual assault and rape

During the 18-year data period, no fines were imposed for rape (MSO).

For sexual assault cases sentenced in the Magistrates Courts monetary penalties are common. Over time, the use of monetary orders has reduced. This has occurred alongside the increasing use of imprisonment and wholly suspended prison sentences. However, this trend is not unique to sexual assault as the same reduction in the use of monetary penalties was observed across all offences sentenced in the Magistrates Courts (excluding traffic and vehicle offences).

The following are illustrative of the circumstances in which fines were imposed for sexual assault in the Magistrates Courts (and one District Court example), based on our review of a sample of cases:

- A 72-year-old man with no previous convictions pleaded guilty to grabbing a woman's buttock as she was closing up a shop she worked at ($400 fine, no conviction recorded).[453]
- A retiree (age not specified) with no prior criminal history pleaded guilty to touching a young woman's buttock as she was walking past a travelator at a shopping centre. The assault was caught on CCTV ($750 fine, no conviction recorded).[454]
- A 33-year-old man, a neighbour of the victim with whom he previously had had a casual sexual relationship, was at the victim's house, followed her into the kitchen and as she walked by reached out and squeezed her right breast. He pleaded guilty and had some history for drug offences and a previous non-sexual assault. He was a self-employed builder ($750 fine, no conviction recorded).[455]
- A 74-year-old man who was a member of a golf club grabbed the victim, who was working at the golf shop, on either side of her head and kissed her on the lips (caught on CCTV). The victim was acquainted with him through their involvement with a local golf club. He pleaded guilty and had no prior criminal history ($2,500 fine, no conviction recorded and no contact order issued for 12 months).[456]
- A 45-year-old man pleaded guilty to indecently assaulting a young woman who was at a hotel for a friend's 21st birthday party. He was intoxicated and approached her from behind as she was at the bar and used his hand to grab onto her buttock and then offered to buy her a drink (caught on CCTV). He had a minimal criminal history ($1,200 fine, no conviction recorded).[457]
- A 55-year-old man pleaded guilty to inappropriately massaging his partner's 16-year-old sister removing her shorts and her underwear and massaging her bottom. He had no prior criminal history ($5,000 fine with no conviction recorded).[458]

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452 PSA (n 17) s 48; *Sgroi* (n 444) 200.
453 Sexual assault, major city, lower courts, non-custodial,#2.
454 Sexual assault, major city, lower courts, non-custodial, #11.
455 Sexual assault, major city, lower courts, non-custodial, #8.
456 Sexual assault, major city, lower courts, non-custodial, #12.
457 Sexual assault, major city, lower courts, non-custodial, #10.
458 Sexual assault, regional/remote, higher courts, non-custodial, #2.

Evidence of effectiveness

Due to the focus of the Council's previous reviews, the Council has not examined evidence of the impact of fines and other monetary orders on reoffending as part of its previous reviews.

The literature review by Griffith University commissioned for this review did not find any relevant research literature related to monetary penalties for sexual assault and rape offences.[459] Generally, there is insufficient evidence to assess the effectiveness of monetary penalties in preventing crime or deterring reoffending.[460]

Stakeholder views

There was limited feedback on the use of fines in submissions.

One individual submitter referred to fines not deterring such offending and not being an appropriate penalty.[461]

TASC (Social Justice) suggested that wealthy offenders could be required to pay fines 'where the funds go to supporting prehabilitative [preventative] programs'.[462]

Subject matter expert interviews

One subject matter expert interview referred to the fines in the context of suspended prison sentences being viewed as being inadequate by many victim survivors:

> Sometimes you hear people say, 'They weren't even fined.' Well that's because [legal practitioners] actually think 12 months' [imprisonment] wholly suspended is a more serious sentence than a $2,000 fine. But I know that you don't understand that, because that's what lawyers understand.[463]

Another participant reflected on their experience in the late 2000s that 'it was a common understanding that fines were very viable for minor sexual offences' but that view had changed.[464] This was, however, contrary to the views of another interview participant, who was surprised that the use of custodial sentences for sexual assault was so high as they mostly had seen fines and probation orders imposed.[465]

Consultation views

At our consultation events, some concerns were expressed that fines may not be an appropriate form of sentencing orders, given the nature of the rights infringed. There was a view by some participants that compensation orders were preferable to the use of fines.[466]

Orders in addition to sentence

Recording of a conviction

As almost all rape cases result in a custodial penalty, a conviction must be recorded.

A small number of cases over the 18-year data period involved a non-custodial penalty being imposed and no conviction being recorded (n=20). In all but one of these cases, the person had committed the

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459 *Griffith University Literature Review* (n 2) 53.
460 Ibid.
461 Submission 27 (Name withheld) 1.
462 Submission 22, Chapter 2 (TASC Legal and Social Justice) 16.
463 SME Interview 14.
464 SME Interview 23.See also SME Interview 14.
465 SME Interview 20.
466 Brisbane Consultation Event, 11 March 2024.

offence as a child (meaning the court was required to sentence the person having regard to the sentence that might have been imposed had the person been sentenced to as a child).[467]

Of the sexual assault (MSO) cases sentenced over the data period, 35.4 per cent received a non-custodial order (n=674). Of these, over two-thirds did not have a conviction recorded (n=470, 69.7%) and almost all were for a non-aggravated sexual assault (99.4%, n=670).

Close to three-quarters of cases did not have a conviction recorded were sentenced in the Magistrates Courts (73.9%, n=362).

For cases sentenced in the higher courts, 108 cases did not have a conviction recorded. All but 3 of these cases were for non-aggravated sexual assault.

The most common order types that resulted in no conviction being ordered to be recorded for sexual assault were:

- monetary orders (38.7%);
- probation orders (35.3%);
- community service orders (14.9%); and
- good behaviour orders (10.4%).[468]

Courts are required by section 12 of the PSA in deciding whether to record a conviction to take into account the circumstances of the case, including the nature of the offence.

The Court of Appeal has acknowledged that, 'The purpose of recording an offender's conviction is to make the fact of the conviction known to those who have a legitimate interest in knowing about it.'[469] The nature of the exercise of the discretion not to order a conviction be recorded and legitimate considerations in reaching this determination have been explained in the following terms:

> The decision not to record a conviction … denies the community the benefit of the information that would otherwise be available when it might be relevant to an assessment of the offender's character. The renunciation of these benefits conferred by the recording of a conviction is not for nothing. The benefit is foregone because a sentencing judge has decided that, in the circumstances of the case, it is to the greater benefit of the community to afford the offender the privilege of non-disclosure. Incidentally the offender also enjoys the personal benefit of this privilege but that is not the point of making the order.
>
> A sentencing judge must consider the potential benefits and detriments to the community of adopting either course. That is what the opposing factors stated in s 12(2) of the Penalties and Sentences Act require … [A]s is implied by the factors that are identified in s 12(2)(b) and (c), the offender's subjective circumstances so far as they relate to the offender's future prospects are also significant matters. They raise for consideration whether the promise of future rehabilitation calls for and justifies affording the offender the advantages that flow from not recording a conviction. To put it another way, the question is whether the community will be better served by not placing the obstacles created by a recorded conviction in the path of the offender towards rehabilitation. The issue is not one of tenderness to the offender.[470]

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467 *Youth Justice Act 1992* (Qld) s 144(2).
468 Three people were also convicted with no further punishment ordered.
469 *R v Graham* (2023) 15 QR 243 [4] (Kelly J, Mullins P and Bond JA agreeing) ('*Graham*').
470 *R v ZB* (2021) 287 A Crim R 519, 522 [9]–[10] (Sofronoff P) (footnotes omitted) referred to with approval in *Graham* (n 469) [5].

Because of the consequences that arise from such a decision, such as loss of employment or relevant licences to undertake work, or impacts on travel, this decision may have further punitive consequences on the person sentenced beyond those inherent in the type of sentencing order imposed.

Non-contact orders

The use of non-contact orders across the data period was relatively uncommon.

Some victim survivors considered that the need for non-contact orders was not sufficiently considered, and some thought their duration should be extended.

The WSJ Taskforce's 2022 report recommended that the duration of a non-contact order be extended to 5 years, consistent with its recommended increase regarding the length of a restraining order for an offence of unlawful stalking as well as the minimum presumptive duration of a domestic violence order (protection order).[471] This recommendation was accepted by the former Queensland Government.[472]

Legislative amendments, to commence on a day to be fixed by proclamation, will extend the maximum duration of these orders to 5 years and the penalty for contravention of a non-contact order from 40 penalty units or one year's imprisonment to 120 penalty units or 3 years' imprisonment.[473]

Regardless of these changes, the legislative threshold for the making of a non-contact order may continue to limit the making of such orders, given that a court must be satisfied at the time of sentence that unless the order is made, there is an unacceptable risk that the offender would:

- injure the victim or associate – including, for example, by injuring the victim or associate psychologically; or
- harass the victim or associate; or
- damage the property of the victim or associate; or
- act in a way that could reasonably be expected to cause a detriment to the victim or associate.

In the absence of a pre-existing work or personal relationship, or the person engaging in concerning behaviour between the commission of the offence and sentence, it may not be possible for the prosecution to establish that such a risk exists.

We acknowledge that victim survivors may be fearful of the person who has harmed them making contact with them, even if the assessed risk of this occurring is low, thus impacting their sense of safety and recovery.

Other options exist for a victim survivor who is not able to seek a protection order under the *Domestic and Family Violence Protection Act 2012* (Qld). For example, they may be able to seek an order under the *Peace and Good Behaviour Act 1982* (Qld) if the relevant criteria are met.[474] Non-contact conditions may be ordered if the person is sentenced to imprisonment and released on parole.

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471 *Hear Her Voice, Report Two* (n 3) 269–70 and rec 60.

472 See *Response to Hear Her Voice, Report Two* (n 16) 23.

473 See *Criminal Justice Legislation (Sexual Violence and Other Matters) Amendment Act 2024* (Qld) ss 47–48 amending ss 43C and 43F of the PSA (n 17).

474 See *Peace and Good Behaviour Act 1982* (Qld) ss 5, 7. The test for an order under this Act is that a person has threatened to (a) assault or to do any bodily injury to the complainant or to any person under the care or charge of the complainant; or (b) to procure any other person to assault or to do any bodily injury to the complainant or to any person under the care or charge of the complainant; or (c) to destroy or damage any property of the complainant; or (d) to procure any other person to destroy or damage any property of the complainant in circumstances where the complainant is in fear of the person complained.

11.6 The Council's view

Key Finding

10. **Sentencing options available to courts in sentencing for rape and sexual assault need to be expanded**

The current range of sentencing options available to the courts is inadequate and needs to be expanded to increase the options that judges and magistrates have to punish offenders in a way that is 'just in all the circumstances' and to meet other intended purposes of sentencing, including denunciation, community protection and rehabilitation.

Current restrictions on the availability and use of orders, such as the exclusion of sexual offences from eligibility for court-ordered parole and the inability to impose a suspended imprisonment order in combination with a community-based order when sentencing for a single offence, puts people sentenced for a sexual offence at risk of not being subject to appropriate supervision and support as part of their sentence. This lack of flexibility impacts negatively on the ability of current sentences imposed to meet the objective of community protection.

See **Recommendation 8**.

As discussed in this chapter, we have identified several problems with sentencing outcomes for sexual assault and rape based on sentencing options available:

- For people in custody, there is limited opportunity for program engagement and completion.
- The use of suspended imprisonment can be problematic for sexual offences. The exclusion of sexual offences from court-ordered parole and the inability to order a suspended sentence with a community-based order for a single offence may contribute to this, resulting in orders being made that do not enable access to treatment programs and interventions and which do not involve supervision.
- In some instances, current community-based orders are not providing courts with suitable alternatives that respond to a person's individual circumstances. The lack of flexibility in the conditions of these orders may also be contributing to the use of fines in sentencing for sexual assault.

The above issues with penalty and parole options indicate to us that the PSA currently does not entirely meet its purpose to provide 'for a sufficient range' of sentences for 'appropriate punishment and rehabilitation'.[475] This limits to the ability of current sentencing practices to adequately reflect the nature and seriousness of sexual assault and rape offences.

We recommend reforms be made to the current range of sentencing options available to courts to improve and expand upon the tools judges and magistrates have at their disposal to punish offenders 'in a way that is just in all the circumstances' and to meet other intended purposes of sentencing, including denunciation, community protection and rehabilitation (**Key Finding 10**).

Many of our previous recommendations would address our concern of the current lack of flexibility in sentencing and parole options and have significant benefits when sentencing sexual assault and rape, in

[475] PSA (n 17) s 9(3)(b).

allowing a court to impose a sentence that appropriately responds to this type of offending and can better meet the purposes of sentencing (**Recommendations 8, 9 and 10**).

We remain of the view that expanding the range of penalty and parole options will lead to better tailored and more appropriate sentencing outcomes consistent with principles of individualised justice.

We consider the practical implications of the adoption of our recommended reforms in sentencing for rape and sexual assault below.

Recommendations

8. **Reforms to community-based sentencing orders and parole options**

The Queensland Government should respond to and implement recommendations made by the Council in its 2019 *Community-based Sentencing Orders, Imprisonment and Parole Options: Final Report*, with appropriate funding provided to support their effective implementation, in particular:

a) Recommendation 9: The introduction of a new intermediate sanction – a 'community correction order' ('CCO') – which can be tailored through the conditions imposed to meet the various purposes of sentencing, while also responding to the individual factors contributing to offending.

b) Recommendations 17 and 37: Allowing courts to combine a suspended prison sentence with a CCO when sentencing a person for a single offence, and until such time as the CCO is fully operational, allowing a court to combine a suspended prison sentence with a probation order or community service order when sentencing a person for a single offence.

c) Recommendations 47 and 48: Establishing a dual discretion to set either a parole eligibility date or a parole release date when sentencing a person to 3 years' imprisonment or less for a sexual offence, and providing legislative guidance as to whether a parole release date or parole eligibility date should be set in such circumstances).

d) Recommendation 51: Subject to implementation of the Council's proposed reforms to community-based sentencing orders and parole, and the outcomes of a recommended review of the effectiveness of parole, the removal of parole for sentences of imprisonment of 6 months or less, with some legislated exceptions.

9. **Access to programs for prisoners on remand**

The Queensland Government respond to and implement recommendation 17 of the Queensland Productivity Commission's 2019 *Inquiry into Imprisonment and Recidivism: Final Report* to ensure that prisoners on remand, including those charged with a sexual violence offence, are able to access suitable programs and other activities likely to aid their rehabilitation.

Such programs should be made available, where practicable, in multiple correctional centre locations and provide for continuation of programs and interventions post-sentence either in custody or in the community.

10. **Reforms to Serious Violent Offences Scheme**

The Queensland Government respond to and implement recommendations made by the Council in its final report on the operation and efficacy of the serious violent offences scheme — *The '80 Per Cent Rule': The Serious Violent Offences Scheme in the Penalties and Sentences Act 1992 (Qld): Final Report* including:

a) The current serious violent offence scheme be replaced with a fully presumptive scheme to be retitled as the 'serious offences scheme' that requires a court to make a declaration when a person Is sentenced to a term of imprisonment of more than 5 years for a listed offence unless the court determines it is in the interests of justice not to do so.

b) Once a declaration is made, to require parole eligibility to be set within a specified range between 50–80 per cent of the head sentence.

11.6.1 Applying the Council's fundamental principles

As for other recommendations made in this report, the fundamental principles guiding the review[476] have provided an important basis for considering reforms required to the existing range of penalty options and to address **Key Finding 10**:

- **Principle 1: Reforms to sentencing laws should be evidence-based with a view to promoting public confidence**: The Council has drawn on the findings of our comprehensive review of current sentencing practices, research evidence summarised in literature reviews commissioned for this review and previous and other relevant research literature, as well as a cross-jurisdictional analysis of different types or penalty options available in other jurisdictions to identify what changes are required to the current mix of penalty options in Queensland as these apply to rape and sexual assault. Our review of this evidence suggests there are current gaps and opportunities for orders to be better tailored to meet the purposes of sentence.
- **Principle 2: Sentencing decisions should accord with the purposes of sentencing as outlined in section 9(1) of the PSA**: Based on the evidence outlined in Principle 1, we consider that there is an opportunity to better align sentencing practices with community and victim survivor expectations and to promote perpetrator accountability and rehabilitation in support of achieving both short- and longer-term community protection. This is best achieved by providing for a mix of different penalty options with conditions that can be better tailored to the individual circumstances of the offence and the person being sentenced.
- **Principle 3: Sentencing outcomes for sexual assault and rape offences should reflect the seriousness of these offences, including their impact on victims, while not resulting in unjust outcomes**: The types of sentences currently imposed for rape and sexual assault reflect the existing sentencing framework in Queensland and sentencing options available under it. We consider that significant benefits would be gained in providing courts with more options on sentence to ensure that the nature of the penalties imposed and conditions under them can be better tailored to meet the relevant purposes of sentencing, including recognition of the harm caused to victim survivors of these offences, which we recommend also be elevated as an important sentence purpose (see **Recommendation 2**).
- **Principle 4: People serving sentences in the community for a sexual offence should have appropriate supervision**: As highlighted above, there is significant evidence that supervision in the community for people convicted of sexual offences can be beneficial in reducing reoffending risks. While evidence suggests the risks of reoffending for this cohort based on reported rates of reoffending is low, as outlined in **Chapter 2**, we also know that these types of offences are highly under-reported and, due to the private context in which they often occur, are unlikely otherwise

476 For a full list of the fundamental principles, see Chapter 3.

to be detected. These offences also have potential to cause substantial psychological and emotional harm, even if the risk of them occurring is low. For this reason, we consider orders involving some element of supervision should usually be preferred over those that do not. This includes making court-ordered parole available as an option to courts in sentencing for sexual offences as it is for other forms of non-sexual violent offending.

- **Principle 5: Sentencing inconsistencies, anomalies and complexities should be minimised**: There are specific anomalies and complexities that relate to sentencing for rape and sexual assault, which also apply to other sexual offences. The reforms we recommend be implemented we have made in previous reports will remedy some of these. They include the inability to order a suspended prison sentence alongside a community-based order when sentencing for one offence, (although this is possible if the person is being sentenced for more than one offence) and the inability of a court to set a parole release date when sentencing a person for a sexual offence, in contrast to other non-sexual violent offences.
- **Principle 6: Reforms should take into account likely impacts on the disproportionate representation of Aboriginal and Torres Strait Islander peoples in the criminal justice system**: The potential impacts on Aboriginal and Torres Strait Islander persons, should our recommended reforms be adopted, are discussed below. Our analysis shows that Aboriginal and Torres Strait Islander individuals are less likely to receive a suspended prison sentence for both rape and sexual assault than non-Indigenous people and more likely to be sentenced to immediate imprisonment.[477] We consider better and more tailored community orders, which can be ordered alone or in combination with a suspended sentence of imprisonment, will offer significant benefits in recognising the seriousness of this offending while providing opportunities to address its underlying causes, including for Aboriginal and Torres Strait Islander persons. These types of orders might also allow for expanded options for community supervision and support that are culturally appropriate and responsive rather than a 'one size fits all' approach. Expanding the availability of court-ordered parole might also result in longer periods being spent in the community under supervision in support of long-term community safety.
- **Principle 7: the circumstances of each person being sentenced, victim survivors and offences are varied. Judicial discretion in the sentencing process is fundamentally important**: The reforms we recommend would retain judicial discretion rather than mandating a particular outcome or removing particular types of sentencing orders from being available. We maintain our view that mandatory penalties are generally undesirable for reasons including moving discretion to other parts of the system that are less visible and transparent (such as regarding charging and prosecutorial practices) and potentially resulting in orders that may not be appropriate and proportionate in the circumstances of the case.
- **Principle 9: Sentencing decisions for sexual assault and rape should be informed by the best available evidence of a person's risk of reoffending**: In **Chapter 12**, we discuss the type of information that may assist courts in determining the most appropriate type of sentence to impose and, where applicable, its conditions. This includes not only information about whether a person is considered at low risk of reoffending, but also the types of interventions that may address factors associated with the person's offending. It may also go to other matters that may

[477] See further Appendix 4.

be important to understand, such as the person's personal circumstances and relevant services and supports in the community, including through the preparation of cultural submissions and reports.

- **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**: A number of rights may be relevant in sentencing, including the right to equality, the right to liberty and security, protection from cruel, inhuman or degrading treatment, the right to humane treatment when deprived of liberty, the protection of families and children, and cultural rights for Aboriginal and Torres Strait Islander persons.[478] The changes we recommend will expand and promote the achievement of these objectives, while also protecting the rights of victim survivors given the significant infringement of human rights acts of rape and indecent assault entail (see **Chapter 6**).
- **Principle 11: The Council will, as far as possible, ensure consistency with previous positions and recommendations**: It has been important to us to build on the Council's previous work and recommendations as well as of other reviews and inquiries, including the WSJ Taskforce. This recognises the importance of any reforms being complementary to work already underway to reform various aspects of the criminal justice system in Queensland and also acknowledges that a number of these reviews have explored specific issues in more detail than has been possible given the scope of this review.

11.6.2 Benefits of adopting the Council's previous recommendations

Benefits of for rape and aggravated sexual assault

Considered together, the implementation of recommendations we have made in previous reports will have significant benefits in meeting current sentencing purposes when sentencing for rape and aggravated sexual assault, which commonly result in immediate imprisonment or a partially suspended prison sentence.

In support of ensuring just punishment, denunciation, deterrence and community protection, the Council's recommended reforms to the SVO scheme would:

- provide potential for higher head sentences to be achieved for sentences of 10 years or more currently subject to a mandatory declaration, as a court would have the ability to set parole eligibility within a range of 50 to 80 per cent;
- mean more people sentenced for rape and aggravated sexual assault to a term of imprisonment of greater than 5 years would be subject to a declaration that the person is convicted of a serious offence and have their parole eligibility date deferred; and
- assist in reducing the anxiety and stress reported by victims of knowing that the person's parole eligibility date is approaching shortly after the person is sentenced, while noting many people

[478] *Human Rights Act 2019* (Qld) ss 15 (recognition of equality before the law), 17 (protection from cruel, inhuman or degrading treatment), 26 (protection of families and children), 28 (cultural rights of Aboriginal and Torres Strait Islander peoples), 29 (right to liberty and security), 30 (right to humane treatment when deprived of liberty).

sentenced for rape serve substantial time beyond their parole eligibility date and this deferral may to some extent reflect current practice.

In support of the objectives of community protection and rehabilitation, other reforms we recommend would enable a court to combine a suspended prison sentence with a community-based order when sentencing for a single offence, which for those sentenced to imprisonment for 5 years or less would increase the likelihood of supervision and to provide for engagement with services and programs where required.

These reforms would be in addition to the existing power to order imprisonment with a parole eligibility date or a combined prison-probation order.

Benefits for non-aggravated sexual assault

For non-aggravated sexual assault, due to the different mix of penalties imposed compared with rape and aggravated sexual assault, and, for orders of immediate imprisonment, the shorter sentence length, the potential benefits would be different.

We know wholly suspended imprisonment is the most common sentencing outcome for this offence. The low number of breaches of wholly suspended prison sentences suggests these orders generally are being appropriately targeted at people who present a low risk of reoffending (while noting that this is based on further offending that is detected and prosecuted).

However, equally, there are cases where it might benefit a person to be under supervision and engaged with treatment services other than on a voluntary basis, which is not possible given that suspended prison sentences do not allow for conditions to be attached. This can only be achieved where the person is sentenced for multiple offences, where a community-based order can be ordered alongside the suspended sentence. We have been told that reliance on the ability to combine orders in this way to enable access to appropriate treatment interventions is problematic for several reasons, including that the co-sentenced offence may be too serious to justify the court imposing a probation order simply to achieve the certainty of release with supervision and, if the order is made for a non-sexual offence (such as a drug offence), the conditions and interventions under the probation order will not be tailored to address factors contributing to the person's sexual offending.

An additional concern is how these offences are viewed by victim survivors and the services that support them, as well as by the broader community. Victim survivors and support services shared their concerns that suspended sentences do not provide an adequate penalty for sexual offending and do not reflect the harm caused by this offending. We heard that the use of this sanction for sexual offending in its current form can result in victim survivors believing that going through the criminal justice process was 'not worth it' and the person's offending had no real, tangible consequences.

To a substantial extent, dissatisfaction with this form of sanction may be due to nature of a suspended prison sentence, which 'threatens future punishment for past misconduct',[479] but without an immediate punitive consequence other than that arising from the fact of the conviction itself, and with no requirement to address factors associated with that person's offending.

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[479] Thomas O'Malley, *Sentencing Law and Practice* (3rd ed, Round Hall Press, 2016) 642 as cited in Keir Irwin-Rogers and Julian V Roberts, 'Swimming against the tide: The suspended sentence order in England and Wales, 2000–2017' (2019) 82 *Law and Contemporary Problems* 137, 137.

The reforms we recommended in our previous *Community-based Sentencing Options and Parole Orders Report* would increase the options available to a court to achieve certainty of release, while at the same time enabling courts to make an order that involves supervision and other conditions. A court would be able to order a suspended prison sentence alongside a community-based order when sentencing a person for a single offence, or to order imprisonment with a parole eligibility or (under our proposals) a parole release date. This would address the anomalous position that an order with supervision and program conditions can only be achieved under a suspended sentence when a court is sentencing a sexual offender for more than one offence.

The ability for a court to set conditions in conjunction with a suspended sentence may allow for the order to operate more flexibly, better respond to the purposes of sentencing (including just punishment and rehabilitation) and promote greater judicial and community confidence in the use of this order.[480]

Through the introduction of a new community-based order – the CCO – courts also would have enhanced capacity to tailor order conditions, taking into account the nature and seriousness of the offence as well the personal circumstances of the person sentenced and factors associated with their risks of reoffending. Such orders, which will likely be longer in duration than if a sentence of immediate imprisonment were imposed for sexual assault, may be more effective in reducing long-term risks of reoffending, in support of the longer-term objective of community protection. This is because short prison sentences carry a number of attendant risks, including disrupting a person's employment and access to accommodation, and negatively impacting family functioning and relationships, while being too short to allow for meaningful engagement with programs while in custody or in the community. Once any time served in pre-sentence custody is factored in, in reality there may be very little of the sentence left to serve and limited opportunities for supervision.

As highlighted by previous reviews of sexual offender treatment programs, 'shorter sentences may … limit important intervention opportunities, including whether an offender is given the chance to complete all intervention components'.[481]

We recommended that the core (general) conditions of a CCO be limited to those directly associated with which the order is made and required for its proper administration and that work be undertaken to identify 'packages' of conditions that could come online progressively as the new orders become operational and ensure the service sector has the capacity to deliver the programs and services envisaged.[482] The types of additional requirements that we recommended be available to a court, with a requirement to attach at least one, included community service, supervision, participation in rehabilitation activities, treatment, alcohol and/or drug abstinence and monitoring, non-association and residence (or non-residence) requirements, place or area exclusions, curfew, payment of a bond, judicial monitoring and electronic monitoring.[483]

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480 *Community-based Orders, Imprisonment and Parole Options Report* (n 4) 255. As to the use of conditions to promote judicial and community confidence, see Keir Irwin-Rogers and Julian V Roberts, 'Swimming against the tide: The suspended sentence order in England and Wales, 2000–2017' (2019) 82 *Law and Contemporary Problems* 137, 137–8.

481 USC Sexual Violence Research and Prevention Unit, *The Effectiveness of Sexual Offender Rehabilitation and Reintegration Programs: Integrating Global and Local Perspectives to Enhance Correctional Outcomes* (Research Report, August 2019) 48.

482 *Community-based Sentencing Orders, Imprisonment and Parole Options Report* (n 4) recs 13–14, 20–21.

483 Ibid rec 22.

As a result of our earlier review, we recommended that parole should only apply to sentences of more than 6 months, with some limited exceptions.[484] This was to encourage the greater use of longer supervised tailored orders in the community rather than the use of short prison sentences, which, in contrast to other Australian jurisdictions, also include the possibility of parole. The types of orders discussed above would be available as alternatives.

11.6.3 Intensive correction orders

Another option raised during the current review by some stakeholders was the potential expanded use of ICOs. Because of the limited duration of these orders (12 months) and their inflexibility, the Council has previously noted these forms of orders are infrequently made. At the same time, they may be viewed by some as valuable for people facing a real risk of being sentenced to immediate imprisonment, given their status as custodial orders served in the community with both punitive (community work) and rehabilitative elements.

Only one rape case over the data period received an ICO. There were 45 ICOs made for sexual assault across the 18-year data period, with most orders (n=39) imposed for non-aggravated sexual assault.

The Council's recommendations with respect to ICOs in our earlier 2019 report were that these orders should be retained as an interim measure only, with a view to their repeal, subject to monitoring and analysis of the impact of proposed sentencing and parole reforms, with a transitional period of at least 2 years, during which time ICOs and any new CCO – including used in combination with a suspended prison sentence – should operate concurrently.[485]

The Council preferred this option over committing to reform of these orders, as has occurred in the ACT, NSW and SA, as we were concerned that this would increase the likely complexity of the sentencing framework, result in potential overlap in the types of sentencing orders available (particularly given the availability of court-ordered parole in Queensland) and risk diverting resources from a CCO model, which would require extensive resources to operate effectively. This was consistent with the Council's preference for the introduction of broader, more flexible community-based orders with a wide range of available conditions that can meet a range of sentencing purposes, rather than overly rigid and inflexible orders that are suitable only for a small group of offenders.

We recommended that, if retained in the long term, they should be reformed to increase their flexibility, drawing on reform models adopted in other jurisdictions, including:

- to reduce the number of mandatory (core) conditions to which a person on the order is subject, in line with the Council's proposed model for CCOs;
- to provide for a range of conditions that can be ordered as additional conditions;
- to allow the frequency of reporting (currently a minimum of at least twice in each week that the order is in force) to be determined by Queensland Corrective Services, based on the person's assessed level of risk and need; and

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484 Ibid rec 51. Recommended exceptions were on activation of a suspended sentence, in whole or in part, and sentencing or imprisonment imposed for offences committed while on parole.

485 *Community-based Sentencing Orders, Imprisonment and Parole Options Report* (n 4) recs 5–7.

- to allow for any attendance at counselling, appointments and programs to be counted towards satisfying the community service component of the order.

This remains our position.

11.6.4 Access to programs on remand

It is likely that many offenders, particularly those charged with rape or aggravated sexual assault, even with the adoption of our recommended reforms, will continue to serve a significant proportion of their sentence in pre-sentence custody on remand. This in itself can contribute to current sentencing options not being adequate or appropriate in meeting the objective of long-term community protection due to the lack of access to treatment programs and interventions prior to sentence.

While the reasons for delays in the finalisation of matters are complex, the impacts of this on sentence can be reduced if access to appropriate programs and interventions pre-sentence can be facilitated. The former Queensland Productivity Commission in its 2019 *Inquiry into Imprisonment and Recidivism: Final Report* recommended reforms to ensure prisoners on remand are able to access suitable programs and other activities likely to aid their rehabilitation.[486]

While the Commission's recommendation was not specific to sexual offending, the Council supports this recommendation and further suggests that such programs and interventions should be made available, where practicable, in multiple correctional centre locations and provide for continuation of programs and interventions post-sentence either in custody or in the community.

We note that there are significant capacity issues in custody, which are likely to continue, and the potential benefits in this context of prioritising the development and funding of suitable community-based alternatives to custody for lower-risk offenders.

A historical barrier to program participation has been a concern about the use of admissions made in the course of a prisoner's program participation. We note that such concerns may be partly addressed by recent amendments made to the *Corrective Services Act 2006* (Qld), which commenced on 19 September 2024.[487] The Act now provides that an admission made by a prisoner as part of their participation in a program or service (established or facilitated under section 266 of that Act) is not admissible against the prisoner in any legal proceedings about the alleged offence for which they have been detained.[488] Evidence of an admission or derivative evidence of the admission will be inadmissible in any civil, criminal or administrative proceeding (unless the prisoner agrees to this) that relates to the facts constituting the offence for which the prisoner was detained on remand.[489]

11.6.5 Resourcing issues

As noted in our *Community-based Sentencing Orders and Parole Options Report*, the reforms recommended will require significant investment by government to ensure that there is appropriately resourcing and funding for these tailored packages of conditions, and taking into account that more people are likely to be subject to some form of QCS supervision. However, where properly targeted, such

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486 *Inquiry into Imprisonment and Recidivism* (n 3) rec 17.
487 See *Criminal Justice Legislation (Sexual Violence and Other Matters) Amendment Act 2024 (*Qld) s 6 inserting a new section 344AB into the *Corrective Services Act 2006* (Qld). This provision commenced operation on the date of assent.
488 *Corrective Services Act 2006* (Qld) s 344B.
489 Ibid.

reforms are likely to be less costly than the significant costs of imprisonment, ensuring that this option is reserved for those requiring imprisonment due to the serious nature of their offending and the risks posed to the community.

More generally, we acknowledge the identified need for ongoing investment to be made in programs, interventions and services, both in custody and in the community, which target factors associated with a person's risks of reoffending. This includes exploration of alternate means of delivery of services and interventions in remote and isolated locations of the state, where it may not be possible to deliver these in person, and to ensure that culturally responsive programs and services can be delivered.

During our consultations, significant concerns were raised by a several stakeholders about what was viewed as a chronic lack of investment in Queensland for rehabilitative programs and interventions.[490] At our Brisbane consultation event, the comment was made that, 'Both the Sofronoff [Queensland Parole System Review in 2019] and the Productivity Commission report on imprisonment and recidivism said the same thing: you need to increase funding to support people to change their behaviour.' We strongly endorse this sentiment.

Similar observations about the need for funding in support of effective interventions were made by the authors of the 2019 research report on the effectiveness of sexual offender rehabilitation and reintegration programs.[491] The author of this report noted that 'significant resourcing (e.g. staff; space)' would be required to maximise the number of offenders who complete the entire treatment package, including transitional programs in support of reducing risks of reoffending.[492]

While some funding has been made available since these earlier reports were delivered, there is an urgent need to review the adequacy of services and funding across the Queensland correctional system.

11.6.6 Supervision, parole and the use of suspended sentences

Why the use of suspended sentences of imprisonment is so high and why this might be a problem

We consistently heard from legal stakeholders that one of the key drivers of the high use of partially suspended prison sentences was a desire by courts to ensure certainty of release, noting that those sentenced have often spent considerable time in pre-sentence custody and also the limited availability of programs that may delay the person's release from custody well beyond their parole eligibility date.

We were also told that in some cases suspension might be appropriate where the person is at low assessed risk of reoffending and where the court may not consider that the person requires supervision.

The primary problem with suspended sentences in Queensland, in our view, is their lack of flexibility.

In contrast to many other jurisdictions which have retained this a sentencing option, they do not allow a court to order that the person be subject to supervision or to engage in rehabilitation and treatment and

490 Cairns Consultation Event, 21 March 2024. Similar concerns were raised during our other consultation sessions.
491 *The Effectiveness of Sexual Offender Rehabilitation Programs* (n 354).
492 Ibid 48.

program interventions as part of their sentence. Under a suspended imprisonment sentence, the only condition with which the person must comply is not to commit an offence punishable by imprisonment.[493]

While we consider that suspended imprisonment sentences have an important role to play in the Queensland sentencing system, we support our previous recommendations that courts be permitted to order conditions as part of a suspended prison sentence through the making of a community-based order alongside a suspended sentence for a single offence. Our preference is that, in the longer term, a new form of community-based order be introduced – a community correction order, or CCO – that would have more flexibility to tailor the conditions to the individual circumstances of the case.

The problems with restricting access to court-ordered parole for sexual offences

With respect to the restrictions on the use of court-ordered parole for sexual offences, we agree with concerns raised by the Queensland Parole System Review, which found that such restrictions may have had the undesirable effect of making it 'less likely that an offender who commits a sex offence is sentenced to a period of imprisonment with subsequent effective supervision and rehabilitation on parole'.[494]

As this earlier review concluded, there are several benefits of extending court-ordered parole to sexual offences, including:

- There is a decreased risk of offending of those subject to parole supervision.
- Parole orders are more effective in terms of supervision than probation orders.
- Additional conditions can be immediately imposed on a parole order.
- People who are unable to be managed safety in the community can have the order suspended and be returned to custody.[495]

We consider that the current situation should be rectified as a matter of priority, with a court having the ability to set either a parole release date or a parole eligibility date to support supervision and rehabilitation on parole being an option available in more cases, as we have recommended previously.

No need for legislative guidance regarding penalty options

We do not see a need, following the model adopted in NSW for domestic violence offences,[496] to legislate a presumptive requirement that a sentence of either full-time detention or a supervised order be made.

We also note reforms introduced by the Australian Government that require a court to have regard to the objective of rehabilitation when sentencing a person for a Commonwealth child sex offence, including to consider the appropriateness of including rehabilitation or treatment conditions and, in determining the length of any sentence or non-parole period, to include sufficient time for the person to undertake a rehabilitation program.[497] While these considerations are highly relevant in sentencing people for sexual assault and rape, we do not see an immediate need for this form of guidance to be legislated. This issue

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493 PSA (n 17) pt 8A. Sexual offences are excluded from these orders: PSA s 151F. They also are only available to offenders sentenced by the Queensland Drug and Alcohol Court in Brisbane who meet other suitability and eligibility criteria set out under the PSA.
494 *QPSR Report* (n 7) 102–3.
495 Ibid.
496 *Crimes (Sentencing Procedure) Act 1999 (*NSW) s 4A.
497 *Crimes Act 1914* (Cth) s 16A (2AAA).

might be further considered as part of the broader review we recommend of section 9 of the PSA (**Recommendation 3**).

We acknowledge that sexual assault, in particular, involves a broad spectrum of conduct of varying levels of seriousness, and the reoffending risks posed by individuals and the types of interventions that might otherwise be appropriate as part of a supervised order (such as counselling) might have also been accessed privately prior to sentence.

Why we have not recommended restricting the use of suspended sentences of imprisonment

We accept that some stakeholders and community members might consider the use of particular forms of orders, such as wholly suspended imprisonment sentences and fines, to be inappropriate for a sexual offence of any kind, and as a basis for the availability of such options to removed or restricted.

A fundamental principle adopted for this review was that judicial discretion is fundamentally important (**Principle 7).** The Terms of Reference further expressly require us to have regard to the need to maintain judicial discretion to impose a just and appropriate sentence.

In our view, increasing appropriate sentencing options to court, rather than restricting available options, is most likely to deliver improved outcomes. This includes introducing the ability for a court to make a community-based order alongside imposing a suspended sentence of imprisonment when sentencing a person for a single offence to ensure, where appropriate, that they are required to comply with conditions of supervision and treatment.

If suspended imprisonment sentences were to be removed as a sentencing option for rape and sexual assault, there would be several undesirable impacts. Of most concern to us, this may significantly disincentivise pleas of guilty, which would likely result in fewer people being convicted of such offences. Given that the NSW data suggests the conviction rate for sexual assault offences may already be as low as 7 per cent or even lower,[498] in our view, any further reductions should not be risked. While current reforms in response to the WSJ Taskforce report are aimed at remedying current factors contributing to attrition, some evidential challenges will remain affecting the rate of successful prosecutions.

Removing suspended prison sentences as a sentencing option may further discourage offenders from disclosing offending that might not otherwise be detected, which warrants an additional element of leniency.[499] These disclosures in the context of sexual offending often involve offences committed against young children,[500] or offences against other vulnerable victims.[501] Removing such incentives may encourage those who have committed such offences to minimise the true extent of their offending behaviour to the detriment of those victim survivors, who might have been subjected to harm and otherwise not had this offending properly acknowledged.

For sexual assault, we envisage that the removal of suspended imprisonment sentences as a sentencing option or placing of restrictions on the use of such orders would result in an undesirable displacement effect to other forms of orders that might result in sentences that do not match the person's assessed

498 See Brigitte Gilbert, *Attrition of Sexual Assaults from the New South Wales Criminal Justice System* (Crime and Justice Statistics Bureau Brief No 170, NSW Bureau of Crime Statistics and Research, May 2024). Differences were found between attrition rates for offences against adults and children and contemporary and historic child sexual assaults.
499 As to this issue, see *AB v The Queen* (1999) 198 CLR 111, 155–6.
500 For example, *R v Ruiz; Ex parte A-G (Qld)* [2020] QCA 72.
501 For example, *R v Smith* [2020] QCA 23.

level of risk and need. This would particularly be the case in the absence of suitable community-based alternatives.

Reforms previously recommended discussed at section 11.2, in our view, are far preferable and will result in better outcomes.

Use of the term 'suspended sentences'

It has become clear during this review that suspended imprisonment sentences are poorly understood by the community.

We are concerned that the common labelling of these sentences as 'suspended sentences' rather than as 'sentences of suspended imprisonment' or 'suspended prison sentences' may be contributing to this lack of understanding.

Our review has highlighted the need to ensure that any sentencing resources and information aimed at the general community adopt the language of ‘suspended imprisonment’ or 'suspended prison sentence' rather than 'suspended sentence'. This will reinforce the custodial nature of this form of order and that the suspension of the term of imprisonment is conditional on the person not committing another offence punishable by imprisonment during the operational period of the order.

The Council will ensure that this language is used in any future information or resources it produces, including any updates made to our website, the *Queensland Sentencing Guide* and the *Court Reporting Guide for Journalists*.

The Council would encourage other Queensland legal stakeholders to make a similar commitment to the Council in adopting the language of suspended imprisonment in developing relevant sentencing information for practitioners and others (see **Recommendation 6.1**) to promote improved community understanding.

Increasing the visibility of the proportion of orders that are breached and action taken on breach in the interests of community confidence is also important. The Council previously has noted current challenges in reporting on these breach outcomes. This is discussed in **Chapter 18** of this report.

Impact of the guilty plea on parole eligibility

There were some, concerns raised during consultation by some stakeholders about current practices around the setting of parole eligibility dates for people who have pleaded guilty and significant benefit being given to a plea even if entered at a late stage. We discuss this issue in **Chapter 15** and recommend a review be undertaken (**Recommendation 24**).

11.6.7 Other issues with penalty types

Use of fines for non-aggravated sexual assault

Monetary orders for offences of non-aggravated sexual assault are common, although the use of these orders is decreasing. This decrease in the use of fines appears to mirror broader trends in the use of these types of penalties rather than being specific to sexual assault.

A fine is undoubtedly punitive; however, given the nature of the infringement of human rights that sexual assault involves, a question could be raised about whether this is a suitable form of penalty.

As discussed in section 11.5.5, fines are often viewed as appropriate in the context of offending viewed as being at the 'less serious' end of the spectrum of offence seriousness – typically where the person has no prior relevant criminal history.

Monetary penalties are used most often in the case of non-Indigenous offenders, although the Council has not explored the reasons for this, which could include factors such as whether the person is a first-time offender and the person's assessed capacity to pay a fine or compensation.

Our main concern with the use of fines is that the type of sentence ordered and the obligations under it should to some extent reflect the nature of the violation. The inherently non-intrusive nature of a fine is in stark contrast to intrusiveness of sexual assault, which violates the victim survivor's rights to privacy, sexual autonomy and integrity, and involves the demeaning objectification of them – most usually by male perpetrators.

We accept that courts may consider that they have few other reasonably available alternatives, particularly where a person is assessed as being at low risk and not in need of supervision.

In our view, this provides further evidence for the need for the types of significant reforms we recommended to the range of intermediate sentencing orders with better tailored conditions. An obligation to participate in a respectful relationships program, to engage in counselling or to undertake unpaid community work, for example, is likely to be more meaningful and more likely to promote a sense of accountability than an order that the person pay a monetary fine.

We remain of the view that expanding the range of sentencing options will lead to better tailored and more appropriate sentencing outcomes consistent with principles of individualised justice.

No recommendations to change discretion to record a conviction

We note that victim survivors and their advocates raised other issues viewed as contributing to the appropriateness of sentencing outcomes for sexual assault in particular. These included a concern about decisions made by a sentencing court that a conviction should not be recorded.

The decision about whether to record a conviction where such an option is open applies to all criminal offences. Taking the broader application of section 12 of the PSA into account, it is not the subject of further Council findings or recommendations. We did not consider it appropriate to recommend that specific exceptions should apply to just two offences.

We acknowledge that decisions made about whether a conviction should be recorded may play an important role in victim survivors' views regarding the adequacy of sentencing responses. In **Chapter 14**, we recommend that additional resources be developed in support interactions with victim survivors (**Recommendations 17, 18 and 19**). It may be beneficial for such resources, once developed, to include a suggestion that judicial officers clearly articulate their reasons for deciding a conviction should not be recorded when imposing sentence, with explicit reference to why the community will be better served by the decision not to do so.[502]

[502] See *ZB* (n 470) [9]–[10] (Sofronoff P),

Non-contact orders

We note identified issues regarding the current criteria for the making of a non-contact order and whether these should be changed in support of more orders being made in circumstances where a victim survivor might be concerned about the perpetrator initiating contact.

We suggest that this issue is best examined in the context of a broader examination of how the current provisions apply across all forms of sexual violence and non-sexual violence offending. Given the limited scope of our review, this has not been possible.

11.6.8 Systemic disadvantage considerations

Sentencing outcomes

Rape

For rape, while there were no difference in the likelihood of a custodial penalty or average or median sentenced length for Aboriginal and Torres Strait Islander people compared with non-Indigenous people,[503] there were statistical differences in the type of custodial penalty imposed.[504]

Aboriginal and Torres Strait Islander people were more likely to have received a sentence of imprisonment for rape (80% vs 65%). Conversely, non-Indigenous people were significantly more likely to receive a partially suspended imprisonment sentence for rape (31.1% vs 16.2%).

Sexual assault

Similar to the outcomes for rape, there was little difference in the average or median sentence length for custodial penalties in the Magistrates Court or higher courts when Aboriginal and Torres Strait Islander status was considered.

Across all sexual assault offences (MSO), Aboriginal and Torres Strait Islander people were more likely to receive a custodial penalty compared with non-Indigenous people (81.8% vs 60.2%).[505] The biggest difference was in the Magistrates Courts, for non-aggravated sexual assault (76.5% vs 41.0%).[506]

A sentence of imprisonment was the most common sentence for Aboriginal and Torres Strait Islander defendants for a sexual assault (MSO) case dealt with in the Magistrates Courts (42.5%), followed by wholly suspended imprisonment sentences (21.5%). In comparison, for non-Indigenous people, nearly equal proportions of people received a wholly suspended sentence (25.9%), a monetary order (24.1%) or a probation order (23.0%).

Discussion of impact

The availability of additional sentencing options that provide an alternative to immediate imprisonment and can be appropriately tailored to the individual circumstances of those being sentenced, including Aboriginal and Torres Strait Islander defendants, may achieve greater equity of access to non-imprisonment alternatives (while noting that there may be other structural barriers to achieving this).

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503 Pearson's Chi-Square Test: $\chi 2(2) = 0.42$, $p = .8110$, V=0.01.
504 Pearson's Chi-Square Test: $\chi 2(4) = 38.92$, $p < .0001$, V=0.15.
505 Pearson's Chi-Square Test: $\chi 2(1) = 63.14$, $p < .001$, V=0.18.
506 Pearson's Chi-Square Test: $\chi 2(1) = 79.91$, $p < .001$, V=0.29.

During consultation, the lack of appropriate community-based options and supervision in regional and remote areas of the state was raised consistently by stakeholders, limiting options for courts in sentencing. This particularly applies in remote Aboriginal and Torres Strait Islander communities, where 'supervision' might be a once-a-month check-in and where there are extremely limited options for treatment interventions.

Referring to data presented in the Consultation Paper, LAQ commented:

> It is also concerning to LAQ that First Nations people were less likely to receive a partially suspended [prison sentence] and more likely to receive a sentence of actual imprisonment … LAQ can only assume this is a product of First Nations people being over-represented on more minor offences and so, when being sentenced for a sexual offence, might present with a criminal history which militates against a conclusion that there are prospects of rehabilitation. LAQ's experience has also been that some First Nations men do not apply for parole and instead serve out their sentences before returning to community. LAQ considers there to be a gap in penalty options, as well as an absence of culturally sensitive programs in small, remote communities.[507]

Similar concerns were raised at a meeting with a representative of the Family Responsibilities Commission, who noted the lack of programs available in communities to address the underlying causes of offending.[508] Supervision in remote communities was considered lacking, with the comment that that this might consist of a phone call with a probation and parole officer once a fortnight. It was suggested that there had been good models operating with direct interventions with high-risk offenders in the youth space. Suspended prison sentences were considered to be particularly valuable sentencing options for Aboriginal and Torres Strait Islander persons. Introducing a capacity for a suspended prison sentence and supervision order to be ordered for the one offence, or conditional forms of suspended imprisonment orders, was supported. The comment was made that there needs to be motivation to comply with the order, and failure to complete a program could trigger a breach of the order. There was also support for extending the ability to set a parole release date to sexual offences.

With respect to shorter sentences of imprisonment imposed for non-aggravated sexual assault, the ability of courts to decide whether to fix a parole release date or a parole eligibility date might be of particular benefit to Aboriginal and Torres Strait Islander persons. This is because they are more likely to receive a sentence of immediate imprisonment, and less likely to receive a partially suspended prison sentence.

An option for courts to order a parole release date through the extension of court-ordered parole to sexual offences may also be beneficial in cases where there is some risk that an Aboriginal or Torres Strait Islander person may not apply for parole. It is important, given the evidence regarding the benefits of parole, that opportunities for this type of supervision be maximised in the interests of supporting the person's rehabilitation and long-term community safety.

However, we note that for rape, reforming the SVO scheme to a presumptive scheme could disproportionately impact Aboriginal and Torres Strait Islander peoples. During the SVO scheme review, we found that Aboriginal and Torres Strait Islander people were disproportionately represented among those sentenced to greater than 5 years' imprisonment for rape, representing just under one-third of all rape (MSO) cases (29.3%).[509]

During that earlier review, legal stakeholders raised the potential for a presumptive scheme to further disadvantage defendants who are marginalised or experiencing disadvantage, including Aboriginal and

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507 Submission 23 (Legal Aid Queensland) 20.
508 Meeting with representative of Family Responsibilities Commission, 9 May 2024.
509 *The '80 Per cent Rule' – Appendices* (n 325) Appendix 5, Figure A.1.

Torres Strait Islander peoples, women, people with a mental illness or cognitive impairment, people from a culturally or linguistically diverse background and other disadvantaged groups. Under the reformed scheme, defendants will be required to make submissions to show why a declaration should not be made. Defendants who have access to high-quality legal representation and are able to fund the preparation of specialist reports might be better able to establish that a declaration should not be made than those who have limited access to the same resources.

The Council therefore recommended that, as part of any implementation strategy developed by the Department of Justice should our recommended reforms be adopted, further consultation should be undertaken with legal stakeholders, including those providing direct representation for Aboriginal and Torres Strait Islander defendants and other defendants who are marginalised or experiencing disadvantage, to identify any additional legal funding or support required to minimise unintended impacts of the scheme.[510] This consultation process should include consideration of the adequacy of existing funding, both in support of defendants' legal representation and to fund the preparation of any required specialist reports. We continue to support this earlier recommendation.

11.6.9 Human rights considerations

Under the HRA, human rights limitations must be justified as a proportionate way of achieving the purpose of legislation, provided there is evidence that it is the least restrictive option.

Any changes resulting in the adoption of higher penalties, more restrictive sentencing options and/or changes to the types of sentencing options available potentially engage several human rights protected in the HRA, including:

- the right to equality (section 15);
- the right to liberty and security (section 29);
- protection from torture and cruel, inhuman or degrading treatment (section 17);
- the right to humane treatment when deprived of liberty (section 30);
- protection of families and children (section 26); and
- cultural rights of Aboriginal and Torres Strait Islander peoples and other persons (sections 27 and 28).

The right not to be subject to retrospective criminal laws (section 35) is also of relevance in considering any required transitional provisions.

The reforms recommended will increase, rather than decrease, sentencing options available to a court in support of individualised justice. The adoption of these reforms will therefore promote rights, rather than limiting these rights.

With respect to reforms recommended to the SVO scheme, the Council has previously prepared a detailed human rights impact statement addressing various aspects of these reforms.[511]

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510 *The '80 per cent Rule'* (n 20) rec 25.
511 See *The '80 Per cent Rule' – Appendices* (n 325) Appendix 15.

Chapter 12 – Information available to courts to inform sentence

12.1 Introduction

In this chapter, we consider an important precondition to ensuring sentences for sexual assault and rape are 'adequate' and 'appropriate': the information available to courts to inform sentence.

The information presented to courts may relate to factors, including:

- the harm caused to any victim survivor of the offending (explored in detail in **Chapter 14**);
- details about the offence itself and what happened, and the events leading up to its commission;
- the personal background of the person being sentenced, including their age, educational and employment background, family circumstances, whether they have a mental illness or cognitive impairment and their cultural background, as well as any history of prior offending;
- any action the person has taken since they committed the offence that may demonstrate their remorse, acceptance of responsibility and a willingness to facilitate the course of justice, such as through their cooperation with the investigation and the entering of a guilty plea,[1] as well as any steps taken towards their rehabilitation, such as voluntary engagement in counselling or treatment.

As discussed in **Chapter 10**, in making submissions on sentence, prosecutors and defence practitioners also commonly provide sentencing courts with information about sentences imposed in cases that are factually similar (case comparators), as well as relevant Court of Appeal guidance.

In this chapter, we consider three specific aspects of the information provided to courts:

- the role of professional medical, psychological and other professional reports;
- the use of pre-sentence reports and advice; and
- the use of cultural reports and submissions.

These reports and submissions are of particular relevance to a court in assessing:

- the nature and extent of harm caused to victim survivors of rape and sexual assault;
- the personal background of the person being sentenced, as well as risks of reoffending and factors associated with their offending; and
- the types of interventions available in custody and in the community that might reduce the person's reoffending risks, as well as the existence of family and community supports.

The use of information commonly referred to as 'good character evidence' and contained in personal references is explored in **Chapter 9**.

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1 On the relevance of a guilty plea, see Chapter 15.

12.2 The current situation

12.2.1 The *Penalties and Sentences Act* 1992

The *Penalties and Sentences Act 1992* (Qld) ('PSA') requires a court to consider several matters that can only be properly ascertained through submissions and supporting evidence put before the sentencing court. In relation to the person being sentenced, these include:

- the extent to which the person is to blame for the offence (s 9(2)(d));
- their intellectual capacity, character and age (s 9(2)(f));
- whether they are a victim of domestic violence and if so, whether the commission of the offence is wholly or partly attributable to this, and their history of being abused or victimised (s 9(2)(gb));
- the risk of the person reoffending (ss 9(3)(a) and (6)(d)) – which is also relevant to considering the need for community protection (ss 9(1)(e), (3)(b), 6(d));
- any medical, psychiatric, prison or other relevant report (ss 9(3)(j) and (6)(j));
- the person's prospects of rehabilitation (ss 9(3)(g) and (6)(g) – noting rehabilitation and community protection are also relevant sentencing purposes (ss 9(1)b) and (e)).

Matters relating to the victim survivor to which a court must have regard include:

- any physical, mental or emotional harm done to a victim (s 9(2)(c)(i));
- for offences of a sexual nature committed against children under 16 years, the age of the child and the effect of the offence on the child (ss 9(6)(a)–(b));
- for offences involving the use or attempted use of violence or that resulted in physical harm to another person, the personal circumstances of the victim (s 9(3)(c)).

Where the person being sentenced is an Aboriginal or Torres Strait Islander person, the court is also required to consider 'any cultural considerations, including the effect of systemic disadvantage and intergenerational trauma on the offender'.[2] Section 9(2)(p) of the Act further provides for submissions to be made by a representative of Community Justice Group ('CJG') in the sentenced person's community regarding these cultural factors in addition to the person's relationship to the community and any considerations relating to programs and services.

Both the prosecution and defence, on behalf of the person who is being sentenced, make submissions to the court to assist the court in understanding factors relevant to sentence. It is the responsibility of the prosecution and defence to put forward information on which they intend to rely before the court (meaning they bear the onus of proof).[3]

In Queensland, a sentencing judge or magistrate may act on an allegation of fact that is admitted or not challenged.[4] If it is not admitted or is challenged, the sentencing judge or magistrate may only act on it if satisfied on the balance of probabilities that the allegation is true.[5] However, the degree of satisfaction

2 *Penalties and Sentences Act 1992* (Qld) s 9(2)(oa) ('PSA').
3 See *R v Olbrich* (1999) 199 CLR 270, 281.
4 *Evidence Act 1977* (Qld) s 132C(2).
5 Ibid s 132C(3).

varies according to the consequences adverse to the person being sentenced of finding the allegation to be true.[6]

A court's understanding of any physical, mental or emotional harm done to a victim is often given to the court in the form of a victim impact statement ('VIS'). Issues regarding the current VIS regime are explored in **Chapter 14**.

12.2.2 Pre-sentence reports and psychological reports

Pre-sentence reports

While any report, whether requested by the court or commissioned by the prosecution or defence, may be referred to as a 'pre-sentence report', for the purposes of this chapter we use this term to refer to those reports that are prepared by Queensland Corrective Services ('QCS') under section 344 of the *Corrective Services Act 2006* (Qld) ('CSA').

PSRs are documents for a court, normally prepared at a court's request,[7] to provide information about a person being sentenced and to assist the court in determining the most appropriate form of sentence or other disposition.[8] They may be mandatory or discretionary, but are generally sought to supplement other information before the court about a person's background or the circumstances of the offence.[9] They are additional to any medical, psychological or other reports that may be obtained, typically by the defence in support of submissions made on sentence.[10] .

Section 15 of the PSA expressly allows a court, in imposing sentence, to receive 'any information' including a pre-sentence report made under section 344 of the CSA. However, there is no requirement for a pre-sentence report ('PSR') to be ordered. In practice, PSRs are not commonly requested or prepared with respect to adults sentenced to imprisonment in the higher courts. The findings of our analysis based on a sample of sentencing remarks about the use of these reports are discussed below.

A pre-sentence report ordered under section 344 of the CSA must be given to the court within 28 days of request. The court is required to provide a copy of the report to the prosecution and the convicted person's legal representatives and to ensure they have sufficient time prior to the proceedings to consider and respond to the report.[11] The court may also order that the report, or part of it, not be shown to the convicted person.[12] Information contained in a report is evidence of the matters contained within it and cannot be objected to on the basis that the evidence contained in it is hearsay.[13]

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6 Ibid s 132C(4). This is in effect, a legislative adoption of the 'Briginshaw' test: *Briginshaw v Briginshaw* (1938) 60 CLR 336 as adopted by the Court of Criminal Appeal in *R v Jobson* [1989] 2 Qd R 464 which had been displaced prior to its introduction by a majority of the Court in *R v Morrison* [1999] 1 Qd R 397.

7 *Corrective Services Act 2006* (Qld) s 344 ('CSA') provides that a court may request a pre-sentence report (PSR) to inform sentencing and section 15 of the PSA (n 2) states that a court may receive any information that it considers appropriate to enable it to arrive at the appropriate sentence, including a PSR.

8 Arie Freiberg, Fox and Freiberg's *Sentencing: State and Federal Law in Victoria* (Lawbook Co, 3rd ed. 2014) 173 [2.190].

9 Ibid.

10 Ibid.

11 CSA (n 7) ss 344(5)–(6).

12 Ibid s 344(7).

13 Ibid ss 344(9)–(10).

In contrast to sentencing legislation in several other jurisdictions, there is no legislative guidance regarding the types of matters that may be included in such a report.[14]

Specialist medical, psychiatric or psychological reports

A request for a PSR is separate to a request by a court for a medical, psychiatric or psychological report, although a court may order both at the same time. Queensland Courts is required to fund the preparation of these reports and there is no dedicated funding provided in support of their preparation. It is more common for medical and psychological reports to be privately commissioned by the defence.

These specialist reports generally set out a person's background as well as any medical or psychological conditions from which they suffer. In some cases, they may also express a view about the defendant's assessed risk of reoffending. For example, a 2020 decision of the Court of Appeal refers at some length to a court-ordered psychiatric report which was requested by the court in conjunction with a PSR, which reported on the person's denial of some of the conduct, reported on the offender meeting the diagnostic criteria for several psychiatric conditions, noted his personal background and expressed the opinion that 'his lack of insight into the impact of his offences upon the victims were concerning features'.[15]

In a more recent 2023 decision of the Court in a case involving 2 counts of rape, one count of attempted rape and one count of grievous bodily harm against one victim and one count of assault occasioning bodily harm against another, the Court referred to a psychological report tendered at the time of sentence, which again reported on relevant factors, including alcohol misuse, and expressed the opinion that 'the applicant's risk for committing future acts of explosive violence was moderate to high, and he needed assistance in learning to understand and express his anger appropriately', also recommending 'appropriate treatment programs'.[16]

Other sources of this type of evidence may include expert reports and transcripts from the Mental Health Court, which may be used at sentence. Previously, these reports could only be allowed if they related to the same offence for which the person was referred to the Mental Health Court. This restriction has now been removed.[17]

Sentencing remarks review

The Council's findings from our sentencing remarks analysis suggest that PSRs are rarely used in rape cases and even less so for sexual offence cases.

Psychological reports are more common – being referred to in one-third of rape cases and close to one in 5 sexual assault cases – though were more common for cases sentenced in the higher courts. See further **Appendix 6**, section 6.2.6.

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14 See, for example: *Sentencing Act 1991* (Vic) s 8B, which lists 18 specific matters such a report may address, in addition to 'any other information that the author believes is relevant and appropriate'. It must also include any matter relevant to the sentencing of the person which the court has directed be set out in the report: ibid s 8B(2); *Sentencing Act 2017* (SA) s 17(1) which refers to 'the physical or mental condition' and 'the personal circumstances and history' of the defendant as relevant matters a court may order a report on, in addition to 'any other matter that would assist the court in determining sentence'.

15 *R v McCoy* [2020] QCA 59, 5–6 [23]–[25]. The offender in this case had been convicted following a trial and sentenced for 2 counts of maintaining a sexual relationship with a child, 8 counts of indecent treatment of a child under 16 (under 12) and 9 counts of rape.

16 *R v Wallace* [2023] QCA 22, 3 [3]–[4].

17 *Mental Health Act 2016* (Qld) s 157(2) amended by *Health and Other Legislation Amendment Act 2024* (Qld) s 15.

Acknowledgement of benefits of report in informing sentence

Some judicial officers referred to reports as providing useful information that could not otherwise be ascertained. For example, in one instance it was observed:

> It was quite obvious to me, having regard to the offending … that there were clearly some psychiatric concerns regarding your behaviour that needed to be the subject of a specialised report and an assessment by a psychiatrist. Both the pre-sentence report and the psychiatric report … have been particularly helpful.[18]

> I have found the report of the psychologist commissioned on your behalf for sentencing purposes to be quite helpful in understanding your clinical and personal background as well as your need for rehabilitation.[19]

State of mental health and hardship

In many instances, a report was used to establish the person's mental health, either at the time of the offending or currently, which might help to inform the sentence and in assessing any additional hardship that serving a prison sentence might cause:

> The psychologist states that you would face considerable hardship in a custodial environment because of your psychological vulnerabilities and your history of thoughts of deliberate self-harm. Furthermore, your relationships with other people may prove difficult in prison; however, sensibly, your counsel, XXX, did not suggest that a sentence that did not involve any custodial component was appropriate.[20]

Risk of reoffending and rehabilitative prospects

Psychological reports were also commonly used to inform the court of an opinion on the person's risk of reoffending and their prospects of rehabilitation:

> In determining the appropriate sentence, I must have primary regard to the impact of your offending, and the protection of the community. The impact of your offending has been enormous. The report that has been provided to me indicates that the writer's opinion is that you are a low risk of reoffending. Importantly, you are willing and desirous of undertaking courses in prison in order to reduce any risk you have of reoffending. General and personal deterrence are important considerations in the exercise of my discretion. The sentence I impose must deter others who consider sexually abusing children. It must deter you from doing so again, and it must denounce your conduct on behalf of the community.
>
> … It must also, of course, balance those features against your prospects of rehabilitation, which appear to be good because of your now expressions of regret, your acknowledgment of the impact of your offending, and your desire to undertake courses to reduce any risk of reoffending.[21]

This may be useful for a court in deciding how to structure a sentence and whether supervision is necessary:

> You have been offered multiple opportunities in the form of probation orders to address your offending behaviour, but by virtue of your attitude to those orders and the fact that you reoffended in similar ways, that would suggest, and it is consistent with the report of Dr XXX, that I am sentencing you as an offender who is a medium to high risk of reoffending. The only way to structure your sentence, therefore, will be to structure it such that you would be under the supervision of the parole authorities upon your release, whenever that might be.[22]

Equally, the absence of a report may hinder a court's ability to assess a person's risk of reoffending:

> As I have indicated, protection of the community, of children, from your risk of reoffending is, in my view, the paramount consideration in determining the appropriate sentence. It is very difficult for me to assess your risk of

18 Rape, regional/remote, imprisonment less than 5 years, #3.
19 Sexual assault, major city, lower courts, custodial, #7.
20 Rape, major city, imprisonment less than 5 years, #1.
21 Rape, major city, imprisonment greater than 5 years, #5.
22 Rape, regional/remote, imprisonment less than 5 years, #3.

> reoffending because there is no material that has been placed before me, psychiatric or psychological, to indicate what your risk of reoffending might be.[23]

Medical and psychological reports substantiating harm to victim survivors

As discussed in **Chapter 8**, one factor to which a court must have regard in sentencing is 'any physical mental or emotional harm done to a victim', including harm referred to in a victim impact statement.[24] In **Chapter 14**, we consider the current role of victim impact statements and the important role these play in informing a court about the harm caused by offences of sexual assault and rape, and for other offences involving personal violence.

It has been acknowledged that:

> Increasingly, as more knowledge is acquired about the long-term and indirect damage caused by various offence categories, courts are more willing to make assumptions about the likelihood of harm being caused by an offence. This obviates the need for evidence to be tendered regarding the existence of such harm. This is especially the situation in relation to sexual offences.[25]

Sentencing magistrates and judges are now free to assume that sexual offences against children cause long-term harm to victim survivors,[26] although '[t]here is a limit to the extent to which judges can draw on their own experience, in other cases or elsewhere, to reach conclusions of fact for the purpose of sentencing'.[27] The special knowledge possessed by sentencing judges and magistrates was recognised in *R v RAZ; Ex parte Attorney-General (Qld)*,[28] a case which concerned the sentencing of a magistrate for sexual offences against his step-grandson, in which the Queensland Court of Appeal found that his position as a magistrate was an aggravating factor because he is assumed to have understood the devastating impact that sexual offences can have on children. The Court commented:

> As a magistrate hearing cases of sexual offences the respondent was in a special position to gather knowledge from the mouths of victims about the effect of sexual offences upon children. While the wider public may not have been aware until recent times about the persistent corrosive effect upon the lives of such victims, those in the legal profession, in law enforcement and in some medical fields have long known that even a single sexual offence against a child may have terrible and enduring consequences.[29]

There may not be the same degree of recognition about how acts of indecent assault committed against adult victims impact the victim survivors in the absence of expert evidence. As we discuss in **Chapters 6, 13 and 14**, these impacts can be significant.

The failure to properly appreciate the extent and level of the harm caused by sexual violence offending can have a significant impact on sentence due to its relevance in assessing the seriousness of this offending (see **Chapter 7**).

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23 Rape, regional/remote, imprisonment less than 5 years, #3.
24 PSA (n 2) s 9(2)(c)(i).
25 Mirko Bagaric and Theo Alexander, 'A rational approach to the evaluation of harm in the sentencing calculus' (2021) 50 *Australian Bar Review* 251, 260.
26 See, for example, *R v Kilic* (2016) 259 CLR 256, 267 [21] (Bell, Gageler, Keane, Nettle and Gordon JJ), 447 [57] (Kiefel CJ, Bell and Keane JJ). See also *Ryan v The Queen* (2001) 206 CLR 267, [42] citing relevant psychiatric studies as to its impacts.
27 *R v Evans* [2011] QCA 135 [33] (Fryberg J, Chesterman JA agreeing).
28 [2018] QCA 178.
29 Ibid 5 [23] (Sofronoff P, Gotterson JA and Boddice J agreeing).

On occasion, courts have the benefit not only of a victim impact statement but also material provided by treating doctors and psychologists. The following is illustrative of how this information might be referred to in the context of sentencing:

> A victim impact statement by the complainant and a letter from a clinical psychologist described the severe short-term impact and the improved, but still very significant, lasting impact the applicant's offending had upon her. She experienced daily panic attacks (having only had one panic attack earlier in her life) and significant anxiety. The psychologist considered that she fitted the criteria for post-traumatic stress disorder.[30]

12.2.3 Cultural reports

Current position

When someone identifies as an Aboriginal or Torres Strait Islander person, submissions can be made from a CJG representative that are relevant to sentencing. This may include information about the 'offender's relationship to the offender's community' and 'any cultural considerations' that a court must consider.[31] These submissions may be provided either in writing or orally during the court proceedings.[32]

The Court of Appeal has acknowledged that submissions from a CJG representative should be given great weight.[33]

When providing a report (written or oral) to a court for sentencing, the CJG representative must advise the court whether:

- any member of the CJG that is responsible for the submission is related to the offender or the victim; or
- there are any circumstances that give rise to a conflict of interest between any member of the CJG who is responsible for the submission and the offender or victim.[34]

CJGs operate in over 52 Queensland communities,[35] and perform a variety of activities to support Aboriginal and Torres Strait Islander people, including preparing and presenting sentencing submissions to the Magistrates Court and Murri Court.[36] In addition to providing cultural advice to inform bail and sentencing decisions, CJGs' other court-related functions are to provide support to Aboriginal and Torres Strait Islander people to enable them to understand and participate in the court process, and to refer people being sentenced and victims to agencies and services that can provide services and support.[37]

The most recent independent evaluation of the CJG Program was released in September 2024.[38] It reported in 2022–23, across the CJG Program, that:

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30 *R v McConnell* [2018] QCA 107, 4 [9].
31 PSA (n 2) ss 9(2)(p)(i)–(ii).
32 The Myuma Group, *Evaluation of Community Justice Groups: Final Report* (November 2023) 92 ('*The Myuma Group, Phase 3 Report*)'.
33 *R v SCU* [2017] QCA 198, 12 [56], 23–4 [113] (Sofronoff P).
34 PSA (n 2) s 9(8).
35 'Community Justice Group Program', *Queensland Courts* (web page, 17 November 2024) https://www.courts.qld.gov.au/services/court-programs/community-justice-group-program ('*Community Justice Group Program*').
36 The Myuma Group, *Phase 1 Report: Evaluation of Community Justice Groups* (November 2021), 68 ('*The Myuma Group,* Phase 1 Report').
37 *The Myuma Group, Phase 3 Report* (n 32) 64.
38 Ibid.

- CJGs attended mainstream court on 1,479 occasions, assisting 6,911 people, making 991 cultural reports and 7,081 referrals;
- CJGs attended Murri Court on 275 occasions, assisting 2,504 people, providing 1,919 Murri Court reports and making 3,072 referrals.[39]

The Phase 2 evaluation report found:

- In 2021–22, CJGs made 444 sentence submissions [367 oral submissions (83%) and 77 written submissions (17%)[40] – but this was likely to be a significant undercount].[41]
- In 2020–21, CJGs made 587 oral submissions and 190 written submissions.[42]

CJGs are funded to operate in the Magistrates Courts, but the Phase 1 evaluation noted CJGs provide cultural reports to Mount Isa and Thursday Island higher courts.[43]

The form of cultural reports adopted varies and there are both formal structured sentence reports used in the Murri Court as well as narrative cultural reports.

The Phase 2 Murri Court evaluation noted advice that CJGs:

> do not provide cultural reports for all defendants in mainstream courts – this will often be decided with the legal representatives and will be affected by whether it is considered that a report will improve the court's ability to make a better decision and whether the defendant is willing to provide information for the report.[44]

As part of the 2019–20 State Budget, $19.4 million was allocated over 4 years to support a grants management system and to increase funding provided to CJGs.[45] An additional $438,000 was allocated in 2023–24 to support engagement with CJGs.[46]

Sentencing remarks review

The Council's review of sentencing remarks did not identify any cases where a submission had been made by a CJG on the sentenced person's behalf. However, a search of the Queensland Sentencing Information System ('QSIS') did reveal a small number of cases in which this had occurred. These included:

- a 2018 decision involving a person sentenced for rape, with reference being made to assistance offered by the CJG to 'continue to help' him with issues including his alcohol use, finding safe accommodation, determining how to relate to his family and finding support and work;[47]

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39 Ibid.
40 The Myuma Group, *Phase 2 Annual Report: Evaluation of Community Justice Groups* (December 2022), 112 ('*The Myuma Group, Phase 2 Report*').
41 Ibid 15. *The Myuma Group, Phase 1 Report* (n 36). The CJGs program has previously been evaluated in 2010, see KPMG, *Evaluation of the Community Justice Groups* (Final Report: November 2010).
4242 *The Myuma Group, Phase 2 Report* (n 40) 112.
43 *The Myuma Group, Phase 1 Report* (n 36) 79.
44 The Myuma Group, Phase 2 Report (n 40) 115.
45 Queensland Government, Framework for Stronger Community Justice Groups <https://www.courts.qld.gov.au/__data/assets/pdf_file/0005/657887/cip-cjg-brochure-stronger-framework.pdf> 3.
46 Queensland Government, *Budget Measures 2024–5* (Budget Paper No 4, 2024) 75.
47 QDC (No 184 of 2018).

- a 2017 decision involving a Torres Strait Islander person sentenced for rape of a child, in which the sentencing judge referred to a report of the CJG reporting on his progress and efforts to make himself 'a better man' and 'better member of the community'.[48]

In a small number of cases identified, the absence of a CJG report was noted.[49]

No cases identified referred to support being provided to the victim survivor by a CJG or submissions made regarding the impacts of the offending on the victim survivor, their family members or the local community.

Although not the focus of specific investigation, we found some examples of judicial officers in sentencing commented on the additional adverse impacts of offending on victim survivors from other cultural backgrounds. For example, in a 2023 appeal decision, one of the factors pointed to as making the offences particularly serious was 'the cultural implications of the blackmail for the complainant [involving the perpetrator threatening to post a video on social media] as "damaged goods"'.[50]

12.3 Previous Queensland reviews

12.3.1 Report of the Special Taskforce on Domestic and Family Violence – *Not Now, Not Ever*

The Special Taskforce on Domestic and Family Violence in Queensland ('Taskforce'), chaired by The Honourable Quentin Bryce AD CVO, was established on 10 September 2014 and tasked with making recommendations to inform the development of a long-term vision and strategy for government and the community to reduce the incidence of domestic and family violence.[51]

The Taskforce acknowledged CJGs as an example of good practice, but concluded that 'such initiatives need to be expanded, well-resourced and adequately supported. It viewed the current context as presenting an 'opportunity to re-visit and improve the CJG model'.[52]

It recommended an expanded role of CJGs in design and implementation of a co-located service response to domestic and family violence, ensuring that they are properly resourced and supported to undertake this role.[53]

It also recommended that, in working with discrete Indigenous communities to develop and support an effective local authority model to respond to crime and violence in those communities, consideration should be given to resourcing and expanding the role of CJGs, Justice of the Peace Magistrates Courts and related local justice initiatives as appropriate, as well as examining the specific role that community justice groups could play in conferencing, mediation and criminal justice system support.[54]

The Taskforce did not expressly consider the role of CJGs in the sentencing process.

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48 QDC (No 96 of 2017);
49 For example, QDC (No 536 of 2017).
50 *R v VN* [2023] QCA 220 [30] (Bowskill CJ and Morrison and Dalton JJA).The victim survivor was from a traditional Tamil family who had fled Sri Lanka.
51 Special Taskforce on Domestic and Family Violence, *Not Now, Not Ever: Putting an End to Domestic and Family Violence in Queensland* (2015) 6.
52 Ibid 261.
53 Ibid rec 9.
54 Ibid rec 92.

12.3.2 The Queensland Productivity Commission 2019 report

The Queensland Productivity Commission, in its 2019 final report on its inquiry into imprisonment and recidivism, reported that screening, particularly for cognitive disability, prior to entry into and within the criminal justice system is important in reducing the potential for reoffending, re-criminalisation and ultimately 'enmeshment' of people with disability in criminal justice systems.[55]

To encourage the use of non-custodial sentencing orders, the Commission recommended reforming sentencing laws to 'create a presumption in favour of courts seeking pre-sentence assessment, including psychological assessment, where there is reason to believe the offender is suffering from a mental illness or intellectual disability and the court is considering imposing a prison sentence'.[56]

While the Commission considered that CJGs may have an important role to play in the development of community-based justice initiatives and proposed deferred prosecutions,[57] their role in the provision of cultural advice and supports at sentence was not expressly considered.

12.3.3 The Council's previous reviews

The Council has considered the use of pre-sentence reports, specialist reports and cultural reports during previous reviews.

During the Council's most recent review of the serious violent offences ('SVO') scheme,[58] legal stakeholders advised that while PSRs – particularly specialist psychological and psychiatric reports – were often desirable to help judicial officers make informed decisions about a person's risk, they were concerned about making such assessments mandatory. In particular, concerns were raised that the availability and quality of such assessments across Queensland would be limited and could lead to substantial delays in sentencing.[59] Assessment of risk made at the time of sentence was also viewed as problematic for those sentenced to longer terms of imprisonment, with the view that risk is best assessed at the time the person is reaching their parole eligibility date.

Responding to those concerns, and acknowledging the potential for the requirement for such reports to further disadvantage defendants who were marginalised or experiencing other forms of disadvantage, the Council recommended that further consultation be undertaken with legal stakeholders to consider the adequacy of existing funding both in support of defendants' legal representation and to fund the preparation of any required specialist reports as part of any implementation strategy.[60]

The availability of PSRs and use of cultural reports was also considered as part of the Council's 2019 review of community-based sentencing orders, imprisonment and parole options. Ultimately, the Council recommended that no change be made to the current power of a court to order a PSR.[61] Support by

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55 Queensland Productivity Commission, *Inquiry into Imprisonment and Recidivism: Final Report* August 2019) 297–8. A similar point was made by the Royal Commission into Violence, Abuse, Neglect and Exploitation of People with a Disability in its *Criminal Justice and People with Disability: Final Report, Volume 8* (2023) in which it referred to previous studies that 'have consistently found that procedures for identifying people with disability, especially cognitive disability, in criminal justice settings are poor': 176.

56 Ibid xlix rec 9.

57 Ibid 452.

58 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).

59 Ibid 208.

60 Ibid section 19.4 and rec 25.

61 Queensland Sentencing Advisory Council, *Community-based Sentencing Orders, Imprisonment and Parole Options* (Final Report, 2019) 195, rec 26 ('*Community-based Sentencing Orders, Imprisonment and Parole Options Report*').

stakeholders for the expanded availability of PSRs and the court advisory service operating out of the Brisbane Magistrates Court, however, was acknowledged.[62]

With respect to cultural reports, the Council noted that a process evaluation of the Murri Court was then underway. It suggested this review might provide an appropriate avenue for the suitability of cultural reports in the Murri Court to be considered – also identifying the use and impact of cultural reports as 'an important area for future research'.[63]

12.3.4 The Women's Safety and Justice Taskforce's recommendations and government response

The Women's Safety and Justice Taskforce supported the expanded use and availability of PSRs in Queensland, recommending:

> 129. The Attorney-General and Minister for Justice, Minister for Women and Minister for the Prevention of Domestic and Family Violence progress amendments to the *Penalties and Sentences Act 1992* and the *Corrective Services Act 2006* to require a court to consider ordering a pre-sentence report when determining whether a community-based order may be suitable for an offender who is otherwise facing a period of imprisonment …
>
> 130. Queensland Corrective Services develop and implement a plan for the sustainable expansion of court advisory services across Queensland to support greater use of pre-sentence reports …[64]

It noted that, 'as part of the expansion of PSRs, QCS would need to build its capacity to provide a trauma-informed and culturally-safe service for the preparation of PSRs'.[65]

The Taskforce suggested that 'legislative amendments should require a court to consider ordering a PSR, and should enable the court to request specific information from QCS'.[66]

The former Queensland Government provided in-principle support for implementation of the Taskforce's recommendations,[67] and work on the expansion of these services has commenced in support of a trial.[68] QCS also received funding for the Enhanced Community Corrections Pilot in Townsville to enhance court advice and prosecution support services focused on First Nations peoples.[69] The objectives of this pilot include 'to reduce the imprisonment of First Nations peoples, maximise rehabilitative outcomes and put downward pressure on rates of recidivism'.[70]

The Women's Safety and Justice Taskforce further recommended that the District Court consider establishing a Murri Court program within the District Court.[71] This recommendation was supported by

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62 Ibid 426.
63 Ibid 430.
64 Women's Safety and Justice Taskforce, *Hear Her Voice – Report Two: Women and Girls' Experience Across the Criminal Justice System* (2022) vol 2, 575 ('*Hear Her Voice, Report Two*') referring to Queensland Sentencing Advisory Council, *Community-based Sentencing Orders, Imprisonment and Parole Options Report* (n 61) 578, recs 129–30.
65 Ibid.
66 Ibid 577. The type of information the Taskforce suggested might be useful was 'information concerning the offender's parenting responsibilities, domestic and family violence history or other circumstances, how suitable the offender is for particular community-based sentencing, and whether the offender would benefit from particular supports or rehabilitation in the community': ibid.
67 Queensland Government, *Queensland Government Response to the Report of the Queensland Women's Safety and Justice Taskforce, Hear Her Voice - Report Two: Women and Girls' Experiences Across the Criminal Justice System* (2022) 8 ('*Response to Hear Her Voice, Report Two*') 40.
68 Queensland Government, *Women's Safety and Justice Reform Annual Report 2022–23* (May 2023) 7.
69 Submission 31 (Queensland Corrective Services), 3.
70 Queensland Corrective Services, *Annual Report 2023–24* (2024) 12.
71 *Hear Her Voice*, *Report Two* (n 64) rec 122.

the former Queensland Government.[72] Progress on implementation of this recommendations and other recommendations is reported on as part of the Women's Safety and Justice Reform annual report.[73]

12.4 The position in other jurisdictions

12.4.1 Pre-sentence and psychological reports

In other Australian jurisdictions, PSRs are commonly required by a court when imposing a sentence for a community-based order,[74] such as an intensive correction order,[75] a home detention order[76] or a community correction order.[77]

For example, in the Northern Territory, a court may order a pre-sentence report and receive 'such information as it thinks fit to enable it to impose the proper sentence'.[78] This may involve a Forensic Psychological Assessment.[79] PSRs may include details about the person's social, employment, medical and psychiatric histories, educational background, circumstances of any past offending, any special needs and 'any courses, programs, treatment, therapy or other assistance that could be available to the offender and from which the offender may benefit'.[80]

In Victoria, pre-sentence and psychological reports may also be ordered, including in support of the sentencing of people who are being sentenced for rape and other forms of sexual offending. By way of illustration, in a March 2024 decision of the County Court, the Court referred to a report sought by the Court prepared by Forensicare (a body that provides mental health care services in that state) reporting on the results of risk assessment tests administered and their implications for care, support and treatment interventions and its relevance in informing the court as to his rehabilitative prospects;[81]

As in Queensland, however, the ordering of such reports is not mandatory and the Victorian Court of Appeal has stated that even where it is necessary to make a finding of risk: '[i]n many cases … while an opinion will greatly assist a sentencing court, the circumstances of the offences, the offender's prior history, the offender's conduct since offending, and the offender's prospects of rehabilitation will be sufficient without such an opinion to allow a conclusion to the requisite standard as to the existence of risk'.[82]

PSRs also are widely used across the United Kingdom, Canada and the United States.[83] In England and Wales, the *Sentencing Code* provides that pre-sentence reports are made 'with a view to assisting the

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72 *Response to Hear Her Voice, Report Two* (n 67) 38.
73 The most recent Annual Report was released in May 2024. See: Queensland Government, *Women's Safety and Justice Reform: Second Annual Report 2023–24* (2024) <https://documents.parliament.qld.gov.au/tp/2024/5724T894-07F0.pdf>.
74 *Sentencing Act 1995* (NT) s 39B.
75 *Crimes (Sentencing Procedure) Act 1999* (NSW) s 17D.However, this is not required if the court is satisfied there is sufficient information before it to justice the making of an ICO without obtaining a report: s 17D(1A).
76 *Sentencing Act 1997* (Tas) s 42AC(2)(b). This is also required for a home detention condition on an ICO in NSW: *Crimes (Sentencing Procedure) Act 1999* (NSW) s 17D(2).
77 *Sentencing Act 1991* (Vic) s 8A.
78 *Sentencing Act 1995* (NT) ss 103–6.See s 103 regarding orders that require the person to be under supervision.
79 *JF v The Queen* [2017] NTCCA 1, 12–18 [27]–[39] discusses the Forensic Psychological Assessment and pre-sentence reports (requested by the Supreme Court) for the sentencing of the male offender who had pleaded guilty to multiple child sexual offences, including sexual intercourse without consent against his 3-year-old nephew.
80 *Sentencing Act 1995* (NT) s 106.
81 *DPP v Sherman (a pseudonym)* [2024] VCC 299 [115]–[118].
82 *Bowden v The Queen* [2013] VSCA 382 [47].
83 Cyrus Tata, 'Reducing Prison Sentencing through Pre-Sentence Reports? Why the Quasi-Market Logic of "Selling Alternatives to Custody" Fails' (2018) 57(4) *The Howard Journal of Crime & Justice* 472.

court in determining the most suitable method of dealing with an offender'.[84] Such a report must contain 'information as to such matters, presented in such manner, as may be prescribed by rules made by the Secretary of State'.[85]

A PSR in the United Kingdom generally consists of:

- a summary of the facts of the case;
- an expert risk and needs assessment based on the person's individual circumstances and the offence/s;
- an analysis of sentencing options with an independent sentence proposal' and
- additional information not otherwise presented to the court, such as information about the person being sentenced and their view of the offence/s obtained through interviewing the person or liaising with other agencies.[86]

There has been a move in more recent years towards the use of oral rather than written reports in the interests of efficiency and to expedite the disposal of cases.[87]

The 2023 Final Report of Royal Commission into Violence, Abuse, Neglect and Exploitation of People with Disability considered the position regarding the preparation of pre-sentence reports and screening tools across jurisdictions with a focus on screening tools and assessments for disability. Based on information provided to the Commission through submissions, it reported:

- South Australian criminal courts 'do not have any process by which a timely, initial assessment of a defendant can be completed to indicate whether a defendant may be a person with disability' and 'the cost of an expert report in South Australia can be prohibitive (unless the defendant is represented and funded by Legal Aid) and the waiting time for an assessment was usually four months or longer'. This has often led criminal courts to rely on pre-sentence reports prepared by the Department of Correctional Services. Although these are usually available sooner, any information about the defendant's disability in the report 'will tend to be generalist in nature.
- [In NSW] 'court-based assessment and support services for identifying and assessing disability are 'extremely limited'. The state-wide Community and Court Liaison Service operates in 22 local courts and employs mental health nurses who may assist in assessing defendants with cognitive disability, but is not a dedicated disability service.[88]

The Royal Commission referred to a submission by Legal Aid Queensland ('LAQ'), which raised similar issues to those highlighted during the Council's current review (discussed further below), being

- grants to fund expert reports for use in court are usually limited to a set fee which does not generally reflect the cost of the assessments;
- difficulty finding experts in psychiatry, psychology and neuropsychology willing to assess referred clients and significant waiting times for reports.[89]

84 *Sentencing Act 2020* (UK) pts 2–13 ('*Sentencing Code*') s 31(1)(a).
85 Ibid s 31(1)(b).
86 UK Ministry of Justice, *Guidance – Pre-sentence Report Pilot in 15 Magistrates' Courts* (19 May 2021) < https://www.gov.uk/guidance/pre-sentence-report-pilot-in-15-magistrates-courts>.
87 Gwen Robinson, *Pre-Sentence Reports: A Review of Policy, Practice and Research* (UK Sentencing Academy, 2022) 2.
88 Ibid 177–8.
89 Ibid 178.

12.4.2 Cultural reports

Many jurisdictions in Australia and internationally are required to take cultural considerations into account when sentencing. However, few jurisdictions have legislated to require that cultural reports be produced for the purposes of sentencing. In many cases the 'cultural background' of a person is a matter for inclusion in a pre-sentence report, rather than a report in and of itself.[90]

In Canada, when sentencing Indigenous persons, a sentencing judge is required under the *Criminal Code* to consider 'sanctions other than imprisonment that are reasonable in the circumstances' and 'the unique situation' of these offenders.[91] This section was inserted into the *Criminal Code* in 1996. Its operation was first considered by the Supreme Court of Canada in the decision of *R v Gladue*,[92] which established a 'framework' for sentencing courts in applying the new provision.[93]

In response to this decision and the new principles to be applied, special forms of reports referred to as '*Gladue* reports'[94] were developed. These reports are pre-sentence reports prepared by *Gladue* caseworkers at the request of the judge, defence counsel or Crown.[95] The report contains information about the Indigenous person, their family and their community, as well as relevant systemic factors, such as their experiences with colonisation, intergenerational trauma, racism and discrimination.[96]

Gladue report writers interview the offender, their family, friends and other members of the community to tell the complete story of their life and circumstances.[97]

However, there is no one approach or model and different approaches have been adopted in different jurisdictions.[98] In some jurisdictions, Indigenous organisations provide these services, while others maintain a centralised service which make use of contracted writers.[99] In some jurisdictions without dedicated funded services, probation officers include reference to *Gladue* factors in PSRs.[100]

These reports are not meant to replace PSRs. Rather, PSRs are written by corrective services about the offender's previous history with the criminal justice system, whereas *Gladue* reports provide a 'comprehensive picture of both the life and circumstances of the Aboriginal person and emphasize the options available in sentencing'.[101]

Gladue reports take significant time and cost to prepare given the extensive research required for their preparation.[102] In Ontario it has been estimated that a *Gladue* report can take up to 20 hours to complete, compared with 8–10 hours for a PSR and can be often between 20 and 40 pages long.[103]

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90 See for example *Crimes (Sentencing) Act 2005* (ACT) s 40A(b).
91 *Criminal Code*, RSC 1985, c C-46, s718.2(e)
92 *R v Gladue* [1999] 1 SCR 688.
93 Ibid [28].
94 Named after *R v Gladue* [1999] 1 SCR 688.
95 Grahame McConnell, *Indigenous People and Sentencing in Canada* (Background Paper, 2020) section 3.2, 10.
96 Anna Ndegwa, Laura Gallant, Jane Evans, *Applying R v Gladue: The Use of Gladue Reports and Principles* (Research and Statistics Division, Department of Justice, 2023) 6.
97 BearPaw Legal Education & Resource Centre, *Writing a* Gladue *Report* (Booklet) <https://bearpawlegalresources.ca/find-a-resource/adult-justice/writing-a-gladue-report-booklet> 7.
98 Ndegwa, Gallant and Evans (n 96) 4.
99 Ibid 4.
100 Ibid.
101 University of Manitoba, Faculty of Law, *Gladue Handbook: A Resource for Justice System Participants in Manitoba* (2012) 30.
102 Ndegwa, Gallant and Evans (n 96) 7.
103 Jonathan Rudin, *Aboriginal Peoples and the Criminal Justice System* (Ipperwash Inquiry, 2007) 48–50.

A 2023 Canadian Department of Justice report into the use of these reports found that 40 per cent of cases reviewed between 2018 and 2021 referred to the use of a *Gladue* report and the majority were sentencing decisions.[104]

Identified barriers to their broader adoption, in addition to the costs involved in their preparation, included: the lack of trained report writers within the region available at the time due to resourcing issues; judicial views that these reports should only be ordered sparingly or only in exceptional circumstances; the ability to access information through other means, such as PSRs with *Gladue* sections or oral or written submissions by defence counsel or the person being sentenced; and reluctance by some people sentenced to agree to the preparation of a report, which could be for reasons including that the process would be traumatic or because this would delay sentencing and result in them spending more time in pre-sentence custody.[105]

Some criticisms were also made by judicial officers about the inconsistency of reports and lack of national standards, and questions were raised about the extent to which those preparing such reports were objective rather than viewing the person about whom they were preparing the report as a 'client'.[106]

12.5 Evidence of impacts

12.5.1 Pre-sentence reports

Evidence on the impact of PSRs on sentencing outcomes is varied. The provision of high-quality information is generally promoted in the hope that it will enable courts 'to make more informed sentencing decisions and may help to raise levels of confidence in community options'.[107] The form of these reports is considered most helpful where they are advisory in nature, rather than simply a 'gathering of' and recitation of facts.[108]

Independently of the ‘intrinsic quality’ of reports that can be used to inform the sentencer, the ‘extrinsic value’ of these reports in influencing sentencing outcomes is less certain.[109] The fact that a sentencer imposes a sentence in accordance with any sentencing recommendation made (also referred to as ‘concurrence’ or ‘concordance’) is viewed as insufficient to assume a report was influential in the decision-making process.[110]

A review of research evidence referred to by QCS in its submission to the Women’s Safety and Justice Taskforce on the impact and effectiveness of PSRs found the presence of a PSR led to less-punitive sentencing outcomes and more diversion than cases where there was no PSR.[111] For high-risk offenders, the presence of a PSR made no difference.[112] The issue of risk assessments and how this may factor into these decisions made by courts on sentence is discussed below.

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104 Ibid 5. In comparison, PSRs were ordered in 45 per cent of cases reviewed: ibid 20.
105 Ibid 19–21.
106 Ibid 21.
107 Tata (n 83) citing Gemma Birkett, '"We have no awareness of what they actually do": Magistrates’ knowledge of and confidence in community sentences for women offenders in England and Wales' (2016) 16(4) *Criminology and Criminal Justice* 510.
108 Ibid.
109 Ibid.
110 Ibid.
111 Letter from Paul Stewart, Commissioner, Queensland Corrective Services to Taskforce Chair, 27 May 2022, enclosure, 11 cited in *Hear Her Voice, Report Two* (n 64) vol 2, 574.
112 Ibid.

A concern raised in some Australian research is the tendency for these reports in the cases of Aboriginal and Torres Strait Islander persons to focus disproportionately on risk rather than 'pro-social' facts with 'relatively little inclusion of strengths-based cultural-specific information in reports regardless of whether they are prepared for Indigenous sentencing or mainstream court'.[113]

12.5.2 Cultural reports

Queensland evaluations

The most recent evaluation of the CJG program reported:

- Over half of the 20 judicial officers surveyed said the cultural information provided by CJGs or Elders informed their decision-making in court 'quite a lot' and helped them 'quite a lot' to understand the defendant's circumstances.
- Half of the CJG representatives also considered stakeholders in the court understood the impact of culture on Aboriginal and Torres Strait Islander people 'quite a lot' because of CJGs' involvement in court, while 41 per cent considered they understood this to some degree ('somewhat').
- A high proportion (81%) of CJG respondents were of the view the information they provided in court helped the court 'quite a lot' in understanding a person's cultural circumstances, and half considered the court used the information they provided in making decisions 'quite a lot'.
- The information CJGs provide in court was also strongly valued by those who took part in a Stakeholder Survey, with a strong majority (69%) reporting the information CJGs provide helps the court 'quite a lot' to understand a person's cultural circumstances.[114]

The involvement of CJGs was also viewed as having broader benefits in improving judicial officers' and stakeholders' knowledge and understanding of the impact of culture.[115]

The phase 2 evaluation identified a number of elements considered of most value in improving court outcomes, including CJG staff and members having the capacity and confidence to provide quality cultural reports, acting impartially on behalf of all families in the community, involving Elders and respected persons in the process, and the availability of local programs and support that are communicated to the court by the CJG. The willingness by the court to 'accept and value the input from the CJG' was also viewed as important.[116]

Canadian evaluations

Much information about the utility of cultural reports in the context of sentencing is based on the Canadian experience with the use of *Gladue* reports.

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113 Darcy Coulter et al, 'Culture, Strengths, and Risk: The Language of Pre-sentence Reports in Indigenous Sentencing Courts and Mainstream Courts' (2023) 50(1) *Criminal Justice and Behaviour* 76.

114 *The Myuma Group, Phase 3 Report* (n 32) 93, Figure 7. Other response options were 'Somewhat', 'Little or not at all' or 'Don't know enough about this' to respond.

115 Ibid 94–100.

116 *The Myuma Group, Phase 2 Report* (n 40) 15. See also 115–20 of that report.

One study in British Columbia found Gladue reports may contribute to fewer and shorter incarceration sentences for Aboriginal people.[117]

An evaluation of the Aboriginal Legal Services of Toronto's *Gladue* Caseworker Program suggests that the impact of *Gladue* reports is not reflected in Aboriginal incarceration rates; rather, they are seen to have a definitive impact on an individual, micro level.[118] These reports ensure all parties involved in sentencing are better informed about an individual Aboriginal offender's circumstances and background, which then influences the sentencing outcome.

A 2023 Department of Justice evaluation found that in 23 per cent of the cases reviewed, the application of the *Gladue* principles had an impact on the outcome, including reducing or varying the sentence, suspension of the remaining period of imprisonment, or reducing the time for parole eligibility or probation.[119] At the same time, it was noted that other factors, such as the availability of programs, proximity of custodial centres to the person's community and rehabilitative resources may also have impacted the outcomes in these cases.[120]

12.6 Stakeholder views

Legal stakeholders who participated in subject matter expert interviews and who made submissions identified a need to improve the information available to a court in support of sentencing, including with respect to factors associated with a defendant's risk of reoffending, as well as the information available to courts regarding the harm caused to victim survivors.

12.6.1 Pre-sentence reports

Court advisory services and PSRs

LAQ told us that, in their view, '[w]ell informed courts will generally make better sentencing decisions' and that it was important that the information provided to the court is 'current, accurate and complete'.[121] They were concerned that 'currently court ordered PSR writers are underfunded and under resourced', noting the potential benefits of the expanded use of court-ordered PSRs in benefiting vulnerable offenders, 'ensuring that the court is fully informed of their background and all circumstances leading up to the offence'.[122] They submitted that '[h]aving additional funded court advisory positions outside of Brisbane may also assist courts to receive oral reports from QCS about an offender's suitability for community-based orders'.[123]

The major barrier to the broader adoption of these reports was viewed as resourcing, with consequent court delays:

> [B]efore the use of PSRs can be expanded, significant resourcing would need to be allocated to the Department of Justice and Attorney-General to ensure PSRs produced are of an appropriate standard to carry any weight and to limit delay associated with the ordering of such reports. If amendments encouraging increased use by the court are

117 Legal Services Society of British Colombia, *Gladue Report Disbursement: Final Evaluation Report* (2013) 2.
118 'Canada's Approach to Sentencing Aboriginal Offenders', *The Law Report* (ABC Radio National, 23 August 2016), Interview with Jonathan Rudin, Program Director, Aboriginal Legal Services, Toronto <http://www.abc.net.au/radionational/programs/lawreport/canada-gladue/7772298>.
119 Ndegwa, Gallant and Evans (n 96) 24.
120 Ibid.
121 Submission 23 (Legal Aid Queensland) 23.
122 Ibid.
123 Ibid.

introduced prematurely, timeframes for the provision of the reports will inevitably increase and delays will be incurred.[124]

Usefulness of PSRs, psychological reports and other professional reports

Subject matter expert interviews

Subject matter expert interview participants told us psychological reports were on the whole mostly useful, helping judicial officers to understand how the sentenced person's personal history and mental health 'affects their moral culpability for their offence'.[125] Practitioners qualified this view by emphasising that the quality of a report is critical,[126] and some questioned the weight that can be given to a report based solely on a sentenced person's self-reporting.[127]

One practitioner said that although PSRs can be ordered by the court, unless there was also a psychiatric evaluation of the person and 'an ability to verify the information which is provided, they're not all that useful'.[128] Others viewed many psychologist reports as being 'very deficient'[129] because they were not always 'accurate',[130] they sometimes 'uncritically accept everything a defendant has said'[131] and they 'contain no reasoning for the conclusions that are being reached'.[132]

Participants also told us that court-ordered reports, and psychological reports more generally, can be expensive, and are 'only worthwhile' if 'directed at particular issues like the risk of reoffending'.[133]

Some participants also commented that reports prepared by psychologists can be received by sentencing courts and noted that views about them may differ.[134] In particular, it was suggested that some judicial officers were not receptive to reports prepared by psychologists on the mistaken basis that they could not make a formal mental health diagnosis.[135]

The absence of psychological or pre-sentence reports for victim survivors documenting the impacts of offending was an area in which some participants identified the sentencing process could be improved. One participant considered that a potential reason for these types of reports or letters from treating doctors not being more frequently tendered might be that these often had to be obtained by the victim survivor at their own expense.[136] Another participant reflected that if better information were available documenting the harm caused to the victim survivor, including any relevant mental health diagnoses, this might be 'a far more powerful, aggravating feature'.[137]

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124 Ibid.
125 SME Interviews 3, 11, 13.
126 SME Interview 3.
127 SME Interviews 1, 3, 5, 10.
128 SME Interview 1.
129 SME Interview 10.
130 SME Interview 15.
131 SME Interview 10.
132 SME Interview 14.
133 SME Interview 10, 12, 14.
134 SME Interviews 1, 7, 16. See, however, *R v Bassi* [2021] QCA 250 in which the court found there was no justification for the sentencing court to reject the tender of a psychologist's report, further noting the evidence of psychologists had been in admitted in a number of cases regarding post-traumatic stress disorder, major depressive disordered, battered woman syndrome and autism spectrum disorder: [60] and [68].
135 SME Interview 7. See, however, *R v Bassi* [2021] QCA 250, [51], [60], [68].
136 SME Interview 1.
137 SME Interview 16.

Submissions

The Queensland Branch of the Royal Australian and New Zealand College of Psychiatrists ('RANZCP') in its submission saw the value of psychiatric reports in the context of court proceedings as being in 'assisting the court with information about the presence or absence of mental disorder/s or mental health problems, the relationship between mental disorder/s and criminal responsibility and issues related to fitness for trial'.[138]

The RANZCP noted that 'under the RANZCP *Professional Practice Guideline 11: Developing reports and conducting independent medical examinations in medico-legal settings* (2020), reports should be provided by an independent medical expert. Treating doctors can provide letters of fact rather than opinion.'[139]

Disclosure issues, PSRs and psychological reports

PSRs prepared by QCS under the *Corrective Services Act 2006* (Qld)[140] ('CSA') are given to both the prosecution and defence.

Some subject matter expert participants raised concerns about the process of disclosure when a report contains information that is not in the defendant's interests.[141] Practitioners noted that defence counsel will generally not submit specialist reports if findings are likely to be adverse to a client, regardless of a report's quality.[142] One practitioner thought PSRs prepared under the CSA were 'the most effective and powerful kind of presentence report' because they were 'impartial' and the court received it 'irrespective of whether or not there's something prejudicial to the accused' contained in the report.[143]

PSRs were not viewed as particularly useful in focusing on the person's cultural background. For example, the PSR might say the person was an Indigenous man, and state the number of family members and that they live at a particular location, with this being the extent of the information provided.[144]

In contrast to views that PSRs under the CSA are the most useful type of report, LAQ in its submission cautioned strongly against 'any reforms which would mandate the commission of a court ordered PSR in sexual assault and rape cases'.[145] It submitted:

> On the current experiences of the scope of these reports and expertise behind such report writers, they would only provide limited value to a sentencing court in matters of rape and sexual assault. If proper court ordered risk assessments were to be ordered by courts, this should be done in consultation with the parties and when properly resourced.[146]

However, advice on available treatment options was viewed as potentially beneficial, with LAQ expressing the view that:

> If change is to be considered on how sentencing is to be approached for sexual assault and rape matters, before arriving at what type of sentencing order should be made, a sentencing court should be provided with information on the availability of specific targeted sex offender courses that could be ordered.

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138 Submission 33 (RANZCP) 1.
139 Ibid.
140 CSA (n 7) s 344.
141 SME Interview 7.
142 SME Interviews 7, 17
143 SME Interview 17.
144 SME Interview 11.
145 Submission 23 (Legal Aid Queensland) 22.
146 Ibid 23.

> … Guidance in this context, to inform a sentencing order places value in early intervention strategies for some situations; to provide guidance in deciding the type of sentencing order to best achieve the sentencing purposes.[147]

Some practitioners interviewed during our subject matter expert interviews were concerned there were often delays in defence-commissioned psychological reports being disclosed, with these sometimes being dated much earlier but only provided on the day of sentence.[148]

Concerns about court delays

LAQ raised significant issues associated with the preparation of expert reports, including delays in proceedings, resulting in defendants spending a longer period on remand prior to sentence and placing burdens on all those involved in the criminal justice system, including victims:

> Availability of suitably qualified experts to assess defendants and complete reports has in LAQ's experience led to delay in sentence proceedings. This can include defendants remaining on remand for longer periods of time. These delays place a burden on all stakeholders within the criminal justice system as well as victims.[149]

LAQ reported that such delays were not uncommon – including delays of up to 6 months or more when accessing records from Queensland Health and Hospital Services in districts responsible for records held by Queensland Correctional Centres.[150] They suggested the Right to Information and Information Privacy process in relation to Queensland Health records could be streamlined by authorising access through the person's lawyer with a signed authority from the client as a practical step that might be taken to reduce such delays.[151] They suggested '[a]dditional funding could also be provided to increase staff in the RTI/IPA divisions within Queensland Health to assist with the processing of requests for information, particularly in those district areas where there are a high number of correctional centres located in the region'.[152]

Subject matter expert interview participants similarly highlighted concerns about time required for the preparation of a report and court delays, including where a person might already have spent a considerable period of pre-sentence custody, and be in a regional or remote area of the state, with a view that such reports may not be ordered for this reason.[153]

Cost of specialist reports, expertise and funding criteria

Subject matter expert interviews

Practitioners who participated in our subject matter expert interviews told us it can be difficult to get funding for psychological reports.[154] They also noted the difficulties of accessing suitably qualified forensic psychiatrists and psychologists, particularly in regional and remote areas of the state, with acknowledgement that the quality of these reports can vary.[155]

Additional challenges in courts having access to psychological and psychiatric reports were identified for people who identified as being Aboriginal and Torres Strait Islander, including funding issues and the additional time potentially required to produce such reports.[156]

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147 Ibid 20.
148 SME Interview 20.
149 Submission 23 (Legal Aid Queensland) 22.
150 Ibid 27.
151 Ibid.
152 Ibid.
153 For example, SME Interviews 23, 24.
154 SME Interviews 3, 22.
155 SME Interviews 22, 24.
156 SME Interviews 7, 9.

The allocation of additional funding was considered one way to improve their quality, including the use of psychometric testing,[157] with the comment made that the funding is considerably lower than many private forensic psychologists would generally charge for their services, meaning there was a limited pool of practitioners from which to draw.[158]

Submissions

With respect to the current Legal Aid funding criteria, LAQ noted that in seeking funding, the lawyer must certify that the report will have a significant impact on the sentence, and failure to obtain a report would be a possible ground of appeal. It is not sufficient that a lawyer believes the report could impact the sentence.[159]

They told us that funding available in support of the preparation of these reports is a clear barrier to their broader use:

> Treating doctors, psychologists and psychiatrists will typically charge a not insubstantial fee for the provision of a letter or short report detailing treatment or engagement. Practices will also charge a fee for provision of patient files. For legally aided clients, it must be argued why this material is substantially relevant which can often be followed by extended timeframes awaiting a decision as to whether to fund this expense. Clients who are not legally aided must weigh up the financial burden of obtaining this material against the likelihood that it will assist at any sentence.[160]

While Legal Aid funding for expert reports is not restricted by financial year, they noted that 'the more highly qualified, experienced sought after experts often limit the number of legally aided assessments and reports they conduct per financial year'.[161] For this reason, '[o]nce their legally aided quota is reached, bookings cannot be made until the next financial year'.[162]

The Aboriginal and Torres Strait Islander Legal Service (Qld) ('ATSILS') also acknowledged the cost of psychological reports being a barrier to obtaining or giving information to a sentencing court.[163]

Taking into account current funding constraints, LAQ submitted that

> there would be merit in increasing funding or reviewing the funding guidelines for defence to obtain independently sourced PSRs particularly in relation to serious sexual offences such as rape and sexual assault.[164]

LAQ submitted that defence practitioners were best placed to facilitate this as they are better able to obtain background material, such as previous assessments.

ATSILS recommended that 'consideration be given to government subsidised psychologist reports (preferably delivered by community-controlled service providers)'.[165]

Consultations

Representatives of the Australian Psychological Society's College of Forensic Psychologists shared concerns that current fee rates in Queensland are deficient ($678 for a pre-sentence report prepared by

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157 SME Interview 22.
158 SME Interview 23.
159 Submission 23 (Legal Aid Queensland) 29.
160 Ibid 27. See also Submission 28 (ATSILS) 7.
161 Submission 23 (Legal Aid Queensland) 22.
162 Ibid.
163 Submission 28 (ATSILS) 7.
164 Submission 23 (Legal Aid Queensland) 29.
165 Submission 28 (ATSILS) 7.

a psychologist).[166] In contrast, NSW Legal Aid recently increased its rates (these vary by court level and are $2,000 for a District Court sentencing report).[167] They advised that typically this type of report took their members 8 to 11 hours to prepare in addition to anywhere from between one to 3 hours to interview the person and review relevant documentation (such as QP9s, the criminal history of the person, schedule of facts and also other material and reports). It was estimated that the Queensland fees covered only about one-quarter to one-third of what the reports should be costing in light of the time spent on their preparation. As a consequence, they acknowledged that a number of forensic psychologists are choosing not to do pre-sentence reports and are undertaking other types of work – which may result in psychologists with less experience or from other professions preparing these reports. It was noted that forensic psychologists have specific training in assessment and intervention with sex offenders – which, generally speaking, other non-forensic psychologists do not.

They also told us that to undertake these assessments for Aboriginal and Torres Strait Islander people and those from other cultural groups in appropriate ways, to ensure the reports are supplemented with information about relevant personal, contextual and community factors, cultural advisers may be required to be engaged to support their preparation.[168]

12.6.2 Risk assessments as part of a pre-sentence report

Similar concerns raised with the Council during previous reviews about the use of risk assessments in informing sentence have been raised during the current inquiry.

Submissions from victim survivor support and advocacy stakeholders

The Queensland Sexual Assault Network ('QSAN') supported risk assessments being undertaken by 'independent and experienced forensic psychologists who are using standardised and measurable approaches and have experience with working with victim survivors and therefore have a victim survivor lens'.[169] It was QSAN's view that these experts 'should be engaged and appointed by the court and not by the defence'.[170] They were concerned these assessments need to be undertaken by 'highly qualified professionals who can see through the manipulation and lies of offenders'.[171]

Submissions from legal stakeholders

LAQ highlighted its concerns that the use of risk assessments where included in court-ordered pre-sentence reports 'carry an inherent risk to the fair and impartial sentencing process'.[172] It pointed to dynamic risk factors that 'can change over time as an offender grows older, receives treatment, or as their attitudes, beliefs and behaviours change', and the need for these to be 'regularly reassessed given the potential to significantly change in what can be a relatively short period of time'.[173] LAQ was concerned

166 Meeting with representatives of the Australian Psychological Society's College of Forensic Psychologists, 16 May 2024. This is for a standard grant of aid. Legal Aid advised for a neuropsychological report, involving neuropsychological testing, the standard fee paid is $1 642: Submission 23 (Legal Aid Queensland) 29 citing Legal Aid Queensland, *Grants Handbook: Neuropsychological assessment and report* (2024).
167 See 'Psychologist and Psychiatrist fee scales', *Legal Aid NSW* (web page) <https://www.legalaid.nsw.gov.au/for-lawyers/fee-scales/crime-fee-scales/crime-psychologist-and-psychiatrist-fees>.
168 Meeting with representatives of the Australian Psychological Society's College of Forensic Psychologists, 16 May 2024.
169 Submission 24 (Queensland Sexual Assault Network) 11.
170 Ibid.
171 Ibid.
172 Submission 23 (Legal Aid Queensland) 24.
173 Ibid.

about the future use of these assessments, suggesting that: 'It would not be accurate or fair to the offender to rely upon a dated risk assessment when considering parole or release in the future'.[174]

For this reason, LAQ submitted that 'reliance could only be placed on risk assessments conducted a short time before sentence where a person was being immediately released into the community and by engaging professionals who are experienced in using and analysing risk assessment tools'.[175]

LAQ was also critical of the tools used by QCS to assess risk, suggested such tools were 'outdated' and not suitable when assessing risk for female or First Nations persons:

> QCS primarily employs the Static-99R risk assessment tool when assessing risk of male sexual offenders in custody. This risk assessment tool is outdated and has been formulated to assess the risk of recidivism that are predicated on the base rate of recidivism among adult male sexual offenders. It is not designed or employed by QCS to be used when assessing risk of females charged with sexual offences. Given the significantly lower rates of sexual recidivism of female sexual offenders, tools validated for males would statistically grossly overestimate risk among women. Second, the items in these risk assessment tools were selected based on their established empirical relationship with recidivism. There are currently no actuarial risk assessment tools available for female sex offenders.
>
> Likewise, studies have found that caution should be applied when using standard risk assessment tools to assess risk of First Nations men charged with a sexual offence. An assessment of the accuracy of the Static-99R tool in predicting recidivism of sex offenders in Western Australia recommended that this tool should not be used to predict sexual recidivism in First Nations sex offenders.[176]

The human rights implications of this are discussed below.

Submissions from professional bodies

Representatives of the Australian Psychological Society's College of Forensic Psychologists considered it critical that any risk assessment tool be used only by those with sufficient understanding of how it is to be used and interpreted and the population it has been developed on.[177] In the absence of this, unstructured professional judgment might be applied with high levels of variability. The use of a range of different methods and approaches was also viewed as very important.

Subject matter expert interviews

Subject matter expert interview participants expressed some caution about the use that could be made of risk assessments, and comments reflected those made about psychological reports more generally.

Some interviewees acknowledged a degree of ambivalence when it came to risk assessment reports – noting that while they did not consider these 'particularly helpful', if the person had no prior criminal history, reaching a conclusion about the person's risk of reoffending was 'very difficult' because sentencing judges and magistrate do not have anything to base their judgment on, other than their own personal assessment of the person's likely risk.[178]

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174 Ibid.
175 Ibid.
176 Ibid 24–5.
177 Meeting with representatives of the Australian Psychological Society's College of Forensic Psychologists, 16 May 2024.
178 SME Interview 5. Similar comments were made in SME Interview 15.

In the absence of such assessments, in assessing risk the court would consider factors such as whether the person had a prior history of similar offending[179] and whether there was a pattern of conduct,[180] including where there had been an escalation in the person's offending behaviour and where the offending was premeditated.[181] Other relevant factors included the person's drug and alcohol issues, mental health issues and environmental factors.[182]

Reflecting the views of many of those we interviewed, one participant commented:

> Well that's the $64,000 question … I've had reports where the report writer has opined that there is like a low risk and then you have the comment, 'Well how can they really say that? They only saw him for an hour and a-half.' But that, I suppose, combined with, well now he's on this proper medication and he's engaged with counselling and not using drugs anymore, so all those little things would link in together to perhaps give the court some assurance that … this person is not going to go back to their old ways.[183]

Another participant referred to problems with the actuarial tools often used because they were developed overseas a long time ago, and the assessments may not be accurate for the current context.[184]

It was acknowledged that if the defence commissions the report, which includes an assessment that the person's reoffending risks are high, the reality is that they will not tender it if it is not in their client's best interests.[185]

The required time and costs involved for these reports to be done well were viewed as a barrier to their broader use, with it also being acknowledged that additional time is required for assessments of Aboriginal and Torres Strait Islander persons.[186]

Consultation events

While not a focus of discussion at our consultation roundtable events, at the Cairns consultation event, some participants supported the use of independent risk assessment reports provided to the court for consideration at sentence.[187]

12.6.3 Cultural reports and submissions

Submission from legal stakeholders

LAQ supported CJGs being given additional funding and support, commenting:

> LAQ's experience is consistent with the findings of The Myuma Group's review of community justice group[s]. The limited resources and funding of community justice groups are insufficient for them to effectively meet the various needs of the communities they serve. Whilst section 9(2)(p) reports undoubtedly assist the court and benefit members of the community appearing in court, anecdotal experience is that their preparation has absorbed resources

179 This is consistent with known predictors of recidivism for sexual offenders with studies finding that a sexual offender's criminal history was one of the best predictors of recidivism, along with having an antisocial personality pattern and pro-criminal attitudes. Education and employment were also important factors: James Bonta and DA Andrews, *The Psychology of Criminal Conduct* (Routledge, 7th ed, 2023) 354–5 and Table 14.5.
180 For example, SME Interviews 10, 12, 13, 14, 20.
181 SME Interview 11.
182 Ibid.
183 SME Interview 22.
184 SME Interview 14.
185 SME Interview 7.
186 Ibid.
187 Cairns Consultation Event, 21 March 2024.

> previously applied to implementing preventative strategies in community and supporting prisoners [to] reintegrate in the community to reduce their risk of recidivism.[188]

ATSILS agreed with comments reported in the Consultation Paper that 'pre-sentence reports should include cultural reports, culturally safe screening and assessment tools for people with cognitive disability and should consider the impact to the family of the offender if imprisonment were to be imposed'.[189]

ATSILS supported greater guidance in the PSA regarding what matters might be included in a cultural report with a view to providing further guidance to CJGs in preparing these reports and 'to enhance [their] quality and content'.[190] The types of factors listed as relevant were:

- the protective factors of the individual's connection to community, kin and culture including spiritual wellbeing;
- the protective factors of the individual participating in relevant programs run by local community-controlled organisations to address root causes for offending behaviour including, for example, programs that address underlying trauma via healing programs;
- the:
    - impacts of intergenerational trauma, child removal, dispossession from lands and systemic racism and the role of such in contributing marginalisation of at-risk individuals; and
    - social and economic disadvantage including in relation to housing, employment and education;
    - impacts of trauma that the individual has experienced in their life, for example, if they were the victim of sexual assault or rape prior to the offending including as a child;
    - impacts of physical health and mental health issues that might have been brought on or exacerbated by the aforementioned factors;
    - impacts of substance abuse/misuse that might have been brought on or exacerbated by the aforementioned factors, to identify underlying drivers of the individual's offending;
- the protective factors of diverting the individual into a community-led programs/initiatives as an alternative to incarceration; and
- the long-standing overincarceration of Aboriginal and Torres Strait Islander individual, including the high numbers of individuals on remand, and the commitments under the NACTG to drive down incarceration levels.[191]

ATSILS also supported expanding cultural capability training for judicial officers – including, notably, 'cultural immersion programs on Country to enhance judicial officers' knowledge and understanding of Aboriginal and Torres Strait Islander culture, history and languages, along with the ongoing impacts of colonisation and intergenerational trauma'.[192]

Subject matter expert views

Several participants in the Council's subject matter experts interviews advised that for sexual violence matters, it was rare for there to be a cultural report, CJG report and/or submission at sentence.[193] Where there was cultural information, the quality of cultural information placed before the court at sentence for sexual assault and rape varies.[194] Interviewees considered some reasons for this included limited

188 Submission 23 (Legal Aid Queensland) 30.
189 Submission 28 (ATSILS) 6.
190 Ibid 6–7.
191 Ibid 5.
192 Ibid 7.
193 SME Interviews 10, 11.
194 SME Interviews 3, 9.

funding, services, practitioners being overworked and the experience of the legal practitioner.[195] Two legal stakeholders also considered that where a person was from a First Nations community (either a victim or a person being sentenced), the person may be reluctant to discuss the offence and may experience shame.[196] As explained by one interviewee, '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.'[197]

CJG cultural reports and advice were viewed as particularly helpful in more remote areas of the state (such as Cape York and the Torres Strait), with some noting the difficulty obtaining reports in urban centres, particularly in South-East Queensland.[198] In circumstances where submissions were made by a CJG, these were viewed as very useful because of the additional information about the person's background, offering a different perspective and also providing helpful information about the support they were offering the person as well and programs with which they already engaged or attempting to engage.[199]

Improvements suggested were to make submissions and cultural reports more readily available across Queensland.[200]

Some interviewees also told us that, for other cultural groups, it would be beneficial to have more information about the person being sentenced to better understand their upbringing and background.[201] It was noted that sometimes this information was provided by community leaders. A suggestion was made that this practice should be promoted to defence lawyers to ensure this type of information is able to be provided without the need for a court to suggest this, giving rise to a need for an adjournment.[202]

Consultation views

At our consultation events, it was suggested that CJG reports and submissions could be extremely beneficial for and valuable to a court at sentence, and that proper regard should be had to submissions made on sentence.[203] At the same time, some participants were concerned that issues such as childhood and intergenerational trauma should not overshadow the seriousness of the offending when the victim survivor is also likely to have experienced the same types of trauma.[204]

While CJGs are able to provide support to both offenders and victims throughout the court process,[205] individuals who participated in our consultation events had limited knowledge of CJGs being used as a support service for women/victim survivors, with one participant reflecting that that historically this is not a role they have sought to fulfil.[206]

A representative of the Family Responsibilities Commission ('FRC') who met with the Council suggested that local leaders are being underutilised in the sentencing process.[207] While CJGs can be effective, this

195 SME Interviews 1, 3, 9.
196 SME Interviews 1, 4.
197 SME Interview 4.
198 SME Interviews 6, 9, 23.
199 SME Interview 9.
200 Ibid.
201 Ibid.
202 Ibid.
203 Cairns Consultation Event, 21 March 2024; Online Consultation Event, 3 April 2024.
204 Cairns Consultation Event, 21 March 2024.
205 'Community Justice Group Program', *Queensland Courts* (web page, 17 November 2024) <https://www.courts.qld.gov.au/services/court-programs/community-justice-group-program>.
206 Online Consultation Event, 16 April 2024.
207 Meeting 9 May 2024 with representative of the Family Responsibilities Commission.

was viewed as being to some degree dependent on the quality of the coordinator and how effectively the group was managed. Generally, this program was considered to be under-supported by government and not appropriately staffed. Ensuring CJG members are appropriately compensated was viewed as important.

We were advised the FRC has a current Memorandum of Understanding with ATSILS in cases where ATSILS has clients who are engaged with FRC. With the consent of the client, the FRC can provide ATSILS with a report that outlines their engagement with the FRC, including relevant case plans, orders and programs in which the person has participated, which can be tendered at court. There are difficulties, however, where clients may prefer expediency and elect to forego such a report to avoid further delays in their matter being finalised. The FRC representative suggested that both ATSILS and Magistrates have noted that where FRC reports are provided, there is a significant impact on the penalty imposed.

Aboriginal and Torres Strait Islander Advisory Panel members' views

Members of the Council's Aboriginal and Torres Strait Islander Advisory Panel[208] were concerned that CJGs are not sufficiently supported or resourced, and expectations are being placed on CJGs to deliver cultural reports and provide submissions to courts with a lack of investment and capacity. There is also a tendency for CJGs not to deal with those matters due to men's business and women's business.

In the higher courts, Panel members considered that there is not really a role for CJGs. It requires cultural experts who are neutral parties to be able to identify the disadvantages for a particular individual.

Panel members discussed the expertise needing to be in the context of the specific case/charges before the court. The report writers need technical expertise as well as providing advice on cultural aspects.

12.7 Issues and options

Pre-sentence reports

To the extent that sentencing for rape and sexual assault is concerned with ensuring the long-term safety of the community, it is important that courts be informed by the best available evidence about factors including:

- the personal circumstances of the individual being sentenced, factors relevant to culpability and the drivers of their offending behaviour;
- the person's risk of reoffending (while noting the issues associated with these assessments);
- the types of interventions that are likely to be most useful in addressing factors contributing to the person's risk of offending, which is likely to be particularly important for those who are assessed as being at medium to high risk of sexual reoffending;
- the person's insight into their behaviour and motivation to change.

The lack of information prior to sentence may limit the ability to ensure the sentence, as structured, appropriately targets factors that might be important to reduce reoffending risks.

208 Meeting of the Aboriginal and Torres Strait Islander Advisory Panel, 18 April 2024.

The current lack of structured assessments available for adults convicted of sexual offences at the sentencing stage contrasts with the detailed information often available for child offenders referred to the Griffith Youth Forensic Service (GYFS). GYFS describes the process as involving:

> Assessment is undertaken of the young person, their broader ecology (family, peers, school, community), and the offence/s they have committed. A risk assessment is also undertaken. GYFS assessment informs the development of a multisystemic case formulation, which in turn informs the development of an individualised treatment and risk management plan, with a focus on individual-, family-, peer- and community-level interventions.[209]

These assessments provide detailed information to a court at sentence, including factors associated with the commission of the offence, previous cognitive and psychological assessment, details about the defendant's personal circumstances, including prior referrals to services and assessed level of sexual and non-sexual violence recidivism risk with a view to informing treatment interventions.[210]

At the same time, the preparation of PSRs and medical, psychiatric and psychological reports requires significant funding and resourcing, and may contribute to delays in matters being finalised. The benefits of these reports therefore need to be assessed in light of these potential impacts.

Issues with risk assessments

The assessment of risk has long been a contentious area of practice. In *Veen v The Queen*[211] *and Veen v The Queen (No 2),*[212] the High Court established the principle that protection of the community from an offender cannot justify a sentence disproportionate to their culpability and the seriousness of the offence. In doing so, it commented:

> Predictions as to future violence, even when based upon extensive clinical investigation by teams of experienced psychiatrists, have recently been condemned as prone to very significant degrees of error when matched against actuality … However if such, perhaps uncertain, predictions are nevertheless to be employed as aids in sentencing, they should at least be the result of thorough psychiatric investigation and assessment by experts possessing undoubted qualifications for the task.[213]

As discussed above, significant concerns have also been raised that such tools may be racially biased.[214]

Reinforcing issues raised by stakeholders, a 2023 review of expert evidence of risk assessments and the preventive detention of dangerous prisoners published in the *Journal of Law and Medicine* highlighted the problems inherent in these processes: 'While psychiatrists and psychologists may be able to assist the legal process by offering opinion evidence which may be informed by the scores from actuarial tools, psychiatrists and psychologists cannot accurately predict future behaviour for any individual.'[215] For this

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209 'Clinical Service: Griffith Youth Forensic Service', *Griffith Forensic Service* (web page) <https://www.griffith.edu.au/criminology-institute/griffith-youth-forensic-service/clinical-service>.

210 For a recent decision referencing information contained in a GYFS assessment see *R v DCD; Ex parte A-G (Qld)* [2024] QCA 91 [16]–[22].

211 *Veen v The Queen* (1979) 143 CLR 458 ('*Veen*').

212 *Veen v The Queen (No 2)* (1988) 164 CLR 465 ('*Veen (No 2)*')

213 *Veen* (n 211) [14].

214 Melissa Perry, Benjamin Durkin, Charlotte Breznik, 'From Shakespeare to AI: The Law and Evolving Technologies' (2024) 98 Australian Law Journal 272, 281 citing Julia Angwin et al, 'Machine Bias: There's Software Used across the Country to Predict Future Criminals. And It's Biased against Blacks', *Propublica* (web page, 23 May 2016) <https://www.propublica.org/article/machine-bias-risk-assessments-in-criminal-sentencing>; see also Carolyn McKay, 'Predicting Risk in Criminal Procedure: Actuarial Tools, Algorithms, AI and Judicial Decision-Making' (2019) 32(1) *Current Issues in Criminal Justice* 22; MD Abdul Malek, 'Criminal Courts' Artificial Intelligence: The Way It Reinforces Bias and Discrimination' (2022) 2 *AI and Ethics* 233.

215 Russ Scott, Ian Coyle and Ian Freckelton AO KC, 'Expert Evidence of "Risk Assessments" and the Preventive Detention of Dangerous Prisoners' (2023) 30(4) *Journal of Law and Medicine* 917, 958.

reason, the authors recommended that '"experts" should eschew giving the impression of scientific certainty in their risk assessments'.[216]

Risk assessments, however, are considered potentially beneficial where such assessments may give some comfort to a court in assessing someone as being *low* risk. In Virginia, an analysis of the impact of a risk assessment tool on sentencing practices found that sentences for the most serious crimes (such as rape) decreased, with the reason suggested to be

> risk assessment served as a sort of second opinion that made judges feel more comfortable granting leniency for those in the lowest risk category. Without this second opinion, a judge bears the weight of the risk entirely on their own shoulders. Should the person go on to re-offend, there is no one but the judge to blame for being so lenient. With risk assessment, the judge can point to a faulty score when a low-risk person goes on to reoffend, thus mitigating internal guilt and external blame.[217]

Medical and psychological reports substantiating victim survivor harm

As discussed above, where medical, psychological of other specialist reports are made available to a court, these are usually prepared at the defence's request.

Reports substantiating the impacts of the offending on a victim survivor's mental health, such as depression, anxiety, substance misuse, suicidal thoughts and post-traumatic stress disorder,[218] are rarely tendered, with greater reliance on self-reports, including through the making of a victim impact statement.

Those who participated in our expert interviews identified funding as being a barrier to seeking these reports, with the preparation of these reports often being at the victim's own expense.

There may be opportunities for current funding provided through Victim Assist Queensland as part of the financial assistance scheme to support these costs being met without the expectation that the burden for arranging for and paying for such reports should rest with victim survivors.

The establishment of the Office of the Victims' Commissioner may also provide an opportunity to explore these issues more fully than has been possible during our current review.

Cultural advice relating to victim survivors

There are also opportunities to enhance the current cultural information available to a court, which may help a sentencing court to better understand the impacts of an offence on a victim survivor who is Aboriginal or Torres Strait Islander or from another cultural background.

In the most recent evaluation of the CJG Program, it was noted that 'in some cases, CJGs also provide support to victims, especially where the CJG employs DFV court support workers or men's or women's support workers', but this was secondary to their work with offenders.[219] However:

> Some stakeholder respondents to the Phase 3 survey were critical in expressing the view that CJGs do not provide enough support to victims and are too focused on defendants. There can be a conflict of interest if the same staff

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216 Ibid citing Robert A Prentky et al, 'Sexually Violent Predators in the Courtroom: Science on Trial' (2006) 12(4) *Psychology, Public Policy, and Law* 357; Ian R Coyle and Robert L Halon, 'Humpty Dumpty and Risk Assessment: A Reply to Slobogin' in Patrick Keyzer (ed), *Preventive Detention: Asking the Fundamental Questions* (Intersentia, 2013).

217 Megan Stevenson and Jennifer L Doleac, "The Counterintuitive Consequences of Sex Offender Risk Assessment at Sentencing" (2023) 73(Suppl 1) *University of Toronto Law Journal* 59, 70–71, cited in Mirko Bagaric, 'Sentencing Developments in the United States in 2023: Continued Reform Stagnation in a Climate of High Crime Rates' (2024) 47 *Criminal Law Journal* 136, 143.

218 On the common impacts for victim survivors of sexual assault, see Emily R. Dworkin, 'Risk for Mental Disorders Associated with Sexual Assault: A Meta-Analysis' (2020) 21(5) *Trauma, Violence, & Abuse* 1011.

219 *The Myuma Group, Phase 3 Report* (n 32) 105, 175.

> member or Elder seeks to support both the defendant and the victim in a matter. In the CJG's DFV court support work, this can sometimes be managed by a different worker supporting each party.[220]

The very limited nature of the support provided was confirmed by data reported by CJGs in 2022–23.[221]

More encouragingly, the survey of CJGs (n=32) found that CJGs' assessment of support provided to victims was on the whole positive, with 84 per cent of respondents agreeing that CJGs had supported victims during the court process 'quite a lot'.[222]

The evaluation concluded:

> While there is evidence that CJGs are also providing some support to victims of DFV (to a lesser extent than their work with perpetrators), there is currently insufficient evidence to evaluate the impact of this work on empowering victims.[223]

There is no current requirement under the PSA that a court must consider any submissions made by a CJG regarding the impact of an offence on a victim survivor in a similar way as is currently required under section 9(2)(p) when sentencing an Aboriginal or Torres Strait Islander person.

Cultural reports and submissions

There has been increasing support for the broader adoption of *Gladue*-style reports in Australia.

The Australian Law Reform Commission's *Pathways to Justice – Inquiry into the Incarceration Rate of Aboriginal and Torres Strait Islander Peoples* report notes the Queensland provision that supports CJGs making submissions about particular matters under section 9(2)(g) of the PSA was intended to address the over-representation of Aboriginal and Torres Strait Islander peoples in custody, and the need for greater community-based, culturally appropriate options.[224] However, the ALRC noted limitations of the current section, including that the current section relies on CJG submissions and that there is no requirement for such submissions to be made.[225] Section 9 has since been amended to insert section 9(2)(oa), which now expressly provides for a court to consider 'any cultural considerations, including the effect of systemic disadvantage and intergenerational trauma on the offender' without the need for submissions to be made by a representative of a CJG.

The Australian Law Reform Commission, noting development across Australia, recommended:

> **Recommendation 6–2** State and territory governments, in partnership with relevant Aboriginal and Torres Strait Islander organisations, should develop and implement schemes that would facilitate the preparation of 'Indigenous Experience Reports' for Aboriginal and Torres Strait Islander offenders appearing for sentence in superior courts.
>
> **Recommendation 6–3** State and territory governments, in partnership with relevant Aboriginal and Torres Strait Islander organisations and communities, should develop options for the presentation of information about unique systemic and background factors that have an impact on Aboriginal and Torres Strait Islander peoples in the courts of summary jurisdiction, including through Elders, community justice groups, community profiles and other means.[226]

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220 Ibid 105.
221 Ibid. The evaluation noted in mainstream Magistrates Courts, CJGs supported 12 victims for non-DFV related offences and 29 victims in DFV-related offences (these account for 0.6% of the 6,911 people supported). In mainstream Magistrates Courts dealing with DFV proceedings, CJGs supported 413 aggrieved parties (6% of total people supported), while in DFV Enhancement sites, CJGs supported 49 aggrieved in DFV proceedings (10% of total people supported).
222 Ibid 214, Figure 56.
223 Ibid 168.
224 Australian Law Reform Commission, *Pathways to Justice: An Inquiry into the Incarceration Rate of Aboriginal and Torres Strait Islander Peoples* Report No 133, December 2017) 189–190 ('*Pathways to Justice Report*').
225 Ibid 191 citing points raised by the Caxton Legal Centre in its submission to the Inquiry.
226 Ibid.

In 2018, the Australian Research Council funded a project piloting Aboriginal Community Justice Reports over a 5-year period.[227] The reports are modelled on Canada's *Gladue* reports. The Victorian Aboriginal Legal Service is undertaking the project in partnership with the Australasian Institute of Judicial Administration, University of Technology Sydney and Griffith University.[228] The project is also being run in Queensland through Five Bridges Aboriginal and Torres Strait Islander Community Justice Group. More information on the trial is accessible on the VALS website.[229]

The Project's broader objectives are to reduce the over-incarceration of Aboriginal and Torres Strait Islander peoples and improve sentencing processes and outcomes for Aboriginal and/or Torres Strait Islander defendants.[230]

The trialling of this model also responds to research that has found PSRs are deficient in providing the court with 'relevant facts pertaining to the defendant's Indigenous community, cultural background, socioeconomic disadvantage, trauma from institutionalisation' as well as the person's 'individual roles or strengths in their Indigenous community'.[231]

227 See Australian Government, Australian Research Council, 'LP180100759 – University of Technology Sydney', *ARC Grants Data Portal* <https://dataportal.arc.gov.au/NCGP/Web/Grant/Grant/LP180100759>; Victorian Government, 'Burra Lotjoa Dunguludja: Victorian Aboriginal Justice Agreement Phase 4' (2018) 39.

228 'Aboriginal Community Justice Reports', *Victorian Aboriginal Legal Service* (web page) <https://www.vals.org.au/aboriginal-community-justice-reports>.

229 Ibid.

230 Ibid.

231 Thalia Anthony et al, 'Individualised Justice through Indigenous Community Reports in Sentencing' (2017) 26(3) *Journal of Judicial Administration* 121, 135.

12.8 The Council's view

Key Finding

11. **Information available to courts to inform sentence may not be sufficient and could be improved**

It is important that sentencing courts be provided with information to enable the proper consideration of the nature and circumstance of the offence, the personal circumstances of the person being sentenced and the impacts of the offence/s on victim survivors.

There is a risk that judicial officers in Queensland are not being provided with sufficient information to inform the proper exercise of their sentencing discretion noting the following points:

- Criminal justice agencies and legal services operate under significant time and resourcing pressures.
- The availability of those with professional expertise regarding the drivers and impacts of sexual offending, including forensic psychiatrists and psychologists, is limited, and there is currently insufficient funding and capacity to support the provision of expert psychiatric and psychological reports for all sentences.
- Pre-sentence reports prepared by Queensland Corrective Services are not often requested or made available, and may not address all important issues at sentence, including regarding issues of risk and potential treatment options.
- Information provided by community justice groups (CJGs) (including cultural reports) is not routinely available in sexual violence matters, and usually only at the Magistrates Courts level. The availability of this same type of information for people from other culturally and racially marginalised backgrounds is similarly limited.
- Judicial officers may not be provided with sufficient information to understand how the offending has impacted victim survivors, as the long-term impacts are often unknown at the time of sentence, few victim survivors have access to expert reports to document the harm or injury caused to them and/or they may not want the offending person to be aware of how the offending has impacted them by including this information in a victim impact statement.

These issues are exacerbated for Aboriginal and Torres Strait Islander persons due to the impacts of systemic disadvantage and cultural issues, which may limit the ability of prosecutors and defence practitioners to put relevant information before the court.

See **Recommendations 11, 12 and 13**.

Recommendations	
11.	**Legal Aid funding and guidelines in support of the preparation of specialist reports** The Department of Justice consult with Legal Aid Queensland, other legal stakeholders and professional associations representing the interests of forensic psychologist and psychiatrists as a matter of priority to review the adequacy of funding available in support of the preparation of specialist reports for defendants charged with a sexual violence offence and current funding guidelines.
12.	**Court-ordered professional reports and advice** The Department of Justice, in consultation with the Heads of Jurisdiction, explore alternative models of professional advice to inform sentence. This investigation might include, for example, consideration of current arrangements for court-ordered reports and advice and the adequacy of this in supporting the court to both understand factors associated with a person's offending, as well as psychological and emotional harm caused to victim survivors.
13.	**Cultural reports** Queensland Courts actively explore alternative models for the provision of cultural advice to courts in the case of sexual offences, such as rape and sexual assault, including through the engagement of professional report writers, consistent with the current model being trialled through the Australian Research Council-funded project on Indigenous Justice Reports. Consideration should be given not only to the preparation and use of these reports for defendants from an Aboriginal or Torres Strait Islander background or other cultural background, but also separate reports for victim survivors, to better articulate the harm caused and the broader impacts of the person's offending on them.

12.8.1 Overview of the Council's findings and recommendations

Based on our research and consultations, and submissions made to the review, we have concluded that the information available to courts to inform sentence may not be sufficient in some cases and could be improved. In making this finding, we acknowledge the following points:

- Criminal justice agencies and legal services operate under significant time and resourcing pressures.
- The availability of those with professional expertise regarding the drivers and impacts of sexual offending, including forensic psychiatrists and psychologists, is limited and there is currently insufficient funding and capacity to support the provision of expert psychiatric and psychological reports for all sentences.
- Pre-sentence reports prepared by Queensland Corrective Services are not often requested or made available, and may not address all important issues at sentence, including regarding issues of risk and potential treatment options.
- Information provided by community justice groups ('CJGs') (including cultural reports) is not routinely available in sexual violence matters and usually only at the Magistrates Courts level, and

the availability of this same type of information for people from other culturally and racially marginalised backgrounds is similarly limited.

- Judicial officers may not be provided with sufficient information to understand how the offending has impacted victim survivors, as the long-term impacts are often unknown at the time of sentence, few victim survivors have access to expert reports to document the harm or injury caused to them and/or they may not want the offending person to be aware of how the offending has impacted them by including this information in a victim impact statement.

We acknowledge that many of these problems are exacerbated for Aboriginal and Torres Strait Islander persons due to the impacts of systemic disadvantage and cultural issues, which may limit the ability of prosecutors and defence practitioners to put relevant information before the court. In this context, we note that significant work is already underway in response to the Women's Safety and Justice Taskforce's recommendations, including to enhance court advice and prosecution support services focused on First Nations peoples, and suggest that this should continue and, if successful, be considered for expansion.

12.8.2 Applying the Council's fundamental principles

Applying the Council's fundamental principles guiding the review has provided an important basis for considering the need for reform.[232] In particular:

- **Principle 1: Reforms to sentencing laws should be evidence-based with a view to promoting public confidence**: The Council has drawn on observations from sentencing remarks, appeal decisions, past reviews and research, as well as evidence gathered from our subject matter expert interviews, submissions and consultations to identify current challenges in ensuring that courts have access to adequate information to inform sentencing. Based on this evidence, pre-sentence reports and advice, and professional reports, may be most useful in cases where a court is considered whether a sentence involving actual custody is required, and whether any risks the person might pose of reoffending can be safely managed in the community, either with or without supervision.
- **Principle 2: Sentencing decisions should accord with the purposes of sentencing as outlined in section 9(1) of the PSA**: The Council acknowledges that the evidence put before a court is of particular relevance to the sentencing purposes of rehabilitation and risk of reoffending (community protection), as well as substantiating the harm caused to the victim survivor. It may also be relevant to assessing the capacity of the person sentenced to be deterred from reoffending (for example, taking into account whether they have been sentenced in the past for offending of the same or a different kind, and how they responded to any sentence imposed).
- **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**: Specialist professional reports substantiating the harm caused the victim survivor, as well as the personal circumstances of the person being sentenced, may provide courts with important information in support of a sentence. Cultural information and advice may help a sentencing court to better understand factors contributing to the person's offending, the impacts of the order they are making on the person sentenced (for example, in circumstances where the

232 For a full list of the fundamental principles, see Chapter 3.

community may not want that person returned to their community) and the personal circumstances of the victim survivor.

- **Principle 4: People serving sentences in the community for a sexual offence should have appropriate supervision**: As a general starting proposition, we consider that it should be assumed that people who have committed rape and sexual assault require some form of supervision. In **Chapter 11**, we discuss how the current structure of sentencing and parole options in Queensland presents practical barriers to achieving this. The adoption of the reforms we recommend will make it even more important that appropriate use be made of PSRs, court advisory services, professional reports, and cultural reports and submissions, to help guide a court in determining what type of order and conditions are most appropriate based on factors contributing to the person's risk of offending, programs and supports available to the person in custody and in the community, and the person's assessed level of risk.
- **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**: A significant criticism of pre-sentence reports and risk assessment instruments is that they are culturally biased and fail to adopt a strengths-based approach when assessing reoffending risks. This is why, in our view, it is important that any risk assessments are undertaken by someone with a proper appreciation of shortcomings of such tools. It is also why both PSRs and specialist reports should be prepared as far as possible in a culturally appropriate way, such as through the use of cultural advisers, and supplemented wherever possible with cultural submissions and advice. The type of general information contained in the *Bugmy Bar Book*[233] is a useful guide to the sort of factors that may have an impact, particularly on Aboriginal and Torres Strait Islander people sentenced for these and other offences as well as victim survivors from an Aboriginal or Torres Strait Islander background. Specialists' reports, and cultural submissions and reports, also may be of significant benefit in substantiating the harm caused by rape and sexual assault to victim survivors, their family members and immediate community in support of the court understanding the extent of the harm caused and the seriousness of the offending, As with a VIS, no inference should be drawn from the absence of such evidence (see further **Chapter 14**).
- **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**: PSRs, courts advisory services, specialist and professional reports and cultural submissions and reports, in addition to other information and evidence, including in the form of a VIS and submissions by the prosecution and defence, all give sentencing judges and magistrates a richer understanding of the individual circumstances of the person being sentenced and the victim survivor in support of individualised justice. Judicial discretion, however, is fundamentally important given that all forms of information have limitations and ultimately a court must decide whether it is satisfied with the relevant matters to the requisite standard of proof required under section 132C of the Evidence Act.
- **Principle 9: Sentencing decisions for sexual assault and rape should be informed by the best available evidence of a person's risk of reoffending**: The problems with risk assessments are

233 The Bugmy Bar Book Project Committee, *Bugmy Bar Book* <https://bugmybarbook.org.au>.

well documented.[234] Because of the only moderate predictive efficacy of these tools, it has been argued that 'they should not be used as the sole or primary means for clinical or criminal justice decision making that is contingent on a high level of predictive accuracy'.[235] Further, 'the current level of evidence is not sufficiently strong for definitive decisions on sentencing, parole, and release or discharge to be made solely using these tools'.[236] Such tools also have been criticised on a number of grounds, including being based on variables over which the person has no control (such as the person's age or gender), as well as socioeconomic factors (such as a person's marital status, educational or employment status) over which the state should have no legitimate interest and on which disadvantaged and marginalised groups rate less well than non-minority groups. Another criticism is that they incorporate variables based on previous criminal history, which also disadvantage certain individuals and groups based on differences in policing practices.[237] We acknowledge that these shortcomings are valid and significant. However, when considered alongside other information, including cultural advice and reports and other information available to a court regarding the personal circumstances of the person being sentenced, these assessments may provide a useful tool for helping a court to consider how any risks the person might pose might be successfully mitigated and managed, consistent with the legitimate objective of community protection.[238]

- **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 use of information and evidence that unfairly disadvantages certain individual and groups, such as regarding reoffending risks, may be viewed as inconsistent with the principles of natural justice and may limit a person's human rights, such as 'rights in criminal proceedings'.[239] The Council is mindful of ensuring that, if a right is limited, it is reasonable and justifiable under the HRA. At the same time, we recognise the importance of recognising the rights of victims and ensuring relevant information can be put before a court substantiating victim harm.

12.8.3 Court-ordered reports and advice

Queensland faces unique challenges, including our geographically dispersed population and the difficulties this causes for service provision, particularly for those who live in regional and remote parts of the state. For this reason, while we see a need for improved information for courts, we do not support the adoption of a 'one size fits all' model without due regard to local circumstances.

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234 For a discussion of some of these problems, 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* (Report, University of Melbourne, August 2021) 3–4; Complex Adult Victim Sex Offender Management Review Panel, *Advice on the Legislative and Governance Models under the Serious Sex Offenders (Detention and Supervision) Act 2009 (Vic)* (Report, 2015) 15–16 [1.59]–[1.65].

235 Min Yang, Stephen C. Wong, and Jeremy Coid, 'The Efficacy of Violence Prediction: A Meta-Analytic Comparison of Nine Risk Assessment Tools' (2010) 136 *Psychology Bulletin* 740, 761 as cited in Michael Tonry, 'Fifty Years of American Sentencing Reform: Nine Lessons' (2019) 48 *Crime and Justice* 1, 14.

236 Seena Fazel et al., 'Use of Risk Assessment Instruments to Predict Violence and Antisocial Behavior in 72 Samples Involving 24, 827 People: Systematic Review and Meta-Analysis' (2012) 345 BMJ 5–6 as cited in Tonry (n 235) 14.

237 Tonry (n 235). As to this last point, see Chapter 2.

238 See *Veen (No 2)* (1988) (n 212) 472 (Mason CJ, Brennan, Dawson and Toohey JJ).

239 *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'.

Our view is that further work is required to support the development of alternative models of professional advice to inform sentence. We recommend that the Department of Justice should lead this work in consultation with Queensland Courts.

This investigation might include, for example, consideration of current arrangements for court-ordered reports and advice and the adequacy of this in supporting the court to both understand factors associated with a person's offending, as well as psychological and emotional harm caused to victim survivors.

Some more modest suggestions have been made to improve current practices, which might be actioned in the short term. For example, Legal Aid Queensland has recommended processes to streamline current arrangements that would allow access to supporting medical records held by Queensland Health.

We acknowledge work underway to expand Queensland Corrective Services' court advisory service and also support this work continuing as an important means of ensuring that courts have access to the information they need when making decisions on sentence. This includes information about the person's likely access to relevant programs and supervision and whether programs and interventions are available custody or in the community, where the nature and seriousness of the offence means a community-based order is reasonably open. Legal stakeholders told us this information is important and that sentencing courts sometimes do not have a good understanding of the programs and interventions available at a local level.

We further note that Queensland Courts are piloting a Sexual Offence Expert Evidence Panel that will allow experts to give relevant evidence in sexual violence proceedings at two locations in Brisbane and Townsville.[240] While the focus of the panel is on providing expert evidence to inform the evaluation of other evidence in a trial context, there may be learnings based on this pilot regarding the use of other forms of expert evidence and reports in a sentencing context.

With respect to specialist reports including risk assessments, we repeat comments made in our review of the serious violent offence scheme regarding the problematic nature of assessing risk. We suggest that a greater focus be placed on human rights grounds in reports that have suggested a person is at low risk of reoffending, rather than reports suggesting a person is at moderate or moderate to high risk of reoffending. While important, this information must be assessed in the context of other information put before the court to inform sentencing. Further, as cautioned by the High Court, a sentence must not be extended beyond that which is proportionate for the purposes of community protection purely on the basis of the person's assessed level of risk.[241]

In addition to the recommended review, we recommend that the Department of Justice consult with Legal Aid Queensland, other legal stakeholders and professional associations representing the interests of forensic psychologist and psychiatrists as a matter of priority to review the adequacy of funding available in support of the preparation of specialist reports for defendants charged with a sexual violence offence and current funding guidelines.

12.8.4 Cultural reports and advice

The Council strongly supports cultural submissions and advice being widely available, noting that these provide an invaluable source of information and advice. As Sofronoff P has suggested, submissions from

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240 See Queensland Courts, 'Sexual Offence Expert Evidence Panel' (web page) <https://www.courts.qld.gov.au/services/sexual-offence-expert-evidence-panel> for more information.

241 *Veen (No 2)* (n 212) 472 (Mason CJ, Brennan, Dawson and Toohey JJ).

a CJG representative should be given great weight, taking into account that opinions are 'expressed by persons who have special local knowledge and whose appointment to the Group carries with it the trust of their community'.[242]

We support efforts already underway to explore opportunities to enhance the provision of this advice and ensure it is available on a statewide basis, such as by continuing to fund and build the capabilities of CJG members to provide oral and written sentencing submissions and considering the outcomes of the current trial of Aboriginal Community Justice Reports in Queensland and Victoria.

We also consider that there are potential benefits in the Queensland Government working with peak bodies, such as the Ethnic Communities Council of Queensland, to develop similar capacities in support of culturally and linguistically diverse communities.

Through professional development and training, there may also be opportunities in support of defence practitioners in making appropriate submissions on sentence. For example, we note in a speech delivered by His Honour Judge Glen Cash QC, His Honour encouraged broader and more imaginative submissions to be made by legal practitioners regarding cultural considerations referred to in the relevant section of the PSA.[243] This might extend, for example, to 'consideration of non-corporal extra-curial punishment (such as exclusion from community or shaming) or … forms of alternative dispute resolution' and factors that might be relevant to assessing a person's level of culpability.[244]

The practice of seeking similar information from community members regarding cultural factors and circumstances, as well as relevant community-based programs available for defendants from other cultural backgrounds, should be promoted to defence practitioners and, where appropriate, included in relevant professional manuals and guidelines.

A current limitation of the reports provided is that they focus solely on the circumstances of people sentenced for these offences rather than those who are most significantly negatively impacted by them – victim survivors. We therefore consider it important that cultural submissions and reports be explored as an option in appropriate cases for victim survivors who are Aboriginal and Torres Strait Islander and from other cultural backgrounds. This would recognise that the impacts of offending can be experienced differently and factors such as the ongoing impacts of colonisation and intergenerational trauma that might impact perpetrators of sexual violence may apply equally to victim survivors. Understanding how these factors impact at an individual level is an important aspect of 'humanising' the sentencing process[245] and giving appropriate recognition and respect to the person who has been harmed.

12.8.5 Systemic disadvantage considerations

As discussed in **Appendix 4**, section 4.3, Aboriginal and Torres Strait Islander peoples represent almost a quarter of offenders sentenced for offences of sexual assault (20.5%) and rape (23.3%). Aboriginal and Torres Strait Islander peoples also are around 3.5 times more likely to have been a victim of sexual assault (including rape and other sexual offences) compared with non-Indigenous Australians.

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242 *R v SCU* [2017] QCA 198, 6 [26], 11–12 [56] and 23–24 [113] (Sofronoff P).
243 His Honour Judge Glen Cash KC, 'Customary Law and the Recognition of Systemic Disadvantage in the Sentencing of First Nations Persons' (Paper delivered to the Sunshine Coast Bar Professional Development Day 28 August 2021) 14.
244 Ibid 15.
245 As to this concept, see also Cyrus Tata, 'The Humanising Work of the Sentencing Professions: Individualising and Normalising' in *Sentencing: A Social Process – Rethinking Research and Policy* (Palgrave Macmillan, 2020) 93.

The use of cultural submissions and reports, in particular, has a unique potential to improve courts' understanding of the context in which a person's offending has occurred and its implications. This includes information not only about the person's community and cultural background, but also any factors of intergenerational trauma that might impact them at an individual level and to better understand that person's role within their community and their strengths.

We consider a much-overlooked aspect of cultural submissions and reports is how this model can be tailored to better capture the experiences and impacts of sexual offending on victim survivors who are Aboriginal or Torres Strait Islander or from other cultural backgrounds. An understanding of the unique experiences of victims is critical, in our view, to ensuring the harm caused to victims is adequately understood in support of better sentencing practices. We explore this issue in detail in **Chapter 14**.

12.8.6 Human rights considerations

Rights relevant to the availability of information and reports to inform sentencing under the HRA include:

- the right to recognition and equality before the law (section 15);
- the right to privacy and reputation (section 25); and
- cultural rights (sections 27 and 28).

Legal Aid Queensland raised concerns about the use of risk assessments applying the current QCS model for all sexual offenders being 'at risk of impacting a defendant's right to equality before the law', also suggesting that 'a risk assessment using tools that may not be accurate in predicting risk of that particular offender, could also engage the right to liberty and security':[246]

> Every person has the right to be free from arbitrary detention and a person must not be deprived of liberty except on grounds established by law. In practice, a risk assessment by a psychologist is afforded considerable weight by a court when determining sentence. This is unlikely to change. An offender assessed by a psychologist or psychiatrist as 'high risk' could conceivably result in their continued incarceration or increase the length of time spent in custody or subject to supervision. Where risk assessments may have limited utility in actually predicting recidivism for certain ethnic and cultural backgrounds, it should be considered whether continued deprivation of liberty, where even partially due to reliance of this assessment is incompatible with human rights for these offenders who are not neurotypical white men. This right may also be invoked where risk assessments are based on incorrect or outdated information about an offender.[247]

This is an important reason we consider these types of assessments should only be undertaken by those with expertise in administering them who are transparent in providing their reports for use as a basis for sentencing about the limitations of any such assessments.

It is also why we consider information drawn from risk assessments should only ever be one of several different sources of information which are used by a court in making its determination. Ultimately the seriousness of the offence the person has been convicted of should be the primary determinative factor in deciding sentence, not the person's assessed level of risk.

246 Submission 23 (Legal Aid Queensland) 25 citing *Human Rights Act 2019* (Qld) ss 15, 29.
247 Ibid 25–6 (footnotes omitted).

Chapter 13 – Understanding victim harm and justice needs

13.1 Introduction

The Terms of Reference ask us to 'identify and report on any legislative or other changes required to ensure the imposition of appropriate sentences for sexual assault and rape offences'.[1] This includes the processes and procedures that guide sentencing for these offences.[2]

In doing so, we must also have regard to protecting victim survivors of sexual offences within sentencing processes, holding offenders to account, maintaining judicial discretion and promoting public confidence in the criminal justice system.[3]

This chapter considers the impacts of sexual offences on victim survivors, their rights and role within the criminal justice system and their experiences engaging with the sentencing process. This includes their right to be kept informed and to be treated fairly and with dignity when engaging with, and navigating, the criminal justice system.

We consider how current sentencing practices and processes operate in Queensland and other jurisdictions to respond to the rights and justice needs of victim survivors of rape and sexual assault, as well as relevant reforms currently underway. We also discuss specific feedback provided by victim survivors of these offences, victim support and advocacy services, legal and justice stakeholders and members of the broader community that informed our findings. Our formal views and recommendations to improve the criminal sentencing process in Queensland for victim survivors of rape and sexual assault are presented in the final section of this chapter.

A further discussion of victim survivor harm and acknowledgement within the sentence hearing (including through a victim impact statement ('VIS')) is outlined in **Chapter 14**.

13.1.1 Impact of sexual offences

Sexual offences (broadly defined as 'sexual violence offences') can have significant immediate and long-term impacts for victim survivors who experience them. Offences of this nature can cause serious and lifelong harm to the mental and physical health of victim survivors, as well as adverse impacts upon their relationships, education, employment, financial security, sexual identity and connection with their culture or religion.[4] As outlined earlier in our report, young children who are subjected to sexual abuse are also particularly vulnerable to experiencing prolonged harm, as 'sexual abuse can affect the emotional, social and physical development' of the child, including the development of their brain, with potential long-term negative consequences.[5]

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1 Appendix 1: Terms of Reference, 2.
2 Ibid 1.[3] Ibid.
3 Ibid.
4 Royal Commission into Institutional Responses to Child Sexual Abuse, *Final Report Volume 3: Impacts* (2017) 9–11 ('*Royal Commission into Institutional Responses to Child Sexual Abuse Final Report Vol 3*').
5 Ibid.

The *Victims of Crime Assistance Act 2009* (Qld) defines 'injury' for victims of sexual offences to include the totality of the following 'adverse impacts' suffered:

(i) sense of violation;

(ii) reduced self-worth or perception;

(iii) lost or reduced physical immunity;

(iv) lost or reduced physical capacity (including the capacity to have children), whether temporary or permanent;

(v) increased fear or increased feelings of insecurity;

(vi) adverse effect of others reacting adversely to the person;

(vii) adverse impact on lawful sexual relations;

(viii) adverse impact on feelings.[6]

The Council acknowledges the significant body of literature documenting the prevailing impacts of sexual offences on victim survivors. We have not recited the contents of this literature here, noting that it has been discussed in detail in section 4.4.3 of our **Consultation Paper: Background**.[7] We nevertheless recognise that these impacts are far-reaching and significant.

13.1.2 Measuring victim survivor satisfaction with the criminal justice system

Public confidence is fundamental to the proper administration and operation of the criminal justice system.[8]

Low levels of public confidence leads to dissatisfaction with the justice system (including with the police, prosecution services, and the criminal courts).[9] Alienation and a lack of standing in the process discourages victim survivors from reporting criminal offending to authorities and proceeding with the criminal prosecution process.[10] This is of particular concern for the prosecution of rape and sexual assault offences as, compared with other offences, proportionately few victim survivors of sexual offending currently engage with the justice system[11] and there are already high rates of attrition associated with proceedings for these offences, as discussed at **Chapter 2**.[12] The Australian Bureau of Statistics reports that as few as 13 per cent of sexual violence incidents are reported to police by females.[13]

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6 *Victims of Crime Assistance Act 2009* (Qld) s 27(f). This is in addition to 'bodily injury', 'mental illness or disorder' , 'intellectual impairment', 'pregnancy' or 'disease': ss 27(a)–(e).

7 Queensland Sentencing Advisory Council, *Sentencing of Sexual Assault and Rape: The Ripple Effect - Consultation Paper: Background* (March 2024) 44–7 (‘*Consultation Paper: Background*’).

8 David Indermaur and Lynne Roberts, 'Confidence in the criminal justice system' (Trends & Issues in Crime and Criminal Justice, No 387, Australian Institute of Criminology, November 2009) 1.

9 Ibid.

10 See Sam Garkawe 'The role of the victim during criminal court proceedings' (1994) 17(2) *University of New South Wales Law Journal* 595, 596; Edna Erez and Leigh Roeger, 'The effect of victim impact statements on sentencing patterns and outcomes: The Australian experience' (1995) 23(4) *Journal of Criminal Justice* 363, 374.

11 Jacqueline Fitzgerald, 'The attrition of sexual offences from the New South Wales criminal justice system' (Contemporary Issues in Crime and Justice, No. 92, Crime and Justice Bulletin, NSW Bureau of Crime, Statistics and Research, January 2006) 2; Robyn L Holder and Elizabeth Englezos 'Victim participation in criminal justice: A quantitative systematic and critical literature review' (2024) 30(1) *International Review of Victimology* 25, 26.

12 See a discussion of the barriers to reporting and attrition in the criminal justice system in *Consultation Paper: Background* (n 7) 19–26 [2.3].

13 Australian Bureau of Statistics, *Sexual violence, 2021-22 financial year* (23 August 2023). The Personal Safety Study 2021-22 also found that 9 in 10 women who experienced sexual assault by a male did not report the most recent

Studies have recognised that victim survivor satisfaction with the police, prosecution and courts is impacted by the quality of interpersonal treatment they receive, as well as opportunities for them to have their voice heard.[14]

Key criticisms often made by victim survivors when engaging with the criminal justice process include that:

- the whole process is not victim focused;
- they are made to feel alienated and excluded;
- they are exposed to discourtesy and disrespect;
- information that victim survivors consider to be important is either withheld or not shared with them;
- there is a lack of support, assistance and advocacy when interacting with the justice system;
- they believe that 'process efficiencies trump the proper administration of justice';
- courts impose what victim survivors consider to be 'inadequate' or lenient sentence outcomes;
- they feel as though they are not sufficiently involved or given adequate opportunity to be heard within the justice process; and
- they believe that 'while defendants have rights and representation, victims have neither'.[15]

As discussed in **Chapter 2**, the prevalence of rape myths and stereotypes also acts as a barrier to reporting for victim survivors of sexual offences.

It has also been recognised that public confidence in different justice agencies (including police, courts and correctional centres) diminishes or has an 'evaporation effect' as charges progress through the criminal justice system.[16] As most members of the community do not have direct experience with these processes, they rely on media portrayals or shared experiences of others to inform the prism through which they view them.[17] Improving public perception that these agencies are acting on behalf of the broader community has been acknowledged as one of the best way to improve public confidence in the system.[18]

Victim survivor and community satisfaction with Queensland's criminal sentencing regime – including satisfaction with both the adequacy of the trial or sentence outcome and the sentence procedure (procedural satisfaction) – was therefore a critical issue for the Council to consider in assessing whether sentences for offences of rape and sexual assault are adequate and appropriate. Victim survivor procedural satisfaction is discussed below, noting that satisfaction with sentence outcomes for these offences was considered in **Chapter 5**.

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incident to the police (92%). This is consistent with the average of 14% calculated from earlier studies: Kathleen Daly and Brigitte Bouhours, 'Rape and attrition in the legal process: A comparative analysis of five countries' (2010) 39 *Crime and Justice: A Review of Research* 565, 568, 572.

14 Robyn Holder, 'Satisfied? Exploring victims' justice judgments', in Dean Wilson and Stuart Ross (eds), *Crime, Victims and Policy: International Context, Local Experiences* (Palgrave Macmillan, 2015) 195.

15 Ibid 189.

16 Ibid citing Indermaur and Roberts (n 8) 1–4.

17 Ibid 4.

18 Ibid 6.

13.2 The role, justice needs and rights of victim survivors within sentencing

13.2.1 The role of a victim survivor in criminal proceedings

Prior to a person who is alleged to have committed a sexual violence offence pleading guilty or being convicted, victim survivors' participation in the criminal justice process includes:

- making a formal complaint to police;
- providing a statement about what is alleged to have happened; and
- if the victim survivors' account is contested, being prepared to give evidence at trial and (potentially) subjecting themselves to cross-examination by defence.

This can be a protracted and difficult process and requires ongoing and active participation on the part of victim survivors.

Once a person being convicted (either following a trial or after pleading guilty), victim survivor participation and involvement in the sentencing process are not mandatory.

As a victim survivor is not a party to the proceeding,[19] they are not obliged to attend the sentence hearing if they do not wish to do so. Sentence hearings can (and often do) proceed without the victim survivor being present. Reflecting the views of many victim advocacy and support services, the Queensland Sexual Assault Network ('QSAN') told us this can contribute to victim survivors feeling their 'needs are unimportant and peripheral'.[20] In the context of sentencing proceedings, the process may seem 'even more focused on the offender than the trial and pretrial processes, because victim survivors are even more ancillary to the process'.[21]

The role of a victim survivor as a participant, rather than as a party, is entrenched within Queensland's adversarial system of justice, which considers crime acts committed against the state.[22] The focus of any sentence hearing is on offence and the offender. Usually, only the person being sentenced and the prosecution service have standing to appear as parties in the sentence hearing.[23]

Victims of crime have consistently expressed a desire to be a party to sentence proceedings, including the ability to challenge the sentence on appeal and to be an active party in decisions about the amendment of any charges, rather than merely being consulted in what they consider to be a superficial way.[24] However, victim survivor input within the sentencing process presents challenges for the adversarial system of justice and remains a point of contention.

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19 Arie Freiberg and Asher Flynn, *Victims and Plea Negotiations - Overlooked and Unimpressed* (Palgrave Macmillan, 2021) 10. The Council has not considered whether victim survivors of rape and sexual assault should be granted substantive rights as parties to the criminal proceeding, recognising that this would entail a fundamental alteration to the adversarial system of justice, which is not within the limited scope of this Terms of Reference.

20 Submission 24 (Queensland Sexual Assault Network) 3.

21 Ibid.

22 Edna Erez, 'Victim Impact Statements' (Trends & Issues in Crime and Criminal Justice, No 33, Australian Institute of Criminology, September 1991) 2.

23 Tracey Booth, *Accommodating Justice: Victim Impact Statements in the Sentencing Process* (Federation Press, 2016) 5. In some cases, legislation provides a person is entitled to be heard even though they are not a party. For example, under the *Youth Justice Act 1992* (Qld) s 74: 'The chief executive is entitled to be heard by the court on matters mentioned in subsection (3), even though the chief executive is not a party to the proceeding'. There is no similar provision for a victim survivor.

24 Erez (n 22) 2.

It has been recognised that increased victim survivor participation has the potential to enhance the criminal justice system by providing the court with information surrounding the seriousness of the offence and communicating to the offender the harm experienced by the victim survivor, and may convey therapeutic and restorative justice benefits to the victim and enhance perceptions of fairness within the sentencing context.[25] Comparatively, those who oppose greater participation by victim survivors consider this concept to be inconsistent with the adversarial nature of our system, which may infringe the right of the person being sentenced to a fair hearing and negatively impact the wellbeing of a victim survivor.[26]

While no common law jurisdiction has implemented reforms that permit a victim survivor to be an independent and active participant in the criminal justice process as a party to the proceeding, with standing to appear and make submissions on sentence, a framework for limited legal representation has been established in some jurisdictions throughout the trial and pre-trial process.[27]

While there has been support for enhancing victim rights and victim-orientated reform in previous reports, this is within the existing adversarial framework.[28] The Victorian Law Reform Commission ('VLRC') proposed a victim should be legislated as a 'participant' but did not consider victims should be a party to criminal proceedings as it 'would significantly alter the adversarial system' and would require significant resourcing.[29]

13.2.2 Specific justice needs of victim survivors of rape and sexual assault

There has been a significant shift in Queensland towards recognising the justice needs and rights of victim survivors, as well as the integral role they play within the criminal justice system.[30] The Women's Safety and Justice Taskforce ('WSJ Taskforce') noted that that there has been increasing recognition of victim survivors as 'integral players in criminal justice, rather than mere bystanders'.[31]

Victim survivors who experience rape or sexual assault have various needs when navigating the criminal justice process. In 2021, the VLRC found in its inquiry into improving the justice system response to sexual offences for victim survivors that these needs may include:

- being **given information** about how the criminal justice system works and what to expect;
- being a **participant**, including being provided with knowledge of how their case is progressing and being involved in, or aware of, key decisions and their role in the criminal justice process;
- **having a voice** – being able to tell 'their full story in their own words';
- **receiving validation** by having their story heard and believed, and having a 'concrete outcome' from reporting the sexual violence;

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25 Booth (n 23) 2.
26 See discussion in Victorian Law Reform Commission, *The Role of Victims of Crime in the Criminal Trial Process: Report* (2016) 27–9 [3.40]–[3.48]; 32 [3.65] ('*The Role of Victims of Crime in the Criminal Trial Process*').
27 Women's Safety and Justice Taskforce, *Hear Her Voice, Report Two: Women and Girls' Experiences Across the Criminal Justice System* (2022) (n 13) vol 1, 275–6 ('*Hear Her Voice, Report Two*'). Various models have been adopted in the United States, Ireland, Northern Ireland, England (Northumbria) and India.
28 See Royal Commission into Institutional Responses to Child Sexual Abuse, *Criminal Justice Report: Executive Summary and Parts I to II* (2017) 15; Victorian Law Reform Commission, *The Role of Victims of Crime in the Criminal Trial Process: Report* (2016) 30 ('*The Role of Victims of Crime in the Criminal Trial Process*').
29 *The Role of Victims of Crime in the Criminal Trial Process* (n 28) 30 [3.53]–[3.54].
30 *Hear Her Voice, Report Two* (n 13); Simon Bronitt and Philip Stenning, 'Understanding discretion in modern policing' (2011) 35 *Criminal Law Journal* 21, 31.
31 Ibid 137 citing Michael O'Connell (then Commissioner for Victims' Rights South Australia), Victims' Rights: Integrating victims in criminal proceedings (Speech, no date) <https://aija.org.au/wp-content/uploads/2017/08/OConnell2.pdf>.

- seeing the offender **denounced and held accountable** by having the sexual violence 'clearly condemned' and seeing those responsible face consequences for their actions; and
- being **treated with respect and supported** – including in the form of counselling and support during the court process.[32]

The ability of the Queensland criminal justice system to respond to the justice needs of victim survivors, including both the procedural justice and the substantive justice aspects, is critical to ensuring that victim survivors – and members of the community more broadly – are satisfied with both the sentencing process and sentencing outcomes.[33]

We also know that sexual offences are experienced at higher rates by some cohorts, including women and children of Aboriginal and Torres Strait Islander descent, or people from culturally and racially marginalised backgrounds, which must be considered within this context.[34]

The impacts of sexual offending may be exacerbated in certain settings, including the workplace, particularly where they intersect with other forms of disadvantage and discrimination, such as sexism, racism, ageism and ableism.[35] Sexual offending may also be less visible and less understood for some marginalised groups in the community.[36] For more information on these intersecting forms of disadvantage, see **Chapter 2**.

Recent inquiries have highlighted the experiences of victim survivors within the criminal justice system in Queensland, including:

- the 2021 WSJ Taskforce established to review Queensland's response to domestic and family violence (Report 1)[37] and the experience of women and girls within the criminal justice system (Report 2);[38]
- the 2022 Commission of Inquiry into Queensland Police Service ('QPS') responses to domestic and family violence;[39]
- the 2022 Commission of Inquiry into Forensic DNA testing in Queensland;[40] and

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32 Victorian Law Reform Commission, *Improving Justice System Response to Sexual Offences* (Report, September 2021) 29–32 ('*Improving the Justice System Response to Sexual Offences*').

33 For a summary of relevant research see Royal Commission into Institutional Responses to Child Sexual Abuse, *Consultation Paper: Criminal Justice* (November 2016) 4 citing the Commissioner for Victims' Rights, South Australia, Submission No. 65.

34 Natalie Taylor and Judy Putt, 'Adult sexual violence in Indigenous and culturally and linguistically diverse communities in Australia' (Trends and Issues in Crime and Criminal Justice, No 345, Australian Institute of Criminology, September 2007) 1, 2.

35 For more information on what is intersectionality, see Diversity Council Australia, *Culturally and Racially Marginalised Women in Leadership: A framework for (intersectional) organisational actions* (Factsheet, 2023) <https://www.dca.org.au/wp-content/uploads/2023/09/carm_women_infographic_intersectionality_explained_final.pdf>.

36 Australian Government, *National Plan to Reduce Violence Against Women and their Children 2022–2032* (October 2022) 41 ('*National Plan to Reduce Violence Against Women and their Children*') citing Victorian Government and The Equality Institute, *Family violence primary prevention: building a knowledge base and identifying gaps for all manifestations of family violence* (2017).

37 Women's Safety and Justice Taskforce, *Hear Her Voice – Report One: Addressing Coercive Control and Domestic and Family Violence in Queensland* (2021) ('*Hear Her Voice, Report One*').

38 *Hear Her Voice, Report Two* (n 27).

39 Commission of Inquiry into Queensland Police Service Responses to Domestic and Family Violence, *A Call for Change* (Final Report, 2022) ('*QPSDFV Inquiry - A Call for Change*').

40 Walter Sofronoff, *Commission of Inquiry into Forensic DNA testing in Queensland: Final Report* (2022).

- the 2023 Queensland Legal Affairs and Safety Committee inquiry into support provided to victims of crime.[41]

The Australian Law Reform Commission ('ALRC') has also conducted an inquiry into justice responses to sexual violence in Australia.[42] Of particular relevance to this review is that the ALRC's Terms of Reference require it to consider:

> c. Policies, practices, decision-making and oversight and accountability mechanisms for police and prosecutors
>
> d. Training and professional development for judges, police, and legal practitioners to enable trauma-informed and culturally safe justice responses
>
> e. Support and services available to people who have experienced sexual violence, from the period prior to reporting to the period after the conclusion of formal justice system processes.[43]

The ALRC invited victim survivors and members of the community to provide feedback about whether specialised training is required for judges and practitioners who conduct sexual offence cases and also asked specific questions about how to improve the sentencing process for victim survivors (including the victim impact statement process) and whether a national approach to sentencing practices and outcomes is required.[44]

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

13.2.3 Rights of victim survivors within the sentencing context

There has been increasing recognition of victims as 'integral players in criminal justice, rather than mere bystanders'.[45]

In Queensland, there have been various developments to the sources of recognised rights for victim survivors within the criminal justice context, including:

- the Charter of Victims' Rights ('Victims' Charter')[46] and the recent establishment of the Office of the Victims' Commissioner to address issues of concern for victims of crime;[47]
- the establishment of Victim Assist Queensland (VAQ);
- the statutory processes by which victim survivors may provide VISs to sentencing courts (discussed in **Chapter 14**), and written statements for consideration by the Parole Board of Queensland; and
- the introduction of measures to support special witnesses (which includes victim survivors of rape and sexual assault) when providing evidence in court proceedings.

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41 Legal Affairs and Safety Committee, *Inquiry into Support provided to Victims of Crime* (Report No. 48, Parliament of Queensland, 57th Parliament, May 2023).
42 Terms of Reference: Justice Responses to Sexual Violence, *Australian Law Reform Commission* (web page, 23 January 2024) <https://www.alrc.gov.au/inquiry/justice-responses-to-sexual-violence/terms-of-reference>.
43 Ibid.
44 Australian Law Reform Commission, *Justice Responses to Sexual Violence: Issues Paper* (Issues Paper 49, April 2024) Questions 33, 39–42. The ALRC received over 200 submissions in response to their consultation paper, which can be accessed at <https://www.alrc.gov.au/inquiry/justice-responses-to-sexual-violence/submissions/>.
45 O'Connell (n 31) cited in *Hear Her Voice, Report Two* (n 13), vol 1, 137.
46 Introduced under the *Victims of Crime Assistance and Other Legislation Amendment Act 2017* (Qld). It is now in *Victims' Commissioner and Sexual Violence Review Board Act 2024* (Qld) ch 3; sch 1.
47 *Victims' Commissioner and Sexual Violence Review Board Act 2024* (Qld).

Charter of Victims' Rights ('Victims' Charter')

The Victims' Charter[48] sets out the current principles in 'one easy to read document for victims'.[49] It reiterates the obligation for relevant agencies to provide information to victims proactively if appropriate and practical to do so. In 2024, the Victims' Charter moved from the *Victims of Crime Assistance Act 2009* (Qld) to the *Victims' Commissioner and Sexual Violence Review Board Act 2024* (Qld).[50]

Under the Victims' Charter, and the various Acts prior to it, victim survivors of rape and sexual assault must be kept informed of the progress of criminal proceedings (at both the investigation and prosecution stages) and must be treated with respect, courtesy, compassion and dignity throughout the criminal justice process.[51] The Victims' Charter confers upon victim survivors the right[52] to be provided with information pertaining to:

- the progress of a police investigation (unless this may jeopardise the investigation);
- major decisions made about the prosecution of an accused person, including the charges brought against the accused person (or a decision not to bring charges), any substantial changes to the charges, and the acceptance of a plea of guilty to a lesser or different charge;
- the name of the person charged;
- information about court processes including hearing dates and how to attend court, and the outcome of criminal court proceedings against the accused person, including the sentence imposed and the outcome of any appeal; and
- information about the trial process and the victim's role as a witness (if the victim is a witness at the accused's trial).[53]

The Victims' Charter outlines the right of a victim survivor to provide the court with a VIS. A VIS is a written statement made by a victim survivor about the harm caused to them by the offending.[54] The VIS regime is discussed in **Chapter 14**.

The Victims' Charter applies to a 'prescribed person'[55] dealing with an 'affected victim',[56] such as stakeholders involved in the justice process, including police, prosecutors, the courts, support services

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48 Prior to the introduction of the Victims' Charter, the *Criminal Offences Victims Act 1995* (Qld) was a compensation-based scheme for victims of crime which contained fundamental principles for justice of victims based on the *United Nations Declaration of Basic Principles of Justice for Victims of Crime and Abuse of Power: United Nations Declaration of Basic Principles of Justice for Victims of Crime and Abuse of Power*, UN Doc A/RES/40/34 (adopted 29 November 1985). The Act included a provision requiring 'fair and dignified treatment', 'access to justice', 'information about investigation and prosecution' and that 'the prosecutor should inform the sentencing court of appropriate details of the harm caused to a victim by the crime': *Criminal Offences Victims Act 1995* (Qld) ss 6, 7, 14(1), 15. In September 2009, the *Victims of Crime Assistance Act 2009* (Qld) replaced the *Criminal Offences Victims Act 1995* (Qld). In doing so, it maintained the fundamental principles for government agencies to comply with when providing a service to a victim of crime, and introduced a mechanism for a victim survivor to provide a VIS during sentencing: *Victims of Crime Assistance Act 2009* (Qld) ch 2 and s 15, when introduced by assent on 17 September 2009. In 2017, the fundamental principles were repealed and became a 'Charter of Victims' Rights'. This was introduced in response to a recommendation of the Queensland Government, *Final Report on the Review of the Victims of Crime Assistance Act 2009* (2015) rec 12 ('*Victims of Crime Assistance Act 2009 Final Report*').

49 *Victims of Crime Assistance Act 2009 Final Report* (n 48) 27.

50 *Victims' Commissioner and Sexual Violence Review Board Act 2024* (Qld) sch 1.

51 Ibid sch 1 pt 1 div 1, 1.

52 Albeit not a legally enforceable right: ibid s 43.

53 Ibid sch 1 pt 1, div 2.

54 *Penalties and Sentences Act 1992* (Qld) s 179I ('PSA').

55 *Victims' Commissioner and Sexual Violence Review Board Act 2024* (Qld) s 40: a government entity, non-government entity, an officer, member or employee of a government entity or non-government entity.

56 Ibid s 41(2). For a definition of 'affected victim; see s 38.

and agencies who are funded to provide a service to victims of crime. If these justice and support agencies do not uphold the rights conferred by the Victims' Charter, a victim survivor may make a complaint to either directly to the agency responsible, or to the commissioner.[57]

The rights stated in the Victims' Charter are not enforceable in legal proceedings, do not provide grounds for review of administrative decisions made in contravention thereof, and do not affect the operation of any other laws.[58]

As the prosecution service retains control of the criminal case, and victim survivors are not formal parties to a proceeding, their rights under the Victims' Charter to receive information and for there to be mechanism to inform a sentencing court of the harm they have experienced are critical to the victim survivor's experience of engaging with the sentencing process.

Although fundamental principles and the Victims' Charter have been established in aid of victims of crime, what we have been told in the course of this review indicates that victim survivors continue to experience dissatisfaction with the sentencing process and their lack of acknowledgment within it.

We note that the WSJ Taskforce recommended a review be undertaken of the Victims' Charter to 'consider whether additional rights should be recognised or if existing rights should be expanded.'[59] The Victims' Commissioner has since commenced this work.

Office of the Victims' Commissioner

The need for an independent Victims' Commissioner to promote and protect the needs and rights of victims of crime, and a sexual violence case review board to review sexual violence matters that are not prosecuted or are discontinued, was highlighted in three separate recent inquiries conducted by the WSJ Taskforce,[60] the Independent Commission of Inquiry into Queensland Police Service's Responses to Domestic and Family Violence[61] and the Legal Affairs and Safety Committee.[62]

On 9 May 2024, part of the *Victims' Commissioner and Sexual Violence Review Board Act 2024* (Qld) commenced,[63] establishing Queensland's first Victims' Commissioner,[64] as well as the Sexual Violence Review Board (to be chaired by the Victims' Commissioner).[65]

The Act provides that the role of the Victims' Commissioner is to:

- provide information about the criminal justice system in Queensland;

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57 Ibid ch 3, pt 3.
58 Ibid s 43.
59 *Hear Her Voice, Report Two* (n 13) vol 1, 139–40 rec 19.
60 Ibid recs 18–19, 46, 181. On 21 November 2022, the Queensland government supported 109 recommendations in full, 71 in-principle and noted 14 recommendations: Queensland Government, *Queensland Government Response to Hear Her Voice - Report Two - Women and Girls' Experiences Across the Criminal Justice System* (2022) (*'Response to Hear Her Voice, Report Two'*).
61 *QPSDFV Inquiry - A Call for Change* (n 39) 343, 345 rec 78. On 21 November 2022, the Queensland Government provided in-principle support for all of the recommendations, as well as a $100 million investment.
62 Legal Affairs and Safety Committee, Parliament of Queensland, *Inquiry into Support provided to Victims of Crime* (Report No. 48, 57th Parliament, May 2023) 8 . On 9 August 2023, the Queensland government provided in-principle support for all of the recommendations.
63 *Victims' Commissioner and Sexual Violence Review Board Act 2024* (Qld) ss 1–2 commenced on date of assent, chs 1 (other than ss 1–2, 3 (b)–(c)), 2 pts 1 (other than s 9 (a)–(b), (d)–(f), (h)), 2, ch 5 (other than ss 99–100, 101 (2)), ch 6 pts 1, 3, 5, sch 2 defs commenced 29 July 2024; ss 3 (b), 9 (a)–(b), (d)–(f), (h), ch 2 pts 3–5, ch 3, ss 99–100, 106, 107 (1) (to the extent it ins s 21AZB (2) (ba)), 108(1) (to the extent it ins s 93AA (2) (ba)), 109(1) (to the extent it ins s 103Q (2) (ba)), ch 6 pts 4, 6, schs 1, 2 defs 2 September 2024.
64 Ibid s 7.
65 Ibid ch 4; s 68(1). The Sexual Violence Review Board provisions have not yet been proclaimed into force.

- respond to complaints made by victim survivors surrounding on potential breaches of the Victims' Charter;
- conduct systemic reviews about matters affecting victims of crime;
- consult with victims of crime on matters relating to them;
- provide advice and recommendations to the Minister about things which can be done better to meet the needs of victim survivors;
- monitor the implementation of recommendations made by the Victims' Commissioner.[66]

The Sexual Violence Review Board will 'identify and review systemic issues in relation to the reporting, investigation and prosecution of sexual offences'.[67] This includes:

- reviewing policy, practices, procedures and systems to identify systemic issues;
- reviewing and analysing data and information;
- making recommendations to the Minister, government entities and non-government entities about improvements to policy, practices, procedures and systems arising out of a review; and
- monitoring the implementation of recommendations.[68]

Since her formal appointment as Queensland's first Victims' Commissioner, Ms Rebecca (Beck) O'Connor has served on our Council in a personal capacity.

13.3 Navigating the criminal sentencing process and hearings

13.3.1 Current sources of sentencing information for victim survivors of rape and sexual assault in Queensland

As a witness without formal standing, victim survivors are not separately represented by their own lawyers or advocates at a sentence hearing, so are entirely dependent upon justice and support agencies to provide them with sufficient information to understand and navigate the criminal sentencing process.

Victim survivors receive different sentencing information from various criminal justice agencies and formal victim survivor support services, depending on the type of offence perpetrated against them and whether the sentence proceeds in the lower or higher courts. However, some information is often only provided on request, which relies upon victim survivor's self-advocacy and understanding of what information can be requested.

A high-level overview of the different agencies and the information they provide is outlined below.

66 Ibid s 9.
67 Ibid s 62(1).
68 Ibid s 62(2).

Table 13.1: High level overview of information provided to victim survivors by agencies

Agency	Pre-sentence information	During & post-sentence information
QPS[69] Including investigative police and Police Prosecution Corps (PPC) officers	• Provides updates on the status of criminal proceedings.[70] • Refers a victim survivor to the ODPP Victim Support Service, Victim Assist Queensland or external support providers (for persons who are 'vulnerable, disabled or have cultural needs').[71] • Notifies a victim of their right to provide a VIS and refers them to a support advocacy service when they require further assistance.[72] • Acts as a liaison between the ODPP and the victim survivor.	• Transport to and from court proceedings (where no other option) and support at court (not mandatory). • Assistance with protection from unwanted contact with the offender when attending court proceedings.[73] • Notification of court outcome.
ODPP[74] Including Crown Prosecutors, Legal Officers, administrative staff and Victim Liaison Officers (VLOs)	• Protection of anonymity.[75] • 'If requested by the victim', details about: court processes; diversionary programs; amendment to charges; outcome of proceeding.[76] • Notifies a victim their VIS may be tendered at sentence (at the pre-trial conference).[77] • Referrals to victim support advocacy agencies.[78] • Offers an optional presentence hearing, where it is in the interests of justice and the victim.[79]	• Ensure victim survivors have all necessary protection from violence and intimidation by their offender or an associated person 'proceeding to court, at court and while leaving court'.[80] • Notification of sentence outcome (mandatory). • Post sentence conference with prosecutor (upon request).
Judicial officers	• Nil.	• Can receive a VIS.[81] • Nil requirement to acknowledge a victim survivor's presence (voluntary practice).
Court services	• Procedural updates.	• Provision of copies of transcripts from sentence hearing (on request only).[82]

69 Queensland Police Service, *Operational Procedures Manual* (Issue 102, October 2024) ('*QPS OPM*').
70 Ibid section 2.12.1, 115.
71 Ibid section 2.12.2–2.12.3, 119; 6.3.14 11–13.
72 Ibid section 3.7.10.
73 Office of the Director of Public Prosecutions, *Director's Guidelines* (30 June 2023) 35 [25](v) ('*ODPP Director's Guidelines*').
74 Ibid.
75 Ibid 31, 33 [25](i). Anonymity for victims of sex offences: 'In the initial contact, the victim must be told of the prohibition of publishing any particulars likely to identify the victim. The Court may permit some publication only if good and sufficient reason is shown. During criminal proceedings, the prosecutor should object to any application for publication unless the victim wants to be identified. In such a case, the prosecutor is to assist the complainant to apply for an order to allow publication.'
76 Ibid 33–4 [25](i). Note: 'Where it appears that a victim would be unlikely to comprehend a form letter without translation or explanation the letter may be directed via a person who can be entrusted to arrange for any necessary translation or explanation'.
77 Ibid 34 [25](iii).
78 Ibid 32–5 [25].
79 Ibid 35 [25](v).
80 Ibid 30 [25](i)(d).
81 PSA (n 54) s 179K;
82 *Recording of Evidence Act 1962* (Qld) s 5B(3)(b).

Agency	Pre-sentence information	During & post-sentence information
Queensland Corrective Services	• Nil.	• Information to eligible persons about key events relating to a person serving a period of imprisonment.[83]
Formal victim support agencies (discussed below)	• Emotional support and practical assistance with financial aid applications and VIS writing.	• Emotional support at court.

Queensland Police Service and Police Prosecution Corps

The QPS is responsible for investigating and charging all sexual offences in Queensland pursuant to the *Police Powers and Responsibilities Act 2000* (Qld), as well as prosecuting matters that resolve in the Magistrates Courts.[84] Interactions and communication between both the QPS investigating and prosecuting officers and victim survivors are guided by the *QPS Operational Procedures Manual*.[85] Within the sentencing context, all police officers are required to provide victim survivors with regular updates regarding the progress of the matter and any critical information relevant to the finalisation of the matter – including a sentencing outcome.[86]

Within the charging context, the investigating officer[87] acts as the main point of contact for victim survivors of criminal offences from the time of first complaint to the finalisation of the matter in the courts.[88] An arresting officer may assist a victim survivor by accompanying them to a sentence, particularly where the victim survivor feels unsafe attending alone or does not have another way to attend the proceeding. There is no ongoing duty to provide information post-sentence.

For matters prosecuted in the summary jurisdiction, the QPS Police Prosecution Corps ('PPC') will usually task the investigating officer to notify a victim survivor of any amendment to the charges.[89] PPC prosecutors often have limited interactions with victim survivors due to the high-volume of case files and fast-paced nature of criminal proceedings in the lower courts. This creates extra challenges for PPC prosecutors, who may not have sufficient time to speak with a victim survivor prior to sentence to notify them that the matter has resolved, or that they can attend the sentence and provide a VIS.

The Office of the Director of Public Prosecutions

Offences of rape and sexual assault finalised in the higher courts are prosecuted by the Office of the Director of Public Prosecutions ('ODPP').[90] The ODPP Victim Liaison Officer Service ('VLO') acts as the main

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83 See *Corrective Services Act 2006* (Qld) ch 6, pt 13, div 1.
84 *QPS OPM* (n 69) section 2.1, 7; section 2.6.3, 61–5; section 3.4.9, 16. On occasion, summary matters are prosecuted by the ODPP, but this is less common, and may only occur in some jurisdictions (such as in Brisbane).
85 Ibid section 2.12, 115.
86 Ibid 63 [(xv)]–[(xvii)].
87 An investigating officer (also known as an arresting officer) is the officer who initially made the arrest and investigated the offence.
88 A matter may be finalised through either the discontinuance of proceedings (through offering no evidence with respect to the charge/s in the Magistrates Court or entering a nolle prosequi to the charge/s on indictment) or by way of sentence (through either a finding of guilt at trial, or a plea of guilty to the charges before the court).
89 *QPS OPM* (n 69) section 3.4.4, 14–16. While the PPC officer must attempt to contact a victim survivor and the investigating officer about the decision to amend a charge or withdraw a charge, their views are 'not conclusive. It is the public, rather than the individual, interest which must be served': Ibid 15. Where it is not 'reasonably practical' to consult with either the investigating officer or the victim survivor, the PPC officer must record this.
90 *Director of Public Prosecutions Act 1984* (Qld) s 10.

point of contact (an administrative liaison role) for victim survivors when engaging with ODPP prosecutorial officers (including Crown Prosecutors and Legal Officers). In addition to their liaison role between prosecution staff and victim survivors, VLOs direct victim survivors to appropriate support services and counselling services. See section 13.3.2 for a further discussion of their role within this context.

Interactions between victim survivors and the ODPP are guided by a set of principles outlined in their *Director's Guidelines*.[91] These prescribe that the ODPP must provide victim survivors with updates regarding the progress of court proceedings, information about the trial or sentence process (including the right to provide a VIS), notification of court hearings and information surrounding any amendments to police charges.[92]

Prior to sentence (but post-conviction or a plea), an ODPP prosecutorial officer will contact a victim survivor and notify them of the sentence listing and to ask whether they would like to provide a VIS.[93] Information about the likely sentence outcome (including the type of penalty which may be imposed) may be provided on request, but will not usually be provided before a prosecutor has been allocated to appear on sentence and they have had the opportunity to form a view with respect to their submissions on sentence.

Where an offender is sentenced to a period of imprisonment, the ODPP (through the VLO) will also provide the victim survivor with information surrounding next steps, such as information about how to register to receive notifications from Queensland Corrective Services, including with respect to key events relating to a person serving a term of imprisonment.[94] While the operation of this register is not a sentencing issue, it may also impact a victim survivor's satisfaction with the sentence.

After providing this information, interactions between the prosecution service and the victim survivor will cease.

It is relevant to note that communication between prosecutorial agencies (including both the ODPP and PPC) and victim survivors is strictly limited to the provision of information, rather than therapeutic or emotional support. While the prosecution owes duties to victim survivors and will often endeavour to progress their rights and justice needs (as outlined above), they have an overriding duty to the court and to the administration of justice. The *Criminal Code* outlines that it is 'a fundamental obligation of the prosecution to ensure criminal proceedings are conducted fairly with the single aim of determining and establishing truth'.[95] Where there is any inconsistency, their overriding duty to the state will prevail.

The role of the ODPP is to represent the interests of the state in a criminal prosecution against the person who has been charged. The prosecutor must consider and decide what details of the harm should be given to the sentencing court, taking into account the wishes of the victim.[96] .

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91 *ODPP Director's Guidelines* (n 73) guidelines 22, 25.
92 Ibid.
93 Ibid guideline 25 for information for victims generally, specifically guideline 25(e)(iii).
94 For more information about VLOs and victim opinion survey results see Office of the Director of Public Prosecutions, *Annual Report 2022-23* (2024) 37–8.
95 *Criminal Code Act 1899* (Qld) sch 1 s 590AB ('*Criminal Code* (Qld)').
96 PSA (n 54) s 179K(3)–(4).

Judicial officers and the sentencing court

In Queensland's adversarial system of justice, sentencing proceedings centre around the prosecution of the person being sentenced. The sentencing process is complicated and requires a judicial officer to assess the severity of the offending in all the circumstances, including balancing the mitigating and aggravating features of the case.

In doing so, the sentencing judge will hear submissions from the prosecution service and legal representatives for the offender before stating the sentence outcome and outlining their sentencing reasons. In determining the appropriate sentence, the sentencing judge will assess any harm caused to victim survivors by the offending, which is often conveyed through the facts of the offending and the provision of a VIS.

Judicial officers in Queensland provide their sentencing reasons on an ex-tempore basis; they will often make a finding and provide their reasons immediately after hearing the submissions on sentence. The importance of language in conveying the gravity of the offending at sentence for sexual assault and rape offences is explored in **Chapter 15**, section 15.4.

As victim survivors are not parties to proceedings, there is no positive requirement for a judicial officer to address them directly during a sentence.[97] For this reason, victim survivors' interactions with the sentencing judge are limited.

A judicial officer may refer to a VIS (if provided) and the harm caused to them, and can adopt a practice of addressing the victim survivor directly if they are in the courtroom. However, there are no prescribed requirements to do so. Ultimately, the degree of communication between a victim survivor and the sentencing judge will depend on that judicial officer's own usual course of practice.

This issue is further discussed in **Chapter 14**.

13.3.2 Support services for victim survivors of rape and sexual assault

The criminal sentencing process is often an emotionally charged environment for victim survivors of rape and sexual assault, who are at risk of retraumatisation when preparing for, or attending, the sentencing of the person who offended against them. This experience may be compounded in circumstances where a victim survivor wishes to attend the sentence and/or to provide a VIS, which results in them 'reliving' the traumatic experience.[98]

Support navigating the criminal sentencing process

VLOs provide timely information to victim survivors about the prosecution of the offender, the court process and their roles within this context.[99] They also refer victim survivors to support agencies, including:[100]

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97 While there is no positive requirement, it is best practice for a judicial officer to acknowledge the victim and to: 'In appropriate cases, consider directing remarks towards the victim, maintaining appropriate eye contact and thanking the victim for their participation.': Judicial College of Victoria, *Victims of Crime in the Courtroom: A Guide for Judicial Officers* (August 2023) 8.

98 NSW Sentencing Council, *Victims' Involvement in Sentencing* (Report, 2018) 29 [3.1].

99 Office of the Director of Public Prosecutions, *Annual Report 2022–23* (2023) 37.

100 Ibid.

- Victims Assist Queensland ('VAQ'), which provides support to victims of crime in Queensland by linking them with funded support services and assisting with financial aid applications. While VAQ previously provided to support to victims of crime when writing their VIS, this is now provided through their funded supported services.[101] The VAQ Victim Coordination Program also provides victim survivors in South Brisbane, Cairns, Rockhampton and Townsville with information about the court process and some assistance writing a VIS and help applying for financial assistance with VAQ; it can also refer victims to a specialist agency that can provide practical court support.[102]
- Protect All Children Today ('PACT'), a government-funded organisation that provides impartial and empathetic court support for victims of crime through the provision of information, support throughout the course of court proceedings, help applying for financial assistance with Victim Assist Queensland, writing a VIS and applying for the Queensland Corrective Services Victims' Register.[103] PACT can also refer victim survivors to other support providers and agencies. While this is a professional service, it relies strongly upon PACT volunteers.
- VictimConnect, provides victim survivors with 24 hour support for victim survivors of crime, including multi-session counselling, information surrounding court processes, assistance when applying for financial aid through VAQ, education surrounding the rights of victim survivors and support navigating court processes (including support writing a VIS).[104] VictimConnect can also help to direct victim survivors to more specialised support services that may better meet their needs.
- Sexual Assault Helpline, which is a statewide service which provides daily counselling support (between 7:30am and 11:30pm) to all victim survivors who have experienced sexual offending, as well as for people who support them.[105] Victim survivors who have been impacted by the forensic testing investigation in Queensland can also access this support (including victim survivors of rape and sexual assault who have been impacted).[106]

Queensland also has a network of non-government services funded to provide specialist sexual assault counselling, support and prevention programs throughout Queensland to specific cohorts, including:

- Murrigunyah, which is a community-based sexual assault support service for Aboriginal and Torres Strait Islander men, women and families;[107]
- Working with People with Intellectual and Learning Disabilities ('WWiLD'), which supports people with intellectual or learning disabilities who have experienced or at risk of experiencing sexual violence or other crimes or exploitation;[108]
- The Immigrant Women's Support Service, a specialist domestic violence and sexual assault service that provides direct support to women and their children from non-English-speaking backgrounds who have experienced domestic and/or sexual violence;[109]

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101 Victims Assist Queensland can be contacted by email at victimassist@justice.qld.gov.au or on 1300 546 587.
102 Ibid.
103 PACT can be contacted through its website, or on 1800 449 632.
104 VictimConnect can be contacted through their website, or on 1300 318 940.
105 The Sexual Assault Helpline is available on 1800 010 120.
106 'Sexual Assault Helpline', *DVConnect* (web page, 2024) <https://www.dvconnect.org/sexual-assault-helpline/>. Also 1800RESPECT can be contacted for domestic family and sexual violence counselling services: 1800 737 732.
107 'Who We Are', *Murrigunyah Family & Cultural Healing Centre* (web page) < https://www.murrigunyah.org.au/about-us >.
108 WWILD can be contacted through their website or by telephone on (07) 3262 9877.
109 'Our Services', *Immigrant Women's Support Service* (web page) <https://iwss.org.au/our-services/>.

- Zig Zag Young Women's Resource Centre Inc, which provides services to young women, trans and gender-diverse young people aged 12–25 years and the wider community, including counselling and support those aged 12–25 years who have experienced sexual assault.[110]
- 54 Reasons (formerly Save the Children), which provides trauma-informed support to young victims of violent crimes and to males aged 14 years and over who have been victims of sexual violence offending.[111]

QSAN is also a state-wide network of services that provide specialist support to victim survivors of sexual assault, as well as access to prevention programs across Queensland.[112] QSAN also publishes a directory of relevant support services on their website to assist those impacted by sexual assault, rape or sexual violence.[113]

A Victims of Crime Community Response ('VOCCR') pilot was also established in 2023 to deliver immediate, 24 hour a day, seven days a week support to victim survivors after experiencing an interpersonal violent crime.[114] This includes the provision of basic necessities (food, clothing etc), accommodation and other assistance within the first 72 hours of the incident.[115]

The VOCCR pilot is administered by VAQ in partnership with VictimConnect. [116] The pilot program currently operates in Logan, Cairns and Townsville, and will be extended to include 2 more locations.[117]

Navigating the support service system to find the right support services can be challenging for victim survivors, as multiple agencies can provide support to victims of crime, but offer different services and support.

What do other jurisdictions do?

Some jurisdictions in Australia have established centralised gateways for victim survivors to access. For example, the Victorian and NSW websites both provide information specifically designed for victims of crime surrounding the court process, ways to access support and how to access help writing a VIS.[118] This information is available from one, easy-to-navigate platform.

By hosting information about the criminal justice process, including sentencing, on the same platform, victim survivors in other Australian jurisdictions are able to easily access this information without having to contact multiple agencies/organisations to find the right support.

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110 *Zig Zag Young Women's Resource Centre* (web page) <https://zigzag.org.au>.
111 54 Reasons can be contacted through their website or by telephone on 1800 760 011.
112 'About Us', *Queensland Sexual Assault Network* (web page) <https://qsan.org.au/about>.
113 'Other Support Services', *Queensland Sexual Assault Network* (web page) <https://qsan.org.au/services/>.
114 Department of Justice and Attorney-General, *Government Response to Review to Improve the Efficiency and Timeliness of the Delivery of Support to Victims* (Response Brief, 2024) <https://www.publications.qld.gov.au/ckan-publications-attachments-prod/resources/770581e4-e25b-4c9e-bfa4-0e34e00d1ce7/government-response-to-the-review-of-the-financial-assistance-scheme.pdf?ETag=1d385c4faefbe27101b218e3f4bdd682>.
115 Ibid.
116 Ibid.
117 Ibid. For information on the pilot expanding, see The Office of the Victims' Commissioner, 'Beck's Experience', *About the Victims' Commissioner* (web page, 2024) <https://www.victimscommissioner.qld.gov.au/about/the-victims-commissioner>.
118 See State Government of Victoria, *Victims of Crime* (web page, 5 September 2024) <https://www.victimsofcrime.vic.gov.au/>; *New South Wales Government, Victims Services* (web page, 2024) <https://victimsservices.justice.nsw.gov.au/>.

Financial support attending sentence

As discussed in section 13.2.1, a victim survivor is not a participant or a party in a sentencing proceeding. This means their presence at a sentence is usually not required for it to proceed.

Usually, if a witness is required to attend court and give evidence at a hearing under a summons or subpoena, they may be reimbursed for expenses such as travel, meals, accommodation and loss of earnings.[119] The party requiring their attendance is usually responsible for covering this cost, which for a victim survivor would be the prosecuting authority.[120] Payment for expenses usually applies to hearings or a trial and not a sentence.

Under the *Victims of Crime Assistance Act 2009* (Qld), a 'primary victim of an act of violence may be granted assistance of up to $120,000' as well as up to $500 for legal costs associated with applying to VAQ for financial assistance.[121] However, this cap is usually not reached by most victim survivors, unless significant medical expenses are incurred.[122]

The Act lists the components a victim may claim, including 'reasonable counselling expenses',[123] 'reasonable medical expenses incurred',[124] 'reasonable incidental travel expenses'[125] and, 'if exceptional circumstances exist for the victim, loss of earnings up to $20,000 suffered'.[126] However, loss of earnings will only be compensated for up to 2 years after the act of violence was committed, which presents challenges where there are delays with the prosecution of a matter. When referring to the Guidelines, VAQ may pay for loss of earnings where there is confirmation from QPS or Queensland Courts that the victim attended court.[127] It is unclear whether this is for a sentence hearing. There is no mention of paying for travel expenses to attend court in the guideline for financial assistance for travel expenses.[128]

Additional 'special assistance' is prescribed for particular categories of offences, including $15,000 for rape and repeated sexual assault offences (defined as 'Category A' circumstances).[129]

VAQ will often provide financial support to pay or reimburse the expenses incurred for a victim who chooses to attend a sentence hearing for accommodation or travel where it can be demonstrated the cost is directly related to the act of violence and will assist the victim's recovery, and where this is not

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119 See, for example, Commonwealth Director of Public Prosecutions, 'Guide to claiming witness expenses' (23 January 2017) <https://victimsandwitnesses.cdpp.gov.au/system/files/downloads/0237_was-guide-to-claiming_and_claim-form_v8_2_1.pdf>. See also, Office of the Work Health and Safety Prosecutor, 'Guide to claiming witness expenses' (2021) <https://www.owhsp.qld.gov.au/sites/default/files/2021-04/witness-expenses-claim-form.pdf>.

120 'Being ordered to go to court as a witness', *Legal Aid Queensland* (web page, 13 April 2023) <https://www.legalaid.qld.gov.au/Find-legal-information/Criminal-justice/Being-a-witness/Being-ordered-to-go-to-court-as-a-witness#:~:text=you%20didn't.-,Get%20legal%20advice,provide%20you%20with%20legal%20advice.>.

121 *Victims of Crime Assistance Act 2009* (Qld) s 38.

122 See Department of Justice and Attorney-General (Qld), *Final Report on the review of the Victims of Crime Assistance Act* (December 2015) 11. At the time of the report, the total average grant of financial assistance per victim is $7,970. The report noted 'Maximum amounts for victims are rarely reached in any category except for funeral assistance', noting only 5 matters where the maximum limit of $75,000 (or close to) has been granted: Ibid 11. See also secondary victims: ibid 15.

123 Ibid s 39(a).

124 Ibid s 39(b).

125 Ibid s 39(c).

126 Ibid s 39(e).

127 Victims Assistance Unit, *Guideline 7, Granting Financial Assistance for Loss of Earning* (Guidelines, 1 September 2013) <https://www.publications.qld.gov.au/dataset/victim-assist-queensland-guidelines/resource/1e7118ea-2597-49aa-a0fd-bdc72f0bc16e#:~:text=Loss%20of%20earnings%20amounts%20to,of%20the%20act%20of%20violence>.

128 Victims Assistance Unit, *Guideline 4: Granting Financial Assistance for Travel Expenses*, (Guidelines, 1 December 2009) <https://www.publications.qld.gov.au/dataset/victim-assist-queensland-guidelines/resource/c376c940-5804-4476-adea-7144bb5a2f91>.

129 *Victims of Crime Assistance Act 2009* (Qld) sch 2, ss 1–4.

provided by the QPS or ODPP.[130] During consultation, we were told by one victim survivor who lived interstate that she was reimbursed for one court attendance by VAQ, but had attended court on the other 2 occasions at her own expense.[131]

What do other jurisdictions do?

From our review of other jurisdictions in Australia, we have found that, similar to Queensland, there is information for a victim to claim expenses when required to attend court under a summons or subpoena, but we have not found information for a victim to claim expenses if they choose to attend a sentence hearing. For example, in Victoria, the Director of Public Prosecutions website has information on claiming expenses when attending court under a summons or subpoena but does not mention attending a sentence.[132] There is a similar scheme to Queensland where victims of violent crime can be assisted under the Financial Assistance Scheme, but this does not mention attending court.[133]

Similarly, in New South Wales a witness may be entitled to claim expenses when they go to go court to give evidence, including an attendance allowance and childcare costs.[134] The Director of Public Prosecutions in New South Wales ('NSW ODPP') publishes information on its website that 'Witness expenses are not paid for attending a sentencing hearing.' However, the NSW ODPP will consider providing support in limited circumstances. [135]

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, noting:

> The importance of attending the sentencing hearing was also linked to a desire for inclusion in the criminal justice process following earlier experiences of exclusion and marginalisation from the process, which stem from their role as a witness in the case. However, not all who wanted to be present at the sentencing hearing were able to attend … practical difficulties such as childcare, transportation and work commitments meant that they were unable to attend. Difficulties in being able to travel to the hearing were compounded by changes to sentencing locations at short notice and a lack of support with the travel costs to attend.[136]

The Scottish Sentencing Council reported it was told by victim survivors that the 'lack of support to attend the sentencing hearing revealed victim-survivors' perceptions that they were superfluous to the process once they have given their evidence'.[137] They were told of victim-survivors requesting to attend the sentence remotely, such as via a live feed, but this was denied; however, the offender was able to appear via video-link.[138]

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130 See Queensland Government, *Claim other recovery expenses*(web page, 20 November 2023) <https://www.qld.gov.au/law/crime-and-police/victims-and-witnesses-of-crime/financial-assistance/types-of-claims/claiming-recovery-expenses/claim-other-exceptional-circumstance-expenses#travel_expenses>.
131 Victim Survivor Interview 2.
132 Office of the Director of Public Prosecutions (Victoria), 'Claiming Witness Expenses', *Going to Court* (web page) <https://www.opp.vic.gov.au/victims-witnesses/going-to-court/#claiming-witness-expenses>.
133 Victoria State Government, 'Financial Assistance Scheme Guidelines', *Victims of Crime* (Guidelines, 15 October 2024) <https://www.victimsofcrime.vic.gov.au/financial-assistance-scheme-guidelines>.
134 Office of the Director of Public Prosecutions (New South Wales), 'Witness entitlements and claims', *Victims and Witnesses* (web page) <https://www.odpp.nsw.gov.au/victims-witnesses/support-services-victims-and-witnesses/witness-entitlements-and-claims>.
135 Ibid.
136 Scottish Sentencing Council, *Victim-Survivor Views and Experiences of Sentencing for Rape and Other Sexual Offences* (Report, 2024) 16–17 ('*Victim-Survivor Views*').
137 Ibid 17.
138 Ibid 18.

One of the Scottish Sentencing Council's recommendations was for victim-survivors' right 'to claim reasonable expenses if they attend court to give evidence should be extended to sexual offence victim-survivors attending sentencing hearings'.[139]

Additional support services for Aboriginal and Torres Strait Islander victim-survivors

In Queensland, the Queensland Indigenous Family Violence Legal Services Aboriginal Corporation (QIFVLS) 'fills a gap in [providing] access to culturally appropriate legal and wrap around support services for Aboriginal and Torres Strait Islander victim-survivors of family and domestic violence and sexual assault.'[140]

In its preliminary submission to this review, QIFVLS noted the findings of the Call for Change report that 'inadequate access to legal representation and assistance is more prevalent in regional and remote communities' and considered this compounded 'the systemic disadvantages faced by Aboriginal and Torres Strait Islander peoples who live in these communities', who are both victims and defendants.[141]

Specialised support available in Townsville: Sexual Assault Response Team

The Sexual Assault Response Team ('SART') was established in July 2016 to provide an integrated response for victims of sexual violence in Townsville. SART has been described as a 'multi-disciplinary, inter-agency group of professionals', and comprises social workers from the Sexual Assault Support Service, detectives from the Sexual Crimes Unit, nurse examiners from the Clinical Forensic Medicine Unit, Allied Health Staff from the Townsville Hospital and Health Service and representatives from the Townsville ODPP.[142]

The specialist team operates from the Women's Centre in Townsville and provides holistic support and guidance to victims of sexual violence as they navigate the criminal justice system from the point of first contact until finalisation.[143] This includes support leading up to, and attending, sentence hearings.[144] This model ensures that victim survivors are supported by a consistent person (where possible) from the reporting stage until sentence.

The SART model was developed to be victim centric and to promote a trauma- and violence-informed framework to represent a best practice response to sexual violence.[145] The SART model is currently not available in other parts of Queensland.[146]

An evaluation of the original pilot of the SART in Townsville reported various positive findings, including with respect to the experience of victim survivors who engaged with the model. However, various

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139 Ibid 48.
140 Preliminary Submission (10) (Queensland Indigenous Family Violence Legal Services Aboriginal Corporation), 1.
141 Ibid 6 citing *QPSDFV Inquiry - A Call for Change* (n 61). Similar findings were noted in Australian Institute of Health and Welfare, *Alcohol and other drug use in regional; and remote Australia: consumption, harms, and access to treatment 2016-17* (Report 2019).
142 Sexual Assault Response Team: Townsville Region (Brochure 2018) <https://www.thewomenscentre.org.au/wp-content/uploads/2019/08/SART-Agency-Brochure-2018.pdf>; Office of the Director of Public Prosecutions, *Annual Report* (2022–23) (2024) 39 ('*ODPP Annual Report*').
143 *Hear Her Voice, Report Two* (n 27) vol 1, 103 103 citing Meeting with Cairns Sexual Assault Network, 20 April 2022, Cairns.
144 Ibid.
145 *ODPP Annual Report 2022–23* (n 142) 39.
146 *Hear Her Voice, Report Two* (n 27) vol 1, 119.

limitations were identified, including challenges associated with transferring matters between jurisdictions and difficulties sustaining 24-hour outreach.[147]

In its report, the WSJ Taskforce described the SART model as an 'excellent example' of how services can work together to provide integrated support services which better meet the needs of victim survivors.[148] However, it recognised challenges with delivery due to there being limited sexual assault service providers across Queensland.[149]

The WSJ Taskforce subsequently recommended that the Queensland Government develop a victim centric, trauma-informed service model that provides a sustainable, accessible and integrated response to sexual violence,[150] informed by the SART in additional locations across Queensland.[151]

13.4 Delays within the sentencing context

Delays within the context of the criminal prosecution have been recognised as anti-therapeutic for victim survivors, with negative implications for their satisfaction with the process more broadly.

Consistent with these findings, we were told that the investigation and prosecution of rape and sexual offences to their finalisation in the higher courts can be a long and protracted experience for victim survivors.[152] To better understand this issue within the sentencing context, we analysed cases of rape (MSO) and sexual assault (MSO) to determine the length of time between conviction and sentence.[153]

Our research also indicates that, for offences of rape (MSO) and sexual assault (MSO) that resolve in a plea of guilty, a victim survivor will usually wait 280 days (approximately 9.2 months) or 250 days (approximately 8.2 months) respectively from the time of committal until a guilty plea is entered.[154] Where the matter is contested (less than one-third of all prosecutions for rape offences and 15.5% of sexual assault offences), that length of time increases to 413 days (approximately 13.6 months) and 331 days (approximately 10.9 months) for offences of rape (MSO) and sexual assault (MSO) respectively.[155]

However, for matters finalised in the higher courts, the time between either a plea of guilty or a conviction after trial and the sentence itself is negligible:

147 Ibid vol 1, 103.
148 Ibid vol 1, 128.
149 Ibid.
150 Ibid rec 11.
151 *Response to Hear Her Voice, Report Two* (n 60) 11, rec 11.
152 Victim survivors told us the approximate number of years it took for their matter to be finalised through the courts: 2–3 years (Victim survivor interview 1); 6.5 years (Victim survivor interview 2); unknown – finalised through restorative justice (Victim survivor interview 3); status of the prosecution was unknown (Victim Survivor Interview 5); an unknown number of years (Victim survivor interview 6); 2 years (Victim Survivor Interview 7); 'a couple of years' (Victim Survivor Support Workers Interview - Group 1); 'years' (Victim Survivor Support Workers Interview - Group 3, 1).
153 We note these findings rely upon the availability of court data and the accuracy of the data at the time of input. We further note that these timeframes do not include the length of time a victim survivor may wait while the charges are investigated, a prosecution brief of evidence prepared, and a legal representative appointed while the matter is in the lower courts..
154 These figures represent the median. See Appendix 4, Figure A8: Median number of days between criminal justice system events for guilty pleas to rape (MSO) sentenced, 2005–06 to 2022–23; Figure 6: Median number of days between criminal justice system events for guilty pleas to sexual assault (MSO) sentenced in the higher courts, 2005–06 to 2022–23.
155 These figures represent the median. See Appendix 4, Figure A9: Median number of days between criminal justice system events for not guilty pleas to rape (MSO) sentenced, 2005–06 to 2022–23; Figure 8: Median number of days between criminal justice system events for not guilty pleas to sexual assault (MSO) sentenced in the higher courts, 2005–06 to 2022–23.

- For offences of rape (MSO), the sentence will usually proceed on the day the plea of guilty is entered, or 5 days after a finding of guilt at trial.
- For offences of sexual assault (MSO), the sentence will usually either proceed on the same day as the plea of guilty is entered, or 2 days after a finding of guilt after trial.

For sexual assault matters (MSO) that resolve in the lower court, a victim survivor will usually wait 11 days for a guilty plea to be entered (from the time of 'lodgement'), with sentences usually proceeding on the same day.[156]

This suggests that delays within the sentencing context specifically were not a significant issue for victim survivors of rape and sexual assault, recognising that this issue persists across the broader investigation and prosecution process and there may be other implications for victim survivors, such as relating to the preparation of a VIS.

13.5 Reforms underway in Queensland to improve the sentence hearing experience for victim survivors

13.5.1 WSJ Taskforce Recommendations

Victim survivor advocacy service

The role of a victim survivor within the criminal justice system in Queensland has recently been considered by the Women's Safety and Justice Taskforce ('WSJ Taskforce'), which was told by victim survivors that they did not understand why they were not afforded standing, 'particularly as the person who has had their bodily integrity violated'.[157]

Recommendations were subsequently made for the Queensland Government to develop, fund and implement a statewide model for the delivery of a professional victim advocate service in consultation with people with lived experience, Aboriginal and Torres Strait Islander peoples and service and legal system stakeholders.[158] Within this model, it was recommended that: 'Victim advocates will provide individualised, culturally safe, trauma-informed support to victims of sexual violence to help them navigate through the service and criminal justice systems and beyond.'[159] Their role will include providing impartial information, rights and needs-based support, liaison and consistency to empower those experiencing sexual violence.[160]

There was a previous Government commitment to consult with the recommended parties to 'develop and pilot the most appropriate statewide professional victim advocate service for Queensland' to ensure a victim-centred and trauma-informed service model for victim survivors of sexual violence.[161] These advocates are intended to serve as a 'consistent point of contact for victim survivors throughout their

156 These figures represent the median. See Appendix 4, Figure A10: Median number of days between criminal justice system events for guilty pleas to sexual assault (MSO) sentenced in the lower courts, 2005–06 to 2022–23.
157 *Hear Her Voice, Report Two* (n 13) 54.
158 Ibid, rec 9.
159 Ibid.
160 Ibid.
161 *Response to Hear Her Voice, Report Two* (n 60) 7–8, 11.

criminal justice system journey' and to liaise with criminal justice entities on behalf of victim survivors,[162] with access to this service to be across the state.[163]

There has also been a commitment to 'strengthen access for First Nations women and girls in implementing statewide initiatives such as victim advocacy services and through legislative and policy reforms', as well as ensuring that 'community legal services are trained in working with victim-survivors of sexual violence, including best practice in working with First Nations women and girls', with a review of 'the Murri Court model through gender-responsive and culturally safe practices.'[164]

The proposed evaluation of this pilot was suggested to involve consideration of whether there is a need for funded legal representation for victim survivors of sexual violence during criminal justice processes.

The current Queensland Government has committed to designing and delivering 'a professional victim advocacy service for victims of crime in Queensland, in consultation with key stakeholders and victims to ensure it is practical and makes a real difference'.[165]

The concept of a victims 'advocate' is discussed in **Chapter 16**. The functions of this service can include:

- acting as an entry point to the justice system;
- supporting victim survivors to understand and exercise their rights;
- helping victim survivors navigate support services, compensation, recovery and justice options, including by through accompanying them to court proceedings;
- being experts in their jurisdiction's victims' rights charter and acting to advocate to ensure a victim survivor's charter rights are upheld.[166]

Trauma-informed practices and procedures

Additional recommendations made by the WSJ Taskforce include:

- **Recommendation 13:** 'The Queensland Government embed a trauma-informed system of safe pathways for victim survivors of sexual violence across the sexual assault and criminal justice systems'.
- **Recommendation 45**: The ODPP and QPS 'review, update and publish the memorandum of understanding relating to the investigation and prosecution of sexual violence cases.'
- **Recommendations 69–74:** establishing a specialist list for sexual violence cases in the District Court of Queensland, and review this to improve efficiency and timeliness for finalisation in accordance with trauma-informed principles and approaches. A sexual violence case management process has recently commenced in the District Court at Brisbane.[167]

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162 *Hear Her Voice, Report Two* (n 13).
163 *Response to Hear Her Voice, Report Two* (n 60) 7.
164 Ibid.
165 Charter Letter from the Honourable David Crisafulli MP, to the Honourable Laura Gerber MP, 8 November 2024, 3 <https://cabinet.qld.gov.au/ministers-portfolios/assets/charter-letter/laura-gerber.pdf> ('*November 2024 Charter Letter from Crisafulli to Gerber*').
166 Respect Victoria, Submission to the Australian Law Reform Commission, *Inquiry into Justice Responses to Sexual Violence*, (June 2024) 18, citing Sexual Assault Services Victoria, Justice Navigator Stakeholder Brief (Brief, 2024).
167 See District Court of Queensland, Sexual Violence Case Management (Practice Direction 3 of 2024, 19 July 2024) <https://www.courts.qld.gov.au/__data/assets/pdf_file/0009/805878/dc-pd-03-of-2024.pdf>

- **Recommendation 95:** The QPS develop a gender-responsive and trauma-informed approach for responding to women and girls in the criminal justice system.[168]

Cultural considerations

In its response to the WSJ Taskforce, recommendations, the former Queensland Government agreed to

> place victim-survivors at the centre of models of response, giving them a strong voice by removing barriers to reporting. We will work with people with lived experience, including First Nations women and girls, service and legal system stakeholders to deliver greater advocacy for victims and trial a victim-centred, trauma informed service model to respond to sexual violence.[169]

It further committed to working with First Nations communities to uplift cultural capability in the service system, as well as reviewing translation/interpretation services used by the QPS. Various reforms are being progressed, including:

- **Recommendations 5 and 96:** QPS is developing initiatives focussed on improving its cultural capability, as well as its ability to respond to sexual violence cases.
- **Recommendation 6:** Improving the translation and interpretation services it uses for First Nations peoples.
- **Recommendation 9:** Developing an appropriate professional victim advocate service for Queensland in consultation with people with lived experience, Aboriginal and Torres Strait Islander peoples and service and legal system stakeholders.
- **Recommendation 51:** Developing and implementing a cultural capability plan with the ODPP in partnership with First Nations peoples.
- **Recommendation 95:** To develop and implement a gender-responsive and trauma-informed approach for responding to women and girls in the CJS. Note: Implementation of this recommendation will be considered further as part of Government's response to the Independent Commission of Inquiry into Queensland Police Service responses to domestic and family violence, so that findings can be appropriately incorporated.
- **Recommendation 121:** Undertaking a contemporary review and strengthening the Murri Court model, including through gender-responsive and culturally-safe practices.
- **Recommendation 126:** Amending section 9(2)(p) to clarify that cultural considerations include the impact of systemic disadvantage and intergenerational trauma on the offender.
- **Recommendation 141:** Delivering a whole-of-government strategy for women and girls to increase rehabilitation opportunities, promote cultural, familial and social connections, and address their general health and well-being, physical and medical support needs while in custody.[170]

The current Queensland Government has signalled its commitment to promoting the rights of victim survivors, including through the establishment of a working group with victims of domestic, family and

168 *Hear Her Voice, Report Two* (n 27).
169 *Response to Hear Her Voice, Report Two* (n 60) 7.
170 Ibid 10–11, 21, 30–1, 38–9, 43.

sexual violence to highlight gaps in the system and opportunities for future reform as part of its 'The First 100 Days' plan.[171]

As part of its youth justice system reforms, the government is proposing to make changes to the *Youth Justice Act 2006* (Qld) to require a court in sentencing a child for an offence to have primary regard to any impact of the offence on a victim, including in the form of a VIS.[172]

Improved engagement between police and victim survivors

Previous reports in Queensland have recognised a need for improved communication practices and processes between the QPS and victim survivors of crime. The WSJ Taskforce recommended clarifying the roles and responsibilities of police Sexual Violence Liaison Officers.[173]

The QPS Sexual Violence Response Strategy 2023-2025 sought to enhance police responses to victim survivors of sexual violence across Queensland.[174] The Strategy outlines actions that seek to promote a 'victim-centric, trauma-informed sexual violence response', as aligned with recent reforms at both the national and state level, including Queensland's Sexual Violence Prevention Action Plan 2023–2027 and the WSJ Taskforce's Report 2.[175] These include actions to promote cultural change and provide victim-centric and trauma-informed training of frontline officers, ensuring victim survivors are kept informed about the criminal justice system and the role of QPS. [176]

The Strategy recognises the lifelong impacts of sexual violence offending and seeks to improve law enforcement practices to ensure they are 'appropriate, effective and supportive through victim-centric and trauma-informed practices'.

To support this, the Queensland Government established the Fast Track Sentencing Pilot ('the pilot') to investigate and identify causes of administrative court delays and, where possible, reduce and address this delay to ensure timely finalisation of matters before the Childrens Court.[177]

As part of the pilot, the QPS received funding for one AO5 Victim Engagement Officer (VEO) in each of the pilot locations to better support victims who suffer personal harm because of youth offending, victim survivors of domestic and family violence perpetrated by young people, or family members of a person who died as a result of youth offending. [178] The VEOs, who are embedded within QPS Prosecution Services:

- update victims with the status and outcome of the relevant Childrens Court prosecution;
- explain the court process and procedures;
- provide a point of liaison between the victim, the prosecutor and the arresting officer;
- refer victims to relevant support agencies, such as Victim Assist QLD;
- provide the victim with a voice in the prosecution process by facilitating the provision of VISs; and

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171 'The First 100 Days: The Right Plan for Queensland's Future', *Liberal National Party Queensland* (web page) <https://online.lnp.org.au/first-one-hundred-days>.
172 Making Queensland Safer Bill 2024 (Qld) cl 15.
173 *Hear Her Voice, Report Two* (n 27) rec 29.
174 Queensland Police Service, *Sexual Violence Response Strategy 2023-2025* (July 2023) 5.
175 Ibid 5–6.
176 Ibid 12–16.
177 The pilot, led by the Department of Justice, operates in Brisbane, Southport, Cairns, and Townsville Childrens Court (Magistrates Court level) and commenced on 1 March 2023: Childrens Court of Queensland, *Annual Report 2022–23* (2023) 2 [6]. The pilot was to run for an initial period of 18 months and has now been extended until 30 June 2025.
178 Email from Executive Director, Legal Division, QPS to Queensland Sentencing Advisory Council, 5 July 2024.

- keep the arresting officer updated with respect to victim interactions.[179]

Interactions between police officers and victim survivors end with the finalisation of criminal proceedings. While many officers will continue to engage with a victim survivor post-sentence on a voluntary basis, they are unable to continue to support victims in any ongoing, official capacity once the QPS file is closed.

The pilot will continue until 30 June 2025.

13.5.2 Queensland Government commitment

The Queensland Government has made a commitment under its Right Plan for Queensland's Future to ensuring that 'victims of crime from across Queensland are appropriately and proactively supported', [180] and are at all times always treated with 'the utmost support and humanity.'[181]

Relevant key deliverables include a commitment to:

> • Deliver a justice system for Queensland that prioritises the rights of victims, is efficient, fair and makes our community safer.
>
> • Boost the capacity of Queensland justice services to ensure victims' cases are heard sooner.
>
> • Provide support and increased transparency for victims of crime as they navigate the justice system.
>
> • Reopen the Childrens Court effectively to victims, their families and media to restore transparency to our justice system. ...
>
> • Work to deliver outstanding recommendations with government support from inquiries and reviews including the Criminal Procedure Review — Magistrates Courts, Women's Safety and Justice Taskforce, review of the *Public Interest Disclosures Act 2010*, and Keeping Queensland's Children more than Safe: Review of the Blue Card System. ...
>
> • Work cooperatively with the Minister for Families, Seniors and Disability Services and Minister for Child Safety and the Prevention of Domestic and Family Violence and the Federal Government, to implement outstanding recommendations from the Royal Commission into Institutional Responses to Child Sexual Abuse.
>
> • Work with the Minister for Families, Seniors and Disability Services and Minister for Child Safety and the Prevention of Domestic and Family Violence and other relevant Ministers, to progress implementation of recommendations from the Royal Commission into Violence, Abuse, Neglect and Exploitation of People with Disability and the National Disability Insurance Scheme Review.[182]

In addition, '[d]esign and deliver a professional victim advocacy service for victims of crime in Queensland, in consultation with key stakeholders and victims to ensure it is practical and makes a real difference.'[183]

13.5.3 National Work Plan to strengthen Criminal Justice Responses to Sexual Assault

Under the Meeting of Attorneys-General's Work Plan to Strengthen Criminal Justice Responses to Sexual Assault 2022–2027 (Work Plan) all Australian jurisdictions have agreed to take collective and individual action to improve the experiences of victim survivors of sexual assault in the criminal justice system. The Work Plan is focused on improving justice outcomes and reducing the retraumatisation of victim survivors

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179 Ibid.
180 *November 2024 Charter Letter from Crisafulli to Gerber* (n 165) 2.
181 Ibid. Charter Letter from the Honourable David Crisafulli MP, to the Honourable Deb Frecklington MP, 8 November 2024 2 <https://cabinet.qld.gov.au/ministers-portfolios/assets/charter-letter/deb-frecklington.pdf>. ('*November 2024 Charter Letter from Crisafulli to Frecklington*').
182 *November 2024 Charter Letter from Crisafulli to Frecklington* (n 181) 2–3.
183 *November 2024 Charter Letter from Crisafulli to Gerber* (n 165) 3.

of sexual assault across Australia. The Work Plan is being considered within the context of various national, state and territory sexual and domestic violence agendas, including the Queensland WSJ Taskforce report, *Hear Her Voice – Report Two*.[184]

As a part of the Work Plan, the Australasian Institute of Judicial Administration and the Commonwealth Attorney-General's Department commissioned the *Specialist Approaches to Managing Sexual Assault Proceedings: An Integrative Review*.[185] Any outcomes or actions arising from this work will likely impact the future experiences of victim survivors in Queensland.

13.6 Stakeholder views

13.6.1 Lack of confidence in the criminal justice system (including sentencing) and attrition

Our consultation revealed a lack of confidence in the criminal justice system's ability to reliably deliver justice for victim survivors. We were told that, from a victim survivor perspective, there is a widespread lack of confidence in the criminal justice process – including with respect to investigation and prosecution decisions – and outcomes, contributing to high attrition rates in proceedings for these offences.

As summarised by Angela Lynch AM, Executive Officer and Chair of the National Women's Safety Alliance Sexual Violence Working Group, at the Brisbane roundtable consultation event:

> In many ways a sentencing experience for a victim survivor is an extension of the entire criminal justice system approach, or how they feel about the whole approach. Despite the crime being inflicted on their body, attacking their sense of self, and many believing they were in danger of losing their life, and their own body being the 'crime scene', they are mere witnesses to the case and their needs and rights can be easily forgotten in a large system that has minimal focus on them.[186]

Submissions from victim survivor support and advocacy stakeholders and justice reform and advocacy bodies

We were told that the criminal justice system is 'failing to meet the needs of most victim survivors'.[187] For example, Fighters Against Child Abuse Australia ('FACAA') reflected that it had 'not heard a single respondent say that they even think we have a justice system. Most said we have a legal system at best and some said we don't even have that.'[188] FACAA further reflected that the criminal justice system is often retraumatising for victim survivors and raised concerns that there is no justice for them at the end, particularly when they 'see their perpetrator receive a slap on the wrist instead of a decent custodial sentence'.[189]

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184 *Hear Her Voice, Report Two* (n 27). Plans and reports of other reviews include: *National Plan to Reduce Violence Against Women and their* (n 36); National Summit on Women's Safety, Statement from Delegates – 2021 National Summit on Women's Safety (Report, 2021); Kate Fitz-Gibbon et al, National Plan *Victim Survivor Advocates Consultation Report* (Report, 2022); ACT Government, *Listen. Take Action to Prevent, Believe and Heal Report* (Sexual Assault Prevention and Response Program Steering Committee Final Report, 2022) ('*Listen, Take Action Report*'); New South Wales Law Reform Commission, *Consent in Relation to Sexual Offences* (2020); *'Improving the Justice System Response to Sexual Offences*' (n 32); WA Office of the Commissioner for Victims of Crime (OCVOC) and Department of Communities, *Sexual Violence Prevention and Response Strategy* (1 August 2023).

185 Amanda-Jane George et al, *Specialist Approaches to Managing Sexual Assault Proceedings* (August 2023).

186 Angela Lynch AM, presentation at Brisbane Consultation Event, 11 March 2024.

187 Submission 32 (Sisters Inside) 3. See also Submission 24 (QSAN) 3; Submission 15 (Fighters against child abuse Australia) 5–6.

188 Submission 15 (Fighters against child abuse Australia) 6.

189 Submission 15 (Fighters against child abuse Australia) 7.

Various submissions attributed the low reporting rates and high attrition for sexual offences to a lack of confidence in the justice system, particularly where sentence outcomes are not perceived to reflect the seriousness of the offending and the harm caused to victim survivors, as well as concerns that victim survivors will not be believed.[190] For example, the Queensland Network of Alcohol and Other Drug Agencies ('QNADA') said victim survivors of sexual violence offences are often seen as less credible by criminal justice stakeholders – particularly where they have a history of illicit substance abuse – and are consequently more reluctant to report offences.[191] Similarly, Sisters Inside raised additional barriers for victim survivors who had previously been convicted of an offence:

> Criminalised women are not considered to be victim-survivors: they are not believed to be good witnesses; their claims are not believed by police; their matters are not progressed by prosecution; and when their matters are progressed negotiations are made and lesser charges are plead to. This systemic disregard discourages criminalised women from reporting assaults.[192]

QSAN stated that '[m]any Aboriginal and Torres Strait Islander women have no confidence in formal processes and have concerns about the inherent racism and misogyny', indicating the 'systemic failure' of the criminal justice system.[193] QSAN noted that it is 'damning of a system that a system set up to provide justice and accountability for all, is too risky and culturally unsafe for Aboriginal and Torres Strait Islander women to use'.[194] It was also noted that these 'issues are exacerbated in small communities and regional towns where everyone knows, despite the anonymity of the process, who is involved. Of course, some victim survivors will withdraw from the process because of the intimidation.'[195]

Victim survivor support advocate views

Similar views were expressed by victim support advocates in group interviews with us. We were told the criminal justice system, and the sentencing process more specifically, can be retraumatising for victim survivors. Some reflected that they feel like they are 'leading lambs to slaughter' when they first meet with a victim survivor to discuss their options and whether they want to proceed with a criminal complaint.[196] One victim advocate reflected:

> Even the women that I have supported who have had a positive outcome from this, a number of them have been re-offended against. They have not gone through the system [again]. I haven't spoken to a single woman who said, 'I would do this again'. (Victim Support Advocate Interview 1)

Various support advocates reflected that it is their role to provide victim survivors with sufficient information to make an informed decision about whether they would like to proceed with the criminal justice process and to ensure that they are 'not blindsided by anything'. [197] In doing so, the victim support advocates reflected that 'you won't ever catch me here calling it a justice system … I will constantly refer to it as a legal process.'[198]

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190 See discussion in Chapter 7. See Preliminary submission 23 (Full Stop Australia) 2–3; Submission 13 (Justice Reform Initiative) 2 [4]; Preliminary submission 6 (Brisbane Rape & Incest Survivors Support Centre) 1, 3–4; Submission 25 (Respect Inc and Scarlet Alliance) 2; Submission 17 (QNADA) 3.
191 Submission 17 (QNADA) 3.
192 Preliminary submission 28 (Sisters Inside) 2.
193 Submission 24 (QSAN) 4.
194 Ibid.
195 Ibid 6–7.
196 Victim Support Advocate Interview 3.
197 Victim Support Advocate Interview 1.
198 Ibid.

Another victim support advocate expressed their view that the sentence and the trial process more broadly are 'deeply flawed'.[199] The advocate considered that victim survivors are not treated appropriately, and that, rather than the offender, the 'state is taking [the victim] to court. She's just a file number … evidence, a witness … and she's treated as such.'[200]

Individual submissions

One victim survivor told us that when she was sexually assaulted in public and reported the matter to police, they asked whether she was wearing any underwear and told her that 'this would change the outcome of the investigation'.[201] While not specific to sentencing, the victim survivor felt she was not taken seriously; nor were appropriate steps taken to investigate the assault.[202]

Submissions from legal stakeholders

In its preliminary submission, the Women's Legal Service Queensland ('WLSQ') expressed the view that Queensland's current criminal justice system does not protect victim survivors of sexual violence, hold offenders to account or meet community standards.[203]

In their submission, TASC (Advocacy Service) recognised that attending to the rights and needs of victim survivors of rape is vital:

> The challenge is in finding ways to meet these rights and needs, and the rights and needs of the community, while providing a sentence to offenders which ensures that the harmful impacts of punishment and attempts at denunciation do not negatively impact pathways towards rehabilitation – the aspect of sentencing with the most potential to better both individuals and society.[204]

13.6.2 Sentencing procedures and processes should be more trauma informed

Submissions

QSAN stated that the criminal justice process is 'horrendous' for victim survivors.[205] Delay was raised as a key concern, with QSAN noting that a 'victim survivor's stability and confidence, understandably, can deteriorate through constant delays and adjournments.'[206] It further described victim survivors as being 'ancillary' to the sentencing process:

> At least in the trial and pre-trial the victim survivor has utility as a witness to the system, whilst this role is concluded by the time of sentencing. Arguably this lack of utility means victim-survivors is even less visible, as sentencing is principally focussed on the offender.
>
> For victim-survivors to engage more fully, the [sentencing] process needs to be much more victim centric, and trauma informed.[207]

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199 Ibid.
200 Ibid.
201 Preliminary submission 27 (Name Withheld) 3 [14].
202 Ibid.
203 Preliminary submission 21 (Women's Legal Service Queensland) 1.
204 Submission 22, Chapter 2 (TASC Legal and Social Justice Services) 9 citing D Brown 'The limited benefit of prison in controlling crime' (2010) 22(1) *Current Issues in Criminal Justice* 137; D Johns 'Confronting the disabling effects of imprisonment' (2018) 45(1) *Social Justice* 27.
205 Submission 24 (QSAN) 6.
206 Ibid 6.
207 Ibid 3–4.

QSAN advocated for reforms to 'bring the victim-survivor and their needs much more into view at the time of sentencing', as well as for their rights to be promoted through this process.[208] It expressed concerns that there is 'no organisation tasked with prioritising or advocating to protect them in the broader system.'[209]

DVConnect outlined that many victim survivors describe Queensland's criminal justice system – including the sentencing process – as 'the second trauma'.[210] It stated that '[t]he rights of victim survivors are repeatedly and substantially undermined by both the person who offended against them and the criminal justice system',[211] noting that that 'more words are spent outlining the protection of rights of a person who is being charged and detained as an accused and/or defendant than any other right. Victim/survivors feel this in real life.'[212]

FACAA recommended that

> judges should get the specific training of listening to rape and sexual abuse survivors tell their stories and traumas … We believe if judges had more empathy for victim-survivors by hearing the trauma they have endured and continue to endure, then they could hand out sentences' society would deem appropriate and that would leave victim-survivors with a sense of justice and safety.[213]

The Your Reference Ain't Relevant Campaign expressed their view that victim survivors 'should not have to choose between their own well-being and the pursuit of justice'.[214]

The Justice Reform Initiative ('JRI') commented that a contested sentence hearing process that may involve the 'robust cross-examination' of a victim survivor is a 'core aspect of the adversarial criminal justice process and an important right for an accused person', but noted that this experience can be 'deeply traumatic' for victim survivors of violent offences.[215]

The Queensland Mental Health Commission ('QMHC') recognised the importance of '[c]reating an effective trauma-informed court and sentencing system in relation to sexual violence and rape offences':[216]

> A trauma-informed system places the potential needs and wellbeing of victim survivors at its core. This approach involves providing choice, control, and respect throughout the legal process. Operational policies, procedures, and processes that facilitate clear and effective communication, ethical handling of cases, fully informed consent, and consideration of the person's comfort and safety are ways to reduce the potential for retraumatisation because of court processes.
>
> Ongoing training focused on understanding trauma is required for all professionals involved in court proceedings and operations including judges, legal representatives, and court personnel. Training should be identified and tailored to the needs of the audience. For example, specialist training may be required for judges; however, all staff should be required to have a minimum level of 'trauma awareness'.[217]

The QMHC suggested system wide reforms to improve the sentence experience for victim survivors of rape and sexual assault, including:

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208 Ibid 5.
209 Ibid 3.
210 Preliminary submission 11 (DV Connect) 4.
211 Submission 20 (DV Connect) 4 (emphasis removed).
212 Ibid 5 (emphasis removed).
213 Submission 15 (Fighters Against Child Abuse Australia) 8–9.
214 Submission 14 (Your Reference Ain't Relevant Campaign) 2.
215 Submission 13 (Justice Reform Initiative) 1 [2].
216 Submission 29 (Queensland Mental Health Commission) 1.
217 Ibid 1–2.

- enhancements to the availability of victim survivor advocacy and support services 'from the point of contact through to the conclusion of the legal process with options provided for referral and ongoing support';
- promotion of enhanced restorative justice options (discussed in **Chapter 16**);
- increased flexibility within sentencing practices to better consider the 'victim survivor's needs and wishes';
- enhanced privacy and confidentiality for victim survivors, particularly for young people;
- the development of a 'trauma-informed court and sentencing system' that 'responds to sexual violence and rape offences [which] requires a shift from traditional methods to those that prioritise healing respect and justice for victim survivors'.[218]

The Royal Australian and New Zealand College of Psychiatrists ('RANZCP') indicated that it is becoming 'increasingly concerned about patient-psychiatrist confidentiality being undermined by the use of subpoenas to gain access to clinical records' to potentially 'cast unwarranted doubts upon the credibility and character of victims'.[219] It described confidentiality as being 'necessary to encourage victims to both seek counselling and report a crime' and reflected that the therapeutic purpose of counselling is being undermined where leave is granted to subpoena protected counselling notes, and for these to be disclosed.[220]

Views of victim survivors

Consultation with victim survivors

We were told by a victim survivor about their experience in the courtroom:

> [I felt like I was] shoved in a corner. (Victim Survivor Interview 1)
>
> I felt like we were the ones being sentenced, not him [the offender], because it was … just always directed at him … it was quickly mentioned that it has done harm to [name withheld] and her family, but … it was just mainly focused on how he's trying to fix his life, not really acknowledging how it has changed our life forever. (Victim Survivor Interview 1 – Parent)
>
> Because you have this thing in your head that you think justice is going to be served and then when you don't get what you think that he should have got, and then you think, okay, so the only other thing I can do to get closure is face this person and make him sit there and listen. No matter if he doesn't take it in, but he still has to sit there and listen to what we have to say. (Victim Survivor Interview 1)

Although the prosecutor told the judge they were there, the victim survivor did not consider that the judge looked at, acknowledged or interacted with them in any way.[221]

The victim survivor told us that having to sit in the same courtroom as the offender and their families was a challenging experience:

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218 Ibid 2.
219 Submission 33 (Royal Australian and New Zealand College of Psychiatrists) 2.
220 Ibid. We note in Queensland sexual assault counselling privilege applies and access is restricted. This process is prescribed by Part 2, Div 2A of the *Evidence Act 1977* (Qld).
221 Victim Survivor Interview 1.

> And just seeing his family looking at us and staring at us like we were the bad people … the worst part is too, like … that courtroom session ended, he walked back to his family and his lawyer sat there going, 'Mate, you've got to be happy with this. This is really good.' We're right there. So that was just devastating. And his family staring at us like, that was terrible. It's almost better if you'd have been in a different room but watching it on a screen or something. Or if you were there but not having to confront them or they had to watch it from somewhere else, I suppose. I reckon maybe they should have had to not be in there and stare at us like we were the ones ruining his life. Because otherwise you're putting the victims away. (Victim Survivor Interview 1)

Another victim survivor told us about the lack of promotion by the prosecution service of alternative ways to attend the sentencing hearing:

> So it was almost like, if you're not going to be in person, you won't hear it, or you won't, there's no other option … It was only based on prompting that kind of made that [attending by video link] happen. (Victim Survivor Interview 4)

Another victim survivor told us about the lack of financial support for attending the sentencing hearing:

> I flew up there, but at my own expense. So, that is another big downfall is that as victims, we, like I paid to travel up there three times for this. I got paid back once for everything. The other two times I lost my wages. I had to pay for my own food. Victims Assist paid for my flights and my accommodation but everything else was at my own expense and I missed a lot of time off work. I'm just lucky my company is so understanding. (Victim Survivor Interview 2)

However, one victim survivor said that they felt 'very' supported throughout the sentencing process and that all justice stakeholders were very respectful - acknowledging the strong support they received from the prosecutor and their support person.[222]

Consultation with victim survivor support advocates

Support advocates noted that the sentence hearing is an offender-centric process and that 'survivors of that process were definitely not out front and centre … they were a little side note to everything.'[223] Another support advocate reflected that they need to prepare victim survivors for what to expect from the sentence hearing, as 'it is victim expectation versus legal reality. They're on two spheres and they don't overlap very much.'[224]

Victim support advocates considered that attending the sentence itself can be retraumatising, including the layout of the courtroom. For example, some courthouses (particularly in regional areas) are not designed so victim survivors can enter the courthouse or wait comfortably for the hearing to commence without a risk of coming into contact with their offender or their family and friends. One victim support advocate reflected that they and the victim survivor they were supporting were 'kept in a storeroom', which was not a positive or victim-centric experience.[225] Some support advocates suggested that there could be a requirement for the offender's family and friends, rather than the victim survivor, to be in another room.[226]

222 Ibid.
223 Victim Support Advocate Interview 1.
224 Victim Support Advocate Interview 3.
225 Ibid.
226 Victim Support Advocate Interview 1.

Victim support advocates heard from victim survivors that they wanted to attend the sentence but were discouraged from doing so by the ODPP.[227] They felt attendance should be the victim survivor's own choice.[228]

SME interviews

Some participants told us there are opportunities to improve the sentence experience for victim survivors to ensure it is more trauma-informed, including ensuring:

- all courthouses (including those in rural, regional and remote areas) are equipped to allow victim survivors to enter the courtroom without fear of seeing their offender;[229]
- the prosecution proactively notifies victim survivors of the option to attend a sentence remotely when it is in their interests to do so, or where they live overseas, but where they wish to participate in the sentence hearing;[230]
- all legal practitioners and judicial officers have a deeper understanding of the true impacts of these offences;[231] and
- the privacy of the victim survivor is protected, and that practitioners are sensitive to this need.[232]

However, one participant considered that, despite reforms, victim survivors will likely never gain a sense of resolution from this process.[233]

Another participant expressed their view that it could be retraumatising for victim survivors to hear the offence facts repeated during sentencing remarks.[234] This may be why some judicial officers avoid restating the facts out of sensitivity to the needs of victim survivors.[235]

Consultation events

Participants commented that the criminal justice process is not victim centric and is very dehumanising, particularly in its language.[236] For example, it was noted that the 'victim's body is the crime scene', and that the language used to refer to them objectifies their body or reduces them to a sexual act, rather than recognising them as an individual.[237]

Other issues raised with respect victim survivor satisfaction with the sentencing hearing include the collegiate relationship between prosecutors and defence practitioners, which can be 'upsetting' for some victim survivors.[238]

Victim advocates told us making the sentencing processes more trauma-informed would be important for victim survivors, as some reflected that procedural justice (including through recognition) is more

227 Victim Support Advocate Interview 3.
228 Ibid.
229 SME Interview 19.
230 Ibid.
231 SME Interview 12.
232 SME Interview 5.
233 SME Interview 20.
234 SME Interview 5.
235 Ibid.
236 Brisbane Consultation Event, 11 March 2024; Cairns Consultation Event, 21 March 2024.
237 Brisbane Consultation Event, 11 March 2024.
238 Cairns Consultation Event, 21 March 2024.

important than the sentence outcome.[239] It was noted that if victim survivors feel validated and heard, they may not rely solely upon the outcome of the proceeding for satisfaction.[240]

Suggestions for improving the criminal justice process included:

- redesigning the courtroom setting and layout to ensure victim survivors feel comfortable and safe, with options to not be in the same room as the offender;[241]
- enhanced training for all legal stakeholders surrounding trauma-informed practices in the sentencing process, including with respect to the language and tone used in communicating sentencing submissions and remarks.[242]

Victim advocates supported the establishment of specialist sexual violence courts in Queensland (discussed in section 13.3.4) where justice professionals are specifically equipped to understand the nuance of sexual violence offending and the impacts on victim survivors (including recognising that a resilient victim can still have suffered serious harm), as well as adhering to concepts of 'swift and certain justice' for victim survivors.[243]

13.6.3 Communication and support for victim survivors and understanding of the process

Submissions from victim survivor support and advocacy stakeholders

The Salvation Army Australia noted that there is a lack of 'intentional communication' with victim survivors (particularly victim survivors of family violence), which causes additional anxiety.[244]

We were told by the NQWLS that it has received regular feedback from victim survivors that they do not often attend the sentence hearing because they were not informed of the sentence date – particularly in the lower courts.[245] Similarly, Respect Inc and Scarlet Alliance reported that this issue is also prevalent for cases involving sex worker victim survivors, who report that they are often not 'informed that the case was to be heard (particularly in the Magistrates Court)'. Both the NQWLS and Respect Inc and Scarlet Alliance described victim survivors as being 'locked out of sentencing processes' when this occurs.[246]

With respect to prosecutorial decision-making, Sisters Inside stated that the position and views of victim survivors are not considered throughout the criminal justice process – including at sentence – and recommended that greater regard be had to the 'autonomy and wishes of the victim-survivors' in deciding how sentences proceed.[247]

The NQWLS also recognised that those victim survivors who do attend the sentence often have no, or limited, knowledge of the sentencing process or the likely outcome.[248] It was acknowledged that it can

239 Brisbane Consultation Event, 11 March 2024..
240 Ibid.
241 Ibid.
242 Online Consultation Event, 16 April 2024.
243 Brisbane Consultation Event, 11 March 2024.
244 Preliminary submission 14 (The Salvation Army Australia) 9 [1.17].
245 Preliminary submission 20 (North Queensland Women's Legal Service) 4.
246 Ibid; Submission 25 (Respect Inc and Scarlet Alliance) 4.
247 Preliminary submission 28 (Sisters Inside) 2.
248 Preliminary submission 20 (North Queensland Women's Legal Service) 4.

be beneficial for a victim survivor to attend a sentence and receive validation of their experiences from the judicial officer.[249]

Views of victim survivors

Consultation with victim survivors

Information and communication with prosecution services about the sentence process, outcome and charges

Victim survivors expressed mixed views about whether they were satisfied with the information and communication with prosecution services. Most victim survivors agreed that they had a limited understanding of the sentencing process before experiencing it, but that 'nothing prepares you for that kind of thing'.[250]

One victim survivor reported a positive experience and considered that they were supported very well by both the ODPP and in court, as well as by police, throughout the process.[251]

Another told us her experience engaging with police investigators was positive, as the arresting officer stayed in regular communication with her, which was beneficial and that this support 'every step of the way affirmed my trust in the Queensland legal system'.[252] However, while the prosecutor 'did his best', she did not have much communication with the prosecution service.[253]

One victim survivor told us they received a telephone call from the prosecutor about a week prior to sentence, and that they were happy with the information they received – including with respect to the likely sentence outcome.[254] However, the victim survivor's support person noted that there had been a seven-week gap between notification of sentence from the VLO and the telephone call with the prosecutor, which was described as a 'big gap of information'.[255] Despite this, the victim survivors did not understand the role of the prosecution service, referring to the prosecutor as 'my lawyer'.[256]

Another victim survivor thought that in some areas she felt as if she had enough information, while in others she did not feel sufficiently prepared.[257]

In contrast, another victim survivor said she was not provided with sufficient information prior to sentence to prepare her for the process, or the likely sentence outcome:

> Like, no one bothered to sit us down and say, this is what's going to happen, this is what he could possibly get … I've done so much research, because no one ever bothered to tell us that here's the consequences of what he could, you know, could he go to jail, could he get probation, could he get this. So we're walking into a courtroom, basically having no idea what the outcome's going to be. (Victim Survivor Interview 1)

In considering what reforms are needed, the victim survivor noted:

249 Ibid.
250 Victim Survivor Interview 6.
251 Ibid.
252 Submission 35 (Name Withheld; Victim Survivor Interview 7) 3.
253 Victim Survivor Interview 7.
254 Victim Survivor Interview 4.
255 Ibid – Support person.
256 Victim Survivor Interview 4.
257 Victim Survivor Interview 6.

> Well, we should have been treated with more dignity and respect. I think maybe there should have been more communication. And more focus on the victim … We've never broke the law. We don't know how the system works. They should have sat us down. And when we first got there, the second time, it was like, come on, let's go, let's go, let's go. This is what could happen right now. There's a chance he's walking away and that's it. Everyone's going to be unhappy. They're just like, come on in, come on in. You just sit there in your head guessing over and over because you don't know the law. You don't know what the consequences are. I think they need to have way more communication with the victims. And try and understand how they feel and how they can make it easier for the victims. At the end of the day, it just felt like they're just doing their job. And that's it. (VS Interview 1)

Where the charges were changed before the sentence, one victim survivor said they were not told the reasons for the change, which made it feel like a 'guessing game' and 'left us with so many more questions'.[258]

Another victim survivor told us they were not told the factual basis for the sentence.[259] As a consequence, they were surprised by some of the facts read out in court.[260]

Another victim survivor with whom we spoke told us that her communication with both the investigating police and police prosecution service had been 'so unsatisfactory' that she did not know whether the matter had been finalised or not.[261] She told us that, despite making a complaint of serious sexual violence offending to police, the matter had not progressed and she was not kept informed.[262]

Information and communication from prosecution services about victim rights and referrals to support services

We were told there are 'not enough supports out there', and it is the responsibility of the victim survivor to find and reach out to support services rather than being referred to them automatically, which a victim survivor was dissatisfied with, as they are constantly reliving and reminded of the offence:

> You're left on your own after those appointments [with police]. You just, you're left with everything that you've just talked about and experienced, and then it's like, "okay, bye." Like, it's not enough support. Mentally, that's really, it messes you up. It does a lot of things to your head because you're reliving it over and over again. And the more detectives and the more lawyers and things that you see, you've got to replay it over and over again. And it's really hard. (Victim Survivor Interview 5)

> [I] was having to reach out [to] organisations for support, instead of, oh, here, there's all the numbers, or we can do referrals for you, or something like that. (Victim Survivor Interview 5)

They considered that accessing support services would be even more challenging for victim survivors who did not speak English very well.[263]

Another victim survivor thought police should be more proactive in assisting victim survivors to get help. While they were provided with pamphlets for formal support services, neither the police nor the prosecution service encouraged the victim survivor to engage with counselling services.[264]

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258 Victim Survivor Interview 1. See section 10.3 of our Consultation Paper for a discussion of the charge resolution process, and the obligations held by the prosecution service to consult with victim survivors on the resolution of any charges.
259 Victim Survivor Interview 1.
260 Ibid.
261 Victim Survivor Interview 5.
262 Ibid.
263 Ibid.
264 Victim Survivor Interview 1.

When we asked victim survivors with whom we consulted, all said they were not told about the Victims' Charter or provided with a copy by any of the justice agencies they engaged with.[265]

Experiences with external support services

Some victim survivors indicated that they were supported at the sentence hearing by either a member of their family, friends or a dedicated support person.[266]

Another victim survivor told us about the benefits of external support services:

> ... they [the Women's Centre] care. That's the main thing. And they walked us through the whole process. Every step of the way, one of them was with us on the phone or, you know, through everything. If we didn't know something, they would help us find out. You know, it was a whole holistic help through the process. I don't even know what happens in places where we don't have a centre like this. I don't know where you would go. I was still so fortunate that we did, that I was living in Townsville at the time and had access to that ... I feel, for those people who wouldn't have that as an option, because that's probably where a lot of, you know, this falls by the wayside and doesn't get reported ... (Victim Survivor Interview 3)

Another victim survivor also reported a positive experience with a support agency, describing VAQ as 'angels of strength and support through the challenges of experiencing a criminal trial as a victim'.[267] She reflected that they 'provided a safe space ... for me to sit out of the courtroom where I wouldn't have to be confronted by the perpetrator'.[268] She said each step of the process was adequately explained, which gave her a sense of safety and comfort.[269] Within this context, she reflected that she did not receive much information from the public prosecutor regarding this process.[270]

Not all victim survivors reported positive experiences with all support services they had contact with. One told us a service provider did not get back to her after saying they would make referrals and another only had limited contact with the agency.[271]

Consultation events

Participants noted that the degree of information varies depending on whether the matter proceeds in the lower or higher courts: victim survivors in the higher courts are provided with 'some support' by the ODPP (specifically, 'just keeping people up to date with the process, but not much else'), while noting that 'this does not happen' for lower court matters prosecuted by the police prosecution service.[272]

We were told communication could be given in more trauma-informed ways to recognise that the criminal justice process for a victim survivor is 'scary' and 'unknown'.[273] It was noted that 'sometimes [prosecution services] expect people who have been traumatised to remember information', which they may not.[274] There were concerns that prosecutor agencies that do not act in a trauma-informed way may inadvertently add to a victim survivor's trauma.[275]

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265 Victim Survivor Interview 3.
266 Victim Survivor Interview 6.
267 Submission 35 (C Murphy) 3.
268 Victim Survivor Interview 7.
269 Ibid.
270 Ibid.
271 Victim Survivor Interview 5; Victim Survivor Interview 1.
272 Brisbane Consultation Event, 11 March 2024.
273 Ibid.
274 Ibid. This was also mentioned in Victim Survivor Support Workers Interview - Group 3.
275 Cairns Consultation Event, 21 March 2024.

Participants reflected that victim survivors need to be provided with more knowledge, including about their rights, how to make complaints, consultations and the type of sentence that could be imposed.[276] This may enhance self-determination and autonomy for victim survivors, as well as reducing feelings of re-victimisation at the conclusion of proceedings.[277]

It was recognised that resourcing is required to enhance interactions with victim survivors, not only for prosecution services but also for support agencies.[278] Victim support services should be provided with sufficient information to explain sentencing processes and outcomes for victim survivors.[279] One participant noted the [then interim] Victims' Commissioner was raising awareness about the rights of victim survivors, as well as options and support services available to them.[280] However, support agencies should not have the sole responsibility for communicating with the victim:

> [W]e're not legal people. We've certainly had a lot of experience in supporting people in court, but we've made sure that they know about those things. Because they might not have heard it from anyone else. So I think that would be something that, you know, that needs to, yes, it's an option, but who's got the responsibility for putting that option before the victim? [281]

Several participants strongly felt that victims need a representative or an advocate during the court and sentencing process.[282] Support for the implementation of a statewide victim advocate service (as a recommendation of recommendation 9 of the WSJ Taskforce) was provided.[283] Participants recommended that this service should be separate from police and prosecutors, recognising their overriding duty to the state and the courts. [284]

Therapy and treatment options were considered to be important for victim survivor healing. Suggestions were made for victim survivors to engage with a psychologist during their first contact with the criminal justice system (at the time of reporting the offence).[285]

One participant suggested that at the sentencing hearing, after the sentence is imposed on the offender, the judicial officer could make an order for the victim survivor to be able to attend a government-funded support service for counselling and support.[286] This suggestion was supported by other participants, who agreed that it recognises the victim survivor at the sentence, provides them with the opportunity to access support and in this way recognises the harm caused.[287] It was suggested this order should not be limited to a sentencing hearing but be available at any point in the proceedings, even where the matter does not result in a conviction.[288]

Participants from the Brisbane event noted that victim survivors are prevented from engaging in some therapy techniques, such as EMDR, as this is classified as an 'altered thought pattern'.[289] However,

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276 Brisbane Consultation Event, 11 March 2024.
277 Brisbane Consultation Event, 11 March 2024.
278 Ibid.
279 Ibid.
280 Ibid.
281 Victim Survivor Support Workers Interview - Group 3.
282 Brisbane Consultation Event, 11 March 2024.
283 Ibid.
284 Ibid.
285 Ibid.
286 Ibid.
287 Ibid.
288 Ibid.
289 Ibid.

participants thought such processes may be necessary for victim survivors to feel strong enough to report the offending.[290]

Aboriginal and Torres Strait Islander Advisory Panel members' views

The Panel recognised that there are several aspects of the legal process that can be alienating and intimidating for victim survivors, including the physical courtroom environment, which was described as a 'high-stress environment' for victim survivors.

The Panel provided support for the use of victim advocates, and for them being permitted to tell the court about the impact on a victim. This would ensure the decision-maker would have 'the full ambit before them to make a decision', and that victim survivors would be heard and the offender held to account - leading to enhanced satisfaction with their experience.

13.6.4 Post-sentence: Understanding of sentence outcomes and post-sentence communication

Submissions from victim support and advocacy services

The Office of the Interim Victims' Commissioner recognised there may be opportunities to 'improve the information provided to victim survivors post-sentencing, including information about the [Queensland Government's] Victims Register and a copy of sentencing remarks'.[291]

The Salvation Army Australia noted limitations with the Victim Information Registrar, as it only applies to some orders, and recommended the implementation of a dedicated liaison person to ensure communication and support for all victim survivors.[292] It also recommended that the courts should consistently publish written documentation of the 'summing up process' as well as sentencing remarks in both the lower and higher courts.[293]

Views of victim survivors

Consultation with victim survivors

While most victim survivors confirmed that they received a sentence outcome letter from the ODPP,[294] they told us they would find it beneficial to receive a copy of the sentence transcript after the sentence:

> I think that would have helped [receiving a copy of the sentencing remarks], because often if you're there, you're not really there... I think it's almost like you're somewhere else. You sort of dissociate in a way. (Victim Survivor Interview 1)

> I don't know how other people feel, but I would actually like that [to receive a copy of the sentencing remarks] because it would help me in, of course, after a certain point I wasn't hearing anything that was being said. Yeah, it just was all too much for me like, and I didn't understand ... he got, the 16 years for the rapes ... but at the time

290 Ibid.
291 Submission 26 (Office of the Interim Victims' Commissioner - now permanently established as the Office of the Victims' Commissioner).
292 Preliminary submission 14 (The Salvation Army Australia) 6, rec 3.
293 Submission 4 (Rita Lok) 2.
294 Victim Survivor Interview 1.

> I was like, hang on, that adds up to 19 and a half years, but no, he didn't, he just got 16 years. (Victim Survivor Interview 2)

When we told those victim survivors that they had a right to request a copy of the transcript, they were surprised.[295] Two victim survivors confirmed that they did apply for, and receive, a copy of sentencing remarks.[296]

If a victim survivor wanted to be told about the offender's eligibility for parole and released from custody, we were told this process needed to be simplified with less paperwork and legal jargon.[297] One victim survivor suggested a 'tick box' on the day of sentence for victim survivors to confirm whether they would like to receive this information, rather than using their own counselling/support sessions to get help navigating these forms.[298]

Another victim survivor told us the sentencing outcome did not appear to be communicated to other agencies as her offender had not been automatically disbarred from his position as a health practitioner, despite the sentencing judge considering this would be a result of the sentence.[299] She told us she had to petition the Queensland Health Ombudsman, which took '[a] year and a half of time, energy, focus and resilience on top of a criminal trial, four years of legal process and the experience and ongoing effects of the crime' to do this'.[300]

Interviews with victim support advocates

Victim advocates agreed that having transcripts automatically provided to victim survivors for them would be beneficial.[301] We were told that victim survivors often dissociate and do not hear or understand sentence outcomes during the hearing:

> They're overwhelmed. They're going through this horrendous trauma. Their brain can't take in … There's just too much trauma and they're overwhelmed by the legal [language] that's thrown at them. It's such an unsafe space for survivors … I think it feels so cold and informal, and hostile, and not victim-friendly or centric at all. (Support Advocate Interview 1)

In addition, there should be opportunities for an appropriate person, such as the prosecutor, to explain the sentence to the victim survivor:

> I feel like I wouldn't be in a position at all to explain these types of [parole eligibility] complications to a survivor, who's been through the court system. We would hope that the ODPP would sit down and take the time needed to explain and to unpack what that means, but I don't think they always have the time to do that. But somebody needs to be able to hear the anguish of the victim, with regard to that. It's not something that we as a team of counsellors have enough expertise in to feel we could do that. And nor should we really be. That's not really our role … (Support Advocate Interview 1)

One advocate further suggested that the provision of a 'toolkit' of sentencing information would be beneficial for victim survivors.[302]

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295 Victim Survivor Interview 1; Victim Survivor Interview 2.
296 Victim Survivor Interview 4; Victim Survivor Interview 7.
297 Victim Survivor Interview 4.
298 Ibid.
299 Submission 35 (Name Withheld) 2.
300 Ibid 2; Victim Survivor Interview 7.
301 Victim Survivor Support Workers Interview - Group 1.
302 Victim Survivor Support Workers Interview - Group 3.

Advocates also noted that 'sometimes people don't know that they can go on the Victim's Register so that they can be kept informed about what's happening with [the offender] if [they] are incarcerated. And we encourage people to do that.'[303]

SME interviews

One participant reflected that justice is done when the broader community understands the sentence outcome.[304] For this reason, it is important that, even if anonymised, sentencing remarks should be published on the Supreme Court Library website for the public (including the victim survivor).[305]

Consultation events

Participants at consultation events also recommended that victim survivors of sexual violence offences should be provided with transcripts of the sentencing submissions and remarks as a matter of course.[306] Participants agreed that this would bring the process back to the victim and would elevate their feelings of inclusion and participation.[307] Participants considered that this would also ensure that victims who are unable to attend the sentence in person, but who later access the sentencing transcript, see that they were recognised.[308]

Some participants reflected that this should occur 'free of charge' and that 'this is a cost that some victims are unable to afford', which demonstrates that some members of the community are not aware that victim survivors can apply to obtain a free copy of sentencing transcripts for their own matters.[309]

Some participants regarded the lack of support services available for victim survivors post-sentence as a 'major issue'. It was noted that police support for victim survivors ends with court proceedings, which means victim survivors are left without support to process proceedings and outcomes.[310]

13.6.5 Victim survivors who experience disadvantage and discrimination

Submissions from victim survivor support and advocacy bodies

BRISSC also told us that victim survivors with intersectional identities may experience additional challenges reporting their experiences. For example, members of the LGBTQI+ community or Aboriginal and Torres Strait Islander peoples may be more hesitant to report sexual violence incidents where it would 'out' them, or where the perpetrator is a prominent member of their community.[311]

QIFVLS expressed the view that judicial discretion must be exercised 'in conjunction with strong and frequent cultural awareness training together with an appreciation of historic and current community factors to mitigate against discrimination'.[312] QIFVLS further agreed with the position taken by the ALRC

303 Ibid.
304 SME Interview 14.
305 Ibid.
306 Brisbane Consultation Event, 11 March 2024.
307 Ibid.
308 Ibid.
309 Ibid.
310 Cairns Consultation Event, 21 March 2024.
311 Preliminary submission 6 (Brisbane Rape & Incest Survivors Support Centre) 2.
312 Preliminary submission 10 (Queensland Indigenous Family Violence Legal Service) 6, referring to the Australian Human Rights Commission, *Wiyi Yani U Thangani Report* (2020) 184.

in its *Pathways to Justice Report* that any criminal justice responses should be developed in consultation with Aboriginal and Torres Strait Islander women.[313]

QSAN recommended mandatory training for court staff to better understand the inherent disadvantage experienced by many victim survivors of Aboriginal and Torres Strait Islander descent.[314] In their submission, QSAN told us that Murrigunyah is the only specialist sexual violence service funded in Queensland for Aboriginal and Torres Strait Islander women. While Murrigunyah has supported victim survivors over an 8-year period, only one person it has supported had her matter proceed to sentence.[315] This illustrates the distrust Aboriginal and Torres Strait Islander victims, in particular, have in the criminal justice system.

QSAN also noted the importance of ensuring that quality interpreters are available for victim survivors to engage with at all stages of the criminal justice system, including in preparation for, and at, sentence.[316] It was noted that, similar to the position in the UK, the interpreter service be run and certified by the Justice Department to ensure 'more oversight and monitoring for quality'.[317]

13.7 What we know from earlier research and reviews

Victim survivor experiences when engaging with the criminal justice system have been considered in earlier research and reviews. Some have related to the criminal justice process generally, while others have focused on sentencing and sexual offences. This section briefly discusses some of this earlier research and key findings from reviews.

13.7.1 Views and experiences of victim survivors of rape and other sexual offences

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.[318] While noting that each victim survivor has a different experience, there were common concerns that led the Scottish Sentencing Council to made key findings in relation to the victim survivor experience and understanding of sentencing, including:

- There was a strong desire from victim survivors for procedural fairness ('being treated with fairness, dignity, respect and given a “voice”'), but this was rarely experienced.
- Most victim survivors considered that they were given little to no information about the sentence process or sentencing options prior to or after the sentence, and did not understand the sentence imposed.

313 Preliminary submission 10 (Queensland Indigenous Family Violence Legal Service) 6–7, referring to the Australian Law Reform Commission, *Pathways to Justice — An Inquiry into the Incarceration Rate of Aboriginal and Torres Strait Islander Peoples* (Report No 133, 2017) 17.
314 Submission 24 (QSAN) 4.
315 Ibid.
316 Ibid.
317 Ibid.
318 *Victim-Survivor Views* (n 136).

- The sentencing hearing was considered an important part of the criminal justice process, but many didn't attend despite wanting to, even via video-link. Reasons for this included fear of seeing the perpetrator and a lack of support (emotional, practical and financial).
- Victim survivors who did attend described 'feeling unprepared and unprotected' and that their rights were neglected.
- The way a judicial officer delivered their remarks (i.e. the tone and content of the remarks) had a significant impact on the victim survivors' sense of justice.
- Victim survivors had difficulty navigating the criminal justice system and understanding who was responsible for providing information about a sentence. There was a preference to speak with someone who could help them to understand the sentence.
- Victim survivors wanted to receive transcripts of the sentence hearing (without charge) to improve their understanding of the sentence outcome.[319]

The Scottish Sentencing Council subsequently made various recommendations to improve the sentencing experience for victim survivors of sexual violence at different stages of the proceeding:

- **Pre-sentence:** Victim survivors should consistently be provided with information about sentencing options (including potential factors a judge may consider and the reasons why); key agencies should provide 'clear and consistent information about sentencing' to victim survivors; training opportunities for key agencies in contact with victim survivors; and the 'opportunity to provide a Victim [Impact] Statement should be given after reporting to the police and then closer to the court case to provide a more representative account of impacts on victim survivors.'[320]
- **During the sentence hearing:** There should be greater recognition of the importance of attending a sentence hearing for victim survivors, with options to attend via video-link promoted and having their rights serve as a 'central consideration in conducting the hearing' (including protection from attacks to their character).[321] It also recommended victim survivors be: provided with emotional and practical support (where sought), compensated for reasonable expenses associated with attending a sentence, and receive information prior to sentence surrounding the processes and practices to be followed at sentence.[322]
- **Regarding sentencing decisions:** Victim survivor safety should be protected by automatically issuing a non-harassment order unless it can be 'demonstrated that the victim-survivor will be safe without one'. Guidelines should also be developed on how judicial officers should sentence sexual offences and what to consider (including the 'enduring impact on their lives').
- **Post sentencing:** Communication of the sentence outcome, the reasons given by the judge and the practical implications of the sentence should be provided 'verbally and in writing to victim-survivors' using plain English, with opportunities for victim survivors to ask questions. They further recommended that meetings be arranged with victim survivors 'as a matter of course'. Where a victim survivor does not attend the sentence, access to the transcript should be provided as soon as possible at no cost. All victim survivors should be provided with information about any

319 Ibid 1–2.
320 Ibid 48.
321 Ibid.
322 Ibid.

programs or rehabilitative work undertaken in custody by an offender with respect to sexual offending.[323]

13.7.2 Trauma-informed practices and victim survivor satisfaction with the sentencing process

Understanding complex trauma and how it impacts people who have experienced sexual violence should be part of a criminal justice response and is essential when engaging with victim survivors. Trauma-informed practice is increasingly being recognised as important to achieving more effective and compassionate responses to those who have been victimised. This practice is a 'strengths-based framework which is founded on five core principles – safety, trustworthiness, choice, collaboration and empowerment as well as respect for diversity'.[324]

A trauma-informed sentencing process involves having 'an understanding of trauma and an awareness of the impact it can have across settings, services and populations'.[325] Adopting this perspective helps courts and others involved in the sentencing process to understand the impacts of particular types of offending behaviour on victims, including sexual assault and rape, as well as the impacts on defendants.[326] The objective of responding in a trauma-informed way is to reduce, and ideally avoid, further trauma.

Some recent reports and inquiries in Australia and internationally have identified the need for ongoing training in trauma-informed practices for legal practitioners and judicial officers.[327]

The Queensland Centre for Domestic and Family Violence Research has developed an approach to trauma-informed practice for sexual violence. This approach is

> underpinned by strengths-based principles and grounded in an understanding of the impact of trauma on the victim. It underscores how to respond to victims while emphasising their physical, psychological and emotional safety. It also involves creating opportunities for victims to become empowered and rebuild their sense of personal control.[328]

The US-based Substance Abuse and Mental Health Services Administration ('SAMHSA') recommends 6 key principles:

> **Safety:** throughout the courtroom, all participants feel physically and psychologically safe.
>
> **Trustworthiness and transparency:** operations and decisions are conducted with transparency with the goal of building and maintaining trust with all court participants.

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323 Ibid 49–50.

324 Cathy Kezelman, 'Trauma informed practice', *Mental Health Australia* (blog post, 4 February 2021) <https://mhaustralia.org/general/trauma-informed-practice>.

325 Sheryl P Kubiak, Stephanie S Covington and Carmen Hillier, 'Trauma-Informed Corrections' in D Springer and A Robert (eds) *Social Work in Juvenile and Criminal Justice Systems* (Charles Thomas, 2017) 92 cited in Katherine McLachlan, 'Same, same or different? Is trauma-informed sentencing a form of therapeutic jurisprudence?' (2021) 25(1) *European Journal of Current Legal Issues* 738.

326 See McLachlan (n 325).

327 See, for example, Amanda-Jane George et al. *Specialist Approaches to Managing Sexual Assault Proceedings: An Integrative Review* (Report, August 2023) 221; Legislative Council Legal and Social Issues Committee, Parliament of Victoria, *Inquiry into Victoria's Criminal Justice System: Volume 1* (Report, 2022) finding 72, 760 ('*Inquiry into Victoria's Criminal Justice System*'); Sir John Gillen, *Report into the Law and Procedures in Serious Sexual Offences in Northern Ireland: Part 1* (2019) 209; Royal Commission into Institutional Responses to Child Sexual Abuse, *Criminal Justice Report: Executive Summary and Parts I to II* (2017) rec 3, 20.

328 Queensland Centre For Domestic and Family Violence Research, *Trauma-informed Responses to Sexual Assault* (Research to Practice Paper, 2020).

Peer support: peers are understood as individuals with lived experiences of trauma; peer support and mutual self-help are key vehicles for establishing safety and hope.

Collaboration and mutuality: importance is placed on partnering and levelling the power differences in the courtroom.

Empowerment, voice and choice: the courtroom fosters a belief in the primacy of the people served, in resilience.

Cultural, historic and gender issues: the courtroom actively moves past cultural stereotypes and biases (e.g. based on race, ethnicity, sexual orientation, age, religion, gender); leverages the healing value of traditional cultural connections; incorporates policies, protocols and processes that are responsive to the racial, ethnic and cultural needs of individuals served and recognises and addresses historical trauma.[329]

Considering the above principles and the experiences of victim survivors, judicial officers can be:

- aware of the impact that trauma experiences may have on the experience of the court process;
- attuned to 'what has happened' to a person rather than 'what is wrong' with a person; and
- aware that a court participant's memory and recall may be affected by trauma.[330]

13.7.3 Reviews into improving criminal justice experiences for victim survivors

Various reviews have been conducted into ways to improve the criminal justice experiences for victim survivors of sexual violence. Broadly, these reviews found a need for more trauma-informed interactions with victim survivors and recommended reforms in response to their findings.

The VLRC undertook an inquiry into Victoria's response to sexual offences, including rape and associated adult and child sexual offences in 2021 at the request of the then Attorney-General.[331] The VLRC made 91 recommendations, including:

- the introduction of a victim advocate to provide continuous support for people who have experienced sexual violence across services and legal systems, including providing information about justice options, to help them to understand and exercise their rights, to support their individual needs, including through referrals to services, and to liaise and advocate for them with services and legal systems;[332]
- the funding of legal advice and representation until the point of trial and in related hearings to ensure victim survivors can exercise their rights and protect their interests, including options for compensation under the *Sentencing Act 1991* (Vic), victims of crime compensation and civil or other compensations scheme and the implications of taking part in restorative justice;[333]
    - the establishment of an independent body, such as a Commission for Sexual Safety, responsible for preventing and reducing sexual violence, and supporting people who experience sexual violence;[334] and

329 Judicial Commission of New South Wales, *Equality Before the Law Bench Book* (25 February 2024), section 12.4 ('*NSW Equality Before the Law Bench Book*').
330 Ibid (citations omitted).
331 *Improving the Justice System Response to Sexual Offences* (n 324).
332 Ibid rec 45.
333 Ibid rec 46. A legal advice service for victim was also supported by the Centre for Innovation Justice, *Strengthening Victoria' Victim Support System: Victim Services Review* (2020).
334 *Improving the Justice System Response to Sexual Offences* (n 32) rec 90.

- greater specialisation of judges, magistrates and barristers and specialised training.[335]

Reforms relating to the trial process, introducing an affirmative model of consent and making it more explicit that the act of 'stealthing' is a crime, were given effect to by the passage of the *Justice Legislation Amendment (Sexual Offences and Other Matters) Act 2022* (Vic) and the *Justice Legislation Amendment Act 2023* (Vic).

Other reforms introduced by the Victorian Government since the report's release, aimed at better supporting victims, have been extensive. They include reforms to defamation laws to remove barriers to reporting[336] and a commitment to introduce 'justice navigators' as part of the government's 'Changing Laws and Culture to Save Women's Lives' funding package 'to make sure survivors of sexual assault can easily navigate support, recovery and justice options'.[337]

An earlier inquiry by the VLRC in 2016 into the role of victims of crime in the criminal trial process also made 51 recommendations to improve services and support for victims (although this was not specific to victims of sexual violence).[338] Relevant recommendations made by the VLRC following this inquiry are discussed throughout this chapter.

The ALRC has been asked to consider training and professional development for judges, police and legal practitioners to enable trauma-informed and culturally safe justice responses as part of its current inquiry into justice responses to sexual violence.[339] The ALRC is due to report by 22 January 2025.

13.7.4 Cultural considerations

As a separate but closely related issue to trauma-informed practices, several reports and inquiries have recommended improving judicial cultural competency in relation to Aboriginal and Torres Strait Islander peoples and CALD groups, and increasing awareness of particular issues experienced by the LGBTIQA+ community and experiences of people with a disability.[340]

In the context of sexual offending, the need for professional development and training can be viewed as particularly critical, given the higher rates of victimisation of these groups, which can be further exacerbated where people experience intersecting forms of discrimination and disadvantage.

A Canadian review into the criminal justice experiences of Aboriginal people[341] who were victim survivors of sexual violence found race to be a 'key determinant in the manner in which a victim will be perceived by the people in the justice system and the manner in which the victim will approach the judicial process'.[342]

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335 Ibid recs 69–73.
336 See *Justice Legislation Amendment (Integrity, Defamation and Other Matters) Act 2024* (Vic).
337 Premier of Victoria, 'Changing Laws and Culture to Save Women's Lives' (Media Release, 30 May 2024) <https://www.premier.vic.gov.au/sites/default/files/2024-05/240530-Changing-Laws-And-Culture-To-Save-Women%27s-Lives.pdf>
338 *The Role of Victims of Crime in the Criminal Trial Process* (n 28).
339 See Australian Law Reform Commission, 'Terms of Reference', Justice Responses to Sexual Violence (web page, 23 January 2024) <https://www.alrc.gov.au/inquiry/justice-responses-to-sexual-violence/terms-of-reference> <https://www.alrc.gov.au/inquiry/justice-responses-to-sexual-violence/>.
340 *Inquiry into Victoria's Criminal Justice System* (n 327) finding 72, 760; *Hear Her Voice, Report Two* (n 13) vol 1, 284.
341 In-depth interview participants with 11 participants included 10 women and one participant who identified as transgender: Arielle Dylan, Cheryl Regehr and Ramona Alaggia, 'And justice for all? Aboriginal victims of sexual violence' (2008) 14(6) *Violence Against Women* 678, 681–2.
342 Ibid 678.

The review recognised that the experiences of Aboriginal people who experience sexual violence in Canada are framed by the broader context of 'social dislocation, poverty, unemployment, neglect and violence'.[343]

Broadly, the review identified 5 key themes:

1. Police were disrespectful, dismissive and unsupportive,[344] with only one of the 11 participants reporting a positive experience engaging with police.[345]
2. Interactions with 'Key Players in the Courtroom' (including the prosecution service and defence lawyers) were mixed, and occasionally dependent upon whether the 'victim felt the crown attorney and the court heard her and valued her input.'[346] The authors further concluded that there was a lack of understanding of the legal terms used in the courtroom, which 'reduces the ability to participate in the discourse and diminishes one's power in the given system'.[347]
3. There was limited understanding of the legal process and available support services.[348] Relevantly, many participants reflected that being more informed about the justice process would have made it less overwhelming.[349]
4. Most participants sought retribution through the justice system and felt a greater sense of resolution when their offender was found guilty, validating their experience, while others felt that being heard contributed to their sense of resolution.[350] In contrast, where the matter did not progress or returned a not guilty outcome, the victim survivor felt a lack of resolution.[351]
5. Racism continues to exist and influences criminal justice interactions.[352]

Similar to the position in Australia, the review recognised that Aboriginal people are over-represented in Canadian penal institutions.[353]

343 Ibid 683.
344 Ibid 684.
345 Ibid.
346 Ibid 686.
347 Ibid 686–7.
348 Ibid 687.
349 Ibid.
350 Ibid 689.
351 Ibid.
352 Ibid 690.
353 Ibid 680.

13.8 The Council's view

13.8.1 Trauma-informed sentencing processes for victim survivors of rape and sexual assault

Key Findings

12 **Trauma-informed practices which recognise the rights of victim survivors should be encouraged, while maintaining principles of fairness for the person being sentenced**

Current sentencing practices and processes can operate in a way that is anti-therapeutic for victim survivors of rape and sexual assault, and that results in victim survivors' retraumatisation. While the focus of sentencing is necessarily on the person who is being sentenced and ensuring that principles of fairness are maintained, it is important for the sentencing process to operate in a way that respects the rights and interests of victim survivors – including those outlined in the Charter of Victims' Rights – and seeks to minimise any risks of retraumatisation.

See **Recommendations 14, 16, 17, 21, 22 and 23**.

13 **Enhanced and trauma-informed communication with victim survivors is needed**

The Charter of Victims' Rights outlines the rights that victim survivors have within the criminal justice system, including the right to be kept informed. Despite these rights, many victim survivors of rape and sexual assault are dissatisfied with the sufficiency of information provided to them regarding the sentencing process, as well as their experiences engaging with the criminal sentencing process.

Improving communication with victim survivors, as well as their interactions with the sentencing process, will have corresponding positive impacts upon their sentencing experience more broadly. This communication should include the provision of regular, timely, effective, consistent and accessible information surrounding the progress of the criminal prosecution (provided by the prosecution service), as well as information about support to navigate the criminal justice system process (provided by an independent, victim survivor support service).

Improving communication between justice agencies (including the Queensland Police Service, the Office of the Director of Public Prosecutions, and Queensland Corrective Services, where relevant) will also ensure that victim survivors are provided with the right information, when they need it.

See **Recommendations 14, 15 and 16.**

14 **Sentencing processes and support services should be enhanced to ensure they are culturally safe for victim survivors**

There is a risk that sentencing processes and support services for victim survivors of sexual assault and rape are not currently culturally safe for Aboriginal and Torres Strait Islander people and are not meeting the needs of other victim survivors, such as LGBTIQA+ people, people with disability and people from culturally and racially marginalised groups, with a corresponding impact on their willingness to engage with, and their experience of, the criminal justice/sentencing process.

See **Recommendations 14, 16, 17, 18, 19 and 20**.

We acknowledge the potential for the current system to operate in a way that may be anti-therapeutic for victim survivors of rape and sexual assault, which has the potential for retraumatisation. Based on our key findings (above) and the application of our fundamental principles,[354] we consider that trauma-informed and culturally safe communication, support and sentencing practices are necessary in order to improve the experiences of victim survivors of rape and sexual assault. We specifically recommend:

- enhanced communication with victim survivors by the ODPP and the QPS PPC (**Recommendation 14**);
- the automatic provision of sentencing transcripts to victim survivors or rape (and possibly sexual assault) at the close of proceedings (**Recommendation 15**); and
- the implementation and progression of related recommendations made by the WSJ Taskforce (**Recommendation 16**).

We recognise that the sentencing experience of victim survivors is intrinsically linked to their broader criminal justice experience, their perception of the criminal justice process and the justice of the outcomes it produces. The intention of our recommendations is to minimise the harm to victim-survivors who are exposed to the sentencing process where offences of rape and sexual assault are concerned.

Understanding why trauma-informed sentencing processes and practices are required

The impacts of sexual violence are different for each victim survivor. In this chapter, we have outlined that for many victim survivors, sexual offending can have significant, immediate and ongoing negative impacts on their mental and physical health and wellbeing.

We have also highlighted that these impacts can be greater for children, as 'sexual abuse can affect [their] emotional, social and physical development'[355] as well as the 'chemistry, structure and function of the developing human brain, especially when it is repeated or ongoing'. This means that very young children are particularly at risk of lasting effects of trauma 'because their brains are still developing and also because brain development is profoundly guided by experience'.[356]

We understand from this review and other research that the criminal justice process can compound the trauma that survivors have already experienced, and may cause secondary trauma or retraumatisation.[357]

There has been a growing awareness of trauma, and in particular complex trauma, over recent decades. This includes a greater awareness of different kinds of trauma – including trauma caused by a single incident (resulting in consequences such as post-traumatic stress disorder) and intergenerational trauma – and the intersection between these. This has led to the development of a trauma-informed practice framework for several practitioner groups, including legal professionals and judicial officers.[358]

How people respond to traumatic events differs from person to person. Understanding why this happens can assist legal stakeholders to make informed decisions that consider the impacts of rape and sexual assault when engaging with victim survivors about sentencing processes and practices.

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354 See Chapter 3.
355 *Royal Commission into Institutional Responses to Child Sexual Abuse Final Report Vol 3* (n 4) 77.
356 Ibid 80.
357 Ibid 73; Australian Institute of Health and Welfare, *Sexual Assault in Australia* (Infocus Report, August 2020) 7.
358 See, for example *NSW Equality before the Law Bench Book* (n 329) section 12.2.

This is particularly important as the criminal justice system is reliant on the willing cooperation of victim survivors to report crime and participate in the prosecution by giving evidence. It is therefore vital that victim survivors are supported and empowered throughout the process (including at the sentencing hearing, following conviction) to ensure they are not subjected to further trauma, which may impact their willingness to continue to engage with the process. As previous reviews have acknowledged, this requires a trauma-informed approach across all aspects of the criminal justice process.[359]

Consideration of Queensland's Sexual Violence Case Management Pilot may inform best practice for trauma-informed engagement with victim survivors of rape and sexual assault across the criminal prosecution process.

We recognise that the focus of sentencing is on the person being sentenced. However, it is important not to lose sight of the rights (including those outlined in the Victims' Charter) and justice needs of victim survivors to ensure that they are not subjected to additional trauma, while still ensuring that principles of fairness are maintained in sentencing.

13.8.2 Improving communication with victim survivors

Recommendation

14. **Office of the Director of Public Prosecutions and Queensland Police Service – improved communication with victim survivors of rape and sexual assault**

Consistent with the rights recognised under the Charter of Victims' Rights – including the right to be kept informed, and to be treated with respect, courtesy, compassion and dignity throughout the criminal sentencing process – that relevant criminal justice agencies should provide victim survivors with regular, timely, effective, consistent and accessible information delivered in a trauma-informed way throughout the criminal justice process. This should include information regarding the progress of criminal proceedings and the sentencing process, as well as greater support navigating the criminal justice system process, such as with the assistance of a Victim Survivor Navigator. To ensure that this process is trauma-informed, victim survivors should have personal agency to decide how much information and support they would like to receive from justice agencies.

Noting that the role of the Office of the Director of Public Prosecutions ('ODPP') and the Queensland Police Service ('QPS') does not currently extend to delivering therapeutic support to victim survivors, the ODPP and QPS should continue to review current communication practices, processes and training, and referral pathways, as required (including in support of promoting victims' rights recognised in the Charter of Victims' Rights) to ensure regular and effective communication occurs with victim survivors of rape and sexual assault. This should include an ongoing commitment to keeping victim survivors informed of key events (unless they have asked not to be kept informed), as well as the identification of roles and responsibilities of justice agencies, and consideration of improved communication processes between them (such as between the QPS, the ODPP and Queensland Corrective Services, where relevant) to address current gaps in the provision of consistent information.

359 *Hear Her Voice, Report Two* (n 27) vol 1, 103, 125–41.

Rights to enhanced information

As outlined earlier in this chapter, victim survivors have rights under the Victims' Charter to be kept informed of the progress of the criminal prosecution of the offender, and to be treated with respect, courtesy, compassion and dignity throughout the criminal sentencing process, which convey obligations on relevant justice agencies.[360] In addition to these rights and obligations, formal guidelines regulate their interactions with justice agencies – including the prosecution service – and prescribe that victim survivors must receive specific information at different stages of the criminal justice and sentencing process.[361]

However, despite these rights and guidelines, we have found that many victim survivors of rape and sexual assault remain dissatisfied with the information provided about the sentencing process and outcome. This dissatisfaction extends across different stages of the criminal sentencing process:

- **Prior to sentence**: Victim survivors want it to be made clearer to them that the sentence hearing will have a strong focus on the person being sentenced and will include considerations such as the offender's 'good character' and other factors that may be relied upon in mitigation of their sentence. Victim survivors ought to be told that these matters are not intended to reduce or lessen the seriousness of the offence, or the impact of the harm the victim survivors have experienced. Additional information and support surrounding the likely sentence outcome and the provision of a VIS was also raised. This is further discussed in **Chapters 13 and 14**.
- **Post sentence:** Victim survivors want someone with legal experience to explain the sentencing outcome to them, and what it means for their offender, as well as enhanced information about available support services, how to obtain a copy of the sentence hearing transcript and how to be added to the victims register.

In addition to wanting enhanced information, it became apparent to the Council that how this information is conveyed was equally important to victim survivors. We heard it is important for consistent information to be communicated repeatedly, both verbally and in writing.

Verbal communication should involve an assessment of a victim survivor's starting point of knowledge, be delivered in small amounts, repeat any information not clearly understood, limit the use of legal jargon and ask the victim survivor what they need to understand what is being told to them.[362]

Visual methods of conveying written information (including flow charts) could be utilised to reduce barriers to communication between victim survivors and justice agencies and assist a victim survivor understand and recall sentencing information.[363]

Options to enhance communication through automated notifications could also be explored to provide administrative information to victim survivors in a timely and consistent fashion[364] – reserving personal

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360 *Victims' Commissioner and Sexual Violence Review Board Act 2024* (Qld) sch 1, pt 1, div 1, 1; div 2, 1–5.
361 See section 13.3 for more information.
362 Rhiannon Davies and Lorana Bartels, *The Use of Victim Impact Statements in Sentencing for Sexual Offences: Stories of Strength* (Routledge, London, 2021) 162.
363 Ibid 160–3.
364 Ibid 168–9. For example, it was noted that many states in the US utilise automated methods for communicating with victims, including 'notifications about scheduled court hearings and outcomes via a range of mechanisms, including telephone, email, and text message'. It was also noted that similar automated notifications have been trialled in New Zealand (information is provided through a text messaging system), England and Wales ('track my crime' online system) and Canada (receive information about the person who harmed them through a secure website).

communication for explaining legal processes and outcomes and answering questions. Privacy concerns and resourcing would need to be considered in this context.

As victim survivors are not a party to proceeding, they are entirely dependent upon justice and support agencies to provide them with sufficient information to understand and navigate the criminal justice process, including sentencing.

As our Terms of Reference are confined to sentencing for rape and sexual assault offences only, we have not considered whether it is appropriate or necessary for the role of a victim survivor to be reformed to that of an active participant, or legislatively entitled to be heard by a court within the criminal sentencing process. Such considerations would require a fundamental alteration to Queensland's current adversarial system of justice, which is far beyond our function. However, we believe it is critical that victim survivors are provided with enhanced information to help them through the sentencing process.

We specifically recommend that people working in the criminal justice system tailor their communication with victim survivors to enhance understanding and, most importantly, take their specific needs into account – particularly for victim survivors who face linguistic or other barriers to comprehension.[365] This information should be provided in written form, with a focus on consistently repeating the same information to reinforce important sentencing information and improve victim survivor understanding.

Communication should include the provision of regular, timely, effective and accessible information at all stages of the criminal sentencing process, including information about:

- options to participate;
- support navigating the criminal justice system process;
- the progress of the criminal prosecution;

the sentencing process itself, including what to expect within the courtroom and their role (including the right to provide a VIS, and what this means – discussed in section 14.3 below);

- the likely sentence outcome;
- the actual sentence outcome and what this actually means for the person being sentenced (to be delivered by a person with legal experience);
- the limited basis on which a sentence can be appealed; and
- available safety options, including on the day of sentence, for both the victim survivor and their family members.

Information about support navigating the criminal justice system process should be provided by an independent victim survivor support service, while information about legal aspects of the progress and sentence outcomes should be provided by the prosecution service.

There also needs to be greater clarity about which justice agency is responsible for providing different information, as well as ensuring that any information is transferred between relevant agencies to address issues that the system is fragmented and difficult for victim survivors to navigate.

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[365] See, for example, Rhiannon Davies and Lorana Bartels, 'Challenges of effective communication in the criminal justice process: Findings from interviews with victims of sexual offences in Australia' (2020) 9(4) *Laws* 31, cited in *Listen,. Take Action Report* (n 184) 62. Davies and Bartels suggest a number of strategies to address issues identified to promote victim understanding.

We recognise that providing information at key stages of the process is more challenging for victim survivors who identify as Aboriginal and Torres Strait Islander people, people from culturally and racially marginalised groups, people from a CALD background or with disability and members of the LGBTQIA+ community. Sentencing processes may not be responsive to the needs of all victim survivors, or safe (**Key Finding 14**). Specifically, as recognised in the Judicial College of Victoria Victims of Crime in the Courtroom: A Guide for Judicial Officers and equal treatment benchbooks:

- Victim survivors of Aboriginal and Torres Strait Islander descent have a history of negative experiences engaging with authorities, as well as language barriers with respect to legal terms, which may impact their communication with justice stakeholders in an adverse way. Cultural concepts of 'women's business' also limit the willingness of Aboriginal and Torres Strait Islander women who have experienced rape or sexual assault to speak about the offending. Victim survivor understanding of the English language and how best to communicate with these victim survivors (such as through the Aboriginal and Torres Strait Islander people's oral tradition of 'transmitting information through storytelling',[366] avoiding interruption) should be considered, as well as ways to encourage victim survivors to inform the court about the harm caused to them by sexual offences.[367]
- Victim survivors who hold particular diverse religious beliefs may be impacted in terms of their willingness or ability to testify under oath, or to attend conferences or court proceedings on days of particular import.[368]
- Victim survivors who are from culturally and racially marginalised backgrounds may need to be addressed in different ways (naming conventions) and using particular words or tones.[369] It is important to recognise that these victim survivors may be reluctant to admit that they require assistance (such as translations services), avoid eye contact or approach communication with silence.[370]
- Victim survivors with a disability 'can face barriers to effective participation in criminal proceedings, from inaccessible courtrooms to misconceptions about their reliability as witnesses'.[371] We were told during consultation of concerns that convictions where the victim survivor has a disability are often overturned on appeal.[372] Practitioners should be aware of any steps that should be taken to provide information about sentence proceedings to these victim survivors in a way that is appropriate to their justice needs, such as using Easy English, Braille, large fonts or audio recordings, ways to familiarise the victim survivor with the courtroom layout prior to a sentence hearing and ensuring they are connected to appropriate support services.[373]
- These communication needs should be considered and addressed within the sentencing context to ensure that all Queenslanders are appropriately supported through sentencing. In doing so, we appreciate that additional resources may be required to enable the prosecution service to deliver enhanced information.

366 Dylan, Regehr and Alaggia (n 341) 681.
367 Judicial College of Victoria, *Victims of Crime in the Courtroom: A Guide for Judicial Officers* (August 2023) 17.
368 Ibid 20–2.
369 Ibid 21.
370 Ibid 17–20.
371 Ibid 25.
372 Victim Survivor Support Workers Interview - Group 3.
373 Ibid.

We acknowledge that the Victims' Commissioner is currently working to raise awareness of the rights of victim survivors in Queensland, as well as the support services available across the state and how to access them, which may promote the provision of enhanced information to victim survivors of rape and sexual assault.[374]

Access to sentencing remarks

Recommendation

15. Sentencing remarks for victim survivors

The Department of Justice, in consultation with the Heads of Jurisdiction, consider processes to support the provision of sentencing remarks for matters involving rape (and possibly sexual assault) to victim survivors as a matter of course within a reasonable period after sentence to enhance their understanding of the sentencing process and outcome.

We also acknowledge that victim survivors have a high degree of emotional investment in the sentence outcome, and in ensuring that it recognises the harm caused to them by the offending.[375] Moreover, we acknowledge that 'victims often perceive that the length of a sentence reflects the way the court viewed the seriousness of the crime and the impact of the criminal act upon them'.[376]

We were told by victim survivors and support advocates that victim survivors who attend the sentence hearing often dissociate, and do not always hear or understand the reasons for the sentence outcome.[377]

There are also many barriers to a victim survivor attending court for a sentencing hearing. These include practical and financial issues that prevent a victim survivor attending, such as costs for travel, meals, accommodation, time off work, loss of earnings, and childcare arrangements and costs. While VAQ will support victim survivors to attend a sentence hearing in certain circumstances (discussed above at 13.3.2), some victim survivors may still not attend the hearing for various reasons, such as fear of seeing the perpetrator, having a lack of support or being unfamiliar with the court building or process.

Victim survivors – particularly those who are unable to attend the sentence hearing – are reliant upon receiving a call or outcome letter from the prosecution service.[378] However, this often only includes a high-level overview of the sentence outcome (such as listing the penalty imposed and whether any additional orders were made). The ODPP outcome letter does not provide any information with respect to the reasons for the decision of the judicial officer, nor whether the judicial officer mentioned the victim survivor, nor the harm caused to them during the hearing.

We understand there is the option for the victim survivor to arrange a post-sentence conference with the ODPP to understand the reasons given by a judicial officer for their sentencing decision. We support this process and consider that there should be a proactive requirement to invite the victim survivor to

374 Victims' Commissioner, 'Submission to the Queensland Government on the Making Queensland Safer Bill 2024' (Submission 96) 4 <https://documents.parliament.qld.gov.au/com/JICSC-CD82/IMQSB2024-B002/submissions/00000096.pdf>.
375 Carol McNaughton et al, *Attitudes to Sentencing Sexual Offences* (Centre for Gender and Violence Research, University of Bristol for the Sentencing Council for England and Wales, 2012) 25–6.
376 Garkawe (n 10) 602.
377 Victim Survivor Interview 1; Victim Survivor Support Worker Interview - Group 1.
378 Victim Survivor Interview 1.

participate in a post-sentence interview with the prosecutor who appeared at the sentence to explain the reasons for the decision and answer any questions.

We also recommend that the provision of sentencing remarks as a matter of course (in addition to an opportunity to participate in a conference) should be available to a victim survivor in an accessible way to help them understand the orders imposed and the reasons of the court for the sentence imposed.

In making this recommendation, we note that remarks are the best source of written information from the sentencing hearing, providing an opportunity for victim survivors to review them in their own time, when they are ready to do so.

However, we recognise the current process of requiring a victim survivor to make a request for a copy of the sentencing transcript is not trauma-informed. Further, it can be a challenging process for some victim survivors, particularly those who come from culturally and racially marginalised backgrounds, and those who have difficulty with literacy, are subject to socioeconomic or systemic disadvantage or live in rural locations.

We consider that victim survivors of rape (and potentially sexual assault, depending on funding constraints) should be provided with a copy of sentencing transcripts as a matter of course post-sentence, unless it is indicated to the court that they do not wish to receive a copy. Notwithstanding this decision, a victim survivor should be able to amend their position at any time.

Consideration of opportunities for victim survivors to 'tick' whether they would like to receive a copy of the sentence hearing transcript at the time of the sentence (rather than submitting a separate request form after the fact) may offer a more considered and trauma-informed way for victim survivors to 'opt in' to this.

13.8.3 Improving support for victim survivors

Recommendation

16. **Improving support for victim survivors of rape and sexual assault and the criminal justice system's capacity to respond to victim survivors and perpetrators of sexual violence**

The Queensland Government continues to commit funding and resources in support of the implementation of the following recommendations of the Women's Safety and Justice Taskforce *Hear Her Voice – Report Two: Women and Girls' Experiences Across the Criminal Justice System* (2022):

- **Recommendations 5 and 96:** The Queensland Police Service develop initiatives focused on improving its cultural capability, as well as its ability to respond to sexual violence cases.
- **Recommendation 6:** The Queensland Police Service improve the translation and interpretation services it uses for First Nations peoples.
- **Recommendations 9 and 64:** The Queensland Government develop and pilot a statewide professional victim advocate service, and the planned evaluation of this model, including consideration of whether there is a need for funded legal representation for victim survivors of sexual violence during criminal justice processes.

- **Recommendation 11:** The Queensland Government co-design, fund and implement a victim-centric, trauma-informed service model that responds to sexual violence.
- **Recommendation 13:** The Queensland Government embed a trauma-informed system of safe pathways for victim survivors of sexual violence across the sexual assault and criminal justice systems.
- **Recommendation 19:** The Queensland Government review the Charter of Victims' Rights in the *Victims of Crime Assistance Act 2009* and consider whether additional rights should be recognised or if existing rights should be expanded. Ideally, this review would be undertaken by the Victims' Commissioner (Recommendation 18).
- **Recommendation 45:** The Office of the Director of Public Prosecutions and the Queensland Police Service review, update and publish the memorandum of understanding relating to the investigation and prosecution of sexual violence cases.
- **Recommendation 51:** The Office of the Director of Public Prosecutions develop and implement a cultural capability plan to improve the cultural capability of staff.
- **Recommendation 95:** The Queensland Police Service develop a gender-responsive and trauma-informed approach for responding to women and girls in the criminal justice system.
- **Recommendation 121:** The Department of Justice undertake a review of the Murri Court model to consider how it can be strengthened and improved.

Challenges for support services

We know victims of crime, particularly those of sexual offences, can experience intersecting forms of disadvantage which impact their justice needs. Ensuring consistent support throughout the entire criminal justice process is therefore critical to their sentencing experience.

We heard about the importance of access to support for victim survivor engagement through this review. However, we were also told that there are challenges surrounding victim survivor understanding of the different support agencies available, and how to access the most appropriate service for them. This is a concern, as victim survivors may not be connecting with support services that could enhance their sentencing experience.

A key concern which became apparent during this review was that support services are fragmented, inconsistent and limited.

We further heard during this review that there are challenges with the delivery of support services as a consequence of limited resourcing to respond to demand. We note there are wait times to access services.

Additional challenges arise when delivering services to victim survivors who live in rural, regional and remote areas, as a result of Queensland's decentralised landscape. A lack of support service hubs in these areas limits the ability of a victim survivor to obtain in-person support. Additional challenges arise when there is only one person in a rural community (or neighbouring community) who can provide this support.

For victim survivors who must travel to attend court proceedings, we heard that there are additional practical challenges that may limit their ability to attend the sentence hearing. This is important, as we know that the ability to attend court proceedings is important to victim survivors' feelings of inclusion.[379]

In addition to these barriers, we heard there is a risk that sentencing processes and support services for victim survivors of sexual assault and rape are not culturally safe, as they may not consider the unique cultural barriers associated with discussing sexual offences within a particular community.

We are of the firm view that sentence hearings should be accessible and culturally appropriate for victim survivors, so they are empowered to participate and engage in the criminal justice system and the sentencing process if they would like to do so. This includes ensuring that there is access to support services at court proceedings, with staff who are appropriately trained; that security staff are trained on how to keep victim survivors safe and separated if needed; information is conveyed in multiple forms (e.g. using visual aids) and in multiple languages; and that appropriately funded translation services are made available. Having videos about the sentencing process (in plain English and other languages) may also help a victim survivor to prepare to come to court.[380]

Concerns were also raised about legislative provisions that enable the defence to request access to protected counselling communications between victim survivors and their psychologist during the criminal hearing process. We note that this may impact a victim survivor's willingness to seek professional support, which may be important to their healing journey. If access to psychological support were increased for victim survivors, opportunities for professionals to provide information about the impact of the offending on a victim survivor may be provided to the court and relied upon at sentence (in addition to, or in support of, a VIS).

Support services and criminal sentencing practices require reform

We recognise that some of the challenges we have identified through this review as they relate to trauma-informed and culturally appropriate sentencing processes and practices are not new. The WSJ Taskforce has made various recommendations that are intended to significantly improve upon the justice experiences of victim survivors in Queensland. We endorse these recommendations and support their implementation in Queensland to improve the criminal justice experience for victim survivors of rape and sexual assault (**Recommendation 16**).

The current Queensland Government has committed to progressing a professional victim advocate model for victims of crime in consultation with key stakeholders in response to the WSJ Taskforce recommendations.[381]

Although these fundamental principles and the Victims' Charter have been established with the aim of positively impacting victims of crime, from what we have been told in this review, victim survivors continue to feel that they are not provided with sufficient information to guide their understanding of criminal proceedings, before, during and after the sentence. As a consequence, they often feel excluded from the criminal justice process (including at sentence), that their voices are not heard, and that the offender's rights are put above theirs. These findings are consistent with those of the Scottish Sentencing Council.

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379 *Victim-Survivor Views* (n 136).

380 For example, the Queensland Courts have videos on the domestic violence court process which is also available in Auslan and 6 languages: 'Videos on domestic violence court process', *Queensland Courts* (web page, 27 June 2018) <https://www.courts.qld.gov.au/going-to-court/domestic-violence/videos-on-domestic-violence-court-process>

381 *November 2024 Charter Letter from Crisafulli to Gerber* (n 165).

It also became apparent to us that some victim survivors feel disempowered through the sentence process, particularly where the judicial officer predominantly addresses the offender and does not appear to sufficiently acknowledge the victim (or their family) and the harm experienced (**Key Finding 12** and **Recommendations 17 and 18**).[382]

The Council endorses the justice needs of victim survivors identified by the VLRC. In particular, we note the importance of receiving validation for many victim survivors and not only having their story heard and believed but also a concrete outcome ensuing. Ensuring the appropriate exercise of the rights of victim survivors and the duties owed to them by those who hold the relevant information is central to a positive experience for a victim survivor and impacts their satisfaction with the sentence imposed.

Information to support victim survivors prior to sentence includes the layout of the courthouse and courtroom; the possibility of seeing the offender's family and friends before or after the sentence; how the sentence will be conducted; information about their offender's life and any mitigating factors personal to the offender; legal terms that will be used; the likely penalty options the court may consider; what they mean; and safety options to address any concerns.

While the provision of timely and accurate information by prosecutors to victim survivors can dramatically increase their satisfaction with the criminal justice system,[383] it is important that the role of the prosecuting authorities (DPP and QPS) is not confused with a therapeutic function for a victim survivor. There needs to be appropriate separation between the role of prosecutors as independent advisers to the court and support services that provide emotional support and assistance to victim survivors.

However, it is also important to recognise that some victim survivors do not want to be kept regularly informed, particularly where the increased information and participation results in increased emotional distress and secondary trauma.[384] It is therefore important for the criminal justice system to take a trauma-informed approach to victims' rights within the sentencing process, rather than mandating that information be shared in all circumstances, but that opportunities to either 'opt-in' or 'opt-out' are enhanced to be more trauma-informed.

The ODPP and QPS should continue to review current communication practices, processes and training, and referral pathways as required (including in support of promoting victims' rights recognised in the Charter of Victims' Rights) to ensure that regular and effective communication occurs with victim survivors of rape and sexual assault. This should include an ongoing commitment to keeping victim survivors informed of key events (unless they have asked not to be kept informed).

Enhancements to communication processes and procedures need to be underpinned by technology solutions that provide choice, control and transparency for victim survivors, consistent with trauma-informed communication practices. Consideration of an adequately resourced victim survivor portal which contained all relevant administrative information could support the better provision of information.

Within this context, the pilot for the victim advocate program could be of benefit to victim survivors in conveying information from the prosecution service to the victim survivor in a way that is trauma-informed.

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382 Victim Survivor Interview 1: It felt like the judge had 'total disregard for the victim', and that they were 'shoved in a corner' during the sentence.

383 Garkawe (n 10) 609.

384 Arie Freiberg and Asher Flynn, *Victims and Plea Negotiations - Overlooked and Unimpressed* (Palgrave Macmillan, 2021) 11.

It is critical that, in piloting this model, regard is had to the role of the victim survivor navigator, as well as their intersections with criminal justice agencies.

We note the WSJ Taskforce recommended a review be undertaken of the Victims' Charter (ideally by the Victims' Commissioner) to 'consider whether additional rights should be recognised or … existing rights should be expanded.'[385] We understand that the Victims' Commissioner has commenced work to review the Charter of Victims' Rights, which may provide an opportunity for our findings and recommendations regarding the provision of information to be considered further. [386]

13.8.4 Applying the Council's fundamental principles

In applying the Council's fundamental principles guiding the review, we determined that a number of recommendations were required to respond to these findings:

- **Principle 1: Reforms to sentencing laws should be evidence-based with a view to promoting public confidence**: It is clear from victim survivors and victim support and advocacy organisations that victim survivors are dissatisfied with the sufficiency of information provided to them during the criminal justice process, particularly the sentencing process. We consider that regular, timely and effective information delivered in a trauma-informed way throughout the criminal justice process will assist to increase the satisfaction and has the potential to reduce retraumatising of a victim survivor. This should include information regarding the progress of criminal proceedings and the sentencing process, as well as greater support in navigating the criminal justice system process, such as with the assistance of a victim survivor navigator. Providing victim survivors with a copy of the sentence hearing transcript as a matter of course will also promote victim survivor satisfaction and public confidence. To ensure that sentencing processes and practices are trauma-informed, victim survivors should have the ability to decide how much information and support they would like to receive from justice agencies. Empowering victim survivors and improving their satisfaction can promote public confidence.
- **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**: In recommending these reforms, we have considered whether amendments to improve the sentencing experiences of victim survivors through enhanced communication and support practices would infringe upon the rights of people being sentenced – noting that Aboriginal and Torres Strait Islander people are disproportionately represented within the offending cohort. We consider enhanced interactions with victim survivors will have no such negative or disproportionate impact.
- **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**: We consider that these recommendations are compatible with the rights protected and promoted under the HRA. Providing victim survivors with clear, timely and regular information and trauma-informed support can be addressed without limiting the rights of the person being sentenced in criminal proceedings as outlined in section 32 of the HRA.

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385 *Hear Her Voice, Report Two* (n 27) vol 1, 139–40 rec 19.
386 Victims' Commissioner (n 374) 4.

13.8.5 Systemic disadvantage considerations

As discussed throughout this report, Aboriginal and Torres Strait Islander peoples are around 3.5 times more likely to have been a victim of sexual assault (including rape and other sexual offences) compared to with non-Indigenous Australians.[387] We consider that any recommendations for reform to better support victims through the sentencing process needs to acknowledge this, while noting that there are many barriers to reporting and points of attrition for sexual violence cases, including those involving Aboriginal and Torres Strait Islander victims.

Stakeholders have noted the need for better communication with Aboriginal and Torres Strait Islander peoples, as both offenders and victims, and for greater cultural sensitivity. Members of the Aboriginal and Torres Strait Islander Advisory Panel considered that there should be enhanced information provided to victim survivors surrounding the likely penalty and the actual sentence imposed. It was acknowledged that all participants, both victim survivors and perpetrators of these crimes, need to understand the consequences of the sentence and to feel like the person being sentenced did not 'get away with it'.

With respect to the consideration of trauma-informed practices, the Panel recognised the importance of considering the most appropriate way for the sentencing court to take into account systemic disadvantage considerations. The Panel also suggested that the physical courtroom environment needs to be considered to ensure it is more trauma-informed, recognising that courts are high-stress environments for victim survivors.

We consider that opportunities to enhance the experience of victim survivors within existing traditional criminal justice processes may have a significant, positive impact upon the criminal justice experiences of both Aboriginal and Torres Strait Islander victim survivors without compromising the rights of the person being sentenced. However, opportunities to improve supports for victim survivors during the sentencing process will benefit Aboriginal and Torres Strait Islanders Islander people only if such supports are culturally safe and appropriate. While some CJGs provide support to both to victims as well as defendants, it is the responsibility of the individual CJGs to determine whether sexual violence matters fall within scope of the services they provide.

The WSJ Taskforce recommendation for the establishment of a professional statewide victim advocate service, expressly requires the Queensland Government to consult with people with lived experience and Aboriginal and Torres Strait Islander peoples in the development of a model to ensure services and support provided are 'individualised, culturally safe and trauma informed'. This same approach should be adopted in any reform work to ensure their benefits can be realised by victim survivors from all cultural backgrounds.

13.8.6 Human rights considerations

Greater recognition of victims' experiences in the sentencing process is consistent with the right enshrined within the Victim's Charter to be treated with 'courtesy, compassion, respect and dignity, taking into account the victim's needs'.[388]

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387 Australian Institute of Health and Welfare, *Family, Domestic and Sexual Violence in Australia* (Report, 2018).
388 *Victims' Commissioner and Sexual Violence Review Board Act 2024* (Qld) sch 1.

We note that the Victorian Victims of Crime Commissioner recently recommended that the *Charter of Human Rights and Responsibilities Act 2006* (Vic) be amended to include victims' high-level rights,' including a right for a victim of a criminal offence to be:

- acknowledged as a participant (but not a party) with an interest in the proceedings;
- treated with dignity and respect; and
- protected from unnecessary trauma, intimidation and distress when giving evidence and throughout criminal proceedings.[389]

We further noted that the WSJ Taskforce recommended a review be undertaken of the Charter of Victims' Rights to 'consider whether additional rights should be recognised or if existing rights should be expanded' and that '[i]deally, this review would be undertaken by the victims' commissioner' once established.[390] We support this recommendation.

An independent review of the *Human Rights Act 2019* ('the Act') has been undertaken in Queensland.[391] The Terms of Reference for this review require an assessment of the effectiveness of the current provisions in the Act, including any issues that have arisen since is commencement on 1 January 2020.

The review was asked to consider whether recognition of victims' rights under the Charter of Victims' Rights should be incorporated into the Act.[392] The review report will be tabled in Parliament.[393]

389 Victim of Crime Commissioner (Victoria), *Silenced and Sidelined: Systemic Inquiry into Victim Participation in the Justice System* (November 2023) 326–7, rec 5.

390 *Hear Her Voice, Report Two* (n 13) vol 1, 139–40 rec 19.

391 See 'Human Rights Act 2019 Review' Queensland Government (web page, 20 May 2024) <https://www.justice.qld.gov.au/initiatives/human-rights-act-2019-review#:~:text=The%20scope%20of%20the%20review,General%20by%2020%20September%202024>.

392 See 'Terms of Reference', First independent review of the Human Rights Act 2019 (Qld) (8 April 2024) <https://www.publications.qld.gov.au/ckan-publications-attachments-prod/resources/1cb8019c-3783-4111-bb8b-66e449dce257/terms-of-reference-human-rights-act-2019-review.pdf?ETag=ea905e564bdf3f86710aa7d6a71d433a>.

393 The report was delivered in September 2024. Pursuant to section 95(5) of the *Human Rights Act 2019* (Qld), the report must be tabled within 14 sitting days following its receipt.

Chapter 14 – Victim impact statements and recognition of harm at sentence

14.1 Introduction

The Terms of Reference asked us to identify any changes to ensure that sentences imposed for rape and sexual assault offences are adequate and appropriate.[1]

As discussed in **Chapter 13**, this required the Council to consider whether the significant impacts of sexual offending on victim survivors is being appropriately understood and recognised within the sentencing context. In that chapter, we also considered the impacts of sexual offences on victim survivors, their rights and role within the criminal justice system and their experiences engaging with the sentencing process.

This chapter specifically considers how the sentencing court acknowledges and recognises the impacts of sexual offences on victim survivors, including through consideration of a victim impact statement ('VIS').

We consider how Queensland sentencing courts receive evidence of the impacts of sexual offending on victim survivors, how the VIS regime operates in Queensland and other jurisdictions and what we know from earlier reviews of these processes. We also discuss specific feedback we received on the operation of the VIS regime in Queensland, as well as how victim survivors (and the harm they have experienced) is being acknowledged within the sentencing court, which informed our findings. Our formal views and recommendations to improve the criminal sentencing process in Queensland for victim survivors of rape and sexual assault are presented in the final section of this chapter.

14.2 Assessment of harm

In Queensland, a court must have regard to the nature of the offence and how serious the offence was in sentencing an offender, including 'any physical, mental or emotional harm done to a victim, including harm mentioned in information relating to the victim given to the court'.[2] The harm experienced by the victim survivor is one of the sentencing factors, together with others, which a court must consider at sentence.[3]

Information about the harm caused to a victim survivor is usually conveyed to the court at sentence through an agreed statement of facts (on a plea of guilty), evidence presented at trial upon which the court or the jury has made a finding of fact (where the charge was contested) or through the provision of a formal VIS under the victim survivor's own hand.

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1 Appendix 1, Terms of Reference.
2 *Penalties and Sentences Act 1992* (Qld) ('PSA') s 9(2)(c)(i). See for example, *R v Pham* (2009) 197 A Crim R 246 [7].
3 PSA (n 2) s 9; see also *R v Pham* (2009) 197 A Crim R 246 [7].

The Victims' Charter outlines that victim survivors have a right to provide a VIS to the court to be considered at sentence.[4] Upon receipt, a prosecutor 'must decide what, if any, details are appropriate to be given to the sentencing court' and provide those details.[5] This recognises victim survivors as the best source of direct information on the harm experienced by them because of the offending.

It is open for the court to make a finding of fact on the harm (including the degree of harm) experienced by a victim survivor, based upon the information provided to it.[6] The court can accept (and act on) any information which is admitted or not challenged.[7]

However, providing a VIS is entirely voluntary; the absence of a VIS 'does not, of itself, give rise to an inference that the offence caused little or no harm to the victim'.[8] In circumstances where a VIS is not provided, the judicial officer can still infer the offence caused harm, having regard to the circumstances of the offence and the definition of harm (any physical, mental or emotional harm).[9]

Recently, a Bill was introduced that elevates the harm to the victim as a primary sentencing consideration under the *Youth Justice Act 1992* (Qld):

> (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.[10]

14.3 Victim impact statements

14.3.1 Introduction

A VIS is a statement by a victim survivor that tells the court about the impact of the offence on them. As victim survivors do not have standing to make submissions at sentence, the opportunity to provide a VIS is recognised as the primary way to ensure 'the victim's voice plays a substantive role in sentencing'.[11]

> The statements provide an opportunity for those whose lives are often tragically altered by criminal behaviour to draw to the court's attention the damage and sense of anguish which has been created and which can often be of a very long duration. For practical purposes, they may provide the only such opportunity. Obviously the contents of the statements must be approached with care and understanding. It is not to be expected that victims will be familiar with or even attribute significance to the many considerations to which a sentencing judge must have regard in the determination of a just sentence in the particular case. Nor would it normally be reasonable or practicable for a sentencing judge to explore the accuracy of the assertions made. Nevertheless, there has been an increasing level of appreciation by the courts of the value of victim impact statements. In my view they play an important role with respect to an aspect of the criminal law to which reference is not often made. They play their part in achieving what might be termed social and individual rehabilitation. Rehabilitation, in this sense, is not perceived from the perspective of the offender, but from that of those persons who have sustained loss and damage by reason of the commission of an offence.[12]

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4 *Victims' Commissioner and Sexual Violence Review Board Act 2024* (Qld) sch 1, pt 1, div 2, right 7. This right only applies if the person was 'found guilty of an offence relating to the relevant offence'. As discussed in Chapter 13, this right is not legally enforceable.
5 PSA (n 2) s 179K(3).
6 Ibid s 15; *Evidence Act 1977* (Qld) s 132C.
7 *Evidence Act 1977* (Qld) s 132C.
8 PSA (n 2) s 179K(5).
9 *R v Abdullah* [2023] QCA 189, 5–6 [23] (Bowskill CJ, Flanagan JA and Buss AJA agreeing).
10 Making Queensland Safer Bill 2024 (Qld) cl 15.
11 Peter Kidd, 'An Evolving Justice System' (Judicial College of Victoria, Managing Sexual Offence Cases, 28 June 2024) 2.
12 *DPP v DJK* [2003] VSCA 109 [17].

A VIS is a point-in-time statement; it reflects the harm suffered by a victim survivor at the time of its provision. While future or potential harm can be inferred by the court based on the nature of the offence and the learned knowledge of a judicial officer,[13] it cannot meaningfully account for the actual harm that will be sustained by the victim survivor in the future – recognising that the harm can compound or extend throughout the duration of their life. This is particularly relevant for children who experience sexual offending, and who may not know or understand its true impacts for years to come.

However, it has been acknowledged that the practical ability of VIS to 'meaningfully satisfy victims by giving them input into the sentencing phase remains a work in progress'.[14]

While all jurisdictions in Australia have established legislation to enable victim survivors to provide a VIS to the court, there is no nationally consistent approach.[15] A table comparing the approaches in other Australian jurisdictions is available at **Appendix 18**.

This section provides an overview of the approach in Queensland and compares it with those of other jurisdictions, where relevant.

14.3.2 The current approach in Queensland and what other jurisdictions do

A victim survivor of a prescribed offence (including rape and sexual assault) 'is permitted to give the prosecutor … details of the harm caused to the victim by the offence, for the purpose of the prosecutor informing the court'.[16] Often, this is given by way of a VIS.

The statutory basis which enables a victim survivor to provide a VIS initially was introduced in 2009.[17] It was intended that 'any proposed provisions should avoid being overly prescriptive so that the courts may deal with VIS in a flexible manner and avoid time and cost implications'.[18] In 2017, the PSA was amended to insert the current process for making a VIS.[19]

How is the VIS presented to the court? (the 'form')

A VIS should be a written and signed statement,[20] which is provided to either the arresting officer or a representative of the prosecution service,[21] who may then present that information to the court.[22]

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13 Recognising there are limited findings a court can make about long-term harm: see *R v Evans* [2011] QCA 135 [33] (Fryberg J, Chesterman JA agreeing). The court discussed the conclusions drawn about the long-term harm. See also McMurdo P (in dissent) who agreed with the error and considered it did affect the sentence and would have allowed the appeal: [10].

14 Rhiannon Davies and Lorana Bartels, 'The Use of Victim Impact Statements in Sexual Offence Sentencing: A Critique of Judicial Practice' (2021) 45 *Criminal Law Journal* 168.

15 PSA (n 2) ss 9(2)(c), 179I–179N; *Sentencing Act 1991* (Vic) ss 8K–8S; *Crimes (Sentencing Procedure) Act 1999* (NSW) ss 26–30G; *Sentencing Act 1995* (WA) ss 23A–26; *Sentencing Act 1995* (NT) ss 106A–106B; *Crimes (Sentencing) Act 2005* (ACT) ss 47–53; *Sentencing Act 2017* (SA) ss 13–16; *Sentencing Act 1997* (Tas) ss 80–81A.

16 PSA (n 2) s 179K(1). A 'victim' for the purpose of this section is as defined under 'affected victim' in *Victims' Commissioner and Sexual Violence Review Board Act 2024* (Qld) s 38. It may also be another person if the victim cannot give a statement because of their age or impaired capacity: s 179L(2).

17 *Victims of Crime Assistance Act 2009* (Qld) ss 15–15B introduced as recommended by Queensland Government, *Victims of Crime Review Report* (November 2008) rec 26.

18 Queensland Government, *Victims of Crime Review Report* (November 2008) rec 26.

19 PSA (n 2) pt 10B. Prior to 1 July 2017, the process was under *Victims of Crime Assistance Act 2009* (Qld) ss 15–15B, which was amended by *Victims of Crime Assistance and Other Legislation Amendment Act 2017* (Qld).

20 PSA (n 2) ss 179I, 179L. A VIS can also be signed electronically.

21 Department of Justice and Attorney-General, Preparing a Victim Impact Statement (Factsheet) <https://www.publications.qld.gov.au/ckan-publications-attachments-prod/resources/6048e39f-617f-415d-9fc0-df5b3a2e991c/victim-assist-victim-impact-statement-factsheet.pdf?ETag=7712fa772962bd9ebd4792b78e1b6ceb>

22 PSA (n 2) s 179K(3).

Special provisions exist to enable the VIS to be read aloud at sentence by the victim survivor or by someone else[23] for therapeutic benefit.[24] It is therefore 'not necessary for a person, reading aloud the VIS before the court under this section, to read the statement under oath or affirmation'.[25] However, where there is any objection from defence to the material within a VIS, only the relevant and admissible sections should be read aloud.[26]

Additional arrangements to support a victim survivor when reading their VIS can be accommodated on application, including to have the offender obscured from sight, the court closed, to have a support person present or to read their statement from a remote room using audio visual link.[27]

There is no provision in Queensland that permits a victim survivor to pre-record the reading of their VIS.

What do other jurisdictions do?

All other jurisdictions have introduced options for victim survivors to provide a written VIS and to read it aloud in court.[28] However, South Australia is the only jurisdiction in Australia that permits a VIS to be pre-recorded and relied upon at sentence.[29]

In the Northern Territory, a prosecutor is also able to prepare a 'victim report', an oral or written statement prepared by the prosecutor on behalf of the victim survivor that provides information about the harm suffered by a victim arising from the offence if this information is not already before the court (if there is no VIS).[30]

What can and cannot be included in a VIS

Legislation briefly says a VIS should state 'the particulars of the harm caused to a victim by an offence'.[31] It may include details about any physical injuries, as well as mental and/or emotional harm.[32]

A VIS can also include financial impacts to the victim survivor and their family, as well as social impacts such as how their life has changed as a consequence of the offending.[33]

Additional supporting material can be provided to assist the court to understand the harm caused to the victim survivor,[34] including 'any doctor's description of injuries and photographs of the injuries'[35] or any

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23 Ibid s 179M.
24 Ibid s 179M(4)(a).
25 Ibid s 179M(4)(b).
26 Ibid.
27 Ibid s 179N.
28 See Appendix 16.
29 *Sentencing Act 2017* (SA) s 14(3). Canada also permits victim survivors to pre-record their VIS: 'Victims' Rights in Canada' *Government of Canada*, (web page, 10 May 2024) <https://justice.gc.ca/eng/cj-jp/victims-victimes/rights-droits/victim.html>.
30 *Sentencing Act 1995* (NT) s 107B(5A).
31 PSA (n 2) s 179I def (b) 'victim impact statement'.
32 Ibid s 179I def 'harm'.
33 See 'What is a victim impact statement', *Office of the Victims Commissioner* (web page) <https://www.victimscommissioner.qld.gov.au/pathways/sexual-violence>; Department of Justice and Attorney-General, Preparing a Victim Impact Statement (Factsheet) <https://www.publications.qld.gov.au/ckan-publications-attachments-prod/resources/6048e39f-617f-415d-9fc0-df5b3a2e991c/victim-assist-victim-impact-statement-factsheet.pdf?ETag=7712fa772962bd9ebd4792b78e1b6ceb>; PACT, *PACTs Guide to Writing Victim Impact Statements (VIS)* (Guide, May 2023) <https://pact.org.au/wp-content/uploads/VIS-Guide-FINAL-May-2023.pdf>
34 Office of the Director of Public Prosecutions, *Director's Guidelines* (30 June 2023) [29(iv), 47(ii)] 52 ('*ODPP Director's Guidelines*').
35 Ibid.

other documents (such as poems, photographs or drawings)[36] 'if they help [the victim] communicate the effects the crime has had'.[37]

Although not legislated, the VIS fact sheet outlines that a VIS should not include information about:

- details relating to the facts of the crime (as opposed to details of the harm), particularly where these details are inconsistent with the agreed basis for which the person is being sentenced;
- other crimes committed by the offender, including offences for which the offender may have been charged with, but not yet found guilty of;
- any medical conditions the victim survivor alleges were caused by the offending that are not, or are unable to be, supported by medical documentation;
- anything that is unsupported by the evidence before the court;
- the victim survivor's own opinion about the character of the person or the sentence they think the offender should receive; and
- offensive or inappropriate language.[38]

The prosecution is required to review the VIS to determine which details are appropriate to be given to the sentencing court. [39] In considering this, they 'may have regard to the victim's wishes'.[40] In making this assessment, the prosecutor will usually edit (strike through and remove) the content of a VIS if it contains any inadmissible or inappropriate evidence prior to sentence:

> Inflammatory or inadmissible material, such as a reference to uncharged criminal conduct, should be blocked out of the victim impact statement. If the defence objects to the tender of the edited statement, the unobjectionable passages should be read into the record.[41]

In discharging their duty to ensure a court 'acts only on truthful information', the prosecution will also scrutinise a VIS for 'reliability and relevance'.[42]

A VIS must relate to an offence which the person is being sentenced.[43] If it also includes details of an uncharged or unconvicted act or offence, a court may still accept and have regard to the admissible portions, but should 'exercise caution' and be 'expressly cognisant of the need to disregard any reference to the count in respect of which the applicant had been found not guilty'.[44]

What do other jurisdictions do?

In summary, Victoria, New South Wales and the Northern Territory permit a VIS to be provided to the court without any prior redaction:[45]

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36 PSA (n 2) s 179I.
37 Department of Justice and Attorney-General, *Preparing a Victim Impact Statement* (Factsheet) <https://www.publications.qld.gov.au/ckan-publications-attachments-prod/resources/6048e39f-617f-415d-9fc0-df5b3a2e991c/victim-assist-victim-impact-statement-factsheet.pdf?ETag=7712fa772962bd9ebd4792b78e1b6ceb>
38 Ibid.
39 PSA (n 2) s 179K(3).
40 Ibid s 179K(4).
41 *ODPP Director's Guidelines* (n 34) [47(iv)] 52.
42 Ibid [47(d),(ii)] 51.
43 *R v Karlsson* [2015] QCA 158 [77]–[78] (Carmody CJ).
44 Ibid [17], [19] (Morrison JA and Boddice J).
45 See Appendix 16.

- In Victoria, a VIS may be provided to the court without the redaction of subjective, emotive, objectionable or inadmissible material prior to sentence.[46] Upon receipt, the sentencing judge exercises their discretion to disregard any material they consider to be inadmissible, without specifying which parts of the material are not being relied upon.[47] However, while there is no requirement for a written and filed VIS to only contain admissible material, victim survivors are only permitted (on request) to read the admissible parts of their VIS aloud in court[48] – decided prior to sentence at a sentence indication hearing.[49] In circumstances where the victim reads their statement aloud, counsel for the defence may cross-examine a victim on their VIS during the sentence.[50] Guidance on how to rely upon a VIS is outlined by the Victims of Crime in the Courtroom: A Guide for Judicial Officers.[51]
- New South Wales ('NSW') permits a VIS to be provided to the court without redaction by a prosecutor. Upon receipt of a VIS, a sentencing judge must not consider or take into account any material that is not specifically authorised by 'this Division'[52] to be included in a VIS (administrative requirements).[53]
- The Northern Territory appears to permit a VIS to be provided to the court without redaction (and also permits victims to include submissions on the appropriate penalty/sentence).[54]

The Australian Capital Territory and Western Australia limit the redaction of content in prescribed circumstances:

- In Western Australia ('WA'), a VIS cannot include submissions about the way, or the extent to which, the offender ought to be sentenced.[55] Excluding this, a sentencing court may receive a VIS without prior redaction and the court may rule as inadmissible the whole or any part of it.[56]
- The Australian Capital Territory ('ACT') appears to only limit the extent to which a VIS should be redacted to content which is offensive, threatening, intimidating or harassing.[57]

Timeframes, inconsistent statements and cross-examination

There is no statutory restriction or practice direction guiding when the VIS must be provided to the prosecution, other than prior to sentence. However, in the District Court, written outlines of submissions

46 *Sentencing Act 1991* (Vic) ss 8L(4)–(5).
47 Ibid s 8L(6).
48 Ibid s 8Q. Prosecutors and defence counsel are expected to work together prior to the heading 'to identify and remove inadmissible material from the statement: Judicial College of Victoria, Victims of Crime in the Courtroom: A Guide for Judicial Officers (August 2023) 15.
49 See Appendix 16.
50 *Sentencing Act 1991* (Vic) s 8O.
51 Judicial College of Victoria, *Victims of Crime in the Courtroom: A Guide for Judicial Officer*s (August 2023) 15. The Guide instructs judicial officers to be mindful that victim survivors hold differing views about whether content from their VIS should be quoted in sentencing remarks. The Guide suggests when a victim survivor has chosen not to read out their statement, judicial officers should consider whether it is appropriate to read aloud from the statement or include them verbatim in published sentencing remarks. The Guide refers to remarks made in the case of *DPP v Latimer* [2017] VCC 87 [18]–[19] as best practice. This case involved child sexual offices.
52 A VIS can include any personal harm, emotional suffering or distress, harm to relationships with other persons, economic loss or harm that arises from any matter: *Crimes (Sentencing Procedure) Act 1999* (NSW) ss 23A, 25.
53 *Crimes Act* (NSW) s 30F(2).
54 *Sentencing Act 1995* (NT) s 107B(5A).
55 *Sentencing Act 1995* (WA) s 25(2).
56 Ibid s 26.
57 *Crimes (Sentencing) Act 2005* (ACT) s 51(7).

are encouraged (which may include details of the impact of the offence on a victim survivor) and should be emailed by 4.00 pm on the day prior to the sentence.[58]

The prosecutor may receive a VIS close in time to the sentencing hearing. Some reasons for this include:

- The victim survivor wants to wait for the offender to be convicted, to help manage their own expectations. The issue with this is that a sentence can immediately follow a jury verdict.
- There is a sudden, or late, plea and the victim survivor has not been informed of the resolution and given the opportunity to provide a VIS due to compressed timeframes. For example, in the Magistrates Courts a matter may proceed to sentence even if it is listed for a 'mention'.
- Prosecuting authorities or police may experience difficulties contacting the victim to discuss the provision of a VIS, such as where they are transient/avoidant, the victim survivor is a child and relies on a support person or parent, their contact number has changed or they require a translator.
- The victim survivor does not feel supported earlier in proceedings, which may lead to disengagement from the criminal justice process.
- The victim survivor wants the VIS to reflect the entirety of the harm they have experienced, including and up to sentencing.[59]

There are legal obligations on the prosecutor if a VIS is provided, particularly if this is prior to a conviction. A VIS must be disclosed to the accused person,[60] This is because there is a 'fundamental obligation of the prosecution to ensure criminal proceedings are conducted fairly' and the prosecution has a disclosure obligation to 'give an accused person full and early disclosure of … all evidence', including 'a copy of any statement of the witness in the possession of the prosecution' as soon as practicable.[61] Non-disclosure of evidence, including a VIS, could result in a miscarriage of justice and a retrial being ordered, particularly if it is considered fresh evidence.[62]

Where a VIS contains information that is inconsistent 'in a material way' with a victim survivor's prior evidence, or where it may raise concerns with respect to the victim survivor's credibility, the *Director's Guidelines* state that it must be provided to defence as soon as possible, to ensure the defendant is provided with the opportunity to question the complainant on any inconsistency,[63] and may rely upon the 'documents (or information contained within them) in an attempt to discredit the principal Crown witness'.[64]

Where a VIS is inconsistent with a victim survivor's prior statement or evidence and is provided before they give evidence, the victim survivor may be cross-examined on its contents at trial. The purpose of doing so is often to demonstrate that the victim survivor is not a reliable or credible witness:

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58 District Court of Queensland, *Practice Direction 5 of 2023: Sentencing Proceedings - Outline of Submissions*, (19 June 2023) <https://www.courts.qld.gov.au/__data/assets/pdf_file/0011/767423/dc-pd-05-of-2023.pdf>.

59 Stakeholder views from this review. See section 14.5 for more information.

60 *Criminal Code* (Qld) ss 590AB; 590AH(2)(e)(i).

61 Ibid.

62 See *R v Agnew* [2021] QCA 190 [81] (Flanagan J, Sofronoff P and Morrison JA agreeing); *R v Cox* [2010] QCA 262 [13] cited with approval in *R v Grimley* [2017] QCA 291 [4], [31], [35]–[36] (McMurdo J, Fraser and Gotterson JJA agreeing). See, for example, the following cases where a re-trial was ordered due to a failure on the prosecution to disclose the VIS: *Dunkerton v Queensland Police Service* [2018] QDC 71 [39]–[40] (Fantin DCJ); *R v Cornwell* [2009] QCA 294 [40]; *R v HAU* [2009] QCA 165 [40]–[43] (Keane JA, Cullinane and Jones JJ agreeing).

63 *ODPP*, *Director's Guidelines* (n 34) [29(iv)] 40.

64 *Dunkerton v Queensland Police Service* [2018] QDC 71 [28] (Fantin DCJ) citing *R v Spizzirri* [2001] 2 Qd R 686 [33].

> [t]he aim is to destroy the reliability of the evidence given in court by demonstrating that the witness was prepared to give a different version of events on a prior occasion.[65]

The court has noted the fundamental right of the defendant to a fair trial, and the importance of ensuring that defence are not deprived of 'documents which could be of assistance to the accused' person.[66]

Where a VIS is provided to the prosecution service prior to the victim survivor giving evidence but is not disclosed to defence in accordance with their obligations, the conviction can be overturned on appeal on grounds that there was a miscarriage of justice, as the defendant must have the opportunity to cross-examine the complainant where there is any inconsistency with their previous statements.[67]

An appeal of conviction may be granted where the contents of the VIS were deemed to be materially relevant, such as where there is something 'in the document [which] amounted to an inconsistent statement or raised a concern about the complainant's truthfulness or reliability in giving evidence'.[68] For example, in granting an appeal of conviction, it was recognised in *R v HAU*[69] that, in such a circumstance:

> defence should have been given the opportunity to raise with the complainant the differences in her account of events. The loss of the opportunity because of the prosecution's failure to meet its obligations of disclosure went to 'the root of the fairness of the trial'.[70]

However, where there is nothing in the statement that 'amounted to an inconsistent statement or raised a concern about the complainant's truthfulness or reliability in giving evidence', its lack of disclosure will not represent a miscarriage of justice, or constitute grounds for the conviction to be overturned on appeal.[71] The test is whether there is anything in the undisclosed document which 'could have made a difference to the verdict'.[72]

Where a VIS is disclosed to defence after conviction and is the subject of an appeal, a victim survivor may be cross-examined on the contents of their VIS where the Court of Appeal deems it 'necessary or expedient in the interests of justice' to do so.[73] However, this power cannot be used 'to permit a fishing expedition'.[74]

Queensland courts have also recognised that 'honest witnesses are frequently in error about the details of events. The more accounts that they are asked to give the greater the chance that there will be discrepancies about details and even inconsistencies in the various accounts.'[75]

Other reasons why information new information is introduced in a VIS may be because the victim survivor was not aware they were important, and no one had asked them before.[76]

For this reason, victim survivors are usually discouraged from discussing the facts of the offending within their VIS and are encouraged to instead focus on the harm caused.

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65 *R v Etheridge* (2020) 3 QR 481 at 486 [12]; [2020] QCA 34 [12].
66 *R v Spizzirri* [2000] QCA 469, 694 [35].
67 *R v HAU* [2009] QCA 165.
68 *R v Demos* [2012] QCA 165 [23].
69 *R v HAU* [2009] QCA 1.
70 Ibid 10 [42].
71 *R v Demos* [2012] QCA 165 [16] citing *R v BBU* [2009] QCA 385. See also *R v Grimley* [2017] QCA 291.
72 *R v HAU* [2009] QCA 165 [40], citing *R v Spizzirri* [2000] QCA 469.
73 *Criminal Code* (Qld) s 671B(1). See, for example, discussion in *R v Demos* [2012] QCA 165.
74 Ibid [23].
75 *M v The Queen* (1994) 181 CLR 487, 534 [63].
76 A J Rafter, 'The impact and use of inconsistent statements in a criminal trial' (Paper presented at a CPD event sponsored by the Crown Prosecutors' Association of Queensland in conjunction with the Bar Association of Queensland, 7 May 2024) 5 [18].

What do other jurisdictions do?

Some other jurisdictions in Australia provide victim survivors with clear guidance surrounding when their VIS should be provided to either the prosecution or the court. For example, NSW states that a VIS should be provided to the prosecution service 10 days before the sentence.

While the ACT does not set numerical timeframes, it prescribes that a VIS should only be provided to the court after conviction or a plea of guilty, but before sentence.[77] The ACT provides additional guidance surrounding the cross-examination of victim survivors, dependent on when they provide their VIS:

- If provided prior to conviction/a finding of guilt, defence are not permitted to cross-examine a victim survivor on their statement unless the court is satisfied that the statement has substantial probative value to justify allowing the cross-examination.[78]
- If provided after conviction, but before sentence, defence are not permitted to cross-examine a victim survivor on their statement unless the court is satisfied that it would materially affect the sentence and gives defence leave to do so.[79]

This process encourages VISs to be provided to the court earlier in proceedings, without the risk that the victim survivor will be cross-examined unless it is so probative or relevant to the fundamental principles of ensuring a fair trial for the defendant, such as the defendant's fundamental right to cross-examine a witness at trial.

Delaying a sentence hearing for the provision of a victim impact statement

In Queensland, the prosecution may request an adjournment for a VIS to be obtained. However, the prosecution has the discretion to proceed without providing a victim with the opportunity to produce a VIS where 'it is reasonable to do so in the circumstances, having regard to … (a) the interests of justice; (b) whether… [it] would unreasonably delay the sentencing of the offender; (c) anything else that may adversely affect the reasonableness or practicality of permitting details of the harm to be given'.[80] The sentencing judge retains their discretion to refuse an adjournment and to proceed straight to sentence.

What do other jurisdictions do?

Only legislation in WA and the ACT expressly prescribes that a sentence hearing may (or, in certain circumstances in the ACT, must) be adjourned for the purpose of enabling the victim to prepare a VIS and for this to be provided to the court:

- WA permits a court to adjourn the sentencing of an offender to either: (a) obtain information about the offence, the offender, or a victim; or … (c) to enable a victim impact statement to be given to the court.[81]
- The ACT prescribes that where a matter is a 'serious offence' (an offence punishable by 5 years' or more imprisonment) and the prosecution requests an adjournment for the preparation of a VIS, 'the court must grant the adjournment for a "reasonable period" to allow the statement's

77 *Crimes Act* 1900 (ACT) s 52(2).
78 *Evidence (Miscellaneous Provisions) Act 1991* (ACT) s 96(1).
79 Ibid s 96(2).
80 PSA (n 2) s 179K(2).
81 *Sentencing Act 1995* (WA) s 16(1).

preparation'.[82] The legislation further qualifies that 'the court must not adjourn the proceedings if satisfied that special circumstances justify refusing the adjournment'.[83]

Community impact statements in other Australian jurisdictions

In South Australia, legislation permits a 'community impact statement' to be made. Any person can tell the Commissioner of Victims' Rights about the impact of an offence.[84] The prosecutor or the Commissioner for Victims' Rights may tell the sentencing court about 'the effect of the offence … on people living or working in the location', known as a 'neighbourhood impact statement', or the impact 'on the community generally', known as a 'social impact statement'.[85]

14.3.3 The role of victim impact statements in Queensland

There are two legislative purposes of a VIS:

- The purpose of a victim survivor providing details of the harm caused to them (including by way of VIS) to a prosecutor is to enable the prosecutor to present this information to the court.[86] A court must have regard to the nature and seriousness of the offence, including the physical, emotional or mental harm mentioned in a VIS.[87]
- The purpose of allowing a VIS to be read aloud in court is to 'provide a therapeutic benefit to the victim'.[88]

While the therapeutic benefit or purpose of writing a VIS has not been legislated, there has been some commentary in the Court of Appeal on the purposes of writing a VIS, and how it should be relied upon at sentence.

The Court of Appeal has indicated that caution should be exercised in giving weight to, and acting on, allegations in a VIS if it is not within the victim survivor's knowledge or experience, or where there is no supporting evidence.[89] This reflects the general rules of facts at sentence: a court may 'act on an allegation of fact if it is admitted or not challenged'.[90] If challenged, a court may act on the allegation of fact if it 'is satisfied on the balance of probability that the allegation is true'.[91] The degree of satisfaction will vary depending on the consequences to the person being sentenced.[92]

In 2006, Fryberg J stated:

> Sentencing judges should be very careful before acting on assertions of fact made in victim impact statements. The purpose of those statements is primarily therapeutic. For that reason victims should be permitted, and even encouraged, to read their statements to the court. However, if they contain material damaging to the accused which is neither self-evidently correct nor known by the accused to be correct (and this includes lay diagnoses of medical and psychiatric conditions) they should not be acted on. The prosecution should call the appropriate supporting

82 *Crimes Act 1900* (ACT) s 51A.
83 Ibid.
84 *Sentencing Act 2017* (SA) s 15(1).
85 Ibid s 15(2), see *R v Wagner* [2019] SASC 70 [10]–[19] (Parker J) for how courts have received this information.
86 PSA (n 2) ss 179K(1), (3), (7).
87 Ibid s 9(2)(c)(i).
88 Ibid s 179M(4).
89 *R v Evans* [2011] 2 Qd R 571 [30] citing *R v Singh* [2006] QCA 71. See also *R v Anthony* [2013] QCA 95 [30]; *R v Margaritis* [2013] QCA 401; *R v Williams* [2014] QCA 154 [12].
90 *Evidence Act 1977* (Qld) s 132C(2).
91 Ibid s 132C(3).
92 Ibid s 132C(4).

> evidence. It is unfair to present the accused with the dilemma of challenging a statement of dubious probative value, thereby risking a finding that genuine remorse is lacking, or accepting that statement to his or her detriment.[93]

In subsequent decisions, His Honour clarified that the sentencing court, in determining the appropriate outcome,

> was not limited to the facts in the statement of agreed facts. Facts put forward by the prosecution in the victim impact statement are not to be ignored. They must be given their due weight. The passage in Singh was concerned to ensure that the defence were not placed in a position of embarrassment or dilemma, often at the last minute, by assertions the truth of which they did not know and were unable to ascertain.[94]

Another member of the Court of Appeal considered 'it is not clear (at least to me) that the primary purpose of a victim impact statement is therapeutic … [it] may serve other purposes, such as informed the court of … the harm caused'.[95] The 'care' required is based on section 132C of the *Evidence Act 1977* (Qld).[96]

Recently, in *R v HYQ*,[97] the Court of Appeal said:

> I cautiously observe that some care must be taken in relation to the weight to be given to victim impact statements tendered at sentencing hearings. That is not intended to diminish the impact of harm on a victim of offending, such as the complainant in this case; nor the therapeutic benefit of enabling such a person to articulate for the court the subjective impact of the offending on them, or the importance of the court understanding that impact. But the statement tendered in this case contains material that appears to overstate some aspects; matters which are not reflected in the agreed factual basis for the sentence (such as the complainant's parents entrusting his care to the applicant; that the applicant "exploited" him; or that all of the difficulties he has experienced in his life since are attributable to the applicant). Some care is therefore required, before accepting the statement unquestionably, or allowing it to overwhelm other features of the case.[98]

Where a VIS includes additional information that is 'outside of [its] purpose' or that includes 'material [that] goes beyond that which is relevant', the court may place 'little to no weight' on those portions.[99] For example, Smith DCJ recently said:

> I find that significant harm has been caused by the offending and it will continue to cause harm to many victims and/or their families even those who have not provided such statements. Insofar as the statements stray into matters outside of their purpose I note they are of therapeutic value to the families and the victims. I consider the statements in that light and place little to no weight on matters outside of their purpose.[100]

What the court has said about the degree of harm and its impact on sentence

The harm suffered because of an offence is relevant to a court's assessment of the nature and seriousness of the offence.[101] The injury and harm caused by an offence can increase the criminality and seriousness.[102]

Court of Appeal decisions demonstrate that courts have relied upon probative evidence outlined in a VIS in assessing harm.[103] It has also been acknowledged that this can be a feature that distinguishes one

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93 *R v Singh* [2006] QCA 71, 8 (Fryberg J) (emphasis added).
94 *R v Major;* Ex *parte A-G (Qld)* [2011] QCA 210 [102] (Fryberg J).
95 *R v Evans* [2011] 2 Qd R 571 [17] (Chesterman JA).
96 Ibid [18] (Chesterman JA).
97 *R v HYQ* [2024] QCA 151.
98 Ibid [80].
99 *R v Griffith* [2024] QDC 207 [71]–[74], [115] (Smith DCJ).
100 Ibid [74] (Smith DCJ).
101 PSA (n 2) ss 9(2)(c); (3)(c), (d); (6)(c).
102 *R v Wallace* [2023] QCA 22 [37] (Dalton JA).
103 *R v Downs* [2023] QCA 223 [46]–[47].

case from another.[104] However, Holmes JA also commented: 'I am not sure that there is much to be gained by comparing victim impacts of two horrific crimes.'[105]

Recently, in *R v Wallace*,[106] it was noted that

> the impact of the defendant's initial attack upon the victim must have been substantial, and the defendant's overall actions resulted in serious physical injury to the victim, as well as severe psychological harm, both with ongoing consequences – matters which place this case within that range of 10 to 14 years; rather than in the lower range referred to by Henry J in Benjamin.[107]

In *R v VN*,[108] the Court of Appeal noted how courts focus on the physical harm, which is a primary factor in the PSA:

> The tendency to use physical injury and harm as a tool for comparison of sentences seems to have developed in cases where the rape or rapes occurred on one violent occasion … It is hard to see how it could be said the psychological harm caused to a complainant such as in the present case can be said to be any less significant … To diminish the harm caused by serious sexual offending of the kind the applicant committed by contrasting it with physical harm is to misunderstand the real impact of offending of this kind.[109]

The absence of a VIS does not mean the harm is a neutral factor at sentencing.[110] And a court may not draw an inference that there is no harm.[111] It is open for the court to rely upon 'common sense' and 'life experience' in making a finding of fact.[112]

For example, it has previously been acknowledged that '[v]ictims of incest and other forms of intra-familial sexual abuse take years to recover from its psychological effects and sometimes never do.'[113]

However, the Court of Appeal has made findings where there was a lack of evidence with respect to the degree of harm caused. For example in *R v Al Aiach*,[114] the Court noted that 'there was no evidence of any long term adverse physical or psychological effect upon any of the complainants'.[115] In *R v Quinlan*,[116] the Court of Appeal noted that 'it was not submitted to have resulted in serious or long-term consequences for the complainant'.[117]

In *R v Evans*,[118] the original sentencing judge found that the victim would 'continue to suffer for a long time'. However, the Court of Appeal found this to have been unsupported by the evidence, reflecting that, 'There is a limit to the extent to which judges can draw on their own experience, in other cases or elsewhere, to reach conclusions of fact for the purpose of sentencing.'[119] Despite this error, the majority considered it 'made no significant difference to the sentence'.[120]

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104 See *R v Williams; Ex parte A-G (Qld)* [2014] QCA 346 [62]–[68] (McMeekin J, Henry J agreeing). At [68] it was stated: 'In Dowden the short description of the impact on the victim suggests a lesser impact there than here.' (footnotes omitted).
105 Ibid [12] (Holmes JA).
106 *R v Wallace* [2023] QCA 22.
107 Ibid [18] (Bowskill CJ, Bond JA agreeing).
108 *R v VN* [2023] QCA 220
109 Ibid [32] (Bowskill CJ and Morrison and Dalton JJA).
110 Ibid [22]–[23].
111 PSA (n 2) s 179K(5).
112 *HG v The Queen* (1999) 197 CLR 414.
113 *R v DD (No 2)* [2008] VSCA 15 (Neave JA).
114 *R v Al Aiach* [2007] 1 Qd R 270.
115 Ibid [32] (Keane JA).
116 *R v Quinlan* [2012] QCA 132.
117 Ibid [30] (Fraser JA, Fryberg and Martin JJ agreeing).
118 *R v Evans* [2011] QCA 135.
119 Ibid [33] (Fryberg J, Chesterman JA agreeing). McMurdo P agreed with the error but considered it did affect the sentence and would have allowed the appeal: [10].
120 *R v Abdullah* [2023] 39 QLR [23] (Bowskill CJ, Flanagan JA and Buss AJA agreeing).

Why clarifying the purpose is important

The purpose of a VIS is relevant to consideration of how the court should receive and use a VIS, and what information (if any) 'should' be removed prior to sentence.

If the purpose were primarily to convey a therapeutic benefit to the victim survivor without having an impact on the penalty imposed at sentence (conveying an '*expressive purpose*'), the importance of redacting inadmissible content would be lessened. This is because the contents of the VIS would not be considered by the judge in determining the appropriate sentence. Rather, the focus would be on providing a victim survivor with a platform to speak freely about the offending in a way that is cathartic without restricting their voice through a redaction process.

Comparatively, if the purpose was to provide information about the harm caused to a victim survivor by the offence, to be taken into account by the judge in their assessment of harm and in imposing the most appropriate penalty (being for an *'instrumental purpose*'), then it becomes important for the person being sentenced to have the opportunity to test that evidence. The court would then need to be satisfied of the veracity of the allegation of fact to the requisite standard prior to placing any weight on it. In those circumstances, consideration of whether inadmissible material should be redacted prior to sentence, or whether it should still be admitted to limiting a victim survivor's voice, becomes pertinent.

This duality creates challenges for both the community (including victim survivors) and legal stakeholders, who have different expectations with respect to how a VIS should be used by the court and which purpose is more important: victim survivors expect to be able to tell their story without restriction to facilitate the therapeutic benefits, while legal stakeholders believe that it should only contain admissible, relevant material, in line with the rules about fact-finding at sentence.[121]

14.4 Support for writing a victim impact statement

14.4.1 Support services for victim survivors when writing their VIS

Police and prosecution agencies both have a responsibility to notify victim survivors that they can prepare a VIS to be considered by the court at sentence.[122]

Victim survivors are not supported by the prosecution service when writing their impact statement. While the prosecution service can direct a victim survivor to publicly available information and support agencies,[123] they are not responsible for assisting victim survivors to write their VIS and are not funded to provide this service.

Support for writing an impact statement was previously provided to victim survivors by VAQ. During consultation, VAQ advised that it no longer directly assists victim survivors with this process unless necessary, instead referring victim survivors to other support organisation (including those outlined

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121 See *Evidence Act 1977* (Qld) s 132C.

122 Queensland Police Service, *Operational Procedures Manual* (Issue 102, October 2024) section 3.7.10 ('*QPS OPM*'); *ODPP Director's Guidelines* (n 34) [25(iii)] 34.

123 Victim Assist Queensland, 'Preparing a Victim Impact Statement' (Department of Justice and Attorney-General, accessed 19 November 2024) <https://www.publications.qld.gov.au/ckan-publications-attachments-prod/resources/6048e39f-617f-415d-9fc0-df5b3a2e991c/victim-assist-victim-impact-statement-factsheet.pdf?ETag=30bc17d39214623bf53b67487751adac>.

below). However, VAQ continues to produce and publish an information sheet on how to write a VIS on its website.

Responsibility for supporting victim survivors of rape and sexual assault to prepare a VIS now lies with separate non-government organisations, which support specific cohorts of victims, including:

- PACT: for children and adults who have experienced sexual violence; and
- Victim Connect (which is funded by VAQ): for victims of a violent crime;
- Working with People with Intellectual and Learning Disabilities ('WWiLD'): for victim survivors with intellectual or learning disabilities that have experienced or at risk of experiencing sexual violence, other crimes or exploitation;[124] and
- QSAN: for victim survivors of a sexual offence.

Inconsistent public information

During this review, we found that available information is inconsistent when outlining which organisation or support service supports victim survivors when writing their VIS.

For example, the QPS OPM states that, 'For a matter appearing before a district or Supreme Court, officers from the ODPP will assist the victim in the process of preparing a VIS.'[125] An ODPP VLO will 'provide information' about the process[126] (for example, they may provide victim survivors with VAQ's fact sheet on what can be included in a VIS). However, this does not include providing any further procedural support (including with respect to the content of the VIS) or emotional support to victim survivors.[127]

The QPS OPM further states that police can refer a victim survivor to VAQ for assistance with completing a VIS for production in court.[128] However (as discussed above), VAQ has advised that it generally no longer provides this service.

14.4.2 Resources available to support victim survivors

In Queensland, the Office of the Victims Commissioner has produced a Victim's Pathway online resource and a podcast to assist adult victim survivors of sexual violence.[129] For a VIS, the page directs a person to a two-page fact sheet on 'Preparing a Victim Impact Statement' produced by VAQ.[130] This document includes high-level information surrounding how to write a VIS, what to include and exclude, how to submit a VIS and who will see it. The document also notifies victim survivors of the right to either read their VIS aloud, or to have another person do this.[131]

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124 WWILD can be contacted through their website or by telephone on (07) 3262 9877.
125 *QPS OPM* (n 122) section 3.7.10.
126 Office of the Victims Commissioner, 'Victim Liaison Officers' (web page) <https://www.victimscommissioner.qld.gov.au/pathways/sexual-violence/definitions/victim-liaison-officers>.
127 Brisbane Consultation Event, 11 March 2024.
128 *QPS OPM* (n 122) sections 3.7.10, 2.12.3.
129 'A victim's pathway', *Office of the Victims' Commissioner* (web page, 2024) <https://www.victimscommissioner.qld.gov.au/pathways/sexual-violence>.
130 Victims Assist Queensland, 'Preparing a Victim Impact Statement' (Department of Justice and Attorney-General), accessed 19 November 2024: <victim-assist-victim-impact-statement-factsheet.pdf>.
131 Ibid.

Queensland does not provide victim survivors with a template to guide them on how to structure their VIS. The fact sheet outlines that there is 'no set form or style. You can write it as if you're writing a letter to the sentencing judge to describe the effect of the crime on you and your life.'[132]

What do other jurisdictions do?

Jurisdictions have different resources available to support victim survivors prepare their VIS (see **Appendix 17**):

- NSW, South Australia and Victoria have dedicated websites and portals that are designed to support victim survivors, and have direct links to support services.[133]
- NSW, Victoria, the Northern Territory, South Australia and Tasmania all provide templates and clearer guides for victim survivors to utilise when preparing their VIS. [134]
- Other jurisdictions produce detailed resources on the process of preparing a VIS.[135]

For example, NSW produces a bundle of VIS documents including a guide, checklist and template:

- The guide provides general information about the process (including listing services available to help them to prepare their VIS), specific information about preparing the VIS (including procedural requirements) and who to provide it to (the prosecution service) and when (10 days before the sentence hearing).[136]
- The checklist guides victims through each step of the VIS preparation process. This checklist includes a suggestion to 'request or locate documentation that may assist with your victim impact statement', including any documents from a medical professional. It also asks victim survivors to 'tick' whether they would like to read their VIS aloud, or to have someone else do this, and whether there are any other arrangements they would like in place during the sentence hearing, such as to close the court, read their VIS using CCTV or have a support person present.
- The template includes a cover sheet with a check box to indicate whether the victim survivor would like their VIS to be read aloud and, if so, by whom or are undecided. It also has headings with questions to prompt victim survivors and spaces to write a response, including opening comments; emotional suffering or psychological harm; physical harm; economic (financial) loss; social harm; and general comments.

In a submission to the ALRC's review, the South East Monash Legal Service in Victoria emphasised the importance of victims being provided with proper support during this process, telling the ALRC:

> Our clients' experiences surrounding Victim Impact Statements (VIS) varies depending on what support they have had prior to and during the preparation of a VIS. Some informants have sent our clients who are a victim of horrific sexual violence home to prepare a VIS with no further support or assistance in preparing a statement. This can be extremely distressing for some, as they do not know what to write or how to structure their statement to express what they would like to say.[137]

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132 Ibid.
133 See Appendix 17.
134 Ibid.
135 Ibid.
136 Ibid.
137 South East Monash Legal Service (Victoria) submission to the ALRC inquiry into Justice Responses to Sexual Violence, submitted 16 June 2024.

14.5 Stakeholder views

14.5.1 The purpose and use of a victim impact statement (including where one is not provided)

While some consultation participants recognised the importance of a VIS in allowing victim survivors to inform the court of the harm experienced,[138] victim support and advocacy organisation and legal stakeholders also commented on the issues and limitations with the current approach to these statements.

Submissions from victim survivor support and advocacy bodies

The Office of the Interim Victims' Commissioner ('OIVC') considered allowing a court to receive the whole, un-redacted VIS 'may better reflect the purpose of victim impact statements'.[139] The OIVC also raised concerns that '[w]here there is only a cursory reference to the presence of a VIS within sentencing remarks, this risks the court record being deficient with respect to the victim's voice and the harm suffered by the victim.'[140] The OIVC also told us that there may be an opportunity to clarify the purpose of providing a VIS for victim survivors, as well as its role in sentencing, through the ODPP's review of the *Director's Guidelines* (currently underway).[141]

Fighters Against Child Abuse Australia ('FACAA') emphasised:

> There is also a need for judges to hear directly from victim-survivors so they can get a better understanding of the trauma endured which will hopefully lead to more appropriate sentences and less plea deals for perpetrators of rape and sexual abuse.[142]

However, the Queensland Sexual Assault Network ('QSAN') noted that some victim survivors do not want to provide a VIS to the sentencing court, as they 'do not want the perpetrator to know how deeply the crime impacted on their life'.[143]

Views of victim survivors

Consultation with victim survivors

Victim survivors had mixed experiences of providing a VIS.

One victim survivor told us she was grateful for the opportunity to provide a VIS and found the process to be 'cathartic' and 'very valuable':[144]

138 For example, Submission 25 (Respect Inc and Scarlet Alliance) 4; Submission 30 (Youth Advocacy Centre) 8; Submission 23 (Legal Aid Queensland) 31.
139 Submission 26 (Office of the Interim Victims' Commissioner) 3. This is now permanently established as the Office of the Victims' Commissioner.
140 Ibid 3.
141 Ibid 4.
142 Submission 15 (FACAA) 12–13.
143 Submission 24 (QSAN) 12.
144 Victim Survivor Interview 7.

> It's cathartic in a way, and, and the way a trial runs … The opposing counsel questioned me for over 2 hours … So being able to, to write the impact statement and then share it out loud, I found very valuable, and I was grateful for that. (Victim Survivor Interview 7)

She also reflected that having the sentencing judge refer to her VIS during sentencing remarks led her to have 'full faith in him as a judge during that process. He seemed really objective and neutral.'[145]

However, we were also told by another victim survivor that she thought providing a VIS would help her, but that 'the judge barely read it. And he didn't care … I don't think anyone in that courtroom really cared … It didn't change anything.'[146]

> We were told that the judge 'quickly mentioned that it has done harm to [XXX] and our family… it was just mainly focused on how he's trying to fix his life, not really acknowledging how it has changed our life forever.

This made them feel as if they 'weren't important'.[147]

There was a broad consensus that while judicial officers may attempt to understand the harm done to victim survivors, they think the judicial officer can never understand the harm caused to them, or that the sentence did not sufficiently take their harm into account:

> I reckon the judge did the best he can with what he could do. They've got the laws that they've got to abide by. It's not the judge, it's the laws. (Victim Survivor Interview 4)

Interviews with victim survivor support advocates

Support advocates recognised that victim survivors have different expectations and experiences of providing a VIS:

> Some of them find it helpful. Some of them find it confronting. Some of them don't want to have to do it because they feel like they have to re-live it again. Some of them don't believe it will do a damn thing. So[me] just don't care. (Victim Support Advocate Interview 1)

> [There is a] victim survivor expectation and [belief] that the VIS will carry a huge amount of weight, because that's the first time they've been able to put their reality before the court. [148]

> I just wanted a bit more knowledge and information given to the woman about what the victim impact statement's for and how you know, what will it be helpful, that sort of [thing] … she wasn't really fully aware why she was doing this – she thought she just got to have a chance to say what she wanted to say. But there was no understanding of how that could have actually been used or taken within the court – that maybe it would help you in sentencing in one way or the other. (Victim Support Advocate Interview 1)

Some advocates reflected that reading a VIS aloud in front of their perpetrator can be 'incredibly powerful' for some victim survivors, as well as a way for them to reclaim their voice in an environment where they are not 'fearful of consequences from him for being able to say what she said in that courtroom'.[149]

Participants expressed strong views that the sentence hearing should focus more on the victim survivor and the impact or harm caused to them.[150] However, it was also stated that not too much weight should be placed on a VIS and that 'caution' should be exercised, lest it be detrimental to a resilient victim

145 Ibid.
146 Victim Survivor Interview 1.
147 Ibid.
148 Victim Support Advocate Interview 3.
149 Victim Support Advocate Interview 1
150 Victim Support Advocate Interview 1; Victim Support Advocate Interview 3.

survivor who does not provide one, or a victim survivor who may be illiterate or face challenges articulating the harm:

> So I think they're fantastic and have a really good place but they can't be too weighty because you could have somebody who is very articulate and able to [state the harm] very clearly … you can never tell, because people feel their emotions differently, and what the long-term effects are likely to be … I think they're really important, but I would hate to see sentences only weighed towards the victims [who provide one].[151]

We were told that the lack of support and assistance for victim survivors mean some are concerned about what a court will consider if there is no VIS:

> It's not very clear the weight that it has either because there can be that fear 'if I don't write something. They'll think I'm not impacted. It's going to be used against me and that it didn't impact me.' [The offender will] get a lighter sentence … Yeah, there's not a lot of education around preparing for sentencing, for victim impact statements, what it all means.[152]

Other submissions

The Dispute Resolution Branch suggested that the purpose of providing a VIS could be expanded to allow victim survivors to not only outline the impacts of the crime, but also to indicate whether the offending person had taken responsibility for their actions, and any steps that they had taken to address the harm caused. It was recognised that this may provide the court with increased insight into the outcome of a resolution while maintaining a victim-centric approach.[153]

Submissions from legal stakeholders

Legal Aid Queensland ('LAQ') outlined that, 'One of the principal purposes of a VIS is to enable a victim survivor to tell the court and the person who harmed them how the offending behaviour impacted them.'[154] Similarly, the Youth Advocacy Centre ('YAC') reflected that VIS are 'beneficial for understanding the harm caused to the victim.'[155]

SME Interviews

One participant observed that a VIS can contain very compelling information, which assists the judicial officer at sentence.[156] This may include information about the impact of a breach of trust, or the long-term impacts it has had on relationships and the victim survivor's mental health.[157] Another recognised that reading a VIS also serves a therapeutic purpose, by providing an opportunity for the victim survivor to talk about their feelings and the impact of the offending on them in the courtroom.[158]

Some participants thought the VIS itself should serve a predominantly therapeutic purpose as the harm 'goes towards setting the overall tariff that courts look for particular types of offences':[159]

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151 Victim Support Advocate Interview 1.
152 Victim Support Advocate Interview 3.
153 Submission 21 (Dispute Resolution Branch) 3.
154 Submission 23 (Legal Aid Queensland) 31.
155 Submission 30 (Youth Advocacy Centre) 8.
156 SME Interview 14.
157 Ibid.
158 SME Interview 16.
159 SME Interviews 1, 25.

> I don't know that the specific VIS necessarily sways the sentence to be imposed, well, it shouldn't do that. It is an opportunity for the complainant to tell the court - or their family - what the impact of the offence is. But that's where it starts and stops.[160]

Where there is no VIS, 'it's just judicial notice of how awful it would be. But nothing … individualised.'[161]

We were told that there are challenges if the victim survivor does not provide material to support some types of harm mentioned in the VIS or they don't provide a VIS at all.[162] For example, one participant told us that a VIS

> can be really problematic because they'll assert matters which are not the subject of charges, are not in sworn statements, and can be prepared and provided after trial … And there can be an inconsistency between the victim impact statement and the facts of the trial which can lead to a mistrial.[163]

We were told that it is clear there is lack of assistance and funding to help a victim survivor prepare a VIS. As a result, this means it:

- may lack utility where the victim survivor was likely not told what the purpose of the statement was;[164]
- Is 'an unsophisticated document' written by the victim survivor,[165] which may contain prejudicial or procedurally unfair content[166] that 'strays well beyond [the] permissible purpose' and is often unusable, in that it does not discuss the harm or impact to the victim survivor;[167]
- may 'overstate' the causal connection between the offence and the harm, while this may be caused by other factors in their lives;[168]
- can contain content that is 'exaggerated' but is then used 'in the defendant's favour'.[169]

If a VIS is not useful, the court can only infer the harm as if no VIS were provided at all.[170]

One participant explained that the lack of funding and support creates an imbalance in the sentencing hearing because the person being sentenced can show the judge 'the 30-page psychologist's report that discusses this horrible tragic history for the defendant' but there is no similar funding for a victim to obtain a psychologist to show the sentencing court.[171]

Where there is no VIS

It was recognised victim survivors may not provide a VIS for a variety of reasons, including:

- where they do not want to provide one because do not want to disclose personal information;[172]
- where there is a relationship or power imbalance between the victim survivor and their offender, which may lead a victim survivor to not want to provide a VIS – particularly within some cultures

160 SME Interview 1.
161 SME Interview 6.
162 SME Interview 11.
163 SME Interview 26.
164 SME Interview 14
165 SME Interview 3.
166 SME Interview 25.
167 SME Interviews 3, 8, 13, 14.
168 SME Interview 12.
169 SME Interviews 7, 21.
170 SME Interview 13.
171 SME Interview 3.
172 SME Interview 10.

where a victim survivor may feel compelled not to speak to others about the offending,[173] the victim survivor was not provided with adequate information to produce one;[174]

- a victim may not want to relive their experience through writing a VIS.[175]

Where a victim survivor does not have the necessary literacy skills, feels incapable of writing their VIS because it is too challenging or has a psychological barrier to doing so, other ways to gather that information should be offered.[176] For example, the prosecution should speak with the victim survivor, write down the facts and present them to the court in order to at least provide some information on the direct impact on the victim survivor.[177]

It was also noted that matters in the lower courts can resolve quickly and without any notice, so it is unusual for a VIS not to be provided in these proceedings due to time restraints.[178] The practice of failing to request an adjournment for a VIS to be obtained was described as both disappointing[179] and 'unacceptable'.[180]

Where there is no VIS, judicial officers will need to make assumptions with respect to the harm caused to the victim survivors, but that there can be limitations to this.[181] Participants reflected that, while an inference can be drawn on a very superficial level as to the impact of the offending, 'of course, direct evidence from the victim survivor on the actual impact is going to be so much more relevant to a sentencing outcome',[182] and the absence of anything specific to the victim survivor limits understanding of the true extent of the harm, as well as the influence this will have on the sentence outcome.[183]

Another participant noted that while it is possible to infer the harm caused, they did not believe it was as effective as 'hearing it from someone's own mouth', with a marked difference in sentencing outcomes.[184]

Others reflected that judicial officers need to be careful not to speculate too much where a VIS is not provided, as this could involve the exercise of sentencing discretion 'for something that is not there'.[185] It was noted that a person's experience of harm will likely depend upon their resilience and whether they have access to treatment.[186]

In some cases – particularly child sexual abuse – while there is knowledge of the impact at the time, 'any sort of sexual assault or rape can have long-lasting impacts. You just don't know.'[187]

It was suggested that one way to ensure there is a VIS is for 'the victim impact statement [to] be prepared at the same time [the victim is] preparing a statement to the police. And [the VIS] can be updated if necessary.'[188]

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173 SME Interviews 11, 14.
174 SME Interview 16.
175 SME Interview 16.
176 SME Interview 14.
177 SME Interview 14. This process is similar to what the provision of a 'Victim report' in the Northern Territory pursuant to s 106B(2) *Sentencing Act 1995* (NT).
178 SME Interviews 6, 12.
179 Ibid.
180 SME Interview 5. See also SME Interviews 4, 9.
181 SME Interview 6, 19, 20.
182 SME Interview 5
183 SME Interview 6, 10, 20.
184 SME Interview 17.
185 SME Interview 12.
186 SME Interview 14.
187 Ibid.
188 SME Interview 26.

Consultation events

Participants reflected that there is a therapeutic benefit associated with reading a VIS aloud. It was also noted that this serves an important function for the person being sentenced, the court and the community to directly hear from victim survivors about the impact of the offending on them,[189] such as the ongoing and often long-term or lifelong effects and multiple impacts (such as mental health/family/social relationships, etc).[190]

We were told a VIS is 'a marvellous thing', as it is important for victims to have a voice, 'but we need to take steps to prevent it being weaponised'.[191] We were told there were some appeals that succeeded because of the contents of a VIS and an accused should have had the opportunity to cross-examine the victim on it.[192] We were told the process of providing a VIS 'is valuable but we want to take away the opportunity to exploit that'.[193] One suggestions was to legislate that the contents of a VIS are 'off limits' for cross-examination.[194]

One participant suggested that it could be beneficial for judges to sign an 'acknowledgment of harm' document, which is then provided to the victim as further recognition.[195] However, participants recognised the importance of making sure this would not become tokenistic and would be done in a meaningful way during sentencing, as opposed to becoming something judicial officers feel they must merely tick off.[196]

Additional challenges were raised within the sentencing context when referring to how a penalty should be imposed where a victim survivor does not produce a VIS, or where they were compassionate or resilient victims who said no long-term harm was done, compared with a victim who experienced greater harm.[197] For example, we were told 'some victims may cope really well, while others don't, so the courts don't attach as much weight to a specific person's response, but they do take into account the harm generally'.[198]

Some other participants described the VIS regime as a false promise (a 'fallacy'), because the VIS was not considered in deciding the penalty.[199] Within this context, participants who believed the VIS to have had no value in impacting the penalty felt there was no point in producing one.[200]

Aboriginal and Torres Strait Islander Advisory Panel members' views

Members of the Aboriginal and Torres Strait Islander Advisory Panel considered that VIS' are under-utilised and may cause more trauma, especially if there is dispute between the parties regarding what is admissible. Although the defence is entitled to challenge the inclusion of inadmissible material, it was acknowledged that this can have significant impacts on a victim survivor.

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189 Cairns Consultation Event, 21 March 2024.
190 Online Consultation Event, 3 April 2024, Table 2.
191 Online Consultation Event,16 April 2024, Table 1.
192 Ibid.
193 Ibid.
194 Ibid.
195 Brisbane Consultation Event, 11 March 2024.
196 Ibid.
197 Ibid.
198 Online Consultation Event, 16 April 2024, Table 2.
199 Brisbane Consultation Event, 11 March 2024.
200 Ibid; Cairns Consultation Event, 21 March 2024.

14.5.2 Procedural rules surrounding providing a victim impact statement

Submissions from victim survivor support and advocacy bodies

QSAN considered that the therapeutic benefit of having a 'voice' and providing a VIS is lost because a VIS 'must be meticulous in their framing to comply with these rules and regulations'', which 'reinforces the system's offender centric approach.'[201]

QSAN also noted it is not therapeutic when a VIS is prepared and not used:

> The victim-survivor can spend many hours on their statement and … are told '*This is your chance to have your say*' often by other participants in the system rather than sexual violence services, and then when a not guilty verdict is returned the process of writing the victim impact statement has zero therapeutic value. This is not trauma informed and can have a profound impact on the victim-survivor whose reality is never heard in court. It is not uncommon for victim-survivors to be very angry about this.
>
> We do not want to extend or draw out the sentencing process, but the system needs to understand the victim- survivor is buoyed by doing the statement and it gives them hope for a just outcome.
>
> There needs to be thought about how the process can be changed to better accommodate victim-survivor needs and to be more trauma informed.[202]

In its submission, the OIVC referred to the key issues identified by the Victorian Victims of Crime Commissioner in its systemic inquiry into victims' participation in the criminal justice system, including:

- victims wanting (or in practical terms needing) to prepare a VIS 'early', leaving them vulnerable to their VIS being used by the defence
- insufficient time to prepare a VIS after a plea or finding of guilt, particularly in the Magistrates' Court
- the potential for victims to be cross-examined on the contents of their VIS
- VISs being 'edited'
- lack of assistance preparing a VIS.[203]

The OIVC suggested the Council consider:

- ACT and Canadian legislation, 'which enables an adjournment to be granted for a reasonable time to allow a victim to prepare a Victim Impact Statement';[204]
- legislative reform to follow the Victorian approach to VIS, allowing the court to 'receive the whole of a VIS, even where it contains inadmissible material',[205] to promote the communicative or expressive function of a VIS; alternatively, ways were suggested to amend a VIS in consultation with a victim survivor; [206]

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201 Submission 24 (QSAN) 12.
202 Ibid.
203 Submission 26 (Office of the Interim Victims' Commissioner) 2 citing Victims of Crime Commissioner (Victoria), *Silenced and Sidelined: Systemic Inquiry into Victim Participation in the Justice System* (November 2023) 432 (citations omitted).
204 Ibid 2 citing *Crimes (Sentencing) Act 2005* (ACT) s 51A..
205 Ibid 3 citing *Sentencing Act 1991* (Vic) s 8L(5)–(6).
206 Ibid.

- increasing victim survivor options to provide a VIS, including pre-recorded statements to be heard in court, as adopted in Canada[207] and South Australia;[208]
- recommendations by the Victorian Victims of Crime Commissioner to 'quarantine' a VIS until after a finding of guilt, to protect victim survivors from having their statements used in cross-examination.[209]

In its submission to the Queensland Government on the Making Queensland Safer Bill 2024, the Victims' Commissioner recommended:

- the provision of adequate information and accessible and timely support for victim survivors;
- legislative amendments to enable the prosecution (on request) to seek an adjournment for a victim survivor to prepare a VIS (similar to the ACT and Canada, and as recommended by the Victorian Victims of Crime Commissioner);
- that a VIS be received by the sentencing court without redaction (similar to Victoria) or for any amendment to be done in collaboration with the victim survivor to promote understanding of why the content is being redacted;
- the consideration of alternative mechanisms to provide a VIS, including through a pre-recorded VIS;
- there be greater recognition of harm caused to a victim survivor in the judicial officer's sentencing remarks, in consultation with the wishes of the victim survivor on whether they want their VIS read aloud in court; and
- the use of Community Impact Statements be considered (similar to South Australia).[210]

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207 Ibid citing 'Victims' Rights in Canada' *Government of Canada* (Web page) < https://justice.gc.ca/eng/cj-jp/victims-victimes/rights-droits/victim.html>.

208 Ibid citing *Sentencing Act 2017* (SA) s 14(3)(a). YAC also supported alternatives to a written VIS such as 'allowing young victims to express their harm [to] the Court through recorded statements': Submission 30 (Youth Advocacy Centre) 8.

209 Ibid 2 noting the position in Queensland as decided in *R v Agnew* [2021] QCA 190.

210 Victims' Commissioner, 'Submission to the Queensland Government on the Making Queensland Safer Bill 2024' (Submission 96) 10–11. <https://documents.parliament.qld.gov.au/com/JICSC-CD82/IMQSB2024-B002/submissions/00000096.pdf>.

Victim survivor views

Consultation with victim survivors

One victim survivor told us they were not informed about the importance of obtaining a medical report:

> At that stage, we were in the middle of getting a diagnosis for [victim survivor] that she is autistic. So, she [the prosecutor] basically said to me, 'if we don't have that report by the time it goes to sentencing, it won't be important', so we just felt like, okay, we didn't have it. We got it four days later. (Victim Survivor Interview 1 - Parent)

The mother of the victim survivor thought it would have helped the court to have a document that spoke about how the offending had affected their home environment.[211]

Consultation with victim survivor support advocates

During interviews, a support advocate reflected that the process of writing a VIS for one victim survivor was 'very triggering and that in and of itself was a difficult process for her'. [212]

It was acknowledged that a victim survivor may be restricted in what they can include in a VIS when their offender is convicted only of particular offences:

> Victim impact statements don't always reflect someone's full experience because … if there's a long history of violence and perpetration, what they're found guilty on might be very limited. And so … [the victim survivor] will get directions about what they can and can't refer to in that, so it's not really reflective of their whole experience of violence …[213]

Another advocate reflected that where charges change, a victim survivor may consider their 'voice and their experiences [are] being silenced or [are being] taken away again by this person, because of how the system has played out'.[214]

Advocates also raised issues surrounding the timing of providing a VIS. [215] Some noted issues surrounding the early provision of a VIS, noting that a victim survivor 'may spend a lot of time, a lot of emotional investment in writing their VIS and if there is a not guilty finding … [it has] no place now. It's completely invalidated, and it's invalidated their experience.'[216]

Advocates noted that this is one example of the DPP wanting to be prepared in case the matter proceeds straight to sentence (particularly for circuit matters), but that it is 'not victim-focused, it's system-focused. It's what's going to best suit the system.'[217]

Some support advocates raised additional challenges for some victim survivors to be able to articulate the harm. For example, if a victim survivor is a child, there is no way to know the full impact; if the victim survivor has a limited understanding of the English language, or is illiterate, it may be difficult to communicate.[218]

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211 Victim Survivor Interview 1.
212 Victim Support Advocate Interview 1
213 Victim Support Advocate Interview 3.
214 Victim Support Advocate Interview 1
215 Ibid.
216 Victim Support Advocate Interview 3.
217 Ibid.
218 Victim Support Advocate Interview 1

When reflecting on how information about providing a VIS should be conveyed to victim survivors, an advocate reflected that this information needs to be victim-centric, trauma-informed, easy to understand and produced by people who support victims and understand the procedural requirements:

> I think there needs to be a variety of places and I think the assumption that everyone can access the internet and get everything off that is not correct. A lot of time people like to have something tangible that they can look at, that they can put down, that they can write on, that they can go back to. The stuff that comes out of government departments is not really written for the average person in the community.[219]

> I still think there's a need for it [information] to be available throughout the state, online, printed, and we all need to be saying the same thing. If you get information that comes out of a system, that information is likely to be useful for that system. It's not always focused, yes we can say trauma informed, we can say victim centric, but the justice system is offender centric. So you can say that, but the information may not end up like that. So sometimes it's better to have that information and we did it in conjunction with DPP and in conjunction with our own local legal firms, that the information comes from the community, from someone who's supporting victims in a way that they could understand.[220]

Other submissions

With respect to the provision of supporting material, the Royal Australian and New Zealand College of Psychiatrists ('RANZCP') acknowledged that it 'may be beneficial for a court to have access to … psychiatric reports for victims to supplement and support information contained in victim impact statements'.[221] The RANZCP further recommended that reports should only be provided by an independent medical expert and that '[t]reating doctors can provide letters of fact rather than opinion.' [222]

Submissions from legal stakeholders

LAQ commented on the late provision of a VIS, as it is 'often [received] the day before or morning of sentence' and that this 'can result in a delay in the proceeding'.[223] It recommended that early disclosure would benefit all parties:

Earlier disclosure would allow more time for an offender to gain meaningful insight and understanding of the impact of their actions prior to sentencing and provide instructions on the accuracy and content of what is contained in the statement.[224]

SME Interviews

Concerns were raised surrounding the admissible content of a VIS, and whether it should be redacted prior to sentence and with respect to the timing of its disclosure. For example, some legal practitioners recognised that the prosecutor does not want to upset the victim survivor by redacting their statement, and because defence does not want to appear to be 'putting the victim through it', inappropriate material is often placed before the court, which is challenging.[225]

Participants reflected that the provision and disclosure of a VIS is often 'last minute' In nature.[226] Where this occurs when the offender has been remanded in custody, it was indicated that magistrates will often

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219 Victim Support Advocate Interview 3.
220 Ibid.
221 Submission 33 (Royal Australian and New Zealand College of Psychiatrists) 1.
222 Ibid 1.
223 Submission 23 (Legal Aid Queensland).
224 Ibid 31.
225 SME Interview 7
226 Ibid.

read the VIS aloud, or will summarise parts of it, to ensure that the offender has the opportunity to hear what is being relied upon.[227] It was also noted that this can serve an important purpose in communicating the harm to the offender.[228]

One participant expressed their view that a VIS should not be provided until after conviction (either after trial or by plea of guilty) to ensure it captures the impact of talking about the offending and giving evidence, which can be traumatic.[229]

Participants expressed strong views that supporting material that speaks to the impact of the offending on the victim survivor is particularly beneficial within the context of the provision of a VIS. One participant reflected that where a VIS outlines some psychological impact or a diagnosis, it could be a far more 'powerful, aggravating feature if [the court] was armed with some sort of evidence to substantiate this'.[230]

For example, one participant noted that providing the sentencing court with psychological reports means the sentencing judge will have really good-quality information to refer to and draw upon in determining the penalty to be imposed.[231] However, it was acknowledged that this is an expense that not every victim survivor can afford.[232] Another participant agreed that additional supporting material that speaks to the consequences of the offending on the victim survivor would be beneficial, but suggested no one is going to fund the provision of a psychologist report for every victim survivor.[233] This issue is exacerbated where a VIS is not provided, and the judicial officer can only say, 'I infer harm, and that's about it.'[234]

A participant reflected upon complaints that there an imbalance between consideration of the perpetrator's circumstances and the impact of the offending on the victim survivor. The participant noted that without additional source information to rely upon when considering the impact on the victim survivor, it is challenging for a judicial officer to do much more.[235]

One participant reflected that some judicial officers have refused to permit the prosecution service to read the VIS aloud unless there is some real purpose in doing so.[236] Contrary to this view, another participant reflected that they found it to be particularly compelling when a victim survivor attends court to read their VIS, and sought to encourage this.[237] It was noted that it is the second best option to have someone else read out the VIS, because there is a 'big difference between words on a page' and speaking it aloud in court.[238]

It was noted that reading the VIS aloud can also have a profound impact on the perpetrator.

Consultation events

Participants reflected that while victim survivors want empowerment form providing a VIS to be used at sentence, procedural requirements limit its effectiveness and the regime requires improvement.[239]

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227 SME Interview 6.
228 Ibid.
229 SME Interview 21.
230 SME Interview 17.
231 SME Interview 14.
232 Ibid.
233 SME Interview 3.
234 Ibid.
235 Ibid.
236 SME Interview 14.
237 SME Interview 17.
238 Ibid.
239 Brisbane Consultation Event, 11 March 2024.

Participants considered 'only about 10% of the sentence' involves the consideration of the harm caused to a victim as outlined in the VIS, while the rest of the sentence focuses on the offender and their life.[240]

Participants indicated that they had been told victim survivors wanted the ODPP to not only conference victims about what could be included in a VIS, but also to provide this information in writing, as any information told to a victim orally is often not retained. [241] One participant considered it 'unjust' for this information not to be provided in another form.[242]

We were told that content editing of VIS can be retraumatising for the victim survivor; by prescribing what a victim survivor can or cannot say in their VIS, the process loses its therapeutic value as it takes away the victim survivor's agency.[243] Participants subsequently expressed a strong view that information should not be redacted from a VIS. Rather, it was suggested that judicial officers should receive the VIS in full and disregard any information they may consider to be inadmissible.[244] In making this suggestion, some participants reflected that it is disrespectful to the judiciary to assume they cannot disregard inflammatory comments within a VIS, and that we should place greater trust in the judiciary to not take this into account, rather than redacting or controlling the information in the VIS.[245]

Participants also raised concerns that a VIS can only reflect the harm suffered at a particular point in time. As a consequence, it is challenging to truly understand the broad-reaching impacts of the offending to include in their VIS at the time one is written.[246] These challenges are enhanced for young victim survivors, who may not understand the impacts of the harm due to their age.[247]

14.5.3 Support writing a victim impact statement

Submissions from victim survivor and support agencies

The OIVC told us that there is currently 'limited support available for victim-survivors to assist them in preparing a Victim Impact Statement', particularly for victim survivors whose matters resolve in the lower courts, or who have not previously been supported by a support service.[248]

One submission highlighted a need for a 'separate support service such as a social worker or of a similar service to support the victim with making such statements', as the process of preparing a VIS is 'overwhelming and stressful'. It was noted that this is particularly important for children.[249]

Consultation with victim survivor support and advocacy bodies

Advocates reflected that they have supported victim survivors through the VIS process, but they are not funded to do this.[250] Some advocates also noted that counsellors are not encouraged to support a victim survivor early on in proceedings, as their records may be subpoenaed.[251]

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240 Cairns Consultation Event, 21 March 2024.
241 Brisbane Consultation Event, 11 March 2024.
242 Ibid.
243 Ibid.
244 Ibid.
245 Ibid.
246 Ibid.
247 Ibid.
248 Submission 26 (Office of the Interim Victims' Commissioner) 3–4.
249 Submission 27 (Name withheld) 3.
250 Victim Support Advocate Interview 3.
251 Ibid.

SME Interviews

While victim survivors are provided with a high-level overview of what types of information can and cannot be included in a VIS from the ODPP VLO, it was noted that this is challenging when they are told not to deal with the facts, and only to focus on the effect and the impact.[252]

It was recognised there would be benefit in the DPP having access to a cultural liaison officer who could provide advice to bridge the gap with Aboriginal and Torres Strait Islander victim survivors, or victim survivors from CALD backgrounds.[253]

Consultation events

Many participants were unclear about which agency (if any) is funded to support a victim survivor through this process, with many assuming this responsibility fell to the ODPP. [254]

It was noted that producing (and potentially reading) a VIS can be a retraumatising experience for victim survivors, as they must recount the harm they experienced.[255] For this reason, participants reflected that better assistance and support are required for victim survivors when writing their VIS to ensure they have a better understanding of what can and cannot be included.[256]

It was further recognised that victim support services are limited in the support they can currently provide because of funding constraints, which means victim survivors may not receive adequate support when writing their VIS; this exacerbates the challenge of writing one.[257]

14.5.4 Use of trauma-informed language during the sentence hearing

Views of victim survivors

Consultation with victim survivors

One victim survivor told us that her satisfaction with the criminal justice process 'unravelled' because the sentencing judge said to the defendant:

> It is not entirely clear what your motivation was, but you must have felt some fondness towards the complainant … and in light of that, you gave in to temptation.[258]

She reflected that the judge's words had

> created an after-effect of feeling less safe in the world, because if a judge says 'Oh, you must just have been overcome with temptation … you can walk out and you can go back to your life', then when I'm walking down the street and there's a man, or I'm in a situation where I feel uncomfortable, the thought is 'what if he's just overcome by temptation?', and I hope later at trial he could be found guilty and the judge is going to say, 'Oh well, he was just too tempted.' Like, that's not setting up a world [I] want to live in.[259]

252 SME Interview 15.
253 SME Interview 21.
254 Brisbane Consultation Event, 11 March 2024.
255 Ibid.
256 Ibid.
257 Ibid.
258 Submission 35 (C Murphy) 1. The Council has reviewed the transcript of the remarks from this hearing to confirm its veracity.
259 Victim Survivor Interview 7.

Victim survivor advocacy groups

Victim support advocates also suggested that there should be enhanced training for judicial officers surrounding the importance of using trauma-informed language within the courtroom:

> I think I would like judges to have some education around gendered violence and the nature of sexual violence. I think it would change their language. I think it would change their sentencing. (Victim Support Advocate Interview 1)

> I would change [how victim survivors are treated in that space] 100 per cent and the language. Nothing else, just the language … (Victim Support Advocate Interview 1)

SME Interviews

One participant reflected that there is a general minimisation of the offence itself during submissions, including through the absence of a discussion on the aggravating circumstances. It was further observed that this could be because it is genuinely challenging to truly understand the impact of this offence unless a person has experienced it.[260] Within this context, another participant reflected on the challenges of truly appreciating and understanding the harm done to victim survivors, and female victim survivors in particular,[261] and suggested that there needs to be better education for all legal practitioners about the true impacts of sexual violence.[262]

In these circumstances, some participants reflected that it is the responsibility of the ODPP to explain to victim survivors prior to sentence that 'whilst this is a reflection of an offence that's been committed against [them], what needs to be spoken about today is the offender, and whether the sentence on this offender is right with the circumstances of the offence itself'.[263] It was noted that this could help victims understand the sentence hearing process before they experience it to alleviate any concerns.[264]

Consultation events

It was suggested that judicial officers should address victim survivors and acknowledge the harm suffered by them when delivering their sentencing remarks.[265] Participants reflected on how best to achieve this, with some participants suggesting this could be facilitated through judicial training.[266] However, others thought it should involve a procedural change, rather than merely occurring through optional judicial training.[267] It was also noted that it can be challenging to change sentencing practices where judicial officers are highly experienced and have been delivering remarks in a particular way for years.[268] There was a suggestion that updating the sentencing purposes to include community harm as a sentencing consideration could require judicial officers to do this, and to take harm to a victim survivor into account.[269]

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260 SME Interviews 9, 12, 19.
261 SME Interview 12.
262 SME Interviews 9, 12.
263 SME Interviews 7, 19.
264 SME Interview 7.
265 Cairns Consultation Event, 21 March 2024; Brisbane Consultation Event, 11 March 2024.
266 Ibid.
267 Ibid.
268 Brisbane Consultation Event, 11 March 2024.
269 Ibid.

One participant noted a positive experience where the magistrate had effectively 'humanised' the court process by speaking in a civil but authoritative voice and explaining the sentence outcome - which was referred to as 'unusual'.[270]

Aboriginal and Torres Strait Islander Advisory Panel members' views

The Panel outlined that the use of simple language and avoiding legal jargon is an important aspect of improving the legal process for Aboriginal and Torres Strait Islander victim survivors.

14.6 Sentencing remarks analysis on acknowledgement of victims and the impact of the offence at sentence

The Council wanted to understand how victim survivors were being addressed in the courtroom and whether VIS are being relied upon by judicial officers within the sentencing context. To do this, we used findings from our:

- thematic analysis of sentencing remarks for offences of rape and sexual assault; and
- content analysis of a sample of sentencing submissions and remarks for offences of rape and sexual assault in the District Court.

14.6.1 Thematic sentencing remarks data analysis

Prevalence of VIS at sentence

The Council reviewed the following sentencing remark data (which differed for each offence):

- **Rape:** a selection of 75 cases randomly selected from all rape (MSO) cases sentenced between 2020–21 and 2022–23 (n=75);[271]
- **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 Courts (n=75).[272]

We found VIS were not always provided in sexual violence matters: across the sample of rape and sexual assault offences analysed by the Council,[273] VIS were only expressly mentioned as having been provided to the sentencing court in less than half of all cases (44 per cent).[274] Of these, victim survivors of rape (MSO) were more likely to provide a VIS (60.0 per cent)[275] compared with victim survivors of sexual assault (28.0 per cent).[276]

However, when a VIS was provided in a sexual assault matter, it was more likely to have been sentenced in the higher courts than the lower courts. Our analysis showed that almost three-quarters of the lower

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270 Ibid.
271 For the methodology on the sample used, see Appendix 5.
272 For the methodology on the sample used, see Appendix 5.
273 Referring to the Council's thematic analysis of a sample of sentencing remarks for sexual assault and rape, discussed in Appendix 5.
274 n=66/150.
275 n=45/75.
276 n=21/75.

court sentencing remarks did not mention a VIS (72.1 per cent), compared with the District Court, where there was no mention of an impact statement being provided in only 13.3 per cent of the cases (n=10).[277]

There was no mention of whether a VIS was provided in 13 per cent of rape (MSO) cases and 54.7 per cent of sexual assault cases. It is therefore unknown whether a VIS was provided and not specifically referred to in those remarks.[278]

Acknowledging the victim survivor's presence by the sentencing court

The Council's analysis found that judicial officers do not usually address victim survivors directly during sentence proceedings. However, where the VIS was read aloud during the proceedings (either by the victim themselves or on their behalf by the prosecutor or a family member), the sentencing judge usually acknowledged both their presence and courage within their remarks:

> The impact of what you did to her has been profound. Three years later her suffering is still raw. She has bravely spoken in Court about the terror that she felt at the time and the terror she has suffered since. She is determined to overcome the trauma you inflicted upon her, but there can be no question that it will be a hard-fought battle. (Rape, regional/remote, imprisonment > 5 years, #4)

> There is a victim impact statement from the complainant which she read aloud in court in your presence. That would have taken a great deal of courage. (Rape, regional/remote, imprisonment > 5 years, #8)

> My view in that regard is fortified by the complainant's victim impact statement, which she read out in open court. It is clear that the complainant has suffered considerably as a consequence of your sexual abuse upon her. (Rape, regional/remote, imprisonment < 5 years, #4)

In circumstances where the victim survivor did not read their VIS aloud, the judicial officer would often summarise the contents of the VIS and the harm caused to them:

> [The victim survivor] talks of the fact that you stole his innocence before he even had a chance to even understand what sex was and how wrong the things were that you did to him. You abused your position as his employer and his mentor. You manipulated him, with your mental control and threats about harming him and his family, to groom him into having sex with you. He suffers from mental health issues now. He finds it hard to see the positives and he feels that he has missed out on so many opportunities because of his self-doubt and low self-esteem, that he contributes to you. (Rape, major city, imprisonment > 5 years, #8)

> I note that the complainant is present in Court here today and it is obvious from his victim impact statement that your offending upon him has had long-standing and grave consequences for him. Indeed, he falls into that category of complainant who has been sexually abused by his father in circumstances where he was entitled to look up to you as someone who protected him, not someone who sexually abused him. (Rape, regional/remote, imprisonment > 5 years, #10)

However, the Council found that, even when the victim survivor was present and had their impact statement read aloud, there were occasions where the victim survivor was not directly addressed by the sentencing judge when delivering their remarks.[279]

Acknowledging the harm to the victim survivor by the sentencing court

Where a VIS was provided and referred to within the sentencing remarks, the degree of acknowledgement varied. Where VIS were referred to, judicial officers often summarised the impact of the offending on the victim survivor. We found the length and depth of these summaries varied greatly.

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277 Table A33: Victim impact statements for sexual assault.
278 Table A32: Victim impact statements for rape; Table A33: Victim impact statements for sexual assault.
279 Queensland Sentencing Advisory Council analysis of a sample of sentencing remarks.

There were examples of sexual assault offences where the judicial officer merely referred to receiving a VIS and made no further comment about the harm experienced:

> And I have read the victim impact statement and while I note, of course what [the prosecutor] has said about it, that you are not responsible for everything that the complainant has suffered, once she learnt about what [you] had done [rubbing his bare penis on her bare genitals while she was unconscious], it is not surprising that she was upset about it. (Sexual assault, major city, higher courts, custodial, #13)

> I have read the victim impact statement which is exhibit 3. (Sexual assault, major city, higher courts, non-custodial, #1)

There were examples where judicial officers discussed the harm caused to the victim survivor at length, sometimes even using the victim survivors' own words drawn from their VIS.[280] However, incorporating a more fulsome acknowledgement of the victim-survivor's harm within the sentencing remarks was not the usual practice.

In one sexual assault case, the judge declined to read out the VIS, 'given that we are in open court', but stated that it

> is made clear from the victim impact statement your offending upon her has both impact her significantly, not only psychologically and emotionally, but it also has had some devastating consequences for her in terms of her career options and her employment. (Sexual assault, regional/remote, higher courts, custodial, #5)

Generally, judicial officers summarised the impacts to the victim survivor in their own words. This was either in short, general remarks:

> She sets out in her victim impact statement, which is exhibit 9, the consequences of your offending upon her. These include self-harming, suffering significant anxiety, suffering from nightmares, and having difficulties trusting other people. (Rape, major city, imprisonment > 5 years, #2)

> The complainant has provided two victim impact statements. She has suffered immeasurably from your callous, cowardly, and degrading acts. She was sickened and terrified during the ordeal. Sadly, she continues to suffer devastating emotional adverse impact. (Rape, major city, imprisonment < 5 years, #11)

> The victim impact statement indicates that the impacts to the victim were substantial and ongoing. She indicates eloquently in the statement the degree of her humiliation and distress at these events. The impacts to the victim are quite serious. (Rape, major city, imprisonment < 5 years, #2)

> The offending has had an impact on the complainant. I note the contents of exhibit 6. None of it surprises me. It's caused her considerable distress. It's caused her confusion and difficulties with other people. As she says, it's affected her in so many ways, mentally, emotionally and psychologically she fears - feels for the breach of trust associated with the offending. (Rape, regional/remote, imprisonment < 5 years, #6)

Or it was in greater depth and detail about the harm caused:

> I have been provided with a victim impact statement from the complainant, which was read out in Court by the Prosecutor, which describes the devastating effect these offences have had upon her, and I take that into account. She says that you stole her identity and robbed her of her life. Her schoolwork suffered, and she has no trust in people. Over the years, she has lost many relationships because of the damage caused to her by this offending. (Rape, major city, imprisonment < 5 years, #18)

> There is a victim impact statement before me, which shows that the offending had a significant impact upon the complainant. She was reluctant or scared to disclose the conduct, and kept it to herself, and it has then, after the complaint was made, caused some further problems for the complainant within the family relationship. And so there

[280] For example, sexual assault remarks (Sexual assault, major city, lower courts, custodial, #3) and (Sexual assault, major city, lower courts, custodial, #7) and rape remarks (Rape, major city, imprisonment < 5 years, #21) and (Rape, major city, imprisonment > 5 years, #3).

> has been, it would seem to me, a significant psychological impact upon the complainant, as a result of your offending. (Sexual assault, regional/remote, higher courts, non-custodial, #2)

> The offending has had a profound effect upon the complainant. She wrote a victim impact statement, which is Exhibit 3. She read out her statement here in court and described the terrible impact that your conduct has had upon her life. She has endured pain. She has been traumatised mentally. She feels anxious and fearful. Her symptoms of endometriosis have been exacerbated by constant distress. She feels unsafe and insecure. She has become withdrawn, moody and aggressive. Therefore, your rape of the complainant has had a devastating impact upon her. (Rape, major city, imprisonment < 5 years, #1)

> Your offending on her has had obvious consequences. I have before me a victim impact statement which speaks of the sorts of impacts which offending of this kind can have on vulnerable young women. It speaks of the emotional impact upon the complainant and upon her family. It speaks of the effect it has had on how she sees herself, as well as others. It details self-loathing that the offending has triggered and the self-harming that she has taken to. It is to her credit that she had the courage to report the offences and to go through the legal process to give evidence, notwithstanding the effects upon her, such effects being evident in her emotionally fragile state whilst she gave evidence, and again today as she read parts of her victim impact statement. (Rape, major city, imprisonment < 5 years, #6)

The physical pain caused by the offending was noted by judicial officers – particularly in rape matters where the victim survivor was a child.

> She felt pain. It hurt her stomach. You threatened her and she felt pain when defecating for some days afterwards … and that was excruciatingly painful in light of her young age at the time. (Rape, major city, imprisonment < 5 years, #16)

> I accept her evidence that it hurt when you penetrated her vagina with your finger. (Rape, regional/remote, imprisonment > 5 years, #13)

> As a result of your violence, the complainant suffered some areas of bruising to parts of her body but in particular to her vulval area. There was medical evidence during the trial as to the nature of that injury. It caused the complainant considerable pain at the time, and she continues to suffer the effects of the offences as evidenced by her victim impact statement and the medical certificate tendered by the Prosecution. Those effects include psychiatric ones. (Rape, major city, imprisonment > 5 years, #17)

The long-term psychological and social implications of the offending were treated seriously by judicial officers and often discussed in detail in the remarks:

> The offending had caused her significant distress. She has noted to have lost confidence in herself, developed negative thoughts. It has impacted her education. The loss of confidence in particular has impacted her capacity to study and take on employment in the field of acting, which was an area of interest for her. She suffered from episodes of depression and anxiety and then experienced difficulties in her relationships with other males. Additionally, other situations triggered the stress, occasioning flashbacks. She observed, understandably, that she felt disgusting and somewhat devalued. She felt self-loathing. (Rape, major city, imprisonment < 5 years, #15)

> Your conduct has gone on to have a devastating impact upon the complainant. The child herself has gone from feeling carefree and a happy young child to being someone who is withdrawn from her friends. She has become emotional, suffered from flashbacks and emotional outbursts. She has become sad and angry at what you did to her. She has been fearful of the same thing happening again. She has had that sense of security destroyed in that she is worried that other kids at school have an inkling about what has happened to her. She has lost her friendship with your daughter, who she had considered to be her best friend. (Sexual assault, regional/remote, higher courts, custodial, #8)

Where a VIS was not provided, judicial officers stated this, and often acknowledged the harm caused by sexual violence offences and the potential for significant long-term consequences:

> Though there's no victim impact statement before me, it would be something that would distress any woman and it would be something that would have, I would expect, a significant effect on any person. (Sexual assault, major city, lower courts, non-custodial, #4)

> Whilst no victim impact statement has been provided, the reality of sexual assault is that it can have unique and longstanding adverse consequences for victims. His distress at what you did immediately after your offending against him is apparent from the statement of facts. (Sexual assault, major city, higher courts, custodial, #8)

> Your younger sister has not provided a victim impact statement, but I have no doubt, and I know that you would accept, that she also suffered significantly as a result of your offending. (Rape, major city, imprisonment < 5 years, #3)

> There is no victim impact statement, but I accept that a rape of this sort [penile-vaginal rape and penile-anal rape] would have had a significant emotional effect upon her. (Rape, regional/remote, imprisonment > 5 years, #1)

> Unfortunately, there is no victim impact material provided, but one can only begin to imagine the feeling of shame and disgust that the complainant must have felt. (Rape, regional/remote, imprisonment > 5 years, #2)

In one case where no VIS was provided, the judge explained why victim survivors of sexual violence may not wish to make an impact statement:

> The complainant did not wish to provide a victim impact statement. That is not uncommon in cases of this kind. I have no doubt it would have been a terrifying event for her. She was clearly distressed immediately after the event. She has provided instructions that she wishes to extend the domestic violence protection order for as long as possible and does not wish to vary any of the conditions in it. I have no doubt that the complainant suffered significant emotional harm during the incident. (Rape, regional/remote, imprisonment > 5 years, #9)

In some instances, the judicial officer noted that they are required under section 179K(5) of the PSA to not infer that the lack of a VIS indicates there was no harm caused to the victim survivor:

> Although I have been provided with no information about the mental or emotional harm done to the victim, I must not assume that there has been no impact, according to section 179K(5) of the Act. (Rape, regional/remote, imprisonment < 5 years, #8)

We also found examples where the judicial officer spoke to the VIS in a way that may have been distressing to a victim survivor. In one case involving a father being found guilty by a jury of 11 counts of sexual assault, 8 counts of rape and one count of doing an indecent act, all perpetrated against his daughter (aged 15–17 years), the judge made the following remarks about the VIS:

> I have read the lengthy victim impact statement of the complainant. Some aspect of the impacts referred to in it are the product of other aspects of your parenting style and the consequences of that, rather than this sexual offending. There is imprecision in many respects in identifying the consequences of the charged conduct and the consequences of other conduct. Nevertheless, it is difficult to think that the conduct in respect of which have been convicted, did not play a material, and indeed significant role in relation to many of the impacts described by the complainant. In other words, while it would be speculation to attempt to determine the extent to which the complainant would have suffered impacts only from the charged conduct, it does seem reasonable to conclude that the conduct played a not insignificant role in many of the impacts described by her. Ongoing emotional and mental consequences are almost in inevitable result of offending of the nature of which you have been convicted. (Rape, major city, imprisonment > 5 years, #4)

14.6.2 Content analysis of sentencing submissions and sentencing remarks

The Council reviewed the transcripts of sentencing submissions and remarks for offences of rape involving either digital or oral rape (see **Chapter 4** for the methodology). Part of that work involved analysing how VIS were relied on at sentence and identifying any issues with practice. The Council sought to better understand the submissions and any supporting material being put forward by the prosecution regarding the impact of the offending on victim survivors, and how these are being received by the court.

Alignment between submissions on harm and acknowledgment in sentencing remarks

The Council's content analysis revealed that, in circumstances where submissions were made in relation to the harm caused to the victim survivor (either by reference to a written VIS or verbal submissions), the harm was often acknowledged directly by the sentencing judge in their remarks and considered in imposing an appropriate sentence.[281] The following table presents some direction examples.

Table 14.1: Examples of sentencing submissions and acknowledgement of harm in sentencing remarks

Prosecution submissions	Sentencing remarks
Your Honour would have noted that the offending has had a significant and traumatic effect on her. She describes herself as being torn apart. She has installed security cameras at her doors. She has advised that she cannot sell her house where it occurred because of her financial instability. She cannot accept gifts or other forms of affection due to the fact that the incident arose from a Valentine's Day present. She avoids crowds, social gatherings and dealings with strangers. She has lost her desire to be intimate with her life partner, has lost motivation and gained weight. She sees a psychologist fortnightly since this event and has described a strained relationship she now has with her children as a result of the depression she has had since this incident. (QDC1)	I have a victim impact statement from the complainant, which I have read. I note that the complainant's partner is in court today. I can only hope that the completion of this process may help the complainant to overcome the traumas caused by your offending. The effect upon the complainant is obviously one of the relevant considerations I must take into account. The victim impact statement of the complainant speaks of the profound and ongoing impacts of your offending. She speaks of the fear she has even being in her own home and a desire to sell her home. She speaks of having been broken and torn apart. She refers to her internal anger, her avoidance of crowds, social gatherings and dealings with strangers. The impact on the intimacy of the relationship with her partner and the now strained relationship with her own children. She speaks of feelings of disgust and being dirty and of her excessive weight gain. She continues two years hence to attend fortnightly upon a psychologist and describes the feeling of numbness and emptiness left as a result of your actions. (QDC1)
Your Honour, as noted in the victim impact statement, she was a tender age at the time, and it's taken a toll on her in terms of her future relationships and how she views the world. She speaks about that in the victim impact statement, as well as having an impact on the family unit, tearing the family apart effectively. (QDC15)	This is extremely serious and concerning criminal offending. You brazenly abused your position as guardian of your 11- or 12-year-old stepdaughter, someone who was entitled to feel safe and protected in your presence. These are heinous acts that have had a devastating consequence, unsurprisingly, on this young woman, who, despite telling someone at the time, was not believed. Unsurprisingly, too, this offending has torn apart the family. (QDC15)
The next is a victim impact statement of [victim survivor 1] taken on the 19th of April 2023. The next is the victim impact statement of [victim survivor 2] taken on 19th of April 2023. (QDC19)	It will impact them for a significant period. They've written about their experience which has been placed in the documents. How it has impacted their own selves. Their outlook on you and others. And how they may be able to contemplate moving

281 QDC1, QDC15, QDC18, QDC19, QDC20, QDC21.

Prosecution submissions	Sentencing remarks
	forward with the disruption of having to deal with the circumstances and how it's impacted their relationship. And their attention to their schoolwork Their childhood has been significantly affected dealing with the shame and the circumstances of being offended against by you. (QDC19)
Victim impact statements have been provided by each of the complainants....I tender each of those. Those three victim impact statements will together be Exhibit 5 ... The Crown submits those victim impact statements indicate that there has been a profound emotional and psychological impact on each of those complainants and it is a lasting impact on them. (QDC20)	Unsurprisingly, the victim impact statements from your two complainant daughters and your wife indicate that there has been a significant emotional and psychological effect upon the victims of your offending. That is a relevant factor I need to take into account, along with those other matters in section 9(6) of the Penalties and Sentences Act. (QDC20)
[The prosecutor read the VIS aloud]	The fact that your serious offending has had a dreadful impact on the children and their families and their mothers and wider families is clearly established by the victim impact statements that were attended and read out by [the prosecutor]. I can only hope that the children and their family get the support and counselling to go forward in life. I hope that the children can get the appropriate psychological treatment and counselling. They'll never forget what you did, but they can at least learn to live with it with guidance and support and they won't be held back in life. So I can only hope that that occurs. (QDC21)
With regard to the victim impact case, both the complainant and the complainant's mother have quite succinctly described how this offending has had the effect of this offending on them, both emotionally and financially. (QDC22)	There were two victim impact statements. I read those carefully. There is one from the complainant. It has had a dreadful effect on him. And there is a statement from the mother. It has had a financial and emotional effect on all of the family. It is terrible to imagine a father could do that to their son. (QDC22)

In one circumstance involving a victim survivor who suffered from an intellectual impairment, the offender pleaded guilty on the on the morning of trial (after the victim survivor had her evidence pre-recorded), and the sentence proceeded immediately.[282] In their remarks, the sentencing judge commented:

> I note the indications with regard to her having NDIS support and being to some extent self-sufficient, but there is obviously a very real need to recognise the trauma for her of her own circumstances, and then the escalation of the difficulties as a result of this offending by [the defendant].
>
> In her brief impact statement contained within the text that was sent, she makes some statements about her own experience. One would expect that there would be consequences for any person the subject of offending of this nature. But of course, in respect of her and her particular difficulties, it is perhaps not unsurprising that she feels insecure, that she does not like going to people's houses and that she feels sad and upset, that she says she suffers

[282] QDC6.

> from anxiety and panics, and she has difficulties entrusting men after the incident and that, as she rather simplistically describes it, as being something that ruined her life.
>
> I accept that there were obvious consequences for her as a result of the offending here and that it is a matter that I do need properly to take into consideration when I look at appropriate punishment in relation to this matter. (QDC18)

Where the victim survivor was present and read their statement aloud, the sentencing judge noted this in their remarks. For example:

- One sentencing judge thanked the victim survivor immediately after she finished reading her VIS aloud in court.[283] In his remarks, the sentencing judge noted that he had 'had regard to the victim impact statement, and of course had listened to it when Miss [XXXX] had read it out'. The judge further acknowledged that it was not surprising that she had been substantially traumatised, probably for the rest of her life, as a result of the offending. His Honour further reiterated that the victim survivor had been having counselling, but that 'she's still dealing with the memory of what you did to her, and the trauma'. He stated that he had 'taken that all into account' in sentencing the offender.
- Another sentencing judge acknowledged that they had heard the VIS read aloud.[284] In referring to the harm in their sentencing remarks, the sentencing judge also acknowledged that 'conduct of this kind has ramifications not only for the individual, it has ramifications for the family also in terms of the distress that they feel and the helplessness that they feel. You've breached their trust, they brought you into their home and you've imposed distress on all of them for your own selfish reasons.'

However, on one occasion where the victim survivor read their VIS aloud in court, there was no immediate recognition of the event, and limited reference was made in remarks.

In one instance, it was noted that the victim survivor had asked for her VIS to not be read aloud, which was respected by both the prosecutor and sentencing judge.[285] On another occasion, the prosecutor read the VIS aloud.[286]

In other cases where there was no VIS, the sentencing judge still referred to the impact of the offence.[287] For example:

> I have no impact statement before me, but clearly offending of this kind has the potential to have adverse impacts on victims, including later in their lives. (QDC14).
>
> In determining the appropriate penalty, I must give primacy to the impact to the victims and the need to protect the community. There have been no victim impact statements tended. However, it is well known to these courts that childhood sexual abuse can have profound and long-lasting effects upon the victims that can last well into adulthood throughout all of their lives and pervade almost every aspect of their lives. It is simply unknown what impact your offending will ultimately have on any of your victims. (QDC23)
>
> There is no victim impact material that has been provided to me, but I'm prepared to accept that following her complaint some years later in 2021 that there would have been significant harm caused to her. (QDC24)

In one circumstance, it was noted by the prosecutor that there 'is no victim impact statement. I understand one of the victims is in the back of the court. I haven't had an opportunity to speak with

283 QDC11.
284 QDC16.
285 QDC17.
286 QDC21.
287 QDC14, QDC23.

her.'[288] However, where the prosecutor made no submissions as to the impact of the sentence, the sentencing judge did not either.[289]

Inadmissible content

In circumstances where there was inadmissible material contained within the VIS, including allegations or diagnoses that could not be supported by evidence at sentence, the sentencing judge often stated that this portion was excluded from their consideration.

For example, in one case involving multiple rapes of a 7-year-old child,[290] which proceeded to sentence immediately after conviction at trial, there was a discussion about the content of a VIS provided by the child's mother:[291]

> Prosecution: The Crown in no way relies on the statement regarding the harassment or threats being attributed to the offender. It is just a consequence of her feelings as to why it remains in the victim impact statement.
>
> Sentencing judge: The victim impact statement is very scant on detail with respect to the child, and I suspect that you're not relying heavily on it.
>
> Prosecution: No, my only response is that seeing panic attacks or the child being anxious does not need to be supported by medical evidence.
>
> HH: No … And you concede [defence] clearly there would have been a traumatic effect of a child?
>
> Defence: Yes, that is a standard finding of any sentencing judge.

In other circumstances, the sentencing judge questioned the prosecutor on aspects of the VIS, such as statements with respect to her loss of wages subsequent to the offence.[292] In doing so, the sentencing judge noted that 'this questioning is not intended to take away in any respect, and I do need to place that on the record, from clearly the profound impact that this offending has had'.[293]

The sentencing judge also challenged part of a report tendered under the hand of the victim survivor's counsellor (a social worker), which stated that they had observed 'presentations fitting for PTSD diagnosis'. In recognising that this person could not make such a diagnosis, and without additional supporting material (a medical certificate) at the time of sentence, the sentencing judge noted that 'it would be inappropriate therefore on what the court has before it at the moment to be saying that it has resulted in PTSD diagnosis'. However, His Honour accepted that it was clear there had been 'significant impacts upon her', noting that

> it has affected the way she is at home. She is scared to be on her own. She will either talk to her mum on the phone to be able to go to sleep or she will make her friends come and stay with her. She left her job because she worked in a male-dominated environment. She felt uncomfortable physically being around men. She was anxious in social situations. She had nightmares. She was experiencing body images and then her own life. (QDC17)

Within the submissions, it was also noted that, despite an offer of compensation being made to the victim survivor as part of the sentencing submissions, the victim survivor was not supportive of it.[294]

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288 QDC23.
289 QDC6.
290 QDC5. The offender was found guilty of two counts of rape, and one count of indecent treatment of a child under 12 years.
291 QDC5.
292 QDC17.
293 QDC17.
294 QDC17.

Late disclosure of a VIS

VIS were sometimes disclosed the day before[295] or on the morning of sentence.[296] In these circumstances, the sentencing judge provided an opportunity for defence counsel to take the offender through the VIS.[297]

On another occasion where the offender was found guilty after trial and the sentence proceeded immediately after the verdict (with a 10-minute adjournment for the judge to read the comparable cases provided), the sentencing judge refused to accept or receive the VIS.[298] The prosecutor notified the court that the 'complainant has provided a victim impact statement. It's just come through to our office and a member of our office is bringing up copies right now.' However, the sentencing judge immediately announced that they were 'probably going to disregard it' as 'it's meant to have been provided to the other side before trial'. When the sentencing judge asked whether it was mandatory to adjourn the sentence to receive the VIS, the prosecutor noted that it was not. His Honour stated that they did not want to 'create all sorts of problems' in receiving it as 'it may contain further disclosures' and they would 'be much more comfortable if we just keep a lid on everything and deal with this as a straight sentence'.[299] The prosecution did not oppose this course or make any submissions to adjourn the sentence.

The Council recognises that this is an unusual case.

14.7 Relevant reforms underway in Queensland

The Women's Safety and Justice Taskforce ('WSJ Taskforce') has recently recommended that the Attorney-General progress amendments to the *Evidence Act 1977* to: [300]

- allow expert evidence to be admitted to the court about the nature and effect of sexual violence, as well as domestic and family violence (similar to the position taken in Victoria);[301] and
- adopt relevant provisions from the Uniform Evidence Law in criminal proceedings for sexual offences, as well as domestic and family violence offences.[302]

These amendments are intended to provide the court with specialist knowledge of the impact of sexual (and domestic and family violence) offences on victim survivors.

We note that these amendments will not be progressed until an expert panel on sexual offence proceedings is established to guide these processes.[303]

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295 QDC18.
296 QDC4.
297 QDC4.
298 QDC10.
299 QDC10.
300 Women's Safety and Justice Taskforce, *Hear Her Voice, Report Two: Women and Girls' Experiences Across the Criminal Justice System* (2022) 386 recs 79 , 349–55 ('*Hear Her Voice, Report Two*').
301 *Criminal Procedural Act 2009* (Vic) s 388.
302 The relevant sections supported for adoption are ss 76–80, 108C.
303 *Hear Her Voice, Report Two* (n 300) rec 80.

14.8 What we know from earlier research and reviews

14.8.1 Victim survivor recognition within the criminal sentencing process and challenges navigating it

Despite having limited contact with victim survivors, judicial officers can play an important role in their experience of the sentencing process by:

- establishing a safe sentencing court environment where victim survivors of sexual violence feel 'confident that their wellbeing and safety will be prioritised';[304]
- increasing victim survivor satisfaction with the sentencing process by acknowledging their presence and the impact of the harm caused to them (including with respect to their impact statement);[305]
- providing well-reasoned and transparent sentencing remarks; this enables victim survivors to better understand the sentence imposed and to see that their experience has been acknowledged, ensures that the community sees that the offender is being held accountable and that the offender understands their sentence, and provides future guidance to courts in making informed treatment and risk assessments;
- using clear and simple language – the sentence judge can assist a victim survivor, and the broader community, to have a better understanding of the reasons for the sentencing decision, which encourages them to accept the sentence as the appropriate outcome.[306]

In their review into the use of VIS in sexual offence sentences in Australia, Davies and Bartels found there to be 'clear anti-therapeutic outcomes arising from minimal judicial acknowledgement of victim harm'.[307] However, they identified challenges identifying which judicial practices affect therapeutic outcomes for victim survivors.[308]

They further identified examples of 'satisfactory victim acknowledgment', including:

- In *R v Ballantyne*,[309] Murrell CJ 'vindicated the victim, by specifically stating that "the Court acknowledges [her] suffering"' and 'encouraged the victim to see the resolution of the criminal proceedings as a turning point in her life';
- In *R v Scrivener*,[310] Judge McIntrye acknowledged the victim survivor and 'drew attention to the way that the victim's words had moved her personally';

304 Vicki Lowik et al, 'The Trauma-informed Court: Specialist Approaches to Managing Sexual Offence Proceedings – Part 1' (2024) 33(1) *Journal of Judicial Administration* 1.
305 Lacey Schaefer et al, *Sentencing Practices for Sexual Assault and Rape Offences* (Final Report, prepared for the Queensland Sentencing Advisory Council by Griffith University, 2024) 71–2.
306 As Philip Wilson and Rob Ellis commented, 'Limited understanding of sentencing, and confusion over terminology, undermines confidence and engagement with the criminal justice system and limits its perceived effectiveness': Philip Wilson and Rob Ellis, 'Communicating sentencing: Exploring new ways to explain adult sentences' (Ministry of Justice Analytical Series, 2013) 1.
307 Davies and Bartels (n 14) 177.
308 Ibid.
309 (Unreported, Supreme Court of the Australian Capital Territory, 1 April 2014).
310 (Unreported, District Court of South Australia, 6 June 2014).

- In *R v QMT*,[311] Wood J 'recognised the victim, by detailing the physical and emotional harm caused as a consequence of the offending', acknowledged the offending as 'wrong' and vindicated the victim survivor; and
- In *Director of Public Prosecutions v Barbat*,[312] Judge Sexton 'recognised the victim, by summarising the contents of her impact statement'.

It has been widely recognised that judicial acknowledgement of the presence of a victim survivor and the harm that they have suffered can have positive therapeutic consequences, including addressing the justice needs of victim survivors for validation and vindication within the sentencing process.[313] However, studies have demonstrated that the degree of acknowledgement varies, with corresponding impacts on how vindicated victim survivors of sexual violence feel.[314]

Victorian Law Reform Commission: Navigating support services

In its report on *Improving the Justice System Responses to Sexual Offence*s, the Victorian Law Reform Commission ('VLRC') found that there were multiple sources of information about the justice system published by different organisations, including surrounding sentencing and support services, which were limited and difficult to navigate for victim survivors.[315]

The VLRC subsequently recommended the establishment of a central website with practical information on sexual offences, and options for support, reporting and justice pathways, including:[316]

- connections with support services 24hours a day (online or via telephone);
- information on ‘how to identify sexual violence, support options, reporting options and justice options, and possible outcomes’; and
- be delivered in a way that is easy to use, and tailored to the needs of victim survivors, people with diverse needs and interested parties (friends and families etc).

Victorian Sentencing Advisory Council

The Victorian Sentencing Advisory Council ('VSAC') reviewed sentencing remarks for rape and sexual penetration with a child under 12 offences.[317] The way sentencing remarks are delivered and the language used by legal practitioners and judicial officers to describe offending and its impact on a victim survivor are important to their experience of being heard and having the perpetrator held accountable.

The findings of the VSAC are discussed in **Chapter 15**.

311 *R v QMT* (Unreported, Supreme Court of Tasmania, 11 May 2015).
312 *DPP (Vic) v Barbat* [2014] VCC 42.
313 Kate Warner et al, 'Public perspectives on judges' reasons for sentence' (2021) 95 *Australian Law Journal* 685, 686; Davies and Bartels (n 14) 174–6.
314 Ibid 686–87.
315 Victorian Law Reform Commission, *Improving the Justice System Response to Sexual Offence*s (Report, September 2021) 114–50 ('*Improving the Justice System Response to Sexual Offence*s').
316 Ibid rec 18, 150.
317 In Queensland, this offence would be charged as rape, as there is no distinct offence for non-consenting sexual intercourse where the victim is a child under 12 years.

Tasmanian Sentencing Advisory Council

In 2015, the Tasmanian Sentencing Advisory Council published its report reviewing sentencing for sexual offences. It noted:

> It is the Council's view that effective victim services and a formal process to inform and involve the victim in decision making are crucial and considers that these steps are important initiatives to increase victim satisfaction with the criminal justice response to sexual violence.[318]

The Tasmanian Sentencing Advisory Council was told that victim survivors who witnessed their victim impact statement being read in court at the sentencing hearing 'felt more satisfied with the sentence'.[319]

14.8.2 Relevant research into the VIS regime

In a recent review into how the Australian judiciary are using VIS within sexual assault sentencing, Davies and Bartels found that judicial acknowledgement can be 'validating and therapeutically beneficial for victims, especially when judicial officers refer to "specifics from [victim impact statements]" when handing down the sentence'.[320] However, this was contrasted with circumstances where the justice professional gave 'minimal acknowledgment, with one-sentence reference described as "tokenistic"'.

Davies and Bartels subsequently recommended the development and publication of a victim-focused benchbook, as well as the introduction of victim-focused pre-sentence hearings for sexual offence cases.

14.8.3 Reviews in Victoria

Report on the Role of Victims of Crime in the Criminal Trial Process (2016)

During its review into the role of victim survivors within the trial process, the VLRC identified challenges with procedural rules surrounding the admissibility of a VIS, including the practice of redacting statements prior to sentence or having portions objected to in court proceedings, which was described as a 'distressing' experience for victim survivors.[321]

The VLRC noted that while rules of admissibility surrounding the trial process were predominantly to 'keep from juries evidence that may be misused by them', the same concerns do not arise within the sentence context. They concluded that this 'weighs against taking a strict approach to determining the admissibility of victim impact statements'.[322]

While the VLRC considered whether judicial officers should have responsibility for assessing the admissibility of material outlined in a VIS to 'avoid the distress and awkwardness caused by the current practice of editing victim impact statements or raising objections in court' (similar to the position in NSW at the time of the report), it ultimately recommended that this should not be the position.[323] In doing so, the VLRC acknowledged the risk that receiving a VIS in full without clarifying what was being relied upon undermines transparency in sentencing.[324] Additional concerns were raised that this may also enhance

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318 Sentencing Advisory Council (Tasmania), *Sex Offence Sentencing* (2015) 7.
319 Ibid 63.
320 Davies and Bartels (n 14) 168–9, referring to Mary Lay Schuster and Amy Propen, *Victim Impact Statement Study* (WATCH, 2006) 24.
321 Victorian Law Reform Commissioner, *The Role of Victims of Crime in the Criminal Trial Process: Report* (2016) 153 [7.124].
322 Ibid [7.119].
323 Ibid [7.124].
324 Ibid [7.125].

the expectations of victim survivors that their entire VIS would impact the sentence, leading to dissatisfaction where this does not occur.[325]

Inquiry into victims' participation in the criminal justice system (2023)

The Victorian Victims of Crime Commissioner recently released a report that looked at victims' experiences of participating the criminal justice system and whether they have been able to participate in the process.[326] The Victims of Crime Commissioner made 55 recommendations for improvement.

These included amendments to the Victims' Charter to extend information and consultation requirements and require a court to ensure that prosecution have met their obligations under the Victims' Charter.[327] The Commission also recommended amendments to its Human Rights Charter, including to be 'acknowledged as a participant (but not a party) with an interest in the proceedings'.[328] It recommended that resources for victims should be reviewed and revised and the case management system in courts should enable 'real time' information to be provided to a victim about their case.[329]

With respect to sexual offence matters, the Commission recommended a 'sexual offences legal representation scheme'.[330] It was recognised that this service could provide 'assistance with ensuring the impact on a victim is considered at the sentence indication stage, including liaison with prosecution as necessary', advise on the admissibility of a VIS and assist if the VIS was questioned by defence and advise on the entitled to seek a restorative justice process.[331]

With regard to sentencing, the Commission made a number of recommendations, including VIS prepared early being 'quarantined',[332] or requiring an adjournment of the sentence if the victim wished to prepare a VIS.[333] In relation to the DPP (Victoria), there were recommended requirements, including to 'seek the views of victims in relation to sentence indications' and confirm that this has been done with the court.[334] The DPP (Victoria) must also advise the court at a sentencing indication if there is insufficient information available about the harm and the reasons why.[335]

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325 Ibid.
326 Victims of Crime Commissioner, *Silenced and Sidelined: Systemic Inquiry into Victim Participation in the Justice System* (November 2023).
327 Ibid rec 1–2 .
328 Ibid rec 5.
329 Ibid rec 19.
330 Ibid rec 21.
331 Ibid, part 3, 374–5.
332 Ibid rec 40.
333 Ibid rec 41.
334 Ibid rec 36.
335 Ibid rec 38.

14.9 The Council's view

14.9.1 Enhanced recognition of victim survivors and the impact of the offending at sentence

Key Findings

15. **Appropriate and trauma-informed language should be used in the courtroom to support appropriate sentencing practices.**

The language used by judicial officers, defence practitioners and prosecutors in rape and sexual assault sentence proceedings impacts how sentences are understood and viewed by victim survivors, perpetrators and the wider community.

Using appropriate and trauma-informed language in sentencing is essential to addressing long-standing systemic issues within the community relating to the understanding of sexual violence offences and the harm they cause. It is also an important aspect of ensuring sentences are adequate and appropriate.

Using inappropriate language that is not trauma-informed may:

- minimise the harm experienced by victim survivors;
- retraumatise victim survivors, impacting their long-term recovery;
- unfairly shift blame for the offending onto victim survivors; and
- minimise acknowledgment of the wrongfulness of the person's actions, thereby undermining the sentencing purpose of denunciation.

Language that is not trauma-informed or that is inappropriate may influence, or be perceived to influence, the way a judicial officer determines the seriousness of the offence for the purposes of sentencing and may retraumatise the victim survivor by appearing to minimise the seriousness of the rape or sexual assault.

It is critical that all justice agencies use trauma-informed language within the sentencing context, as language used by:

- legal practitioners and within professional expert reports may impact the language used by judicial officers during proceedings;
- judicial officers can impact both the person being sentenced and the victim survivor;
- the Court of Appeal (or accepted without comment) sets precedents for how sexual violence is understood and approached in future criminal proceedings.

See **Recommendations 17, 18, 19 and 20.**

16. **Victim impact statements require improvement within the sentencing process**

There is strong dissatisfaction among victim survivors and members of the community with respect to the victim impact statement regime. This dissatisfaction permeates all aspects of the process, including with respect to its purpose, content, form of presentation, arrangements for cross-examination, timeframes and degree of acknowledgement of the victim survivor and the harm they have suffered by the sentencing court:

- Agency roles and responsibilities regarding information and support for victim survivors of rape and sexual assault offences in the preparation of a victim impact statement are unclear, meaning victim survivors may not be provided with sufficient support when

preparing a statement, and the information conveyed to the courts may be of limited utility.

- There is a pervasive lack of understanding of the purpose and use of victim impact statements in sentencing, which means stakeholders hold different (often unmet) expectations with respect to how a victim impact statement should be used.
- Victim survivors are dissatisfied with the process of redacting or 'content editing' victim impact statements by the prosecution service prior to sentence. The way this information must be provided to the court may not meet victim survivors' needs.
- Victim survivors may not be offered an opportunity to provide a statement prior to sentence due to concerns about this causing delays in the proceedings and matters being finalised.
- Victim survivors are often dissatisfied with the degree of acknowledgement by the sentencing court of the harm they have suffered as a consequence of the offending (as outlined in their victim impact statement).

See **Recommendations 21, 22 and 23**.

We were told many times during this review that it is important for victim survivors to have a voice within the sentence context and to have their experience validated by legal practitioners and the court. The opportunity for victim survivors of rape and sexual assault to provide a statement to the court in their own words was recognised as a critical way to satisfy this justice need, with corresponding impacts on their broader criminal justice experience.

However, the use of a VIS in its current form proved a challenging issue for our consideration. It became clear to the Council that there are differing views within the criminal justice system regarding how a VIS should be used in sentencing (including how judicial officers should acknowledge victim survivors and weigh the harm caused to them in the exercise of their sentencing discretion), and which agencies should provide support to victim survivors when writing one.

While a VIS can have an important role within the sentence hearing, we acknowledge that there is broad dissatisfaction surrounding the VIS regime; there are aspects of the VIS regime that are not fit for purpose and do not serve the interests of victim survivors of rape and sexual assault, those of the offending person or those of the court:

- There is a pervasive lack of clarity among legal justice entities, victim survivors and victim support services regarding the purpose of providing an impact statement.
- There is a lack of clarity across all stakeholders regarding which agencies are funded to assist victim survivors in preparing a VIS, with a corresponding impact on the experiences of victim survivors who want to be supported through this process.
- Resources to support victim survivors to prepare a VIS are limited.
- Victim survivors report being disappointed and frustrated by procedural rules that restrict their voice in their VIS, such as with respect to the form, admissible content and redaction of, and timeframes for providing, a VIS.
- Victim survivors want to be acknowledged by the judicial officer and know the sentencing court has regard to the impacts of the offending on them in sentencing the offending person.

We acknowledge that these issues likely extend to all victim survivors who have a right to provide a VIS in Queensland under this regime. We have subsequently recommended that a broader review be conducted into the VIS regime to determine the extent of these challenges, and to enable holistic recommendations to be made surrounding the purpose of providing a VIS, and any reforms to procedural requirements (**Recommendation 21**).

We intend that our observations on the challenges which arose through this review, and our preliminary consideration of the potential implications of reforms to the Queensland approach, will serve as an initial guide within the context of any such review.

In the interim, we have identified a need for some immediate changes to improve the sentencing experience of victim survivors of rape and sexual assault in Queensland, including through:

- in support of enhanced, trauma-informed interactions with victim survivors, the development of enhanced resources to engender a greater awareness among members of the judiciary, prosecution services and defence practitioners that the language they use, as well as how they refer to victim survivors and the harm they have experienced, can positively or negatively impact victim survivors (**Recommendations 17, 18, 19 and 20**);
- clarification of which agencies are funded to assist victim survivors through the preparation of their VIS and enhancing existing VIS resources to ensure victim survivors are appropriately supported through the process, and are aware of any procedural requirements surrounding the process (**Recommendation 22**); and
- legislative amendments to section 179K(5) of the PSA to ensure that victim survivors who do not provide a VIS are not negatively impacted within the sentencing context (as per legislative intent) (**Recommendation 23**).

These issues should also be considered within the context of a broader review (**Recommendation 21**) to ensure it produces a comprehensive and considered VIS regime for victim survivors, support advocates, legal professionals and the broader community.

Why trauma-informed language is important for the sentencing experiences of victim survivors

As discussed at section 13.8, trauma-informed practices within the sentencing context are critical to the experiences of victim survivors of rape and sexual assault.

We know the language used by prosecutors, defence practitioners and judicial officers, and the way a sentence hearing is conducted, can have a significant negative impact on the entire criminal justice experience of victim survivors of rape and sexual assault.

While we received general feedback about the lack of judicial acknowledgement of victim survivors within the courtroom (including acknowledgement of the harm caused to them as detailed in their VIS), one victim survivor stated that her confidence in the sentencing judge was compromised by the language used by the judicial officer in delivering their remarks.[336]

In sentencing remarks for rape and sexual assault, the Council observed examples of language being used when describing the offending behaviour that risked minimising the harm caused to victim survivors

[336] Victim Survivor Interview 7.

or the culpability of the person being sentenced contrary to the objective of promoting perpetrator accountability. From our review, we have concluded that some practices were problematic. This issue is discussed further in **Chapter 15**, section 15.4.

We note that there is no legislative requirement for a court to refer to the fact that a VIS has been made by the sentencing court and, if provided, the form and the degree of acknowledgement required. As with many other relevant sentencing factors, this is a matter for individual judicial discretion.

However, research with victim survivors of sexual violence has found that this form of acknowledgement can respond to the justice needs of victim survivors and convey a therapeutic benefit to them by validating their experience, particularly when the judicial officer refers to specific details outlined in the VIS when delivering their remarks, rather than brief and 'tokenistic' forms of acknowledgement.[337] Conversely, 'an apparent failure of the system to recognize the real significance of what has occurred in the life of [the victim survivor] as a consequence of the commission of the crime may well aggravate the situation'.[338]

The reference made by judicial officers to a VIS may also impact on victim survivors' satisfaction with the sentencing process more broadly. Consistent with this, we observed that victim survivors may be more satisfied when they're acknowledged by the sentencing judge,[339] while victim survivors who feel excluded or as if they are not adequately acknowledged may be more dissatisfied with the process.[340]

While the focus on sentencing is necessarily on the person who is being sentenced and ensuring that principles of fairness are maintained, it is important for the sentencing process to operate in a way that respects the rights and interests of victim survivors and seeks to minimise risks of further harm through involvement in the process. Within this context, it is important for practitioners and judicial officers to ensure that victim survivors and the impact of the offending on them are sufficiently and visibly recognised in both sentencing submissions and remarks.

The Council notes the trauma-informed principles recommended by SAMHSA (see section 13.4) and the opportunities for courts to improve communication with victim survivors of sexual violence.

Enhanced understanding of sexual violence offending and its impact on victim survivors

Recommendations	
17.	**Resources to assist the courts to respond to the needs of victim survivors of rape and sexual assault within the courtroom** The Department of Justice, in consultation with the Heads of Jurisdiction, and with reference to work being led by the Judicial College of Victoria, support the development and provision of practical information for courts about responding to the needs and interests of victim survivors of rape and sexual assault in criminal proceedings, including preferred ways to acknowledge victim survivors and the harm they have experienced.
18.	**Resources and professional development for judicial officers** Until such time as a Queensland Judicial Commission is established, the Queensland Government ensure appropriate funding and resources are provided to Queensland Courts to

337 Davies and Bartels (n 14) 168–9,
338 *DPP v DJK* [2003] VSCA 109 [18].
339 Victim Survivor Interview 7.
340 Victim Survivor Interview 1.

enable judicial officers to continue to participate in national judicial officer training programs focused on sexual violence and in support of the development of Queensland-based sentencing resources (see also **Recommendation 6.1**).

The use of trauma-informed language is particularly important for sexual offences due to long-standing systemic issues relating to understanding of these offences, and the harm caused. As discussed in **Chapter 6,** how legal practitioners and judicial officers describe the seriousness of an offence is important to ensure that the gravity of offending is appropriately recognised and sentenced. When language is used to describe offending that may not reflect the offending gravamen, it minimises both the harm caused and the culpability of the perpetrator, as well as not properly denouncing the offender's conduct. This issue is further discussed in **Chapter 15**, section 15.4.

We recognise the findings of the VLRC (outlined in **Chapter 13**) that victim survivors have various needs that must be met to improve their experience of the sentence hearing.[341] These include the importance of having a voice, receiving validation, seeing their offender denounced and held accountable, and being treated with respect.[342] We concur with these findings and believe that these needs can better be met with appropriate resources and trauma-informed training for all legal stakeholders, noting that they can be promoted without limiting the rights of the person being sentenced.

Within this context, we consider that there are opportunities for resources to be developed to assist judicial officers and provide ways to enhance the acknowledgement of victim survivors and the harm they have experienced (including with respect to their VIS) during the sentencing hearing.

Earlier in this report, we recommended the development of enhanced resources such as an updated Benchbook on Sentencing (**Recommendation 6.1**). We also consider it important for there to be practical information and opportunities for training for all justice stakeholders involved in court processes to enhance responses to the needs of victim survivors in sentencing proceedings (**Recommendations 17 and 18**).

One aim of additional resources and training is to ensure that judicial officers are made aware of the positive impacts their acknowledgement can have on a person who has experienced rape or sexual assault. Specifically, this can be achieved by conducting the hearing in a trauma-informed way and acknowledging the harm caused to victim survivors more frequently and deliberately during the delivery of their remarks.[343]

The Judicial College of Victoria has developed and published a comprehensive resource to guide interactions with victim survivors,[344] which might serve as a foundation or guide for a Queensland resource. In relation to the VIS, the guide recognises the importance of judicial officers explaining the sentencing process and how their VIS may be used to victim survivors, including:

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341 *Improving the Justice System Response to Sexual Offences* (n 315) 29–32.

342 Ibid.

343 See a discussion of Davies and Bartels' recommendations for best judicial practice when acknowledging victim survivors at sentence, which included the development of a victim-focused benchbook to guide judicial officers on best practice for acknowledging victim survivors at sentence: Rhiannon Davies and Lorana Bartels, *The Use of Victim Impact Statements in Sentencing for Sexual Offences: Stories of Strength* (Routledge, London, 2021) 182.

344 Judicial College of Victoria (n 51) 3. In addition to members of the judiciary, the Judicial College of Victoria consulted with 'prosecutors, defence lawyers, the Victims of Crime Commissioner, the Victims of Crime Consultative Committee, the Office of Public Prosecutions' Witness Assistance Service, the Department of Justice and Community Safety, Child Witness Service and Court Network.

- explaining the purpose and process of the hearings;
- acknowledging that it may be difficult for victims to hear;
- referring to the factors that must be weighed in reacting a decision; and
- explaining the role of a VIS in sentencing.

Best practice surrounding how to acknowledge victim survivors without naming them in proceedings was also provided by way of an example:

> The law requires that a victim of sexual offending not be identified. Because of the relationship between the parties in this case, it is necessary to use a pseudonym for the offender to prevent identification of the victim. The name I will use in these remarks is Conrad Leon.
>
> For the same reason, I will refer to the victim of the offending as 'the complainant', and not refer to any other person in the family by name, only by relationship. I mean no disrespect to anyone in not using their names.[345]

This may inform how Queensland can appropriately acknowledge victim survivors at sentence without compromising their anonymity.

In considering how to facilitate changes to current sentencing practices, we did not consider it appropriate to mandate judicial acknowledgement within the sentencing hearing through legislation. In doing so, we recognise that judicial officers – when aware of the impacts of language on victim survivors – should retain discretion to moderate how they facilitate recognition. We also note that mandatory recognition may result in anti-therapeutic consequences, leaving victim survivors to feel as if their acknowledgement was tokenistic, or merely to 'check' something off from a list.

Improving trauma-informed practices and interactions with victim survivors at sentence

Recommendations	
19.	**Resources for prosecutors** The Office of the Director of Public Prosecutions and the Queensland Police Service review guidance and training materials to ensure that prosecutors are employing trauma-informed practices, and that the language being used in the context of the prosecution of rape and sexual assault matters continues to promote recognition of the objective seriousness of this form of offending and the significant impacts it has on victim survivors.
20.	**Resources for defence practitioners** The Queensland Government consider making appropriate funding or resources available to Legal Aid Queensland, the Queensland Law Society and the Queensland Bar Association to enable similar resources and training to be made available to defence practitioners with respect to the importance of employing trauma-informed practices and language in the context of submissions made on sentence.

In addition to recognition within the courtroom, we recognise that it is important for all legal stakeholders to be aware of trauma-informed practices, and to consider not only the 'substantiative law and procedure,

[345] Ibid 16, citing *DPP v Leon (a pseudonym)* [2014] VCC 237 [1].

but [also] … the way in which they interact with people in court and the potential impact of their actions on the wellbeing of those affected by them'.[346]

We recognise that there is 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 enhanced sentencing information on this topic. 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.

This should include funding for training and resources for prosecutors and criminal defence practitioners to promote recognition of the objective seriousness of this form of offending and its significant impacts on victim survivors. Language used by prosecution and defence practitioners in their submissions potentially impacts the adequacy of sentencing practices because it may:

- influence or be perceived to influence the way judicial officers determine seriousness for the purposes of sentencing;[347]
- retraumatise the victim survivor by appearing to minimise the seriousness of the offending and/or the offender's culpability; and
- provide inadequate information about the offence and offending for both parties, as well as other essential parts of the justice system, including for QCS to risk-manage and provide treatment to the sentenced person and the Parole Board to make informed decisions about the person's parole suitability.

Applying the Council's fundamental principles

In making these recommendations trauma-informed sentencing practices to be deployed within sentencing court, we have had regard to the fundamental principles guiding our review:

- **Principle 1: Reforms to sentencing laws should be evidence-based with a view to promoting public confidence**: It is clear from victim survivors and victim support and advocacy organisations that there is general dissatisfaction with the degree of victim survivor acknowledgment within the sentencing court, particularly with respect to recognition of the harm caused to them as a consequence of the offending. Ensuring judicial officers and legal stakeholders are aware of the importance of language and the impacts of enhanced recognition of victim survivors within the courtroom will assist with increasing victim survivor satisfaction with sentences and has the potential to reduce the risk of retraumatising. Empowering victim survivors and improving their satisfaction can promote public confidence.
- **Principle 6: Reforms should take into account the likely impacts on the disproportionate representation of Aboriginal and Torres Strait Islander people in the criminal justice system**: In recommending these reforms, we have considered whether amendments to improve the sentencing experiences of victim survivors through greater recognition and the use of trauma-informed practices would infringe upon the rights of people being sentenced – noting that Aboriginal and Torres Strait Islander people are disproportionately represented within the

346 Davies and Bartels (n 343) 173.
347 See comments in *WA v Wynne* [2024] WASCA 20 [73] 21 (Buss P, Mazza JA and Hall JA agreeing).

offending cohort. We consider enhanced, trauma-informed processes with victim survivors will have no such negative or disproportionate impact.

- **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**: We consider that these recommendations are compatible with the rights protected and promoted under the HRA. Recognition of the victim survivor within the courtroom and the use of trauma-informed language can be addressed without limiting the rights of the person being sentenced in criminal proceedings as outlined in section 32 of the HRA.

14.9.2 A comprehensive review of the VIS regime in Queensland is required

Recommendation

21. **Comprehensive review of the victim impact statement regime**

The Department of Justice or other appropriate entity undertake a comprehensive review of the victim impact statement regime under the *Penalties and Sentences Act 1992* (Qld), including with respect to the purpose of providing a victim impact statement, the content, form of presentation, arrangements for cross-examination, timeframes and degree of acknowledgement by the sentencing court of the victim survivor and the harm they have suffered as a result of the offending – ensuring that victim survivors who do not provide information about the specific harm caused to them, or who are limited in their ability to do so (including child victims), are not disadvantaged at sentence. This should include consideration of trauma-informed practice.

The purpose of providing a VIS is unclear, which leads to dissatisfaction for all parties

We are of the view that the VIS regime has the potential to provide strong value for victim survivors, who are otherwise alienated by the system:

- A well-prepared VIS that focuses specifically on the impact of the offending can provide an instrumental benefit to court by conveying critical information about the harm suffered by the victim survivor, which would be otherwise unknown to the sentencing judge.
- The VIS, in providing the court with information about the personal circumstances of the victim survivor, 'constitute[s] a reminder of what might be described as the human impact of crime',[348] and may therefore serve to 'humanise' the person who has been most directly affected by the person's offending and, through the court's recognition of their individual experiences, serve a broader therapeutic purpose.[349]

The purpose of providing a VIS is to inform the court of the harm the victim has suffered, and this must be taken into account as part of the nature and seriousness of the offence.[350] The purpose of reading a VIS is 'to provide a therapeutic benefit'.[351] In this way, a VIS has a dual informative (instrumental) and a

348 *DPP v DJK* [2003] VSCA 109 [17].
349 Cyrus Tata, '"Ritual Individualization": Creative genius at conviction, mitigation and sentencing (2019) 46(1) *Journal of Law & Society* 11. See also Cyrus Tata, *Sentencing: A Social Process – Rethinking Research and Policy* (Palgrave Macmillan, 2020) Chapter 5 – The Humanising Work of the Sentencing Professions: Individualising and Normalising.
350 PSA (n 2) ss 9(2)(c)(i), 179K(1), (3), (7).
351 Ibid s 179M(4)(a).

therapeutic (expressive) role. However, these purposes conflict when considering how evidence in a VIS should impact the sentence outcome.

This duality creates challenges for both the community (including victim survivors) and legal stakeholders, who have different expectations of how a VIS should be used by the courts and which purpose is more important: victim survivors expect to be able to tell their story without restriction to facilitate the therapeutic benefits, while legal stakeholders believe that it should only contain admissible, relevant material in line with the rules about fact finding at sentence.[352]

Commentary from the Court of Appeal demonstrates that a VIS is a relevant consideration within the sentence hearing. However, there can also be issues about the weight given to the information contained therein if it is not sufficiently detailed or supported with reliable evidence, or where it contains details that are broader than the specific impact of the offence on the victim. There can also be uncertainty regarding how a court makes an assessment of harm where there is no VIS.

By clarifying the purpose of a VIS, this may be relevant to the consideration of how the court should treat it, what information (if any) 'should' be excluded by the prosecution service prior to sentence and processes surrounding the timing of providing the VIS and the mechanism for doing so:

- If the purpose is **purely expressive** and has no impact on the penalty, the courts could adopt a more relaxed approach to the restriction of its content to ensure that the victim survivor feels that they can speak freely about what happened to them in a way that is cathartic, without having their voice suppressed or edited by the prosecution service or the courts.
- If the purpose is to inform the court of the harm suffered for consideration in deciding the penalty (an instrumental purpose), then it is important for the veracity of the statement to be tested by the person being sentenced prior to it being relied upon at sentence. In these circumstances, it would become more important to ensure that any inadmissible content is redacted from a VIS prior to sentence.

Our observations are consistent with a study by Davies and Bartels, who considered the use of VIS in sentencing for sexual offences across four Australian jurisdictions (Victoria, South Australia, Tasmania and the ACT). They identified that: [353]

> Participants experienced numerous practical difficulties because the Australian impact statement legislation, case law, policies, and guidelines are inconsistent in their guidance around the actual purpose of impact statements. Consequently, justice professionals are unable to provide coherent and consistent advice to victims about the type of information they can include in their statement and how the statement may be used by the court.

Our findings in this review indicate that a comprehensive review of the regime is required to determine, among other things, the purpose of a VIS.

In **Chapter 8**, we noted that one of our concerns is that the factors listed in section 9(3) of the PSA (to which a court must have primary regard when sentencing offences of personal violence such as rape) 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 a concern to protect community members (most usually women and girls) from the psychological and emotional harm that is more relevant in the case of sexual assault and rape. This may contribute to a sentencing court focusing on whether there was physical harm

352 See *Evidence Act 1977* (Qld) s 132C.
353 Davies and Bartels (n 343) 7.

(often referred to as involving violence), rather than the significant emotional and mental harm often caused by these offences. This can further be exacerbated by a lack of evidence about emotional and mental harm in a VIS, which may be due to the victim survivor not being able to get psychological support, a victim survivor being unsure about what to include due to limited guidance or no VIS being submitted.

In addition, earlier in this report we recommended the development and enhancement of existing resources for prosecutors, defence practitioners and judicial officers 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 in addition to 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**), as well as to ensure judicial officers have access to resources and ongoing professional development focused on sexual violence (**Recommendations 17 and 18**).

We recognise that, if the VIS are to serve a truly therapeutic purpose, processes surrounding their preparation and use need to be informed by principles of trauma-informed practice. Acknowledging that there is currently a lack of research into trauma-informed best practice for the provision of a VIS,[354] we suggest that any review into the VIS regime in Queensland should include consideration of how a more trauma-informed approach can be achieved. Applying general trauma-informed principles, important elements might include, for example:

- ensuring victim survivors are consistently and accurately informed about how the VIS will be used and options for providing them;
- putting protections around how they are provided to safeguard the victim survivors' safety, and ensure they are not subject to further trauma;
- ensuring all those who provide support to victim survivors in preparing a VIS receive appropriate training;
- offering victim survivors choice about how the VIS is provided, including technological solutions for the making of a VIS, and about whether it is provided in writing, as well as options for the victim to ask for it to be read by another person, such as a family member, on their behalf;
- providing victim survivors with a copy of their VIS if it is redacted or amended so they can view it in its final form; and
- ensuring professionals acting on the victim survivor's behalf, such as victim advocate, can reassess their needs throughout the criminal justice process and beyond, including linking them with therapeutic supports.

The redaction of victim impact statements is anti-therapeutic for victim survivors

Victim survivors told the Council that Queensland's current practice of redacting a VIS prior to sentence is often upsetting. This is particularly the case where charges (or counts on the indictment) have been

354 The Council was unable to locate any research into trauma-informed practices and processes for the provision of a VIS specifically. See, however, Davies and Bartels (n 343) which discusses the use of victim impact statements in Australia based on the perspectives of 6 female victim survivors and 15 justice professionals, supplemented by an analysis of 100 sentencing remarks. They discussed trauma-informed communication practices with victim survivors more generally (at 160–69), and recommended that urgent research is 'required to inform the implementation of a victim-focused pre-sentence mechanism to settle both prosecution and defence issues around impact statements, as well as automated notification systems to help keep victims informed throughout the justice process.': at 183.

amended (e.g. from rape to sexual assault), and they want to talk about their entire experience and the harm it has caused.

We appreciate these concerns. We also recognise the challenges for the court in not redacting the VIS within the current VIS regime prior to sentence, including:

- risks that the judicial officer may be seen to take into account information which is inadmissible or inappropriate; and
- creating an additional obligation for the court to expressly state what information is not being considered in delivering their remarks to avoid the risk of falling into error. We note that this process could be upsetting for some victim survivors.

Within our current VIS framework, we have recommended reforms to the support services and resources available to victim survivors when writing their VIS. As a consequence, we believe there will be less risk of this information being included at first instance.

However, in conducting a broader review and considering whether a VIS should be subject to redaction by the prosecution service, and how to make this process more trauma-informed for victim survivors, it will be important to have regard to its purpose (once clarified).

We also acknowledge that regimes in other jurisdictions may provide information to guide the review of this process. For example, in South Australia the court is required to declare which portions they are not relying upon, while in Victoria consideration of any information is at the discretion of the sentencing judge and there is no requirement for the judge to declare which information has been excluded from consideration.

The South Australian model may provide some guidance for Queensland in considering how to respond to the needs of victim survivors without limiting the rights of the person being sentenced to understand which information is not being considered within the VIS. While we consider that the practice of stating which information will be disregarded in court may potentially be traumatic for victim survivors, it is important to recognise that this process already occurs in Queensland, albeit in a less-formal manner: the prosecution tells a victim survivor that content must be redacted or, where it is admitted, there may be discussions during the sentence hearing whereby the content is excluded (see the discussion at section 14.6.2 regarding medical diagnosis). Indeed, a failure of a judge in Queensland to do this can result in the sentence being overturned on appeal (discussed below).

Disclosure and content issues are having unintended adverse impacts on victim survivors

We observed Court of Appeal cases where the content of a VIS was the subject of argument on appeal, or where issues with disclosure caused a conviction to be overturned.[355] We realise that this can have devastating impacts on a victim survivor if their VIS is the reason for a sentence to be reduced or a conviction overturned.

This signals to us that there is a need for victim survivors to be better supported and guided when preparing their VIS to ensure these statements are providing reliable information that is of benefit to the

[355] See *R v Agnew* [2021] QCA 190 [81] (Flanagan J, Sofronoff P and Morrison JA agreeing); *R v Cox* [2010] QCA 262 [13] cited with approval in *R v Grimley* [2017] QCA 291 [4], [31], [35]–[36] (McMurdo J, Fraser and Gotterson JJA agreeing). See, for example, the following cases where a re-trial was ordered due to a failure on the prosecution to disclose the VIS: *Dunkerton v Queensland Police Service* [2018] QDC 71 [39]–[40] (Fantin DCJ); *R v Cornwell* [2009] QCA 294 [40]; *R v HAU* [2009] QCA 165 [40]–[43] (Keane JA, Cullinane and Jones JJ agreeing).

sentencing court and will not lead to an appeal. We believe that improvements to a VIS at the outset may limit the need for legal arguments surrounding its contents at sentence and on appeal (and potentially a retrial) and ensure it is given appropriate weight.

Within this context, we recognise the importance of encouraging the provision of additional material to support assertions of fact made within a VIS. However, we note that this could raise challenges where this information is then relied upon by defence as a mechanism by which to cross-examine a victim survivor, which is not the intention.

Consideration of adjournment options to provide a VIS

We also found victim survivors are not always provided with sufficient time to prepare a VIS. While an adjournment may be requested and granted in Queensland to enable a VIS to be provided, this process depends on the prosecution service requesting an adjournment and the court exercising its discretion in granting it.[356]

Our review also revealed this issue is exacerbated in the lower courts, where VIS are rarely provided and adjournments are not being sought to obtain them.

Our review found that sentences often occur immediately after a person enters a plea of guilty to sexual assault or rape, or after two days (sexual assault, MSO) or five days (rape, MSO) where there is a guilty verdict after trial. On one hand, this ensures people who are at risk of spending too much time in custody are sentenced as soon as possible, and concludes the matter for victim survivors without undue delay, which may benefit them by providing closure. One the other, it may mean victim survivors cannot participate in a sentence hearing by submitting a VIS.

While we found (consistent with other reviews) that delays within the criminal justice process can cause anxiety for some victim survivors, we also know that for some victim survivors the opportunity to participate in the sentencing process through the provision of a VIS is important. Taking this opportunity away to have their voice heard through this process in order to facilitate an expeditious resolution will likely have severe anti-therapeutic consequences for victim survivors and does not reflect best trauma-informed practices.

A review of the VIS regime should also consider how to maximise the therapeutic benefit of providing a VIS and limit potential adverse impacts on victim survivors. This should include consideration of whether legislative changes are required to:

- clarify the procedural aspects associated with the provision of a VIS for a victim survivor, including when they should provide their VIS and to whom, as well as ensuring that they are aware of the opportunity to put supporting medical material before the court to support the court's consideration of any allegation of harm psychological or physical harm outlined in a VIS;
- address concerns raised by legal stakeholders regarding untested statements of fact in a VIS by encouraging victims to attach any medical material in support of their statement;
- provide sufficient information for a sentencing judge to appropriately exercise their discretion when considering statements of fact made by victims in their VIS;[357]

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356 PSA (n 2) s 179K(2).
357 This is similar to the ACT: see *Crimes Act 1900* (ACT) s 52(2).

- ensure that the prosecution has sufficient time to receive and disclose a VIS and any supporting material to defence practitioners and the defendant prior to sentence; and/or
- create a presumption that the courts must grant an adjournment (on the request of the prosecution) for a reasonable period to ensure victim survivors have the opportunity to provide a VIS and, following a finding of guilt at trial, to be consulted on the conviction of the offender (and to understand any changes in charges that may have happened.

In doing so, we recognise that it is important for judicial officers to retain the discretion to proceed immediately to sentence in circumstances where it is necessary for the interests of justice.[358]

In the interim, changes to prosecutorial training and guidelines should be enacted to ensure that prosecutors and legal officers appearing on these matters are aware of the importance of requesting an adjournment where they have not had the opportunity to consult with the victim survivor on the outcome (particularly after trial), or for them to provide a VIS. It is understood that enhanced processes are currently being trialled in children's Magistrates Court proceedings in select jurisdictions by PPC.

Alternative mechanisms of providing a VIS

We also considered whether there should be alternative mechanisms for providing a VIS. The current requirement for a VIS to be produced as a formal signed and written statement (including an electronic statement) can be limiting for some victim survivors, particularly those who may experience additional challenges articulating the harm caused to them in writing, such as children, those requiring an interpreter, Aboriginal and Torres Strait Islander people or people from culturally and racially marginalised backgrounds. This issue persists even where a VIS is read aloud, as a victim survivor must read their written statement verbatim rather than speaking ad hoc to limit the risk of inadmissible evidence being spoken into the court record.

In considering alternative mechanisms to a written VIS, it is noted that opportunities for the prosecution to produce a victim report – similar to the provisions in the Northern Territory – may provide an alternative, more trauma-informed approach to the traditional form of a VIS for some victim survivors. A victim report would enable the impact of the offending to be conveyed to the court without subjecting the victim survivor to the challenging experience of writing down the harm caused to them. Such a process may be of benefit for particular cohorts of vulnerable victim survivors, as well as in circumstances where a victim survivor is pressed for time, but still wishes for the harm caused to them to be considered by the court. For example, subject matter experts told us it can be particularly difficult for Aboriginal and Torres Strait Islander victim survivors or those from CALD backgrounds to disclose details about the offending (and therefore the impact and harm) due to cultural taboos and shame related to sex.

Additional issues were raised surrounding the requirement for a victim survivor to read their VIS aloud in court, rather than providing victim survivors with agency to decide when to record their VIS. By enabling a VIS to be pre-recorded prior to sentence and played to the court, a victim survivor may regain a sense of control over the process, as well as potentially obtaining closure earlier, rather than feeling anxious about the upcoming sentence hearing.[359]

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358 See, for example, *Crimes (Sentencing) Act 2005* (ACT) s 51A.

359 Judicial College of Victoria (n 51) 20. See also Victims' Commissioner, 'Submission to the Queensland Government on the Making Queensland Safer Bill 2024' (Submission 96) 10 <https://documents.parliament.qld.gov.au/com/JICSC-CD82/IMQSB2024-B002/submissions/00000096.pdf>.

While the Council observed this practice in other jurisdictions, we concluded there would be significant practical challenges associated with this process in Queensland, such as how victim survivors would record their VIS, and provide these to the prosecution, to then be disclosed in a timely way to defence – especially for victim survivors living in regional or rural parts of the state.

The decentralised nature of Queensland must be considered, such as ensuring that all courthouses have sufficient resourcing capabilities to facilitate a change in process, and that no victim survivor is disadvantaged because of their geographical location or limited access to technology.

Applying the Council's fundamental principles

In making this recommendation for a comprehensive review of the VIS regime, we have had regard to the fundamental principles guiding our review:

- **Principle 1: Reforms to sentencing laws should be evidence-based with a view to promoting public confidence**: It is clear from victim survivors, victim support and advocacy organisations and legal stakeholders that there is a problem with the current VIS regime. We have been told that confusion about the predominant purpose of providing a VIS is prevalent, with flow on impacts for how this evidence is being provided to, and used by, the sentencing court, including with respect to the cross-examination of a victim survivor. We recognise that without a review, this issue will continue to persist, limiting public confidence in the regime. We recommend that a review be progressed which will enable the responsible agency to consider whether there is a broader case for change within the context of all offences, and to consider any impacts of reforms (including those identified through our review and outlined above).
- **Principle 6: Reforms should take into account the likely impacts on the disproportionate representation of Aboriginal and Torres Strait Islander people in the criminal justice system**: The potential impacts on Aboriginal and Torres Strait Islander persons as defendants and victims should be considered within the context of a broader review.
- **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**: We do not consider that this reform will result in any limitations on a person's human rights, noting that we are recommending there be a review, rather than any legislative change. However, we are of the view that any reforms to the VIS regime should balance the human rights of both victim survivors and perpetrators of these offences, including through greater recognition of the significant infringements sexual offending has on the human rights of victim survivors.

14.9.3 Victim survivors need to be provided with greater and clearer support when preparing their VIS

Recommendation	
22.	**Clarification surrounding the roles and responsibilities of agencies with respect to the preparation of victim impact statements** As a matter of priority, the Department of Justice or other appropriate entity, such as the Office of the Victims' Commissioner, undertake work to map agency roles and responsibilities with respect to victim impact statements and to make this information available to all relevant agencies and

services with a view to promoting better understanding and identification of current gaps in service provision.

On completion of this work, existing resources and information for victim survivors should be updated, or new resources developed, to provide clear advice to victim survivors about how to seek support when writing their victim impact statement and what can be included.

A trauma-informed approach to sentencing requires victim survivors to be supported when considering whether they would like to provide a VIS and, if so, throughout the writing stage.

Writing a VIS may cause victim survivors to relive the trauma of their experience. This may be exacerbated if parts of the statement must be redacted to remove 'inadmissible' content where victim survivors did not understand the procedural rules limiting this process.

This is also relevant to assist victim survivors to better understand that 'harm' is significantly broader than 'physical', 'emotional' or 'psychological' harm, and to help them better articulate the impacts of the offending on them in their VIS to allow the court to consider this harm. For example, it can extend to reproductive, financial and cultural harm.

Through our review, we identified that there are many services in Queensland that can support victim survivors through the process of writing a VIS, but as a system, this support can be disjointed and under-resourced. The different roles and responsibilities for agencies supporting victim survivors are not always clearly understood.

For example, the QPS OPM states that, 'For a matter appearing before a District or Supreme Court, officers from the ODPP will assist the victim in the process of preparing a VIS.'[360] However, while a ODPP VLO will provide victim survivors with VAQ's factsheet on what can be included in a VIS, it is not funded to provide any further procedural support (including with respect to the content of the VIS) or emotional support to victim survivors.[361]

The QPS OPM further states that police can refer a victim survivor to VAQ for assistance with completing a VIS for production in court.[362] However, VAQ has advised that it no longer (usually) provides this service, instead referring victim survivors to other organisations that are funded to provide such assistance.

The DPP also told us that the role lies with either the arresting police officer or other support services such as VAQ. However, VAQ suggests that this service should be provided by the ODPP; VAQ has commissioned several support organisations to provide this assistance, depending on the circumstances of the victim survivor and the offence, and whether it previously has had involvement with the person.

Independent support services also provide support to victim survivors on a voluntary basis in some circumstances.[363] However, they are not funded for this. There was also confusion expressed at our consultation events, with many participants erroneously suggesting that this was the DPP's responsibility.

360 *QPS OPM* (n 122) section 3.7.10.
361 *ODPP Director's Guidelines* (n 34).
362 *QPS OPM* (n 122) sections 3.7.10, 2.12.3 (emphasis added).
363 Victim Support Advocate Interview Group 1.

Our finding aligns with the views expressed by the Victims' Commissioner, that support services are 'fragmented and limited due to the lack of awareness and proactive provision of information to victims on their right to make a VIS.'[364]

As this review has revealed, the current VIS process is unclear to legal experts. We believe it is also likely to be poorly understood by victim survivors and support services. For victim survivors who are anxious about discussing the offending or engaging with the criminal justice system, this lack of clear information surrounding who is best placed to help them at the outset may contribute to feelings of dissatisfaction and lead them to disengage from these support services, potentially leading to greater dissatisfaction with the court process more generally.

It is our view that immediate steps should be taken to map which agencies are responsible for supporting victim survivors through the process of writing their VIS to gain a deeper understanding of current gaps in service provision. Ideally, this support should be provided through one victim survivor support advocacy service on a proactive basis, rather than requiring victim survivors to independently make contact with support services.

In considering which agency is best placed to support victim survivors with this service, it is important to recognise their roles and functions. For example, while some stakeholders have expressed the view that this responsibility should lie with the prosecution (either the PPC or the ODPP),[365] prosecutors in Queensland have an overarching responsibility to act in the public interest, rather than in the interests of victims of crime, where there is a conflict.[366]

We agree that it is important for the prosecution service to remain independent and impartial from the VIS process, particularly to ensure that there is no perception of 'coaching' or leading a victim survivor to provide particular information to the court. Irrespective of this requirement for impartiality, prosecutors are not funded to provide this service, and it would require significant additional funding to support victim survivors through this process.

We also note that there is a victim advocate service is to be piloted in Queensland. Once established, further consideration could be given to roles and responsibilities within this broader context and mapping, including with respect to the provision of any assistance to victim survivors when preparing a VIS. The role of the victim advocate/navigator should also involve consideration of how best to support children who experience sexual offending, noting that they will likely experience significant challenges articulating the actual or potential harm to them in their VIS.

We also compared existing resources to support victim survivors through the VIS process in Queensland to other jurisdictions and identified opportunities for existing resources to be enhanced to provide victim survivors with clearer and more helpful information to guide the preparation of their VIS.

This could include additional information to support victim survivors, such as listing the support services available to assist with the preparation of their statement, clarifying how the VIS will be used by the sentencing court and additional procedural information, such as when to provide a VIS, as well as the legal consequences for doing so at different points of the prosecution process.

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364 Victims' Commissioner, 'Submission to the Queensland Government on the Making Queensland Safer Bill 2024' (Submission 96) 10 <https://documents.parliament.qld.gov.au/com/JICSC-CD82/IMQSB2024-B002/submissions/00000096.pdf>

365 Meeting with Victim's Assist Queensland, 19 April 2024.

366 Arie Freiberg and Asher Flynn, *Victims and Plea Negotiations - Overlooked and Unimpressed* (Palgrave Macmillan, 2021) 2, 10

We further recommend that, similar to the position in other jurisdictions, any updates to existing resources should include consideration of a checklist and template to guide victim survivors regarding the structure for how to write their VIS and what should be included and attached in support. In designing this template, we recommend that regard be had to the templates produced in New South Wales, which includes headings to help victim survivors in structuring their statement, and a 'Checklist' to guide victims through the steps required to prepare and provide their statement (see **Appendix 17**). We believe this could be a useful tool for victim survivors to rely upon when engaging with what can be a very difficult and painful task, to ensure that they include the information most relevant to the sentencing court's consideration.[367]

Upon completion, the 'map' of support services and any updated resources should be provided to all relevant justice agencies and services to ensure that clear and consistent information is provided to victim survivors about how to seek support when writing their VIS, and what can be included in it.

Once complete, mechanisms (whether by linking to relevant resources, through the delivery of training or otherwise) should also be implemented within the ODPP and the QPS to ensure legal staff and police understand support services available to victim survivors, and agency roles and responsibilities with respect to the preparation of VIS, as well as how to refer victim survivors to them.

We believe clarification of the roles of respective justice agencies and enhancements to front-end processes surrounding what can and cannot be included within a VIS will have an immediate positive impact on the experiences of victim survivors of rape and sexual assault by ensuring that they are appropriately supported through this process. This will also reduce the risk of inadmissible material being included in a VIS at first instance, limiting the need for subsequent redaction by the prosecution, or contest by defence prior to sentence.

However, the Council is of the view that this recommendation alone will not address concerns surrounding the purpose of providing an impact statement (discussed below). Without clarification from the legislature or the courts on how an impact statement should be utilised at sentence, victim survivors will continue to see a VIS as an opportunity for them to have their voice heard and to impact the sentence imposed, while legal stakeholders will continue to redact their statements to only present 'appropriate' and 'admissible' details of harm to the court.[368]

Applying the Council's fundamental principles

In applying the Council's fundamental principles guiding the review, we determined that a recommendation was required to respond to this finding:

- **Principle 1: Reforms to sentencing laws should be evidence-based with a view to promoting public confidence**: Victim survivors and support advocates have told us that better support services must be provided to victim survivors ensure that they understand what needs to be included in a VIS, and to support them through this process. Legal practitioners and other justice stakeholders have highlighted concerns for the admissibility of a VIS when inadmissible information is not included, or where it does not serve an informative purpose. Supporting victim

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367 Department of Justice and Attorney-General, *Preparing a Victim Impact Statement* (Factsheet) <https://www.publications.qld.gov.au/ckan-publications-attachments-prod/resources/6048e39f-617f-415d-9fc0-df5b3a2e991c/victim-assist-victim-impact-statement-factsheet.pdf?ETag=7712fa772962bd9ebd4792b78e1b6ceb>

368 PSA (n 2) s 179K(3).

survivors through the VIS process will also promote victim survivor satisfaction and public confidence.

- **Principle 6: Reforms should take into account the likely impacts on the disproportionate representation of Aboriginal and Torres Strait Islander people in the criminal justice system**: The potential impacts on Aboriginal and Torres Strait Islander persons as defendants and victims are considered. It is envisaged that this reform will benefit victim survivors while having a minimal impact in terms of changing sentencing outcomes for those sentenced for these offences.
- **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**: We do not consider that this reform will result in any limitations on a person's human rights. In any case, the Council considers strengthening section 179K(5) to prohibit a court from drawing 'any inference' about whether the offence caused harm from the fact that a VIS was not given 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.

14.9.4 Legislative amendment is required to ensure victim survivors are not negatively impacted because they did not provide a VIS

Recommendation	
23.	**Amendment to section 179K(5) of the *Penalties and Sentences Act 1992* (Qld)** The Queensland Government amend section 179K(5) of the *Penalties and Sentences Act 1992* (Qld) to ensure a court does not draw any inference about whether the offence had little or no harm caused to the victim survivor from the fact that a victim impact statement was not given.

As discussed in section 14.2, under the PSA a court must have regard to the nature of the offence and how seriousness the offence was, including 'any physical, mental or emotional harm done to a victim, including harm mentioned in information relating to the victim given to the court under section 179K'. In accordance with section 179K(5) of the PSA, the absence of an impact statement 'does not, of itself, give rise to an inference that the offence caused little or no harm to the victim'.

There is no requirement for a victim survivor to make a VIS and we do not think this should change. There are valid reasons why a victim survivor may choose not to make a statement, and this should not detract from the harm caused by the offending. However, we consider that the current wording of section 179K(5) could be strengthened to prohibit a court from drawing 'any inference' about whether the offence caused harm from the fact that a VIS was not given.

We are concerned that if the current wording is not strengthened, it may place pressure on a victim survivor to make a VIS.

A VIS contains highly personal information about distressing and traumatising events[369] and the physical, mental and/or emotional harm the victim survivor has experienced as a consequence.[370] While a VIS has provides an opportunity to deliver a therapeutic benefit to victim survivors by allowing them to share this information with the court, the offender, and the public,[371] equally some victim survivors may make a conscious decision not to make a VIS on the basis that they do not wish to broadcast the depth and extent of their pain. The decision not to make a statement may be made for self-protective reasons.[372]

The Victorian Sentencing Council acknowledged: 'All VISs are likely to contain highly personal information, and by making and reading a VIS, a victim may open themselves to embarrassment and further trauma and distress.'[373]

While a VIS can 'increase offenders' awareness of the harm have caused',[374] a victim survivor may 'not want the offender to be fully aware of the harm caused to them'.[375] This is particularly the case if a victim survivor is concerned an offender will extract enjoyment from hearing about their harm, as this will defeat any potential therapeutic benefit for a victim survivor in providing a VIS.

Amending s 179K of the PSA will promote victim survivors' right to be treated with respect and dignity and right to have their personal information protected[376] and remove any pressure on a victim survivor to provide a VIS.

This approach does not prevent a court from considering other empirically supported research or evidence or the judicial officer's own learned experiences to conclude there was, or is likely to be, harm experienced by a victim survivor. [377]

We note the proposed wording is consistent with the wording in other jurisdictions such as New South Wales,[378] ACT[379] and the NT.[380] A similar recommendation was made by the NSW Sentencing Council,[381] which was subsequently implemented.[382]

The Terms of Reference are focused on sentencing practices for sexual assault and rape. A potential inconsistency would arise if our recommendation was limited to these two offences. To limit sentencing

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369 Victims of Crime Commissioner, *Silenced and Sidelined: Systemic Inquiry into Victim Participation in the Justice System* (Report, November 2023), 438.

370 In a US study analysing the contents of VISs, they noted common themes of 'psychological and physical effects, feeling "robbed," … insulted by lack of remorse … disillusioned with the criminal legal system …. Victimization in broader terms … internalized blame, and defenselessness (sic)': Miltonette Craig and Daniel Sailofsky, 'What happened to me does not define who I am': Narratives of resilience in survivor victim impact statements' (2024) 19(2) *Victims and Offenders* 329, 334–38.

371 Davies and Bartels (n 343) 15.

372 Lieke C.J Nijborg et al, 'Grief and delivering a statement in court: a longitudinal mixed-method study among homicidally bereaved people' (2024) 15(1) *European Journal of Psychotraumatology* 1, 6–8.

373 NSW Sentencing Council, *Victims' Involvement in Sentencing* (Report, March 2018) 35 [3.22].

374 Davies and Bartels (n 343) 30 citing J Roberts, 'Victim impact statements and the sentencing process: Recent developments and research findings' (2003) 47 *Criminal Law Quarterly* 365.

375 Australian Law Reform Commission, *Sentencing* (Report No 44, 1988) n 71, citing the Australian Victims of Crime Association, Submission, 10 November 1987. See also Davies and Bartels (n 343) 41 citing Fiona Tait, *Testaments of Transformation: The Victim Impact Statement Process in NSW* as *Experienced by Victims of Crime and Victim Service Professionals* (2015).

376 *Victims' Commissioner and Sexual Violence Review Board Act 2024* (Qld) sch 1 'Charter of Victims' Rights'.

377 See, for example, *R v Stefanac* [2022] NSWCCA 129, [56]–[57] (Hamill J).

378 *Crimes (Sentencing Procedure) Act 1999* (NSW) ss 30E(5)–(6).

379 *Crimes (Sentencing) Act 2005* (ACT) s 53(1)(b).

380 *Sentencing Act 1995* (NT) s 106B(6).

381 NSW Sentencing Council, *Victims' Involvement in Sentencing* (Report, March 2018) 43 [4.25], rec 4.6.

382 *Crimes Legislation Amendment (Victims) Act 2018* (NSW) sch 3, subdiv 3.

inconsistencies, anomalies and complexities, this recommendation should not be limited to sexual assault and rape, but rather applied to all matters where a VIS can be provided.

Applying the Council's fundamental principles

In applying the Council's fundamental principles guiding the review, we determined that a recommendation was required to respond to this finding:

- **Principle 6: Reforms should take into account the likely impacts on the disproportionate representation of Aboriginal and Torres Strait Islander people in the criminal justice system:** The potential impacts on Aboriginal and Torres Strait Islander persons as defendants and victims are considered. It is envisaged that this reform will benefit victim survivors while having a minimal impact in terms of changing sentencing outcomes for those sentenced for these offences.
- **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**: We do not consider that this reform will result in any limitations on a person's human rights. In any case, the Council considers strengthening section 179K(5) to prohibit a court from drawing 'any inference' about whether the offence caused harm from the fact that a VIS was not given 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.

14.9.5 Systemic disadvantage considerations

As discussed throughout this report, Aboriginal and Torres Strait Islander people are around 3.5 times more likely to have been a victim of sexual assault (including rape and other sexual offences) compared with non-Indigenous Australians.[383] We consider that any recommendations for reform to better support victims through the sentencing process (including the VIS process) need to acknowledge this.

As discussed in **Chapter 13**, stakeholders have recognised a need for better communication with Aboriginal and Torres Strait Islander people, as both offenders and victims, and for greater cultural sensitivity. Members of the Aboriginal and Torres Strait Islander Advisory Panel considered that VIS are under-utilised and may cause more trauma, especially if there is dispute between the parties as to what is admissible. Although the defence is entitled to challenge the inclusion of inadmissible material, it was acknowledged that this can have significant impacts on a victim survivor.

We consider that opportunities to enhance the recognition and acknowledgement of victim survivors and their experiences within the sentence hearing may have a significant, positive impact on Aboriginal and Torres Strait Islander victim survivors when engaging with the criminal justice system without limiting the rights of the person being sentenced.

We note that opportunities to improve supports for victim survivors when providing their VIS will benefit Aboriginal and Torres Strait Islander people only if such supports are culturally safe and appropriate. This includes greater recognition of the concept of 'Women's Business' and that some victim survivors may be hesitant to speak about the harm they have experienced. While some Community Justice Groups ('CJGs') provide support to victims as well as defendants, it is the responsibility of the individual CJGs to determine whether sexual violence matters fall within scope of the services they provide. Greater consideration of

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

how Aboriginal and Torres Strait Islander women and children should be supported through this process needs to be considered.

The WSJ Taskforce's recognition of the importance of the Queensland Government consulting with people with lived experience and Aboriginal and Torres Strait Islander people in developing any recommendations to ensure they are 'individualised, culturally safe and trauma informed' should be adopted in any reform work to ensure their benefits can be realised by victim survivors from all cultural backgrounds.

An additional consideration is the way recognition of victim harm and perpetrator accountability is communicated and given effect to in sentencing, with a view to ensuring that this is done in a culturally safe and appropriate way for both victims and offenders. A further discussion of the impacts of language within the sentencing context is provided in **Chapter 15**, section 15.4.

14.9.6 Human rights considerations

Victims have an express right under the Victims' Charter to 'make a victim impact statement under the *Penalties and Sentences Act 1992* for consideration by the court during sentencing of a person found guilty of an offence relating to the crime'.[384] Greater recognition of their VIS is consistent with the right enshrined within the Victim's Charter to be treated with 'courtesy, compassion, respect and dignity, taking into account the victim's needs'.[385]

Promoting opportunities for victims to make a VIS and for the VIS process to operate in a way that meets their intention and does not retraumatise a victim and supports victims' rights is vital. However, VISs often contain personal information and concerns have been raised that this can give rise to 'significant privacy issues for victims'.[386]

We note that the Victorian Victims of Crime Commissioner recently recommended that the *Charter of Human Rights and Responsibilities Act 2006* (Vic) be amended to include victims' high-level rights, including a right for a victim of a criminal offence to be:

- acknowledged as a participant (but not a party) with an interest in the proceedings;
- treated with dignity and respect; and
- protected from unnecessary trauma, intimidation and distress when giving evidence and throughout criminal proceedings.[387]

We further note that the WSJ Taskforce recommended a review be undertaken of the Charter of Victims' Rights to 'consider whether additional rights should be recognised or if existing rights should be expanded' and that '[i]deally, this review would be undertaken by the Victims' Commissioner' once established.[388] We support this recommendation.

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384 *Victims' Commissioner and Sexual Violence Review Board Act 2024* (Qld) sch 1, div 2, right 7.
385 Ibid sch 1.
386 Victim of Crime Commissioner (Victoria), *Silenced and Sidelined: Systemic Inquiry into Victim Participation in the Justice System* (Report, November 2023) 438, rec 44.
387 Ibid 326–7, rec 5.
388 *Hear Her Voice, Report Two* (n 300) vol 1, 139–40 rec 19.

Chapter 15 – Other issues relevant to sentence

15.1 Introduction

In this chapter, we consider some other issues identified through this review, which impact current sentencing practices for sexual assault and rape offences, including:

- reducing a sentence to recognise a guilty plea;
- cumulative vs concurrent sentences; and
- language in sentencing.

These issues are relevant to sentencing of sexual assault and rape but also have wider implications for sentencing of other offences.

This chapter explores each of these issues, what other jurisdictions do and what we heard from stakeholders and consultation. We then present our key findings and recommendations.

15.2 Reducing a sentence to recognise a guilty plea

15.2.1 The current approach

As discussed in **Chapters 6** and **9,** a person's guilty plea is recognised as a statutory and common law mitigating factor.

Under section 13(1) of the *Penalties and Sentences Act 1992* (Qld) ('PSA'), a court 'must take the guilty plea into account' and 'may reduce the sentence it would have imposed had the offender not pleaded guilty'.[1] There is 'no requirement for a court to state the extent of the reduction for the plea of guilty'.[2] However, if a court does not reduce the sentence when a person has pleaded guilty, the court must state this is open court and give reasons for not reducing the sentence.[3]

Aside from stating a court may have regard to the timing of the plea,[4] section 13 of the PSA does not 'prescribe the factors which are relevant to a decision to reduce a sentence on the ground' of a guilty plea.[5] The considerations that are relevant come from the common law.[6]

At common law, there are 3 reasons why a guilty plea is generally accepted as justifying a lower sentence than would otherwise be imposed:[7]

1 *Penalties and Sentences Act 1992* (Qld) s 13 ('PSA').
2 *R v TBD* [2024] QCA 182 [36] ('*TBD*') citing *R v CCR* [2021] QCA 119, [15] ('*CCR*').
3 PSA (n 1) s 13(4). Although a sentence is not invalid because of this failure, it could be considered on appeal: s 13(5).
4 Ibid s 13(2).
5 *TBD* (n 2) [37].
6 *CCR* (n 2) [16]. Those considerations include the plea being evidence of remorse, it saves the community the cost of a contested trial and it may save the victim from giving evidence - see *Siganto v The Queen* (1998) 194 CLR 656 [22].
7 *Siganto* (n 6) [22], cited with approval in *TBD* (n 2) [37].

1. The plea can be a manifestation of remorse or contrition. The Court of Appeal has cautioned that 'on sentencing, an offender's remorse should not be left to inference. If it exists, it should be proved with clarity.'[8]
2. The plea has a utilitarian value to the criminal justice system. It saves the Queensland public time and money.
3. '[I]n particular cases — especially sexual assault cases, crimes involving children and, often, elderly victims — there is particular value in avoiding the need to call witnesses, especially victims, to give evidence.'[9]

In *Siganto v The Queen*,[10] the High Court found:

> a plea of guilty is ordinarily a matter to be taken into account in mitigation; first, because it is usually evidence of some remorse on the part of the offender, and second, on the pragmatic ground that the community is spared the expense of a contested trial. The extent of the mitigation may vary depending on the circumstances of the case. It is also sometimes relevant to the aspect of remorse that a victim has been spared the necessity of undergoing the painful procedure of giving evidence.[11]

In the absence of remorse for their actions, the focus turns to the willingness of the perpetrator to facilitate the course of justice.[12]

As to the utilitarian value of the plea, courts have recognised that the public interest is served by an accused person who accepts guilt and pleads guilty to an offence charged,[13] even if there would have been a high likelihood of conviction had the case proceeded to trial.[14] This is because, unless there is some incentive for a defendant to plead guilty, there is always a risk that they will proceed to trial.[15] While the weight given by the court will vary according to the degree of conviction certainty (as it appears to the sentencing judge), a guilty plea must always be considered a factor.[16]

The courts have indicated the more serious the offence, the less significance a plea will carry in terms of the ultimate sentence imposed and in some cases may warrant no discount at all.[17]

A person's motive for pleading guilty is not a reason not to take the plea into account.[18] A plea of guilty is also not a guarantee to a certain sentence that would bind a judge.[19]

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8 *R v Randall* [2019] QCA 25, 5 [27] ('*Randall*').
9 *R v Thomson; R v Houlton* (2000) 49 NSWLR 383, 386 [3]. This principle has been cited with approval by the Queensland Court of Appeal. See, for example, *R v Bates; R v Baker* [2002] QCA 174, [76] (Atkinson J) ('*Bates*').
10 (1998) 194 CLR 656.
11 *Siganto* (n 6) [22], cited with approval in *TBD* (n 2) [37].
12 *Cameron v The Queen* (2002) 209 CLR 339, 343 [11], [13]–[14] (Gaudron, Gummow and Callinan JJ); and *R v McQuire & Porter* (2000) 110 A Crim R 348, 358 (de Jersey CJ), 362 and 366 (Byrne J)
13 *R v Harman* [1989] 1 Qd R 414, 421; *Cameron v The Queen* (2002) 209 CLR 339, 360–1 [66]–[68] (Kirby J).
14 *R v Bulger* [1990] 2 Qd R 559, 564 (Byrne J).
15 Ibid.
16 *TBD* (n 2) [2024] QCA 182 [36] - [44]; *R v SEA* [2023] QCA 56 [8]; R *v Mahoney & Shenfield* [2012] QCA 366 [55]-[56]; *R v Ellis* (1986) 6 NSWLR 603, 604 (Street CJ).
17 See, for example *R v Crilley* [2020] QDCSR 291 where Judge Rafter declined to reduce the sentence due to the plea of guilty because 'the gravity of [his] offending is such that a reduction from the otherwise appropriate sentence of life imprisonment should not be made' [236]. See also *R v Mahoney & Shenfield* [2012] QCA 366 [53] (Gotterson JA, Muir JA and Applegarth J agreeing); *R v D* [2003] QCA 547 [40] (Chesterman J, McPherson JA and Mullins J agreeing).
18 *Bates* (n 9) [83] (Atkinson J) citing *R v Morton* [1986] VR 863, 867.
19 *R v Smith* [2022] QCA 55 [63] (Morrison J).

The 'one-third' – a rule of thumb

As discussed in **Chapter 11**, there is a statutory 50 per cent ratio between the minimum time to be served before an offender is eligible to be released on parole and the head sentence.[20] This usually means that if a court does not set a parole eligibility date, a person will become eligible for parole upon reaching the halfway mark of their sentence.[21]

Often, when a person pleads guilty, the non-parole period will be ordered around the one-third mark. For example, in *R v AAG*,[22] the Court of Appeal stated:

> Although there is no mathematical formula and every case will turn on its own circumstances, courts give very significant discounts to sex offenders who plead guilty and save the complainant from giving evidence at committal and trial, usually in the range of one-quarter to one-third of the head sentence applicable after a trial. Where apposite, a parole eligibility date may also be fixed somewhat earlier than the usual half-way point. Of course, the overall sentence must still be within the appropriate range to reflect the criminality of the offence.[23]

However, it is not a legislated rule,[24] as explained in *R v Craigie*:[25]

> The one-third non parole period often adopted by sentencing judges is not of course a legislative rule. It is a useful 'rule of thumb'. Unlike the legislatively fixed non parole period set out in a provision such as s 184(2) of the *Corrective Services Act 2006*, failure to comply with it does not require the sentencing judge to necessarily explain his reasons for doing so – the period chosen simply reflects the sentencing judge's view as to the minimum time that justice requires that the offender must serve having regard to all the circumstances of his offending conduct.[26]

Often other mitigating factors are also taken into account, not just the plea of guilty, such as a lack of relevant criminal history or a commitment by the person to their rehabilitation.[27] However, this is no 'hard and fast rule' and 'the authorities do not condone, in any respect of sentencing, some arithmetical approach under which a reduction is made from a pre-determined range of sentences'.[28]

Timing of the guilty plea

Any reduction to the head sentence or where parole eligibility or a partially suspended sentence is set depends on the timing of the plea and individual facts of the case.[29]

Section 13(2) requires the court to consider how early or late the plea was entered, as this is 'relevant to the extent of any reduction to be received' on a sentence.[30] Generally, a plea made at the 'last moment

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20 *Corrective Services Act 2006* (Qld) s 184(2).
21 There are a number of exceptions to this including if a person is declared convicted of a serious violent offence, in which case the person must serve 80 per cent of their sentence prior to being eligible for parole, or is serving a life sentence: see ibid s 182.
22 [2009] QCA 158.
23 Ibid [20] (McMurdo P).
24 See *Randall*(n 8) [38], [43].
25 [2014] QCA 1.
26 Ibid [26] (McMeekin J).
27 *R v Crouch* [2016] QCA 81 (McMurdo P, Gotterson JA agreeing at [34] and Burns J agreeing at [35].
28 *R v Torrens* [2011] QCA 38, [25] (Lyons J, Wilson AJA and Martin J agreeing).
29 See, for example, *TBD* (n 2) [37]–[38]; *R v Crouch* [2016] QCA 81 [29] in which the McMurdo P said that judges should continue to 'exercise the sentencing discretion judicially' and that 'whether a sentence warrants mitigation reflected in a parole eligibility, a parole release date or a suspension set after one third of the sentence, or at some other time, will always turn on the particular circumstances of the individual case'. The serious circumstances in a case and overwhelming evidence may mean that no reduction for a plea of guilty is warranted: see *R v Mahony* [2012] QCA 366 [50]–[56].
30 *TBD* (n 2) [39].

(as on the day set down for the trial) will ordinarily attract a smaller discount than one that is entered at the first reasonable opportunity'.[31]

To determine whether a plea was entered at the first reasonable opportunity, it is necessary to consider the relevant circumstances leading to the plea 'and not mere regard to the form of the charges'.[32] For example, a person may be only willing to plead guilty to an offence after other charges are withdrawn, so a court cannot automatically assume the person has not pleaded guilty at the earliest opportunity.[33] Where plea timing is disputed, the person must provide:

> evidence of the progress of negotiations in relation to charges that were withdrawn, the particular forensic prejudice or disadvantage in pleading guilty to some charges whilst another charge or other charges remained on an indictment or a late development in the case, such as the emergence of new evidence.[34]

Guilty plea reduction in offences of a sexual nature against a child

In *R v Crothers (a pseudonym)*,[35] the Court of Appeal determined that when sentencing a person for sexual offences against a child, the weight to be given to a guilty plea is affected by the sentencing factors in section 9(6) of the PSA. Sofronoff P stated:

> while s 13 of the Act requires a guilty plea to be taken into account, the weight to be given to such a plea when sentencing an offender who has committed sexual offences against children is affected by the terms of s 9(6) of the Act which requires a sentencing judge to "have regard primarily to" the factors there listed. The first four of these factors relate to the situation of the victim of the sexual offence and three relate to the situation of potential future victims. These were the matters to which [the sentencing judge] rightly gave the greatest attention and weight. The remaining factors of real consequence mentioned in s 9(6) which relate to the applicant are his prospects of rehabilitation, his remorse or lack of remorse and any psychiatric reports relating to him. For reasons that should be obvious, none of these factors are worth much in this case.[36]

Guilty plea reduction in setting the head sentence

As discussed in **Chapters 8** and **11**, the SVO scheme requires a person to serve 80 per cent of the sentence in custody before they are eligible for parole. In our SVO review, we found that the scheme constrains judges' ability to take all circumstances of the case into account and balance them appropriately, leaving the length of the head sentence as the only adjustable component of the sentence.[37]

There is no fixed practice around the amount to reduce the head sentence to recognise a guilty plea, and it will depend on the circumstances of the case. For example, in *R v CCR*,[38] the Court dismissed an appeal that the 14-year sentence for serious child sexual abuse offences was manifestly excessive because the reduction from 16 years for the plea of guilty was inadequate. The Court noted the reduction of 'one-eighth' was 'not unprecedented' and a review of similar cases showed that while it 'was a heavy sentence' it was not so excessive that it demonstrated there was an error of principle nor that the sentence was

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31 *R v Pike* [2021] QCA 285 referring to remarks by Kirby J in *Cameron v The Queen* (2002) 209 CLR 339, 359 [65] citing *R v Holder* [1983] 3 NSWLR 245; *R v Bulger* [1990] 2 Qd R 559; cf *R v Dodge* (1988) 34 A Crim R 325 at 331; *R v Heferen* (1999) 106 A Crim R 89, 92 [12]; *R v Thomson* (2000) 49 NSWLR 383 414–15 [132].
32 *TBD* (n 2) [39].
33 *Atholwood v The Queen* (1999) 109 A Crim R 465, 468 (Ipp J) cited in *Bates* (n 9) [80].
34 *TBD* (n 2) [40].
35 *R v Crothers (a pseudonym)* [2020] QCA 268.
36 Ibid [18].
37 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) 28 ('*The '80 Per cent Rule*').
38 *CCR* (n 2).

'unreasonable or plainly unjust'.[39] In *R v BEA*,[40] the Court cited without comment the decision of *R v Martin*,[41] in which the sentencing judge reduced a sentence of 12 years' imprisonment to 10 years, 'to ameliorate the effect of the serious violent offence declaration that was made'.[42]

In cases involving a plea to an ex officio indictment (the earliest point at which a person may plead guilty), the Court of Appeal has said that 'a significant discount' is warranted.[43] In *R v Wark*,[44] the Court reduced a sentence from 13 years to 12 years on this basis (and associated remorse) that had the case gone to trial, a sentence of 15–16 years imprisonment was merited and '13 years [imprisonment] did not make adequate allowance for the plea of guilty'.[45]

In cases where a mandatory SVO may apply to a sentence, generally courts are not to give a 'double benefit' to a guilty plea by reducing both the head sentence (to below 10 years) and the parole eligibility date.[46] However, there may be some circumstances where a double benefit is warranted.[47]

Prosecutorial approach to guilty pleas

When a person has been charged with a sexual offence, whether the offence can be dealt with summarily or on indictment will determine whether it is heard in the Magistrates Court or a higher court. Rape is an indictable offence and will almost always be dealt with by the District and Supreme Courts,[48] whereas sexual assault may be dealt summarily or on indictment, depending on the seriousness of the matter and their willingness to plead guilty.

For sexual assault cases dealt with summarily, police will be responsible for prosecuting the matter.[49] Where a sexual assault offence is charged on indictment or it is a rape offence, the Office of the Director of Public Prosecution ('ODPP') will prosecute. The Queensland Police's Operational Procedures Manual and the ODPP's *Director's Guidelines* set out how sexual violence offences are to be prosecuted and how to engage with victim survivors.[50]

Office of the Director of Public Prosecution procedures

The ODPP must determine whether there are reasonable prospects of a conviction and whether a prosecution is in the public interest.[51] The public interest test has 2 components: (1) Is there sufficient evidence to proceed with the prosecution? and (2) Does the public interest require a prosecution?[52]

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39 Ibid [19], [28].
40 [2023] QCA 78 ('*BEA*').
41 Unreported, District Court of Queensland, Cairns, Morzone QC DCJ, 28 May 2019.
42 *BEA* (n 40) [67].
43 *R v Wark* [2008] QCA 172 [55] (Cullinane J).
44 Ibid.
45 Ibid [20] (Mackenzie AJA).
46 *R v Cumner* [2020] QCA 54 [68].
47 *R v Tran; Ex parte A-G (Qld)* [2018] QCA 22. See also *R v King* [2020] QCA 9.
48 See Chapter 7, which explains the limited circumstances in which rape may be dealt with in the Magistrates Court.
49 Summary offences can be dealt with in higher courts when the offender is also charged with indictable offences.
50 Queensland Police Services, *Operational Procedures Manual* (Issue 102, 1 October 2024) Ch 3 – Prosecution Process; Office of the Director of Public Prosecution, *Director's Guidelines* (30 June 2023) ('*ODPP Director's Guidelines*'). Guideline 25 sets out how prosecutors are to protect and consult with victims. This includes ensuring a closed court for victim testimony during sexual offence cases (*Criminal Law (Sexual Offences) Act 1978* (Qld), s 5 and *Evidence Act 1977* (Qld) s 21A and protections from improper questions during sexual offence trials (*Evidence Act 1977* (Qld) s 21).
51 *ODPP Director's Guidelines* (n 50) Guideline 4, 2–8.
52 The *Directors Guidelines* set out a range of discretionary factors which may be used to assess whether a case meets the public interest criteria, such as '(a) the level of seriousness or triviality of the alleged offence, or whether or not it is of a 'technical' nature only'. Factors which pertain to the victim survivor include: '(k) any entitlement or liability of a victim or other person to criminal compensation, reparation or forfeiture if prosecution action is taken' and '(l) the attitude of the victim of the alleged offence to a prosecution': ibid 3–4.

Securing a guilty conviction is in the public interest and 'the most efficient conviction is a plea of guilty'.[53] The *Director's Guidelines* encourage early negotiations because early notice of guilty plea 'will maximise the benefits for the victim and the community'.[54]The purpose of negotiations is 'to secure a justice result'.[55]

However, a guilty plea will only be accepted if 'it is in the general public interest'. Under the *Director's Guidelines*, the public interest can be satisfied in one or more of the following ways:

(a) the fresh charge adequately reflects the essential criminality of the conduct and provides sufficient scope for sentencing;

(b) the prosecution evidence is deficient in some material way;

(c) the saving of a trial compares favourably to the likely outcome of a trial; or

(d) sparing the victim the ordeal of a trial compares favourably with the likely outcome of a trial.[56]

The Guidelines also provide for when a plea will not be accepted: it doesn't 'adequately reflect the gravity of the provable conduct of the accused'; the ODPP would be required to distort evidence or the defendant maintains their innocence.[57] Victim survivor views must be sought before any decision is made; however, these are not determinative, as 'it is the public, rather than an individual interest, which must be served'.[58]

When engaging in the plea negotiation process, the ODPP must also, if requested by the victim, provide victims with information regarding notice of a decision to substantially change a charge, or not to continue with a charge, or accept a plea of guilty to a lesser charge[59] – consistent with rights recognised under the Charter of Victims' Rights for a victim to be kept informed about these matters.[60] However, while victim survivors' views 'must be recorded and properly considered prior to any final decision, those views alone are not determinative'; the PDPP has the ultimate discretion to decide whether or not to proceed with the prosecution, having regard to the above mentioned factors.

Guilty plea and outcomes

Guilty plea rates for rape and sexual assault in Queensland

The Council's data analysis over the 18-year data period found that the guilty plea rate for all Queensland offences is 99.1 per cent (the not-guilty plea rate is 0.9%), and for sexual offences generally, 88.6 per cent (the not guilty plea rate is 11.4%).[61]

Compared with sexual offences generally, we found rape had an even higher proportion of not guilty pleas, with close to one-third of people sentenced having entered a not guilty plea (31.3%), but sexual assault had a lower proportion of not guilty pleas (8.1%).

Plea type and parole eligibility date – for rape

Our analysis found that people who pleaded guilty and were sentenced for rape (MSO) had short non-parole periods. The median time before parole eligibility was 2.3 years (average 3.1 years) for a person

53 Ibid 23.
54 Ibid.
55 Ibid.
56 Ibid.
57 Ibid 24.
58 Ibid.
59 Ibid 33.
60 *Victims' Commissioner and Sexual Violence Review Board Act 2024* (Qld) sch 1, div 2.
61 See Appendix 4.

who pleaded guilty to rape (MSO), compared with 3.0 years (average 3.5 years) for a person who pleaded not guilty.

Of the 535 people who pleaded guilty to rape (MSO) between July 2011 and June 2023 and received an imprisonment order, three-quarters had parole eligibility set below the halfway mark (74.4%), and over half had their parole eligibility date set at or below the one-third mark (55.8%). For these cases, the average proportion of the head sentence to serve before parole eligibility was 39.8 per cent (median 33.4%).

In contrast, of the 319 people who did not plead guilty, two-thirds were only eligible for parole after serving half of their head sentence (66.8%) and a much smaller proportion than for those who pleaded guilty (17.6%) had their parole eligibility date set below 50 per cent of the head sentence. Most commonly, people were required to serve 50 per cent of their sentence before becoming eligible for release on parole. Unlike the guilty pleas, there was no concentration at the one-third mark, suggesting that other sentencing considerations, such as specific factors in personal mitigation, were being applied to those set below the halfway mark.

Plea type and parole eligibility date – for sexual assault

If a person does not plead guilty to a charge of non-aggravated sexual assault, they must have the matter dealt with in a higher court, regardless of how serious the alleged conduct is.

The median imprisonment length to serve before being eligible for release on parole (after pleading guilty) for non-aggravated sexual assault sentenced in the Magistrates Courts was 0.2 years (approximately 2.5 months; average 0.2 years). There were some cases that only had to serve a short amount of time (under one month) or were able to apply for parole immediately, usually due to time served in pre-sentence custody. Due to a lack of jurisdiction, there were no not guilty pleas in the Magistrates Courts.

In the higher courts, those who pleaded guilty and received imprisonment were eligible for release on parole after serving a median of 0.8 years (approximately 10 months) with an average time to serve of 0.8 years.[62] Those who did not plead guilty had to serve a median of 0.5 years (approximately 6 months) prior to parole eligibility with an average time to serve of 0.6 years (approximately 7 months). However, the sample size for those who pleaded not guilty was small (n=14) in comparison to that for people who pleaded guilty (n=50).

Plea type and time to progress through the courts

The Council's analysis showed there was a substantial difference in the time it took a case to progress through the courts, depending on the person's plea.

For rape offences, just over two-thirds of cases involved a guilty plea (68.7%, n=1,246/1,813). The median time between committal hearing to sentence for a plea was 280 days (approximately 9.2 months). For cases that went to trial, the median time between committal hearing to sentence was 413 days (approximately 13.6 months).

For sexual assault offences sentenced in the higher courts, cases that involved a guilty plea had a median time of 250 days from committal hearing to sentence (approximately 8.2 months). For cases that went to trial, the median time between committal hearing to sentence was 331 days (approximately

62 Three cases were excluded from this analysis because plea type was not available.

10.9 months). All sexual assault cases sentenced in the Magistrates Courts pleaded guilty, with the median time from lodgement to sentence being 118 days (approximately 3.9 months).

15.2.2 Sentencing remarks analysis

The Council's thematic analysis of sentencing remarks of sexual assault and rape found a plea of guilty was the most referenced factor in mitigation.

Sentencing courts explained the value of the plea in different ways, but most commonly referred to acceptance of responsibility for the offending, evidence of cooperation with the administration of justice, and sparing the victim survivor from having to give evidence.

Where pleas of guilty were assessed as early courts set the parole eligibility date or release on a partially suspended sentence at one-third or less:

> The significance of the early plea, and it has been categorised as an early plea by the Prosecution, in my view quite properly, given that the matter was indicated as a sentence on the day that the indictment was presented, it means that the complainant has obviously been spared the obvious ordeal of having to relive the traumatic event of 32 years ago.[63]

> You pleaded guilty to all of these charges when you were arraigned before me this morning. In the circumstances that have been outlined by the Crown, I accept that these are early guilty pleas and I have taken that into account in determining the penalty that I am going to impose upon you today.[64]

> Your plea of guilty demonstrates, from very early, a willingness to accept responsibility and a degree of remorse for your actions … There is something of a practice to reflect the plea of guilty and other matters in mitigation of fixing a person's parole eligibility date at about a third. I have already given you the benefit of the matters in your favour by fixing the head sentence at that point, but I still am prepared to order your eligibility for release even and before three years because of the matters I have just referred to.[65]

Similarly, when pleas were accepted as timely, the courts generally set parole eligibility at one-third:

> As I say, your plea of guilty, though, is of significance, and in my view deserving of considerable reduction in penalty. There must surely be some encouragement to people accepting responsibility for this style of offending … I am satisfied that it would be appropriate in the exercise of discretion to reduce both the head sentence, and the time at which you become eligible for parole release. In the circumstances, in my view, balancing the competing considerations, I consider the following sentence to be just.[66]

> I accept your guilty plea, its timely. By this you have saved the State time, resources and the expense of preparing for trial and you have also saved the complainant from having to give evidence. I take it in to account in determining the sentence to be imposed upon you today.[67]

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63 Rape, major city, imprisonment < 5 years, #8: Pleaded guilty to 1 count of rape, one count of indecent treatment (as it was then), 1 count of entering a dwelling with intent to commit an indictable offence at night and one count of deprivation of liberty. Sentenced to 5 years imprisonment with parole eligibility date set after 18 months.

64 Rape, major city, imprisonment > 5 years, #9: Pleaded guilty to 6 counts of indecent treatment of a child under 16, under 12, who is a lineal descendent, under care and 3 counts of rape. Sentenced to 6 years imprisonment with parole eligibility date set after 18 months' imprisonment.

65 Rape, major city, imprisonment > 5 years, #18: Pleaded guilty to 10 sexual offences, including 5 counts of penile-vaginal rape of his daughter (aged 8–18 over period of offending) was sentenced to 9 years with parole eligibility at 2 years and 9 months. Plea was made early in Magistrates Court.

66 Rape, regional/remote, imprisonment > 5 years, #2: Pleaded guilty to one count of (penile-vaginal) rape of his intoxicated and semi-conscious friend for 'an extended and protracted period of time' was sentenced to 6 years with parole eligibility at 22 months.

67 Sexual assault, major city, higher courts, custodial, #11: Pleaded guilty to one count of sexual assault (rubbing erect penis on victim survivor's genitals) and was sentenced to 12 months' imprisonment, wholly suspended (operational period of 2 years).

Our analysis showed that even when a plea was late, judges thought the benefit for victim survivors to not be retraumatised by cross-examination warranted setting it at the one-third mark (or below):

> The most significant effect of your plea of guilty is that the complainant did not have to come to court and did not have to give evidence and did not have to relive the trauma of what you did to him, and I take that into account in your favour … I am prepared to accept that your plea of guilty is a product of your genuine remorse, even though it is in the face of an inability to remember what you did, I am told.[68]

> Your plea is a late plea. Your plea was entered on the morning that a pre ordering of the complainant's evidence was listed to proceed in this court. Your matter had been indicated to the court on a number of occasions as being a trial. So therefore, I treat your plea as a late plea. However, I also accept that by your plea of guilty you have spared the complainant the added trauma or distress of not only having to give evidence in court, but also from being cross-examined and having the allegations challenged, which of itself no doubt could have been a traumatic experience.[69]

> I take into account the timing of your plea of guilty, but albeit relatively late. Your cooperation in bringing this matter to a conclusion has saved the complainant from having to come to Court and speak to strangers about what you did to her.[70]

> I intend to set your parole eligibility date at the one-third point of the sentence I impose. I do so again, acknowledging that your plea is a late plea but that needs to be carefully weighed up with all the other relevant considerations.[71]

> The trial of these proceedings were listed to commence before me this morning, but you pleaded guilty when you were arraigned before me. In the circumstances, I accept that your guilty plea has assisted with the administration of justice, and I have taken that into account in structuring the penalty that I am going to impose upon you today. Particularly in a case such as this, in my view there is a great benefit to a guilty plea because it meant – despite the lateness of the plea – ultimately the complainant did not have to give evidence before a jury in the witness box … So in relation to the overall head sentence for each of the rape counts, I am going to impose a sentence of three and a half years' imprisonment. The Crown submits that because of your late plea I would make you eligible for parole at a date past the one-third, but there is a great benefit to your guilty plea today and I want to recognise that in making you eligible for parole at the date that I have determined that is appropriate in all the circumstances and that is 20 April 2024. So that is slightly below the one-third, but it will be a matter for the Parole Board for you to show that you have taken steps towards your rehabilitation before they release you back into the community.[72]

These cases suggest that, irrespective of the timing of the plea, parole eligibility is set at one-third of a head sentence or below.

There were examples where discretion was highlighted. In a case involving two counts of rape (penile–vaginal and penile–anal) by a man on his sleeping partner (who was pregnant at the time), the judge suggested the late plea did not warrant the same discount as an early one; however, when combined with other mitigating factors (no use of violence, mental impairment, not regarded as ongoing risk of sexual offending), the judge reduced both the length of the sentence and when the suspension date was set:

> The fact you pleaded guilty is important. It did come late in the day, it was in the week in which the matter was listed for trial; nonetheless, there is important benefit in your plea of guilty. It has saved the complainant from having to

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68 Sexual assault, major city, higher courts, custodial, #8: Pleaded guilty to one count of aggravated sexual assault (non-consensual oral sex performed on male victim with a known cognitive impairment) was sentenced to 18 months' imprisonment, suspended after 4 months. A delayed plea made 1 month prior to trial.

69 Rape, regional/remote, imprisonment < 5 years, #4: Pleaded guilty to 2 counts of indecent treatment of a child under 16, under care, 4 counts of rape (penile-oral and digital-vaginal), 2 counts of sexual assault and 1 count of aggravated sexual assault of stepdaughter (aged 13 to 18 years over period of offending). Sentenced to 4.5 years with parole eligibility at one-third.

70 Rape, regional/remote, imprisonment > 5 years, #15: Pleaded guilty to 2 counts of rape (digital-vaginal and penile-vaginal) of family friend. Sentenced to 5 years and 9 months with parole eligibility set at one-third.

71 Rape, regional/remote, imprisonment > 5 years, #10: Pleaded guilty to 17 counts of indecent treatment of a child under 16 under 12, lineal descendent and 4 counts of penile-anal rape and one count of common assault against his son. Sentenced to 7 years with parole eligibility set at one-third.

72 Rape, major city, imprisonment < 5 years, #23: Pleaded guilty to 3 counts of rape (digital-vaginal and tongue-vaginal) and 3 counts of indecent treatment of a child under 16 as a guardian of step-daughter (11 or 12 years old).

> testify and from the ignominy of telling everyone in her own words what happened. The lateness of it means that you cannot be given the same benefit as if it was truly an early plea in all of the circumstances, but you have saved the cost of the conduct of a trial and thereby contributed to the efficient administration of justice in addition to the factors I have just spoke of concerning the complainant … A pervasive feature that I must have regard to, amongst other things, is this developmental delay. In my view, it is quite relevant to the nature and structure of the sentence to be imposed … Your case I consider to be very unique. I expressly indicate that I am tailoring this sentence in an effort to deal with the many competing factors, and it should not be regarded as broadly comparable unless, somewhat surprisingly, the same issues would arise again. I intend to reduce the head sentence as well as the bottom of the sentence; that is the point at which you should be released – to reflect the matters in your favour.[73]

Sentencing different offences against multiple victim survivors can be complicated, particularly if the person pleads guilty to some charges but not others. In one case involving 3 separate victim survivors, the perpetrator pleaded guilty to offences against all 3 women but not guilty to the (digital–vaginal) rape of one of them. In balancing these considerations (and others), the judge stated:

> [O]rdinarily, by virtue of your pleas of guilty, any head sentence I imposed upon you might have required for you to have served one-third of that sentence. What I am ultimately going to do is make no order for parole, which means that the effect of the Corrective Services Act will require you to serve 50 per cent of that sentence before you become eligible for parole…But I am structuring the sentence in that way, by reducing the sentence, I, otherwise would have imposed upon count 1 [unlawful stalking], to take into account the fact that I am not making any recommendation for parole. That, again, in view, carefully balances your pleas of guilty in respect of count 4 [recording in breach of privacy] with the fact that you were found guilty after trial in relation to count 5 [rape] and, therefore, are not entitled to any discount for your plea of guilty on that count, and carefully balances those considerations by reducing the head sentence I might otherwise have imposed on count 1 to give you the benefit of your pleas of guilty for counts 1 to 4.[74]

Where the SVO scheme was raised, judges commented on the challenge in the mandatory aspect of the scheme and recognising the person's guilty plea:

> I agree that the appropriate range for the overall gravity of the offending is eight to 10 years' imprisonment. Having regard to all the factors 10 years is too high and that would also involve an order made a declaration of a serious violent offence, particularly for the rapes which would mean you would have to serve eight years in jail and as [defence counsel] said that would not give you any real recognition of your early plea of guilty and your – some cooperation with police.[75]

15.2.3 What do other jurisdictions do?

All Australian jurisdictions recognise a plea of guilty as a mitigating factor in sentencing, either in statute or through the common law. This is also the position in England and Wales, Scotland and New Zealand. However, there are a range of approaches to the discount allowed for a guilty plea.

New South Wales ('NSW'), South Australia and England and Wales use a sliding scale model of discounts based on fixed points within a pre-trial process.[76] The discount is usually applied to the length of the sentence. For example, in England and Wales the maximum sentence reduction is one-third of the head sentence (for an early plea),[77] while NSW legislation has a mandatory scheme for indictable offences that

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73 Rape, major city, imprisonment < 5 years, #5: He was sentenced to a head sentence of 5 years' imprisonment, suspended after 15 months.
74 Rape, regional/remote, imprisonment < 5 years, #3.
75 Rape, major city, imprisonment > 5 years, #15.
76 New South Wales: *Crimes (Sentencing Procedure) Act 1999* (NSW) Division 1A; South Australia: *Sentencing Act 2017* (SA) s 40(3) — in 2020 following a review the maximum discount for a guilty plea in the case of a serious indictable offence is now 25% — a reduction from the previous maximum discount of 40% — with reductions also made to discounts that can be applied to pleas entered at a later stage; Sentencing Council of England and Wales, *Reduction in Sentence for a Guilty Plea - First Hearing On or After 1 June 2017 Guideline* ('*UK Guilty Plea Guideline*').
77 *UK Guilty Plea Guideline* (n 76).

involves a sliding scale of discounts based on fixed points (see Table 15.1).[78] Despite the mandatory terms in section 25(1) of the *Crimes (Sentencing Procedure) Act 1999* (NSW), a court may refuse the discount or a reduced discount if:

- the perpetrator's culpability is so extreme the community interest in retribution, punishment, community protection and deterrence warrants no, or a reduced, discount;[79] or
- the utilitarian value of the plea was eroded by a factual dispute which was not determined in the perpetrator's favour.[80]

Table 15.1: New South Wales plea of guilty discount scale for indictable offences

Timing of plea	Discount
Before committal in the Local Court	25%
Up to 14 days before the first day of trial in the District or Supreme Court (for plea or notice of plea)	10%
In any other circumstances	5%

Source: *Crimes (Sentencing Procedure) Act 1999* (NSW) Division 1A

In Western Australia, when a term of imprisonment is imposed, a court cannot reduce the fixed term by 25 per cent or more[81] unless the offender pleads guilty or indicated that they will do so at the 'first reasonable opportunity'.[82] Legislation provides that the sentence discount must be stated in open court.[83]

Comparatively, the Australian Capital Territory ('ACT'), the Northern Territory ('NT'), Victoria, Scotland and New Zealand ('NZ') do not have a legislative prescribed discount.[84]Like Queensland, these jurisdictions have a statutory requirement to take into account a guilty plea (and its timing), but discretion is left to the court in relation to the extent of the discount given. This approach places 'the emphasis on the utilitarian value of the plea … [meaning the] timing of the plea [is] the key factor relevant to the reduction received'.[85] Generally, case law provides guidance as to the appropriate discount for a plea, however there is some statutory guidance in the NT in relation to the Local Court.[86]

In contrast to Queensland, there is a legislative requirement for the court to state the discount provided in the ACT, Scotland and Victoria.[87] For example, in Victoria the court must state the sentence it would

78 *Crimes (Sentencing Procedure) Act 1999* (NSW) pt 3, div 1A. The scheme does not apply to Commonwealth offences; where offences committed by a persons under 18 years and were under 21 years when proceedings commenced; sentences of life imprisonment; and summary offences or an offence dealt with on indictment to which this division does not apply (s 22(5)).
79 *Crimes (Sentencing Procedure) Act 1999* (NSW) s 25F(2).
80 Ibid s 25F(4).
81 *Sentencing Act 1995* (WA) ss 9AA(4)(a).
82 Ibid ss 9AA(4)(b).
83 Ibid ss 9AA(5).
84 *Crimes (Sentencing) Act 2005* (ACT) ss 35(3) and 37(2); *Sentencing Act 1995* (NT) s 2(j); *Sentencing Act 1991* (Vic) s 5(2)(e); *Criminal Procedure (Scotland) Act 1995* (Scot) s 196; *Sentencing Act 2002* (NZ) s 9(2)(b).
85 Tasmanian Sentencing Advisory Council, *Statutory Sentencing Reductions for Pleas of Guilty* (Final Report No. 10, October 2018) 10 ('*Sentencing Reductions for Pleas of Guilty*').
86 *Sentencing Act 1995* (NT) ss 108A (state and recording requirement for sentence after guilty plea) and 123A (Late guilty plea not relevant for sentencing for offence).
87 *Crimes (Sentencing) Act 2005* (ACT) s 37; *Criminal Procedure (Scotland) Act 1995* (Scot) s 196(1A); *Sentencing Act 1991* (Vic) s 6AAA.

have imposed 'but for the plea of guilty'.[88] In the ACT, when considering a 'lesser penalty (including a shorter non-parole period)' for a guilty plea, courts are required to consider a range of statutory factors including the timing of the plea, negotiations between the prosecution and defence about the charge the offender pleaded to, the seriousness of the offence, the effect of the offence on the victim survivor, and where the prosecution's case was 'overwhelmingly strong' not to 'make any significant reduction'.[89] Any 'lesser penalty imposed ..... must not be unreasonably disproportionate to the nature and circumstances of the offence'.[90]

Tasmania is the only state that does not have a statutory basis for a sentencing reduction for a guilty plea. Tasmanian common law does recognise that the utilitarian benefit of a plea may be taken into account 'as a mitigatory factor separate from any subjective consideration of remorse'.[91] Tasmanian courts regard the timing of the plea and the strength of the Crown case as relevant factors to the sentencing reduction. In *DPP v Broad*,[92] the Tasmanian Court of Criminal Appeal set out principles in stating the reduction, with Justice Wood stating that in some cases there was 'real benefit in quantifying the discount' as 'the gain to be derived from promoting the administration of justice is plain' but that it is 'best left to the discretion of the judge'.[93] The Tasmanian Sentencing Council in 2018 recommended a statutory scheme be implemented; however, this has not been adopted.

Guilty plea reduction or ratio in setting the non-parole period

Generally, other states and territories have a ratio between 50 and 75 per cent of the head sentence.[94] In South Australia,[95] Victoria[96] and the ACT,[97] this is via the common law (although SA and Victoria do have statutory schemes that set minimum non-parole periods).[98] The Victorian Court of Appeal has observed that the fixing of the non-parole period is not only in the interests of the offender, but also 'the community, in ensuring that, after a period of incarceration, the offender is safely rehabilitated into society'.[99] However, while rehabilitation is an important consideration,

> the non-parole period must be sufficient to reflect the gravity of the offence and the offender's subjective culpability. In particular, the non-parole period must be adequate to properly fulfil the sentencing purposes of general deterrence, denunciation, specific deterrence and protection of the community.[100]

In other states and territories, sentencing and parole legislation provides guidance on the required minimum or recommended proportion between the non-parole period and the head sentence. This ranges

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88 *Sentencing Act 1991* (Vic) ss 6AAA(2) and 6AAA(3).
89 *Crimes (Sentencing) Act 2005* (ACT) ss 35(2)–(5).
90 Ibid s 35(6).
91 *Sentencing Reductions for Pleas of Guilty* (n 85) viii.
92 [2018] TASSAC 5.
93 Ibid [9]-[10].
94 *The '80 Per cent Rule'* (n 37) 16.
95 he South Australian Court of Criminal Appeal has noted that non-parole periods have tended to range between '50% and 75% of the head sentence': *R v Devries* [2018] SASCFC 101, [19] (Hinton J) citing *R v Palmer* [2016] SASCFC 34, [4] (Kourakis CJ).
96 Generally Victorian sentencing courts impose non-parole periods that are between 60% and 75% of the head sentence: Judicial College of Victoria, *Victorian Sentencing Manual* (4th ed, July 2021) 162 [8.3.2] (*'Victorian Sentencing Manual*').
97 The 'usual [percentage] range of 50-75%' has been noted in a number of Court of Appeal decisions: *see Zdravkovic v The Queen* [2016] ACTCA 53, [74] citing *Barrett v The Queen* [2016] ACTCA 38, [52]: *Taylor v The Queen* [2014] ACTCA 9 at [20] (Murrell CJ, Refshauge and Penfold JJ agreeing generally as to reasons).
98 In South Australia, these are the serious repeat offenders scheme and the mandatory minimum non-parole period for serious offences against the person. In Victoria, the standard sentences scheme has mandatory non-parole periods and the statutory minimum sentences scheme applies a statutory defined term minimum non-parole period to certain offences
99 *Mush v The Queen* [2019] VSCA 307 [100]
100 Ibid [101].

from 50 per cent in the Northern Territory,[101] Tasmania[102] and Western Australia[103] to 75 per cent in NSW.[104] In Western Australia, for sentences of more than 4 years, a person is eligible for parole after serving all but 2 years of the term of imprisonment imposed in custody.[105]

What we know from previous reviews into sentencing reductions for guilty pleas

There have been reviews of the sentencing reduction for guilty pleas in several Australia and international jurisdictions, including England and Wales,[106] NSW,[107] South Australia,[108] Tasmania,[109] Victoria[110] and Western Australia.[111]

Some reviews have been government initiated to measure the operation and effectiveness of that jurisdiction's guilty plea scheme and/or to seek advice on ways to reform the guilty plea scheme. It is apparent that transparency of sentencing decisions and consistency (particularly in relation to the timing and circumstances of a plea) were important considerations in those reviews.

This section will briefly consider government-initiated reviews of guilty pleas in NSW, South Australia and Tasmania.

New South Wales

The NSW Sentencing Council ('NSWSC') and the NSW Law Reform Commission ('NSWLRC') have both examined guilty pleas and reductions in sentencing in reviews in 2009, 2013 and 2014.

The NSWSC's 2009 review examined the principles and practices governing sentence reductions and focused on a number of specific discounting factors, including the guilty plea and assistance to authorities. The report made several recommendations, which were implemented by the NSW Government. The new laws included:

- no discounts for sex offenders solely on the basis that they will be designated prohibited persons under Child Protection laws and prevented from working with children;
- any discounts received do not result in a penalty that is 'unreasonably disproportionate' to the serious nature and circumstances of the offence; and
- to require the court to take into account the circumstances in which the offender pleads guilty.[112]

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101 Applies to sentences of 12 months or longer: *Sentencing Act 1995* (NT) ss 53 and 54. The non-parole period increases to 70% for certain sexual and violent offences: ibid ss 55 and 55A.
102 *Sentencing Act 1997* (Tas) s 17(3).
103 In this case limited to sentences of 4 years or less: *Sentencing Act 1995* (WA) s 93.
104 *Crimes (Sentencing Procedure) Act 1999* (NSW) s 44, unless there are special circumstances for the balance of the sentence to be more. A court can also decline to set a non-parole period: s 45.
105 *Sentencing Act 1995* (WA) s 93.
106 Sentencing Academy, *Sentence Reductions for Guilty Pleas: A Review of Policy, Practice and Research* (December 2020).
107 NSW Sentencing Council, *Reduction of Penalties at Sentence: Final Report* (2009); NSW Law Reform Commission, *Sentencing: Final Report* (Report 139, 2013) ('*Sentencing Final Report*'); NSW Law Reform Commission, *Encouraging Appropriate Early Guilty Pleas: Final Report* (Report 141, 2014) ('*Encouraging Early Guilty Pleas*').
108 Brian Ross Martin, *Review of the Sentence Reduction Scheme – Part 2 Division 2 Subdivision 4 of the Sentencing Act 2017 (SA)* (Interim Report, 5 June 2019).
109 *Sentencing Reductions for Pleas of Guilty* (n 85).
110 Victorian Sentencing Advisory Council, *Sentence Indication and Specified Sentence Discounts* (Final Report, 2007).
111 Western Australia Department of Justice, *Review of Section 9AA of the Sentencing Act 1995: Review Report* (October 2019).
112 Honourable John Hatzistergos MLC, Attorney-General and Minister for Industrial Relations, 'Moves to Restrict Sentence Discounts for Police Informants and Sex Offenders' (Media Release, 27 November2009).

In 2013, the NSWLRC recommended introducing a legislative requirement to quantify the discount of a guilty plea and that courts must specify the discount given because this 'could improve both the transparency and consistency of sentencing for the benefit of all stakeholders'.[113]

In explaining its rationale for these amendments, the NSWLRC referred to the Australia Law Reform Commission's recommendations to federal sentencing legislation[114]and commentary of Justice McClellan:

> Having an identifiable and easily understood parameter for guilty plea discounts has had enormous benefit for the administration of criminal justice. One only has to compare the state of the criminal lists in countries where a plea brings no discount to understand the benefits of a structured sentencing approach … Quantified discounts make the reasoning of sentencing judges more comprehensible to offenders, victims, the public, and the appellate courts.[115]

The NSWLRC's 2014 review into encouraging appropriate early pleas made a recommendation to introduce the three-tiered statutory scheme referred to above.

Legal stakeholders, including the NSW Office of the Director of Public Prosecutions, NSW Bar Association, Legal Aid NSW and the Chief Magistrate of the Local Court of NSW, supported the introduction of a statutory system of plea discounts because it 'could facilitate certainty and consistency'.[116]

Some stakeholders did not support the use of discounts in return for the utilitarian benefit the plea gives to the criminal justice system. From the victims' perspective 'sentence discounts for this purpose can appear to be unjust' and 'somehow "discounting" what has occurred to them'.[117] The NSW Public Defenders argued that sentence discounts of this type may 'present an inappropriate inducement to plead guilty' and that the greater the disparity between sentence quantum received at trial compared with a plea, the more likely it is that a person will enter a false or inappropriate guilty plea.[118]

The NSWLRC noted that the latter argument was supported by the academic literature, but ultimately concluded that inappropriate pleas should be mitigated under its blueprint. It considered the possible disproportionate impact on marginalised groups, but noted that Bureau of Crime Statistics and Research ('BOCSAR') research had found little difference between Aboriginal and Torres Strait Islander people and non-Indigenous people when it came to the likelihood of a guilty plea.[119]

BOCSAR evaluated the early appropriate guilty plea reforms, finding that while they 'were not associated with a significant increase in guilty pleas overall', they did 'significantly affect the timing of guilty pleas'.[120] The analysis found early guilty pleas in District Court matters had increased by 6.5 per cent (from 70% to 76.5%) and at least 7 additional matters were finalised each week. However, overall court proceedings had not reduced, as improvements in the District Court were offset by an increase in time matters spend in the Local Court.[121] BOCSAR also interviewed stakeholders, with some concerned the scheme did not

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113 *Sentencing Final Report* (n 107) 125-26.
114 See, Australian Law Reform Commission, *Same Crime, Same Time: Sentencing of Federal Offenders* (Report 103, 2006) [11.42], rec 11-1.
115 Peter McClellan, 'Sentencing in the 21st Century' (Paper presented at the Crown Prosecutors' Conference, 10 April 2012) 17–18 cited in *Sentencing Final Report* (n 107) 125.
116 *Encouraging Early Guilty Pleas* (n 107) 224.
117 Ibid.
118 Ibid 225.
119 Clare Ringland and Lucy Snowball, 'Predictors of Guilty Pleas in the NSW District Court' (Crime and Justice Statistics Bureau Brief No 96, NSW Bureau of Crime Statistics and Research, 2014) 4.
120 Ilya Klauzner and Steve Young, 'The Impact of the Early Appropriate Guilty Plea Reforms on Guilty Pleas, Time in Justice and District Court Finalisations' Crime and Justice Bulletin, No. 24, NSW Bureau of Crime Statistics and Research, August 2021) 16.
121 Ibid 1.

sufficiently recognise the utilitarian benefit of guilty pleas, in particular for sexual assault and child sexual assault matters, with one stakeholder commenting:

> The lack of recognition that the decision to plead guilty is difficult to make at the preliminary stage, particularly for some offences, such as sexual assault, where one of the biggest factors in terms of the utilitarian value relates to whether a complainant has to give evidence and re-live the trauma of the sexual abuse.[122]

South Australia

In South Australia, the guilty plea discount scheme was introduced in 2013.[123] Initially, the scheme allowed for a discount of up to 40 per cent if entered not more than 4 weeks after the person first appeared in court. The purpose of the discount scheme was to make the guilty plea discount transparent and to apply an upper limit that is 'not overly generous'.[124] It also aimed to reduce delays and result in timely justice.[125]

In 2019, the Honourable Brian Ross Martin AO QC reviewed the scheme.[126] He found that although the scheme had increased the early resolution of matters,[127] many victim survivors were dissatisfied with the discount levels, particularly in relation to serious offences. Victim survivors thought the discount of 40 per cent was too high and should only be 10 per cent, and that a reduction should not be given if:

- the evidence was very strong as a conviction was inevitable;
- a plea was entered at the last minute;
- the person was a repeat offender.[128]

The review made 12 recommendations. The discount was subsequently reduced for indictable offences,[129] and for serious indicatable offences capped at 25 per cent (only for pleas submitted not more than 4 weeks after the defendant's first court appearance in relation to the relevant offence).[130] A late plea for a serious indictable offence can only receive a discount of up to 5 per cent.[131]

Tasmania

The Tasmanian Sentencing Advisory Council ('TSAC') was asked to examine and report on a statutory sentencing discount for pleas of guilty in Tasmania. The review was instigated in response to concerns about the delay to criminal proceedings and late-resolving guilty pleas, the impact to the administration of the justice system and the 'unnecessary stress and trauma' for victims, their families and other vulnerable people in the trial process.[132]

As noted above, Tasmania is the only Australian jurisdiction without a legislative provision which recognises a reduction of sentence for a guilty plea. TSAC considered four models of reform and

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122 Lily Trimboli, 'Early Appropriate Guilty Plea Reform Program - Process Evaluation' (Crime and Justice Bulletin, No 238, NSW Bureau of Crime Statistics and Research, August 2021) 22.
123 *Criminal Law (Sentencing) (Guilty Pleas) Amendment Act 2012* (SA), *Criminal Law Sentencing (Supergrass) Amendment Act 2012* (SA) came into operation on 11 March 2013.
124 Ibid 6–7, citing Second Reading Speech (Deputy Premier, 11 July 2012).
125 Ibid 37–8 [61].
126 Martin (n 108).
127 Ibid 43 [72] citing the Director of Public Prosecutions.
128 Ibid 21–2 [30]–[31].
129 *Sentencing Act 2017* (SA), s 40. This section applies to offences not described in s 39(1).
130 Ibid s 40(3)(a).
131 Ibid s 40(3)(d).
132 Tasmanian Sentencing Advisory Council (n 109) v.

recommended amending the *Sentencing Act 1997* (Tas) to recognise the guilty plea as a mitigating factor and to set out three factors relevant to the reduction:

- the fact of the guilty plea;
- the timing of the plea or the indication of the intention to plea assessed in the circumstances of the case; and
- the lesser penalty imposed must not be unreasonably disproportionate to the nature and circumstances of the offence.[133]

Other recommendations included that a judicial officer must state the effect of the guilty plea on the sentence when dealing with orders of imprisonment, and in the case of other penalty orders, they may state the effect.[134] These reforms were a package and TASC expressly stated it did 'not support any legislative reform that would adopt only some aspects of the recommendations'.[135]

15.2.4 Public opinion and guilty pleas

Discussed in **Chapter 5**, research on public opinion and sentencing shows the public is often at odds with judicial officers over the weight to be given to mitigating factors, such as the guilty plea.

Research commissioned by the Sentencing Council for England and Wales into public attitudes of the discount for a guilty plea found 'the public (and some victims and witnesses) do not like the idea of a universal approach to reductions'.[136] Rather, the reduction 'should depend on certain factors/circumstances relating to the offender or offence type'.[137] The same research revealed that the public found the idea of 'rewarding' offenders for pleading early 'unpalatable'.[138]

The national Jury Project led by Kate Warner examined juror and non-juror views on guilty plea discounts, in sexual violence cases. Only a minority supported a guilty plea discount, with most participants finding it 'inappropriate to reduce a sentence on the basis of facts unrelated to offence seriousness or the offender's level of culpability'.[139]

15.2.5 Stakeholder views

Submissions from victim survivor support and advocacy stakeholders

In its preliminary submission, Fighters Against Child Abuse Australia ('FACAA') recommended that 'plea deals' should be limited with respect to 'how far from the original charge they can be pleaded down'[140] for charges of rape. FACAA argues that plea deals to downgrade charges of rape do not align with principles of justice and reinforce the community's lack of faith in the justice system.[141]

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133 Ibid (n 109) xvi. These were Recommendations 2 and 5.
134 Ibid. These were Recommendations 6 and 7.
135 Ibid xi. This was Recommendation 3.
136 William Dawes et al. *Attitudes to Guilty Plea Sentence Reductions* (Sentencing Council Research Series, February 2011) 2.
137 Ibid.
138 Ibid 24.
139 Kate Warner et al. 'Juror and Community Views of the Guilty Plea Sentencing Discount: Findings from a National Australian Study' (2020) 22(1) *Criminology and Criminal Justice* 78.
140 Preliminary submission 17 (Fighters Against Child Abuse Australia) 10.
141 Ibid 6.

FACAA also noted that it has been told that the 'vast majority of [victim survivors] had their abuser's charges pleaded down against their wishes',[142] and that many were not consulted by the prosecution service before the decision was made to accept a plea.[143] For example, FACAA highlighted that in one circumstance, 'the DPP told our client that they had "great news" after the charges resolved',[144] which was not considered to be appropriate, as '[t]o hear that their abuser or rapist had pleaded guilty to a charge of assault is not "great news" for a victim-survivor'.[145] Particular concerns were also raised where a sexual violence offence resolves without there being a sexual component, as victim survivors are concerned that their perpetrator will not appear on the Sex Offenders Register and can continue working with children.[146] FACAA also stated that victim survivors are robbed of any sense of justice where a resolution without a sexual element prevents them from 'speak[ing] publicly about the truth of what happened to them as the conviction is only assault and does not feature a sexual component'.[147] FACAA stated that:

> To allow a rapist to plead down all the way to assault or even simply sexual touching without consent has left FACAA clients feeling like the people who were supposed to speak for them in the courts, the public defenders 'literally slapped them in the face'.[148]

In its submission in response to the Council's consultation paper, FACAA stated that:

> QLD [has] some of the best laws in Australia when it comes to rape [and] sentencing multiple time rapists. Currently there are mandatory minimum sentences of life for repeat federal level rapists, however 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.[149]

FACAA also expressed the view that '[l]egislation needs to be put in place to stop plea deals from circumventing the legislation written to act as a deterrent for future crimes and to bring a sense of justice to victim-survivors.'[150]

The Queensland Sexual Assault Network ('QSAN') and the Brisbane Rape and Incest Survivors Support Centre ('BRISSC') also raised concerns about the downgrading of offences, offence severity and offence counts because of guilty pleas.[151]

In its submission, Respect Inc and Scarlet Alliance said that 'survivors should be consulted about plea deals'.[152]

Submissions from justice reform and advocacy bodies

The Justice Reform Initiative ('JRI') raised concerns that contested criminal proceedings can be retraumatising for victim survivors[153] and that enhancing the severity of sentences for these offences

142 Ibid 8.
143 Ibid 10–11.
144 Ibid 11.
145 Ibid.
146 Ibid.
147 Ibid.
148 Ibid.
149 Submission 15 (Fighters Against Child Abuse Australia) 8.
150 Ibid 11.
151 Preliminary submission 5 (Queensland Sexual Assault Network) 1; Preliminary submission 6 (Brisbane Rape & Incest Survivors Support Centre) 3.
152 Submission 25 (Respect Inc and Scarlet Alliance) 4.
153 Submission 13 (Justice Reform Initiative) 1.

could result in higher rates of not-guilty pleas – potentially subjecting more victim survivors to the risk of further traumatisation.[154] The JRI concluded that a more punitive sentencing framework would be detrimental to the interests of victims of crime.[155]

The Uniting Church emphasised in its submission that securing convictions was essential to victim survivors having confidence in the criminal justice system and reporting offences to police:

> Tougher penalties, longer sentences and stringent release practices, do little to address the majority of sexual offending, instead making offenders reluctant to take responsibility for their offending and choosing to contest the allegations. This in turn makes victims reluctant to pursue a prosecution, not wanting to be drawn into the protracted adversarial process. In other words, most victims of sexual assault do not report to the police, do not pursue a prosecution, or if they do, do not secure a conviction.[156]

Submissions from legal stakeholders

Legal Aid Queensland ('LAQ') echoed the JRI's concern that a 'sentencing system' that 'disincentivises pleas of guilty is likely to lead to more cases being taken to trial and more of such matters resulting in no convictions'.[157] LAQ acknowledged 'there are many reasons why defendants plead guilty. An offender may plead guilty for reasons beyond acceptance of their own guilty, but for forensic reasons and/or based on legal advice'.[158]

In relation to plea negotiations, the Youth Advocacy Centre recommended:

> Transparency in the proceedings involving regular consultation with the victim would alleviate some of the perceived injustices through the 'plea bargaining' process undertaken by the Queensland Police Service and Director of Public Prosecutions.[159]

Victim survivor views

Consultation with victim survivors

The Council consulted with victim survivors. In respect of guilty pleas, victim survivors told the Council about their views of pleas of guilty and discounts.

One mother told the Council:

> I was happy that we didn't have to put [my daughter] through that, because we'd been through so much already. But at the end of the day, I still believe that he just said he was guilty because his lawyer told him it would be better off for him. Not because it was going to help us in any way. Not because he cared if we put our daughters through a trial. (Victim Survivor Parent Interview 1)

There were concerns about plea bargaining and the person being sentenced on the basis of facts which did not reflect what really happened to the victim survivor:

> I don't think they should get that. They've done their thing. If they haven't done it, still, go to trial. Prove that you haven't done it.

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154 Preliminary submission 4 (Justice Reform Initiative) 2.
155 Ibid.
156 Submission 16 (Uniting Church in Australia, Queensland Synod) 7 citing Centre for Innovative Justice, *Innovative Justice Responses to Sexual Offending–Pathways to Better Outcomes for Victims, Offenders and the Community* (Report, 2014).
157 Submission 23 (Legal Aid Queensland) 18.
158 Ibid 26.
159 Submission 30 (Youth Advocacy Centre) 10.

> I don't think they should get [plea bargaining]. If they haven't done it, still, go to trial. Prove you haven't done it. (Victim Survivor Parent Interview 5)

One victim survivor was frustrated that prosecutors had accepted a plea to a lesser charge:

> I was so angry when I found out because I was like, I would have rather gone to trial because there was so much evidence against him … I mean obviously [my daughter] would have had to have gone to him. We would have had to like, you know, sit there, whatever, but it would have been more of an outcome for her than this. (Victim Survivor Parent Interview 5)

While the benefit of a plea of guilty in not requiring the victim survivor to give evidence was recognised, victim survivors had mixed views:

> I guess it was a good thing because me and my sister didn't have to go to trial, didn't have to face all that. But it sort of sucks too, because it would have been better if he pleaded not guilty and then ended up being guilty and got way longer. (Victim Survivor Interview 4)

> If he had pleaded guilty, obviously it would have made the process a lot easier, but he would have also got a lighter sentence. So it's a lose, lose situation really. (Victim Survivor Interview 6)

For one victim survivor the process of going through a trial was lengthy:

> From the time I reported it to the time we got to court, it was 6 and a half years. (Victim Survivor Interview 2)

Victim survivor support advocate views

Victim survivor support advocates discussed with the Council how guilty pleas impact the victim survivors with whom they work. Advocates recognised that, for some victim survivors, a plea is 'a relief … because it will mean that they don't have to go through that legal process [a trial]'.[160]

However, they also spoke of how difficult it was for victim survivors when a plea is accepted for less serious offences, because it can:

- impact the outcome, particularly if it was a penetrative offence downgraded to a non-penetrative offence;[161]
- mean victim survivors cannot reflect 'all of those matters that have been bargained away and the impact of those', which makes the criminal justice process less worthwhile.[162]

One advocate spoke of a client she supported whose perpetrator pleaded guilty on the day of the trial. The victim survivor had been preparing for the trial and being a witness where she wouldn't see the perpetrator, 'and now we were suddenly, without warning, thrust into the [sentence hearing] and he was there'.[163] While the victim survivor didn't have to go through the trial process, the feeling was mixed 'because the reason why he took a plea of guilty is because they decided to take rape off the table' and instead he was sentenced on less-serious offences. So, while he was convicted of child sex offences, 'the most traumatic part of her experience … didn't really get acknowledged'.

Another advocate gave an example of from a mother and young daughter she was supporting.[164] On the morning the child victim survivor was waiting to pre-record her evidence, a plea was accepted by the DPP.

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160 Victim support advocate interview 3.
161 Ibid.
162 Victim support advocate interview 1.
163 Ibid.
164 Ibid.

For the family there was 'relief that they didn't have to go through the trial, and I guess that validation that he is guilty of all these awful things, and that would be the outcome heard in court'. However, it was confronting to hear the judge to talk about 'how an early plea was submitted' and while the legal technicality was understood, 'the impact for that young person, that was her date of trial, like that was for her and she was maybe 13 or 14 at the time, so that was huge'.

Subject matter expert views

The importance of defendants pleading guilty was recognised by many of the participants we interviewed.

One practitioner spoke of the value of plea in ensuring a person is convicted for their offending, because in their experience, there is a '50–50 chance' of the person being successful and acquitted at trial, even where there is a strong prosecution case.[165] They observed that having clarity around the benefit given for a guilty plea is beneficial when talking to a client.[166]

Another practitioner observed that 'because your biggest currency from a defence counsel's point of view is the timing of that plea' and that with late pleas of guilty, 'sometimes that the client deep down might want a plea, but he's got a wife and a kid and all his parents are there and he's embarrassed'.[167]

Another practitioner emphasised, 'You don't just get to plead guilty and say, 'I'm remorseful'. There is a difference between remorse as a result of a plea of guilty and actual remorse.'[168]

In relation to the reduction given for a plea, practitioners referred to the usual practice, 'generally getting a third or less'[169] and that 'it's quite challenging to explain that' to community members.[170]

Two practitioners raised NSW's scheme that the reduction corresponds to when you enter a plea of guilty, with one stating that was 'a really good idea'.[171] The other practitioner thought the NSW model was resulting in a much higher early plea rate, 'more than 50%, something like that' compared to '10% of cases in Queensland committed to sentence'.[172] The same practitioner thought this was 'so much better for victims, they've got early results' and that 'it can be good for offenders as well, they're not in limbo for so long' and that the reduction was statutorily reduced when a plea was made a week out from trial.[173]

Some practitioners raised concerns about Queensland's approach, stating that people can get the same benefit for a late plea as 'if they plead guilty months earlier'.[174] It was recommended that a scheme which incentivised people to plead guilty earlier 'is probably the key'.[175]

Some participants referred to the impact of the SVO scheme and how it can incentivise pleas of guilty because the plea can be a factor to reduce the head sentence.[176] The same participant went on to refer to the Council's previous review on the scheme and the distorting effect of SVOs on sentencing, stating, 'How do you recognise a plea unless you take it off the top? And as soon as you take it off the top you're

165 SME Interview 7.
166 Ibid.
167 SME Interview 7.
168 SME Interview 11.
169 SME Interview 19; SME Interview 17.
170 SME Interview 19.
171 SME Interview 17.
172 SME interview 19.
173 Ibid.
174 SME Interview 17. Also SME Interview 19.
175 SME Interview 17.
176 SME Interviews 1, 15 16.

not an SVO and we have all these arguments around whether there needs to be something special to get an SVO for an offence'.[177]

Consultation events

At our Cairns consultation event, some participants thought more should be done to incentivise pleading guilty, as this is of benefit to the community and addresses the delay issues. However, other participants thought victim survivors would only appreciate this if the process were transparent.[178]

In contrast, at our Brisbane consultation event, some participants thought incentivising guilty pleas being giving a discount (e.g. setting the non-parole period at a third of the head sentence) was not conducive to a victim survivor's healing process.[179] Participants suggested some offenders may just be 'playing ball' because it is in their interest to do so, rather than meaningfully taking responsibility for their offending.

Some participants were also critical of the court treating a guilty plea as evidence of remorse, given that it may have been made to reduce the sentence.

At our Brisbane consultation event, concerns were raised that plea negotiations should not be done on the morning of a trial, when the victim is highly charged and about to give evidence. However, it was noted that there isn't really much incentive to plead guilty prior to trial, as the offender is often still given the benefit of a timely/early plea.

The issue surrounding plea bargains is that often it is left to the very end (just before trial) and victims are highly charged, thinking that they are about to be cross-examined. One participant thought that there should be more consideration taken by the court for when a plea is entered. This was echoed by participants in our online consultations, with concerns raised that the discount is the same for an early or late plea.[180]

At our online events, participants spoke of how challenging it is for the DPP to explain to victim survivors the notional one-third rule. While it is an eligibility date for release, not a release date, it was still difficult for victim survivors to accept. The thing that really matters to many victim survivors is the time actually spent in custody.

15.2.6 The Council's view

Key Finding

17. **Sentencing reductions for a guilty plea are important and should continue, but there may be benefits in reviewing current practice.**

There is value in courts continuing to have the ability to recognise the benefit of a plea of guilty in sentencing for offences of rape and sexual assault, such as through a reduction in the sentence that might otherwise have been imposed, or the fixing of an earlier parole eligibility date. The extent of any such discount, however, will always depend on the individual facts and circumstances of the case, including the context and circumstances in which the person's plea was entered and its timing.

The current approach in Queensland and other jurisdictions is not consistent. It is critical that the way a guilty plea is reflected in a sentence for rape and sexual assault achieves a proper

177 SME Interview 1.
178 Cairns Consultation Event, 21 March 2024.
179 Brisbane Consultation Event, 11 March 2024.
180 Online Consultation Event, 16 April 2024.

balance between the benefits to the criminal justice system, ensuring just and appropriate punishment and promoting public confidence.

See **Recommendation 24**.

It is a long-standing practice in all Australian courts to reduce a sentence where there has been a plea of guilty. Queensland courts are required to recognise a guilty plea under section 13 of the PSA and may choose to reduce the sentence. The court must consider how early or late the plea was made, and the circumstances surrounding the plea.

The Council agrees with the value of this practice and supports it continuing in Queensland. We recognise that a plea of guilty can be a manifestation of remorse; it saves the Queensland community time and significant expense; and, in cases of sexual assault and rape offences, it saves victim survivors from being retraumatised by giving evidence.

However, it became apparent in this review that there is tension between the need to recognise the guilty plea in assisting with the administration of justice and concerns that the reduction given does not adequately reflect the very serious nature of the offending. There were mixed views from victim survivors with whom we spoke about guilty pleas, and while a plea may have meant they did not have to go to trial and give evidence, they thought the sentence imposed was inadequate because of the discount given.

We heard during this review (and indeed in earlier ones)[181] from many victim survivors, victim support and advocacy services and members of the community that they had concerns about the sentencing reduction for a plea of guilty, particularly for serious harm offences such as sexual assault and rape. Those concerns include:

- There is a lack of consistency about when a plea is made (and in what circumstances) and the reduction which is given.
- Setting the non-parole period at one-third of the head sentencing is too generous for serious offences such as sexual assault and rape, particularly when the plea is late.
- There is considerable concern about whether reductions in sentence should be allowed at all for such serious offences.

Our analysis of sentencing remarks for rape and sexual assault revealed examples where the plea was late but the judge still set parole eligibility at one-third of the head sentence. While instinctive synthesis requires judicial officers to take a range of factors into account to determine a just sentence, and the weight given to a plea among other mitigating factors is not known, it appears that in some cases courts are giving the same reduction to a late plea as an early one, even ex officio pleas, despite the very serious nature of the offending.

We recognise that there are concerns about the way the Queensland guilty plea scheme currently operates and believe a review is timely. We are of the view that a lack of clarity about how the discount is applied (i.e. to the head or bottom of the sentence), how much of a discount is given and at what stage a plea was entered or offered may undermine public confidence in the court system. To address this concern, we recommend that consideration be given to initiating a review of the current sentencing

181 Queensland Sentencing Advisory Council, *Sentencing for Criminal Offences Arising from the Death of a Child* (Final report, 2018) 179.

practice with respect to guilty plea discounts in Queensland and whether it is meeting its objectives (**Recommendation 24**).

Recommendation

24. Review of guilty plea discounts

The Attorney-General and Minister for Justice consider initiating a review of the current sentencing practice with respect to guilty plea discounts as this applies in Queensland and whether it is meeting its objectives. Such a review should consider the approaches in other Australian and international jurisdictions and any evidence about the impacts of these models (for example, regarding impacts on plea rates, victim survivor satisfaction and/or rates of reoffending) while noting the importance of retaining a Queensland-based approach, given differences as to relevant legislative frameworks and legal contexts.

Applying the Council's fundamental principles

Applying the Council's fundamental principles guiding the review[182] to the issues raised in considering guilty plea discounts and to address **Key Finding 17** guided us in making a recommendation for a review to be considered:

- **Principle 1: Reforms to sentencing laws should be evidence-based with a view to promoting public confidence**: The Council has drawn on data analysis, research on community views, observations sentencing submissions and remarks, appeal decisions, past reviews and research, as well as extensive consultation. We know 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.[183] While we have made recommendations to seek to address this, we also note from research on public opinion that only a minority supported a guilty plea discount, with most participants finding it 'inappropriate to reduce a sentence on the basis of facts unrelated to offence seriousness or the offender's level of culpability'.[184] The Council's analysis in the SVO review found 'Queensland generally sets lower parole eligibility dates, relative to the head sentence, than other Australian jurisdictions (in the absence of special parole provisions)'.[185] We consider a review of the practice of guilty plea discounts in Queensland is important for promoting public confidence.
- **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 know sexual offences generally, and rape in particular, have high rates of not guilty pleas. We recognise a plea of guilty can be a manifestation of remorse, it saves the Queensland community time and significant expense, and in cases of sexual assault and rape offences, it saves victim survivors from being retraumatised by giving evidence. However, we found that tension exists between the need to recognise the guilty plea in assisting with the administration

182 For a full list of the fundamental principles, see Chapter 3.
183 For a discussion on UniSC findings see Chapter 5.
184 Warner et al (n 139).
185 *The '80 Per cent Rule'* (n 37) 15.

of justice, particularly when there is a lower rate of plea for these types of offences when compared to other non-sexual offences, with concerns that the reduction given does not adequately reflect the very serious nature of the offending. There were mixed views from victim survivors with whom we spoke about guilty pleas, and while a plea may have meant they did not have to go to trial and give evidence, they thought the sentence imposed was inadequate because of the discount given. There was also concern about the discount given when the plea is late; and whether reductions in sentence should be allowed at all for such serious offences.

- **Principle 5: Sentencing inconsistencies, anomalies and complexities should be minimised**: While we note the broad discretion in section 13 of the PSA, victim survivors have told us there is a lack of consistency about when a plea is made (and in what circumstances) and the reduction given. From a review of other jurisdictions, it appears the discount is given to the length of the sentence rather than the setting of the non-parole period.
- **Principle 6: Reforms should take into account the likely impacts on the disproportionate representation of Aboriginal and Torres Strait Islander people in the criminal justice system**: The potential impacts on Aboriginal and Torres Strait Islander persons are discussed in detail below. A review should consider the impact of plea rates on Aboriginal and Torres Strait Islander people, as well as the accessibility of legal advice to regional and rural Queensland so people are adequately represented and fully informed of their legal rights.
- **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**: We note the broad judicial discretion in section 13 of the PSA and that there can be flexibility in sentencing under the PSA where a court can choose to structure a sentence in different ways to take into account the guilty plea and other mitigating factors to structure a sentence that is appropriate and just in all the circumstances.[186] A review should ensure judicial discretion is maintained.
- **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**: A review of the Queensland's guilty plea practice does not affect rights under the HRA, which is discussed in more detail below. In summary, it can promote human rights by ensuring that if any changes are made, this does not impact rights under the HRA and could also consider whether any reforms raise issues of unfairness, or potentially impact the voluntariness of a plea and the ability of a person charged with an offence to make an informed decision.

The approaches in other Australian and international jurisdictions

We examined other Australian and international jurisdictions and found a range of approaches to recognising pleas of guilty in sentencing. Generally, it appears the discount is given to the length of the sentence, rather than the setting of the non-parole period.

Although Queensland has a similar model to the ACT, the NT, Victoria, Scotland and NZ, in that there is a statutory requirement to take a guilty plea into account and its timing with discretion left to the courts,

186 See, for example, *R v Ponsonby* [2024] QCA 229 [3] (Mullins P).

there are differences. For example, the ACT, Scotland and Victoria require courts to clearly articulate the discount for a plea in sentencing remarks.[187]

Some jurisdictions have a legislated sliding scale of discounts based on fixed points within the pre-trial process. For example, in England and Wales, if a guilty plea is entered at the first available opportunity (usually at a person's first court appearance) then a reduction of one-third will be applied to the sentence.[188] NSW has a similar approach, although the reduction is capped at 25 per cent if accepted at committal proceedings. We heard from some subject matter experts that the NSW model would be beneficial to increase early plea rates, which would be 'so much better for victims' and 'for offenders as well'.[189]

We note a finding from our SVO review that Queensland generally sets lower parole eligibility dates relative to the head sentence than other Australian jurisdictions, and that the setting of non-parole periods is an ongoing concern for many victim survivors and community members. We refer to **Recommendations 8** and **10** of this report concerning parole and the impact of the SVO scheme on head sentences by restricting the court's ability to take personal factors of mitigation into account.

We also acknowledge the work being undertaken by the Australian Law Reform Commission in its national inquiry into justice responses to sexual violence, which invited submissions on guilty pleas.[190] Findings from this review should inform consideration of **Recommendation 24**.

Systemic disadvantage considerations

Any review Queensland's guilty plea scheme should consider the potential impact of any changes on Aboriginal and Torres Strait Islander peoples and other culturally and racially marginalised groups.

In **Appendix 4**, section 4.3, we report on the demographics of people sentenced for sexual assault (MSO) and rape (MSO) as well as plea type by Aboriginal and Torres Strait Islander status.

Aboriginal and Torres Strait Islander people were disproportionately represented in both rape and sexual assault offences. Although Aboriginal and Torres Strait Islander peoples represent approximately 4 per cent of Queensland's population (aged 18 years and over),[191] they accounted for almost one-quarter of people sentenced for sexual assault (20.5%) and rape (23.3%) during the 18-year period.

The majority of people sentenced for rape (MSO) enter a guilty plea (68.7%). A slightly higher proportion of Aboriginal and Torres people sentenced for rape (MSO) pleaded guilty compared to their non-Indigenous counterparts (71.5% compared with 68.1%); however, this was not a significant difference.[192]

Most people sentenced for sexual assault (MSO) enter a guilty plea (91.9%). This varies slightly by court level and offence type, with sexual assault (aggravated) sentenced in the higher courts having the lowest proportion of guilty pleas at 80.3 per cent, and sexual assault (aggravated life) having the highest (100.0%). In the Magistrates Courts, 99.1 per cent of sexual assault (non-aggravated) cases had a guilty plea, compared with 84.4 per cent of sexual assault (non-aggravated) cases in the higher courts.

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187 *Crimes (Sentencing) Act 2005* (ACT) s 37; *Criminal Procedure (Scotland) Act 1995* (Scot) s 196(1A) and *Sentencing Act 1991* (Vic) s 6AAA.
188 *UK Guilty Plea Guideline* (n 76). This is one-third from the head sentence.
189 SME interview 19.
190 Australian Law Reform Commission, *Justice Responses to Sexual Violence: Issues Paper* (April 2024) 20.
191 As at 30 June 2021. See Australian Bureau of Statistics, *Estimates of Aboriginal and Torres Strait Islander Australians*, Table 7.3, available at accessed 8 October 2024.
192 Pearson's Chi-Square Test: $\chi 2(1) = 1.78$, $p = .1823$, V=-0.03.

Overall, when plea type is considered by Aboriginal and Torres Strait Islander status, few differences are seen. However, for sexual assault (non-aggravated) offences (MSO) sentenced in the higher courts, Aboriginal and Torres Strait Islander people were significantly more likely to plead guilty (91.9%) compared with non-Indigenous people (82.9%).[193]

While not specific to sexual offences, in a 2016 study of Aboriginal and Torres Strait Islander peoples living in discrete communities in Queensland who had spent time in custody, participants expressed concerns that 'they were not adequately supported in court to defend the charges and were advised to plead guilty as a means of expediency'.[194] It was found that the technical language used within the justice system is difficult to understand, leading to several offenders 'pleading guilty without fully understanding the nature of the charges'.[195]

A review should consider the impact of plea rates on Aboriginal and Torres Strait Islander people, as well as the accessibility of legal advice to regional and rural Queensland so people are adequately represented and fully informed of their legal rights.

Human rights considerations

A review of the Queensland's guilty plea scheme does not affect rights under the HRA. It can promote human rights by ensuring that if any changes are made to the scheme, this does not impact a right to equity before the law[196] or the right to a fair hearing.[197] It also needs to ensure and that 'a person charged with a criminal offence has the right to be presumed innocent until proved guilty according to law'.[198]

A review of the guilty plea scheme would need to consider whether any reforms raise issues of unfairness, or potentially impact the voluntariness of a plea and the ability of a person charged with an offence to make an informed decision.

The current approach to reducing a sentence to recognise a guilty plea may not be supporting the rights of victim survivors and may undermine victim survivor and community confidence in the justice system's ability to respond to serious offending. We consider that these concerns are best achieved through a review to assess whether the scheme is meeting its objectives.

15.3 Cumulative vs concurrent sentences

15.3.1 The current approach

If a court is sentencing a person to imprisonment for more than one offence, the court does not have the power to impose a single sentence of imprisonment for all offences.[199] The court will say, for each term of imprisonment, whether some or all of it is to be served concurrently (at the same time) or cumulatively (one after the other).

The principle of totality applies where there is more than one offence (discussed below). If sentences of imprisonment are concurrent without cumulation, the total sentence may be too lenient. If there is

193 Pearson's Chi-Square Test: $\chi 2(1) = 8.55$, $p = .0035$, V=-0.10.
194 Glen Dawes, *Keeping on Country: Doomadgee and Mornington Island Recidivism Research Report* (2016) 39.
195 Ibid.
196 *Human Rights Act 2019* (Qld) s 15. See also *Thilimmenos v Greece* [2000] (Judgment) (European Court of Human Rights, App No 34369/97, 6 April 2000) [44].
197 *Human Rights Act 2019* (Qld) s 31.
198 Ibid s 32.
199 *R v Crofts* [1999] 1 Qd R 386, 389 (Fitzgerald P, Davies JA, Moynihan J).

cumulation of sentences of imprisonment without any moderation, the total sentence may be disproportionately severe.

In Queensland, two approaches are taken to sentencing a person convicted of multiple offences.

Under the PSA, there is a presumption that sentences of imprisonment will be served concurrently with another offence, unless otherwise ordered.[200]

Concurrent sentences for multiple offences are generally structured by fix a sentence to the most serious offence, which is higher than it would be alone, but takes into account the overall criminality involved in the other offences. This is often referred to as a 'global sentence', 'the *Nagy* approach' or the '*Nagy* principle' after the case in which this approach was articulated:[201]

> Where a court is sentencing an offender for a number of distinct, unrelated offences, it may fix a sentence for the most serious (or the last in point of time) offence which is higher than that which would have been fixed had it stood alone, the higher sentence taking into account the overall criminality. However, that approach should not be adopted where it would effectively mean that the offender was being doubly punished for the one act, or where there would be collateral consequences such as being required to serve a longer period in custody before being eligible for parole, or where the imposition of such a sentence would give rise to an artificial claim of disparity between co-offenders. Such considerations may mean that the option of utilising cumulative sentences should be adopted.[202]

The PSA also provides a court with a discretion (choice) to order cumulative orders of imprisonment, meaning the imprisonment 'may be directed to start from the end of the period of imprisonment the offender is serving'.[203] A cumulative sentence cannot be imposed on a life sentence.[204]

The general practice is to order that the sentences are cumulative at the end of each order (moderating sentence length by taking into account totality considerations).[205]

In some circumstances, a cumulative sentence is mandatory. Most commonly, if the person commits a certain type of offence (including rape and sexual assault) and was serving a term of imprisonment in prison or on parole at the time, the PSA provides a court has no discretion (choice) and must impose a cumulative order of imprisonment for the new offending.[206] For some offences, the offence itself requires imprisonment to be cumulative.[207]

The principle of totality

The principle of totality means 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.[208] Where there is a cumulative sentence, a court may ameliorate the cumulative sentence (for example, by ordering a term

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200 PSA (n 1) s 155.
201 *R v Nagy* [2004] 1 Qd R 63, 72 [39] (Williams JA).
202 Ibid.
203 PSA (n 1) s 156 (emphasis added).
204 *R v Pryor; Ex parte A-G (Qld)* [2001] QCA 241.
205 See *R v Bowditch* (2014) 67 MVR 339; [2014] QCA 157 where McMurdo P noted at [2]: Judges have a discretion as to whether to impose cumulative or concurrent sentences or part cumulative and part concurrent sentences: *Griffiths v R* (1989) 167 CLR 372; 87 ALR 392; 63 ALJR 585; 41 A Crim R 163.
206 Ibid s 156A. This applies to Schedule 1 offences under the PSA (n 1), including rape and sexual assault.
207 See, for example, *Bail Act 1980* (Qld) s 33(5).
208 *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); *R v Beattie; Ex parte A-G (Qld)* (2014) 244 A Crim R 177, 181 [19] (McMurdo J) cited in *R v DBQ* (2018) 274 A Crim R 19, 25 [27] (Philippides JA, Boddice J agreeing at [43] and Bond J agreeing at [44])

of imprisonment that is lower than it would be if it were not cumulative), to ensure the sentence properly reflects the criminality.[209]

Under the PSA, a court must take into account the sentences a person is liable to serve.[210]

The Court of Appeal has emphasised that 'what is essential' to a sentencing judge when deciding whether to order concurrent or cumulative sentences is 'that [the] sentences imposed properly reflect the overall criminality of the offending conduct'.[211] The Court has also provided guidance that 'either method is apposite provided the judges made clear the method adopted and the reasons for it; that the overall effect of the sentence is not manifestly excessive; and that the sentences to do not result in double punishment for the same acts'.[212]

Courts must ensure that their total combined effort is not crushing. This can be due to 'the need to vindicate the rights of different victims while giving effect to the totality principle results in making sentences cumulative in whole or in part'.[213] In such cases, harshness in the overall sentence (it in fact arises in the particular case) is alleviated by the notion that a sentence should never be a 'crushing sentence'.[214] Such a sentence has been described as so harsh as to 'provoke a feeling of helplessness in the [offender] if and when he is released or as connoting the destruction of any reasonable expectation of useful life after release'.[215]

In *R v Brown; Ex parte Attorney-General (Qld)*,[216] which involved 29 offences (including 11 counts of rape and 2 counts of sodomy) against 5 victim survivors aged 14 to 16 years, the Court of Appeal said:

> A court of appeal considering a head sentence imposed for multiple offences committed over a number of discrete episodes of offending must confront considerable analytical difficulties in assessing the head sentence that is required to reflect the overall criminality of the offending conduct against the conclusionary standard of manifest inadequacy. A sentencing judge in this State is not required to construct the sentence in a way that reflects the individual sentences and the degree of cumulation, as is required, for example, under the applicable legislation in Victoria … Of course, the learned sentencing judge was required to review the aggregate sentences and consider whether they were just and appropriate having regard to the totality principle. And, as is often recognised, 'the severity of a sentence increases at a greater rate than any increase in the [linear] length of the sentence'. Against that, the learned sentencing judge was also required to have regard to the overall criminality and whether the sentences reflected the totality of the respondent's criminality. [217]

Sentencing outcomes and multiple offences

The Council's analysis of sentencing outcomes for sexual assault and rape offences over 18-years included whether the perpetrator was sentenced for more than one offence in the same sentence hearing.

However, there are some limitations to this analysis. A co-sentenced offence does not tell us whether there was more than one victim. It does not tell us whether the offences were committed as part of the same incident or even that the offences were committed on the same day. It does not tell us whether a

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209 See *Mill v The Queen* (1998) 166 CLR 59, 59 (Wilson, Deane, Dawson, Toohey and Gaudron JJ).
210 PSA (n 1) ss 9(2)(k)–(m).
211 *R v Van Der Zyden* [2012] 2 Qd R 568, [107] (Muir JA).
212 *R v Bowditch* [2014] QCA 157 [2] (McMurdo P) ('*Bowditch*').
213 *R v Symss* (2020) 3 QR 336, [25] ('*Symss*') citing *Richards v The Queen* [2006] 46 MVR 165.
214 Ibid [32].
215 Ibid [27] citing *R v Beck* [2005] VSCA 11, [19] (Nettle JA).
216 [2016] QCA 156.
217 *R v Brown; Ex parte A-G (Qld)* [2016] QCA 156 [90] (Jackson J) referring to *Director of Public Prosecutions v Felton* (2007) 16 VR 214.

sentence of imprisonment was cumulative on a sentence the person was already serving. Analysis of offences that are sentenced together can provide context about the type of offending that is commonly associated with rape and sexual assault.

Rape offences

The Council's analysis of the 1,817 cases of rape (MSO) over the 18-year data period found four in five (79.8%) were also sentenced for other offences at the same court event. This most common additional offences were rape (44.2%) and indecent treatment of a child (35.9%).

Co-sentenced offences were common for rape offences across all penalty types; however, they were most frequent where an imprisonment sentence was ordered. We found that, across all penalty types, there was an apparent increase in sentence length where there were co-sentenced offences.

The majority of people who received a prison sentence for the rape (MSO) were also sentenced for other offences within the same court event (82.5%). The median imprisonment sentence for rape (MSO) with co-sentenced offences was 7.0 years (average 6.8 years),[218] compared with 5.5 years (average 5.2 years) when there no co-sentenced offences, with this difference being statistically significant.[219]

Sexual assault offences

There were 1,904 cases sentenced for sexual assault (MSO) over the 18-year period, 1,230 of which received a custodial penalty. Of those cases, just over half (n=679, 55.2%) of sexual assaults (MSO) had a co-sentenced offence.

Of the 163 people who received an imprisonment sentence for non-aggravated sexual assault in the Magistrates Courts,[220] 79.1 per cent (n=129) were also sentenced for other offences within the same court event. The median imprisonment sentence with co-sentenced offences was 2.0 years (average 0.2 years) compared with 0.8 years (average 0.9 years) when there was no co-sentenced offence.

However, of the 174 people who received an imprisonment sentence for sexual assault[221] in the higher courts, 71.3 per cent (n=124) were also sentenced for other offences within the same court event; there was no difference for multiple offences. The median imprisonment sentence where other offences were also sentenced was 0.8 years (average 0.8 years), compared with 0.5 years (average 0.5 years) when no other offences were sentenced.

Nearly three-quarters of people who received a partially suspended sentence in the Magistrates Courts were also sentenced for other offences within the same court event (n=37, 74.0%). The median partially suspended sentenced where other offences were also sentenced was 1.0 years (average 0.9 years), compared with 0.8 years (average 0.7 years) when no other offences were sentenced.

By comparison, nearly two-thirds of people who received a partially suspended sentence in the higher court were also sentenced for other offences within the same court event (n=134,64.7%). The median partially suspended sentenced where other offences were also sentenced was 1.5 years (average 1.7 years), compared with 1.0 years (average 1.1 years) when no other offences were sentenced.

Nearly half of all cases with a wholly suspended sentence for sexual assault in the Magistrates Courts had co-sentenced offences (n=109, 44.9%). The median wholly suspended sentence with co-sentenced

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218 This calculation excludes life sentences (n=7).
219 Independent groups T-test: $t(433.64) = 9.36$, $p < .001$, two-tailed (equal variance not assumed).
220 This includes 148 imprisonment orders and 15 prison/probation orders.
221 This includes 150 imprisonment orders and 24 prison/probation orders.

offences was 0.5 years (average 0.5 years). There was no difference in the average or median sentence length when there were no co-sentenced offences.

In contrast, a smaller proportion of cases with a wholly suspended sentence for sexual assault sentenced in the higher courts had co-sentenced offences (n=128, 38.0%). The median wholly suspended sentence with co-sentenced offences was 1.0 years (average 0.9 years). When there were no co-sentenced offences, the median wholly suspended sentence was 0.8 years (average 0.7 years).

15.3.2 Sentencing remarks analysis

The Council's analysis of sentencing remarks for rape (MSO) and sexual assault (MSO) offences sentenced between 1 July 2020 and 30 June 2023 showed that, overwhelmingly, judicial officers imposed sentences of imprisonment for multiple offences to be served concurrently. Only 7 rape cases and 5 sexual assault causes discussed cumulating the penalty.

Of those 7 rape cases, all but one involved a cumulative sentence. In one of those cases, it was mandatory because of section 156A under the PSA.[222]

The remaining cases primarily involved multiple victim survivors;[223] however, in one case the perpetrator had committed sexual offences when he was a child and a young adult against the same child victim survivor.[224]

In one of the cases involving 2 victim survivors, the perpetrator was found guilty after 2 trials for offending against each victim survivor, and the judge decided to cumulate.[225] For reasons of totality, the judge moderated the sentences for offences committed against each victim survivor.

In another case there were 5 child victim survivors. The judge considered cumulating, but ultimately declined to cumulate, the sentences because 'the discrete penalty or penalties imposed in that situation [a cumulative sentence] would prove quite illusionary when considering issues of totality'. The judge concluded that a global penalty would better 'acknowledge [the offender's] repeated similar offending against multiple complainants'.[226] The judge sentenced all the rape counts to 9 years' imprisonment, stating:

> I think it is just and does not achieve a disproportionate penalty, to impose the same elevated penalty for the greatest offending, which I consider to be each of the rape charges. I do not consider it fair or just to choose one of them. They are heinous and made worse by the other. There is not one that stands alone, and imposing the same penalty for each would not, in the circumstances, make it necessarily disproportionate any more than choosing one would do. All sentences would be concurrent. I appreciate that, ordinarily, it would be appropriate to inflate the penalty on only one count so that the penalty for discrete offences not be liable to criticism as being disproportionate but for the

222 In one case the person committed the offence in prison while serving another sentence (Rape, regional/remote, imprisonment > 5 years, #3).
223 Rape, major city, imprisonment > 5 years, #1, Rape, regional/remote, imprisonment < 5 years, #3 and Rape, regional/remote, imprisonment > 5 years, #12. In Rape, regional/remote, imprisonment > 5 years, #13 cumulation was discussed but not applied. In Rape, major city, imprisonment < 5 years, #2 the person committed the rape offence while on bail for other fraud offences and had been sentenced to imprisonment before being sentenced for the rape offence. The judge exercised his discretion to order a cumulative sentence for the rape to begin at the end of the fraud offence.
224 Rape, regional/remote, imprisonment > 5 years, #11. The judge moderated the sentences for individual counts and made the rape and indecent treatment offences committed as a child concurrent to each other, but cumulated to the counts of rape committed as an adult. This meant a head sentence of 7.5 years, comprising 15 months plus 6 years.
225 Rape, major city, imprisonment > 5 years, #1.
226 Rape, regional/remote, imprisonment > 5 years, #13.

> reasons that I hope I have explained, I think it is just to do what I have decided to do and I hope I have made that reasoning quite plain.[227]

Of the 5 sexual assault cases examined where the sentence was cumulated, all involved the mandatory provision under section 156A of the PSA.[228]

15.3.3 What happens in other jurisdictions

Several other Australian and international jurisdictions have cumulation schemes for serious offending (e.g. Victoria's Serious Offender Scheme makes cumulation presumptive)[229] or sentence on an aggregate basis, particularly where offences were committed in separate events.[230] Many jurisdictions allow for sentences to be served partly concurrently and partly cumulatively.[231]

However, no matter what approach is taken, all Australian courts must apply the principle of totality.

New South Wales

In NSW, sexual assault cases with more than one victim will generally require an increase in the sentence for one victim[232] and it is open to a court to make each victim's sentence wholly cumulative upon the non-parole period of another victim where the offences are committed on separate victims over an extended period.[233] Courts must consider the number of victim survivors and whether the sexual offences were committed on separate occasions.[234]

The NSW Criminal Court of Appeal has found error in imposing wholly concurrent sentences for discrete sexual violence offending against both the same victim survivor over time[235] or against multiple victims.[236]

Victoria

In Victoria, when sentencing a person to a term of imprisonment for more than one offence, courts must generally fix a total effective sentence. This is 'usually achieved by imposing individual sentences for each offence and then making orders for concurrency or cumulation of all or part of those sentences'.[237] The judge will select a 'base sentence', usually the most severe individual sentence, and then cumulate sentences for other offences on top of that offence. There are two approaches to cumulation.[238] Judges must explain in their remarks 'the components of the sentence, that is, the individual terms and the extent

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227 Rape, regional/remote, imprisonment > 5 years, #13.
228 Sexual assault, regional/remote, lower courts, custodial, #1; Sexual assault, regional/remote, higher courts, custodial, #2; Sexual assault, major city, lower courts, custodial, #6; Sexual assault, regional/remote, lower courts, custodial, #3; Sexual assault, regional/remote, lower courts, custodial, #7.
229 *Sentencing Act 1991* (Vic) s 6E.
230 For example, Western Australian courts can order sentences aggregate sentences which are wholly or partly accumulated for sexual offences - *Sentence Act 1995* (WA) s 88, whereas in the NT, courts may not impose an aggregate term of imprisonment if one of the offences is a sexual offence - *Sentencing Act 1995* (NT) s 52(2).
231 For example, *Crimes (Sentencing Procedure) Act 1999* (NSW) s 55(2); *Sentencing Act 1995* (WA) s 88; *Crimes Act 1914* (Cth) s 19.
232 *Vaovasa v The Queen* [2007] NSWCCA 253 [16].
233 *Magnuson v The Queen* [2013] NSWCCA 50 [142].
234 *Van der Baan v The King* [2023] NSQCCA 5 [117].
235 *R v Smith* [2006] NSWCCA 353, [23].
236 *R v TWP* [2006] NSWCCA 141, [25]-[27], [34].
237 *Victorian Sentencing Manual* (n 96) 162.
238 Ibid 164.

of concurrency and cumulation' so that 'the public and appellate courts can discern how the sentencing judge has viewed the gravity of the offences'.[239]

The Victorian Court of Appeal has said that ordering a total effective sentence on one charge and total concurrency on all the other charges 'is problematic because the punishment for the entire offending [is attributed to one charge], with no punishment for the separate offending constituted by the other charges', and this may lead to disproportionate sentencing.[240]

Victorian courts may also order aggregate sentences when sentencing a person for 'two or more offences which are founded on the same facts, or form, or are part of, a series of offences of the same or a similar character'.[241] This allows to the court to address multiple offences in one sentence instead of separate offences for each offence. However, an aggregate sentence of imprisonment cannot be ordered on a 'serious offender' where any of the convicted offences are a 'relevant offence'[242] or if one or more of the offences is a standard sentence offence such as rape.[243] An aggregate sentence could be ordered for sexual assault offences.

Canada

In Canada, section 718.2(c) of the *Criminal Code* requires that where cumulative sentences are imposed, the combined sentence not be 'unduly long or harsh'.

In 2015, amendments were made to the *Criminal Code* outlining specific rules regarding when a sentence should or must be served cumulatively. For example, where a person was already serving imprisonment at the time of sentencing, the court 'shall consider directing' that the new term of imprisonment be served consecutively to that sentence.[244] Cumulative sentences may be ordered for terms of imprisonment at the same sentencing event where the 'offences do not arise out of the same event or series of events'.[245]

Courts are also required to order cumulative sentences for sexual offences against children when sentencing a person at the same time for more than one sexual offence committed against a child.[246]

15.3.4 Reviews and research

Royal Commission into Institutional Responses to Child Sexual Abuse

The Royal Commission into Institutional Responses to Child Sexual Abuse ('Commission') considered cumulative and concurrent sentencing, which often arise in child abuse matters. The Commission noted the dissatisfaction concurrent sentences can cause for victims and survivors. For example, the Commission was told:

> I do not understand the logic behind concurrent sentencing. I work in business; if someone buys a hundred of something from me, they get a discount. It appears that the same logic applies in criminal law, so if I'm going to rape someone, I may as well rape ten women because I'm still going to get the same sentence. Concurrent sentencing is illogical and is not a deterrent. Around the same time of Doyle's sentence, a man was sentenced to more time for

239 *Director of Public Prosecutions v Felton* (2007) 16 VR 214, [2] (Buchanan JA).
240 *Frost v The Queen* [2020] VSCA 53 [48].
241 The test is the same as applied to the joinder of charges on an indictment. See *DPP (Vic) v Rivette* [2017] VSCA 150, [80]–[81] quoting *R v Grossi* (2008) 23 VR 500, 510 [39] (Redlich JA).
242 *Sentencing Act 1991* (Vic) s 9(1A)(a).
243 Ibid (Vic) s 9(1A)(b).
244 *Criminal Code* (RSC 1985 c C-46) s 718.3(4)(a).
245 Ibid s 718.3(4)(b)(i).
246 Ibid s 718(7).

> fraud charges. This just doesn't make sense. It appeared to me from this example that the law values money and property more highly than children.[247]

The Commission considered that a poor understanding of sentencing principles contributes to this dissatisfaction, noting concerns raised by knowmore that:

> Concurrent and cumulative sentences are not well understood and it's often a very difficult and traumatising process for survivors to engage with prosecutors around their decisions of what matters will proceed on an indictment and what matters the accused will ultimately plead to … ultimately, our position on sentencing is that the sentencing judge should have the discretion around cumulative or concurrent sentencing, because I think if you operate with binding presumptions in either way, there can be particular difficulties which might cause injustice in particular cases. We've referred in our submission that if the presumption was to change, as it has in Victoria, to cumulative rather than concurrent, that may lead to some change in prosecution practice, which may have unforeseen consequences, such as limiting the number of charges in recognition of the cumulative impact, and if there are multiple charges, I would think the sentencing exercise becomes more difficult for the court.[248]

The Commission noted that Victoria has a presumption in favour of cumulative sentencing for serious child sex offences. They noted the submission from the Victorian DPP about its impact:

> the Victorian DPP submitted that, in practice, the presumption in Victoria in favour of cumulative sentencing for serious child sexual abuse offenders has minimal impact on the sentences imposed, as a consequence of the ongoing obligation to apply the principle of totality. He submitted that a clear legislative displacement of the principle of totality would be required to make a cumulative presumption effective.[249]

In line with this, the Commission did not consider that a presumption of cumulative sentences would address the issue for victim survivors, as sentences would need to be reduced for totality, meaning 'in order to comply with the principle, head sentences for child sex offences would need to be reduced in order to avoid a crushing sentence, which might be just as distressing to victims and survivors'.[250]

Instead, the Commission considered that when sentencing multiple offences, judicial officers should 'to the greatest degree possible, provide separate recognition for separate episodes of child sexual abuse offending, and certainly for multiple victims'.[251] The Commission concluded that there was scope for legislation 'to ensure that the separate harm done to victims by separate offences is recognised where there are multiple discrete episodes of offending and/or there are multiple victims' and recommended that:

> State and territory governments should introduce legislation to require sentencing courts, when setting a sentence in relation to child sexual abuse offences involving multiple discrete episodes of offending and/or where there are multiple victims, to indicate the sentence that would have been imposed for each offence had separate sentences been imposed.[252]

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247 Royal Commission into Institutional Responses to Child Sexual Abuse, *Criminal Justice Report - Parts VII to X and Appendices* (2017) 303 ('*Criminal Justice Report – Parts VII, X, Appendices*'),, quoting exhibit 38-0007, 'Statement of KJ Whitley', Case Study 38, STAT.0914.001.0001_R at [43].

248 Transcript of Mr Warren Strange, Case Study 46, 2 December 2016 cited in *Criminal Justice Report – Parts VII, X, Appendices* (n 247)) 305.

249 *Criminal Justice Report – Parts VII, X, Appendices* (n 247) 305–6.

250 Ibid 306.

251 Ibid.

252 Ibid 307, rec 75.

In the Queensland Government response, initially this was 'for further consideration';[253] later, the government reported that this recommendation was accepted and completed:

> The Queensland Government considers the existing Queensland sentencing framework appropriately ensures that sentences for child sexual offences recognise distinct behaviour and are transparent, in line with the intent of the recommendation.[254]

Victim survivor views

Recent research by the Scottish Sentencing Council on victim survivor views and experiences of sentencing for rape found that communication about the sentence by prosecutors and the judge was a critical issue for victim survivors. One victim survivor was involved in a complex case involving multiple offences and victim survivors, and she was 'unable to fully understand what the judge was saying … which contributed to a lack of clarity about how the sentence reflected individual experiences'.[255]

These findings align with research by RMIT's Centre for Innovative Justice into victim services. What emerged as more important than sentencing outcomes for victim survivors was 'the extent to which they felt that their experience had been recognised … and whether they had been supported to understand why a particular outcome had occurred'.[256]

15.3.5 Stakeholder views

Submissions

The Council discussed this issue in its Consultation Paper and invited submissions on whether it was impacting sentencing for sexual assault and rape. No submissions received commented on cumulative or concurrent sentencing.

Victim survivor views

Consultation with victim survivors

The Council consulted with victim survivors about their views on concurrent and cumulative sentencing. One victim survivor and her sister were both offended against as children by the same perpetrator. She told the Council that the sentence given to their perpetrator:

> It was like a cumulative … my child [offence] was only 3 years. And my sister's was 2. (Victim Survivor Interview 4)

253 Queensland Government, *Queensland Government response to the Royal Commission into Institutional Responses to Child Sexual Abuse* (Report, June 2018) 119 <https://www.dcssds.qld.gov.au/resources/dcsyw/about-us/reviews-inquiries/qld-gov-response/rc-child-sexual-abuse-response.pdf>.

254 Queensland Government, *Queensland Government fifth annual progress report Royal Commission into Institutional Responses to Child Sexual Abuse* (Report, 2022) 161 <https://www.dcssds.qld.gov.au/resources/dcsyw/about-us/reviews-inquiries/qld-gov-response/gov-annual-progress-report-child-abuse-2022-recommendation-implementation.pdf>.

255 Scottish Sentencing Council, *Victim-Survivor Views and Experiences of Sentencing for Rape and Other Sexual Offences* (2024) 21.

256 Centre for Innovative Justice, Build It or Burn It Down, Submission to the Australian Law Reform Commission (2024), 30 (emphasis in original).

Victim survivor support advocate views

When asked about concurrent sentencing in cases with more than one victim, one victim survivor advocate commented, 'Well, I don't think their experience is concurrent. They're just individual experiences of people. They should be sentenced that way.'[257] There was a strong view that, in cases involving multiple offences where a global sentence was ordered, this suggested the other offences 'don't count', 'he gets to do those other things for free' and 'if you're going to rape someone, make sure you do everything in one'.[258]

There were concerns that allowing offenders to serve sentences concurrently was not an appropriate 'consequence of your actions because it isn't a deterrent. Because it's not treated seriously. This violence is not taken seriously.'[259]

Subject matter expert interviews

One participant noted there is 'real resistance to cumulative sentencing in Queensland' and questioned whether 'that meets community expectations' and 'whether [global sentencing] is necessarily an appropriate way to sentence' sexual violence matters, particularly involving children.[260] That participant wondered whether 'the *Nagy* approach does invite a degree of generality in a way' and whether 'it may not be appropriate for cases where you've got a large number of offences or multiple victims'.

Consultation events

This issue was discussed by participants in our Cairns event, with some suggesting that greater consideration should be given to cumulative sentencing where there are multiple victims. When sentences are made concurrently, participants thought this made victim survivors feel they didn't matter.

While non-cumulative and concurrent sentences were not raised in our online events, participants spoke about the importance of preparing victim survivors for a sentence and how this contributes greatly to how adequate the person finds the sentence.[261] It was important to manage expectations such as knowing what the penalties might be to avoid surprise.

15.3.6 The Council's view

Key Finding

18. **No legislative changes are required to the current approach to concurrent and cumulative sentencing for multiple victim survivors of sexual violence.**

No additional guidance is needed regarding the ordering of cumulative sentences when sentencing for sexual assault and rape offences involving multiple victim survivors.

We find that there is a need to maintain judicial discretion to impose a just and appropriate sentence in individual cases, including the decision about whether to make consecutive or cumulative sentences. The Council concluded that no legislative changes are needed to current sentencing practices in cases

257 Victim support advocate interview 1.
258 Ibid.
259 Ibid.
260 SME interview 10.
261 Online Consultation Event, 16 April 2024.

involving multiple victim survivors of sexual violence. However, we note that, in contrast to Queensland, it is common sentencing practice in many other jurisdictions to partly cumulate sentences of imprisonment when dealing with multiple offences.

The Council recognises that the circumstances of each offender, victim survivor and offence are infinitely varied. For this reason, sentencing approaches that promote individualised justice applied within a framework of broad judicial discretion are generally more likely to support positive outcomes than a 'one size fits all' or 'one size fits most' approach.[262]

The Council is also mindful of the sentencing principle of totality and the need to ensure sentencing outcomes are proportionate to an offender's 'actual overall culpability'.[263]

We also recognise the common law practice that a sentence should never be a 'crushing sentence' because 'even justly severe punishment ought not remove the last vestige of a prisoner's hope for some kind of chance of life at the end of the punishment'.[264]

The Council agrees with comments made by the Queensland Court of Appeal that the decision about whether or not to cumulate should be made on the basis of which method will 'properly reflect the overall criminality of the offending conduct'.[265] We note the Court's guidance by President McMurdo (as she was then) that, regardless of which method is selected, judges 'must make clear the method adopted and the reasons for it'.[266] We also agree with comments by the Court that 'sometimes the need to vindicate the rights of different victims while giving effect to the totality principle results in making sentences cumulative in whole or in part'.[267]

One of the Council's fundamental principles for this review is that sentencing inconsistencies, anomalies and complexities should be minimised. On this basis, we do not recommend introducing a mandatory or presumptive cumulation scheme for sentencing sexual violence matters with multiple victim survivors as it may result in unnecessary complication to sentencing practices and could increase the risk of sentencing error. This is unlikely to improve victim survivor satisfaction and may further retraumatise victim survivors with matters going to the Court of Appeal for review. Further, as we have stated elsewhere in this report, mandatory sentencing practices have unintended consequences and we do not support their introduction.

However, we recognise that, for some victim survivors, concurrent sentences do not adequately reflect their experience and can appreciate that concurrent sentences may be seen as a benefit to a person sentenced for more than one offence.

During this review, we heard that victim survivors are not being provided with sufficient information to understand the sentence imposed. Understanding why a global sentencing approach has been used and the explanation by the decision-making is critical to this issue. From a victim's perspective (and the general public, for that matter), concurrent sentences are often seen as benefiting offenders who commit multiple offences, particularly against multiple victims.

As noted throughout this report, an essential part of victim survivor satisfaction with sentencing is to be heard and recognised during proceedings. Victims of crime are participants in the court, and it is

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262 See Fundamental Principle 7 in Chapter 3 of this report.
263 *Symss* (n 213) [22].
264 Ibid [40].
265 *R v Van Der Zyden* [2012] 2 Qd R 568, [107].
266 *Bowditch* (n 212) [2].
267 *Symss* (n 213) [25].

incumbent on all parties to treat them with dignity. Improving communication with sexual violence victim survivors about sentencing will have corresponding positive impacts on their sentencing experience, including enhanced understanding of the approach a judicial officer has taken to sentence the perpetrator (**Key Finding 12**).

We noted the findings of the Royal Commission into Institutional Responses to Child Sexual Abuse that victim survivor dissatisfaction may be due to a poor understanding of the principles behind concurrent sentencing. While we agree with the Queensland Government response that the current sentencing framework provides judicial officers with sufficient flexibility to recognise distinct offending, we think there is always opportunity for enhancing communication. The Commission emphasised that, 'to the greatest degree possible', judicial officers should 'provide separate recognition for separate episodes of child sexual abuse offending and certainly for multiple victims'.[268]We echo this advice and suggest that when sentencing a person for sexual offences committed against more than one person, judicial officers should direct remarks towards each victim survivor and, if they are present in the courtroom, maintain appropriate eye contact and acknowledge their experience directly. These considerations could form part of the guidance developed for legal practitioners and judicial officers in **Recommendations 6** and **17** of this report.

Applying the Council's fundamental principles

Applying the Council's fundamental principles guiding the review[269] to the issues raised in considering cumulative and concurrent sentencing and to address **Key Finding 18** guided us in making a recommendation for a review to be considered:

- **Principle 1: Reforms to sentencing laws should be evidence-based with a view to promoting public confidence**: The Council has drawn on data analysis, research on community views, observations sentencing submissions and remarks, appeal decisions, past reviews and research, as well as extensive consultation. We note the position of the Royal Commission into Institutional Responses for Child Sexual Abuse that, while many victim survivors were dissatisfied with concurrent sentencing, this was partly due to poor communication by the court and legal practitioners of the reasons for structuring sentences this way and that, 'to the greatest degree possible', judicial officers should 'provide separate recognition for separate episodes of child sexual abuse offending and certainly for multiple victims'.
- **Principle 2: Sentencing decisions should accord with the purpose of sentencing as outlined in section 9(1) of the PSA**: Ensuring judicial officers have discretion to structure a sentence that is just in all the circumstances according to the sentencing purposes in the PSA is paramount.
- **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 know sexual offences generally often involve more than one offence being sentenced at same sentencing event. We note concerns expressed to the Council and the Royal Commission that people who commit multiple offences appear to get a discount when sentences are ordered concurrently and that this can be distressing. We note that the Queensland Court of Appeal has said that when judicial officers are deciding which approach is most appropriate, the

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268 *Criminal Justice Report – Parts VII, X, Appendices* (n 247) 306.
269 For a full list of the fundamental principles, see Chapter 3.

chosen method should 'properly reflect the overall criminality of the offending conduct'. The current sentencing practice for concurrent or cumulative sentencing is flexible and allows judicial officers to make decisions that reflect the harm experienced balanced with the totality principle.

- **Principle 5: Sentencing inconsistencies, anomalies and complexities should be minimised**: Should a presumption or mandatory scheme of cumulative sentences for sexual offences be introduced, our concern is that this will lead to complexities, inconsistencies and anomalies in sentencing. We note our earlier findings that the mandatory aspects of the SVO scheme are distorting sentences and that scheme is applying downward pressure on sentences. We are concerned that changes leading to increased complexity, and therefore more appeals, are unlikely to improve victim survivors' satisfaction.
- **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**: We note the broad judicial discretion in Part 9, Division 2 of the PSA and that there can be flexibility in sentencing under the PSA where a court can choose to structure a sentence in different ways.

15.4 Language used in sentencing

This section discusses the language used in sentencing, primarily through sentencing remark delivery.

The Terms of Reference required the Council to consider:

- The need to protect victims from domestic and family violence and sexual violence;
- The need to hold domestic and family violence and sexual violence offenders to account; and
- The need to promote public confidence in the criminal justice system.

All these considerations are highly relevant and can be promoted by sentencing remarks that appropriately express the offence and the reason for a certain sentence imposed. However, these considerations can be undermined when sentencing remarks are poorly delivered and the court does not adequately explain the reasons for sentencing decisions.

15.4.1 Purpose of sentencing remarks

Under the PSA, 'if a court imposes a sentence of imprisonment … it must state its reasons in open court'.[270]

The purpose of delivering judicial sentencing remarks is to ensure the reasons for imposing a particular sentence on a person are transparent and accessible to the public: 'accessible reasoning is necessary in the interests of victims, of the parties, appeal courts and the public'.[271] It is therefore important for sentencing remarks to serve as an official record of the factors that influenced the sentencing decision, including sufficient details of the offence, the culpability of the person being sentenced and the harm caused to the victim survivor. [272]

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270 PSA (n 1) s 10. However, 'A sentence is not invalid merely because of the failure of the court to state its reasons as required by subsection (1)(a), but its failure to do so may be considered by an appeal court if an appeal against sentence is made.': PSA s 10(2).
271 *Markarian v The Queen* (2005) 228 CLR 357 [39] (Gleeson CJ, Gummow, Hayne and Callinan J agreeing) ('*Markarian*').
272 *R v Koumis* (2008) 18 VR 434 [62] (citations omitted) ('*Koumis*').

Sentencing remarks serve a powerful communicative function to all members of the public by ensuring:

- the offending person understands their sentence and is held accountable for the harm they have caused;
- the victim survivor understands the reasons for the sentence imposed, and sees their experience has been acknowledged by the courts;
- there is consistency between sentences imposed within a particular common law jurisdiction; and
- the community sees that the offender has been denounced for their conduct.[273]

It is important for a judicial officer to provide sufficient reasons for their decision, '[t]o ensure that the instinctive synthesis in the sentencing process is not unfathomable and does not conceal error, the 'law strongly favours transparency'.[274] It has been recognised in Queensland that:

> It is desirable that sentencing remarks be succinct, sharply focussed and expressed in a way likely to resonate with the offender, the victim and the public at large. They also have to be able to withstand the scrutiny of appellate courts. The reasons for structuring a sentence in a particular way should ordinarily appear in the sentencing remarks, and a sentencing court may more readily infer error when reasons are not expressed.[275]

This is particularly important when deciding a contested issue at sentence. The courts have recognised it is 'desirable that conclusions reached by the sentencing judge as to the primary arguments advanced by the parties, particularly if they are in controversy, should be apparent from the reasons'.[276] For example, the Victorian Court of Appeal concluded that due to the seriousness of the offending and the 'evidence showing a significant risk of [the offender] committing further offences of violence, whether sexual or not',[277]a 'substantially higher sentence was called for'.[278] The Court noted that 'since [the sentencing judge] did not explain how the various factors were brought to bear on the sentencing decision, we are constrained to infer that the matters urged in mitigation were allowed to overwhelm other considerations, leading to error of principle'.[279]

Ex tempore sentencing in Queensland

Queensland courts are unique in that the most common sentencing approach is to make ex tempore remarks. This means the judge delivers the sentencing remarks verbally, immediately following oral submissions by the prosecution service and defence representatives.

It is accepted that public understanding of sentencing is enhanced by clear and well-crafted remarks; however, in considering ex tempore reasons delivered in busy courtrooms, the courts have also acknowledged that '[i]t is not appropriate to parse and analyse judgments'[280] and '[i]mpreciseness of language … can have less significance that it might otherwise have'.[281]

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273 Andrew von Hirsch et al. *Principled Sentencing: Readings on Theory and Policy* (Bloomsbury Publishing, 2009) 129.
274 *Koumis* (n 272) [62] (citations omitted).
275 *R v Hyatt* [2011] QCA 55 [11].
276 *Koumis* (n 272) [63].
277 *DPP v Patterson* [2009] VSCA 222 [51].
278 Ibid [52].
279 Ibid.
280 *Andersen v Commissioner of Police* [2020] QDC 23 [18], citing *Commissioner of Taxation v Baffsky* (2001) 192 ALR 92, 102.
281 *Andersen v Commissioner of Police* [2020] QDC 23 [18], citing *R v Hooper; ex parte Cth DPP* [2008] QCA 308, [23].

There are positive and negative aspects to delivering remarks on an ex tempore basis. Legal stakeholders generally regard Queensland's practice of ex tempore remarks as 'very efficient'.[282] In a 2016 review into live broadcasting of remarks, although legal stakeholders acknowledged that public understanding of sentencing was enhanced by clear and well-crafted remarks, a 'delay in the prompt imposition of sentences' may not be 'in the interests of justice, the interests of the person being sentenced or the interests of victims'.[283] That review noted the demands and pressures of busy court lists means that judicial officers may not always have the time required to craft sentencing remarks.

One negative aspect of ex tempore remarks is that they can lack detail, particularly about the offending, and be less structured, particularly when compared to written remarks in other jurisdictions. As ex tempore sentencing remarks are delivered following submissions, some judicial officers do not re-state the facts of the offending, which limits transparency for members of the community who do not have access to transcripts of sentencing submissions, only sentencing remarks. It is also likely that when judicial officers deliver their remarks due to the immediate proximity of the submissions, they may rely upon language and terminology used by legal practitioners. It is therefore important for legal practitioners to use appropriate, trauma-informed language in their written and oral sentencing submissions.

Sentencing remarks are relied on by other parts of the justice system as an independent record of what happened. For example, sentencing remarks are an important evidence base for the Queensland Corrective Service ('QCS') when making decisions about programs and treatment, and without sufficient detail of the offending there may only be the offender's account of what happened to rely on.

What happens in other jurisdictions

While ex tempore sentencing occurs in other Australian jurisdictions, it is not the common approach for higher court decisions in some jurisdictions, such as NSW and Victoria. In those jurisdictions, it is more common for judicial officers to hear the submissions at the plea hearing and then adjourn the sentence hearing to later date, enabling time to draft and revise their remarks.

The NSW Criminal Court of Appeal in *Gal v R*[284] held that the sentencing judge had erred in making no reference to the facts of the offence and not assessing the objective seriousness of the offence, despite referring to the serious in argument. The Court said 'there was an insufficient statement of the basis upon which the applicant was sentenced'.[285] The Court further stated:

> Ultimately any practice of having recourse to the transcript of sentence hearings as an adjunct to the reasons for sentence has significant limitations. Sentencing judges are not bound by the observations made during the course of sentencing hearings. Sentencing judgments speak to a wider audience than simply the parties and even this Court, none of whom can be expected to consult the transcript. Nothing in this judgment is meant to suggest that a sentencing judgment must dwell upon either the facts of an offence or their objective seriousness at any length. Instead, at a minimum such reasons should state or refer to the essential facts upon which an offender is sentenced and provide at least some assessment of, or reflection upon, the seriousness of the offending conduct.[286]

The Victorian Court of Appeal has said sentencing remarks are a 'reaffirmation of society's values' and these may be properly expressed in sentencing reasons.[287]The Court also said:

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282 The Bar Association Queensland submission to the Supreme Court review, *Electronic Publication of Court Proceedings – Report* (April 2016) 37.
283 Supreme Court of Queensland, *Electronic Publication of Court Proceedings – Report* (April 2016) 37.
284 [2015] NSWCCA 242.
285 Ibid [37].
286 Ibid [39].
287 *WCB v The Queen* [2010] VSCA 230; 20 VR 483, [12] ('*WCB*').

> A sentencing judge need not be reticent to express him or herself in terms of community values. The circumstances in which a sentencing court may refer to or draw upon the concerns or expectations of the community is not to be circumscribed as the appellant suggests. The courts do not exist independently of the society which they serve. As the sole legitimate administrator of criminal justice, they may be viewed as the trustees of the power of the community to judge and, where appropriate, punish its members. This requires that courts vindicate the properly informed values of the community and, equally significantly, that they are seen to do so.
>
> The expectations and values of the community are, in fact, often invoked in sentencing remarks and in the broader context of sentencing laws. Central to the purposes of sentencing is public denunciation of the offending conduct and reinforcement of society's expectations. The sentence communicates society's condemnation of the offender's conduct. It signifies the recognition by society of the nature and significance of the wrong that has been done to affected members, the assertion of its values and the public attribution of responsibility for that wrongdoing to the perpetrator. The sentence serves to reinforce the standards which society expects its members to observe.[288]

The Court has also said more comprehensive reporting of details in sentencing is even more critical in cases of sexual offences, to both maintain 'public confidence in the operation of the criminal justice system' and to increase public awareness of the 'type of sentences imposed for that kind of criminal conduct':[289]

> Regrettably, sexual offences against children, including incest, are amongst the range of commonly occurring crimes which are not generally reported or which receive little attention. Thus to return to our earlier proposition, if sentencing outcomes in these and other commonly committed crimes are not adequately made known to the public at large, general deterrence will lose its authority as a prime principle justifying the imposition of custodial and other punitive measures. When the community labours under the belief that sentences that are imposed are inadequate, a sense of injustice exists that damages the respect in which our criminal justice system is held. The public needs to be made more aware of the full extent of custodial sentences that are handed down on a regular basis in all levels of the legal system. For example, the community must be better informed as to the consistent imposition of custodial penalties that are imposed by all of the courts for offences such as home invasions, violence resulting in injury, trafficking in or cultivating drugs of addiction, sexual offences and more serious driving offences. The courts and the media must be able to utilise all technologies that are available so as to achieve a more comprehensive reporting of sentencing for all types of criminal conduct.[290]

15.4.2 Why language matters in sentencing sexual assault and rape offences

Language is even more important for sexual violence offences due to long-standing systemic issues relating to our understanding of sexual violence and the harm caused by these offences.[291] As discussed in **Chapter 2** of this report, although sexual violence is prevalent, it is one of the most under-reported crimes, and even when it is reported to police, there are high attrition rates. Some of the barriers to reporting include a fear of not being believed,[292] a lack of trust in and/or concerns with the justice system[293] and unsupportive community attitudes about women, racism and rape myth acceptance.[294]

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288 Ibid [34]-[35].
289 Ibid [42].
290 Ibid [43].
291 For example, the Women's Safety and Justice Taskforce recommended the Criminal Code be reviewed to modernise language used for sexual offences because some terms in offences were 'problematic' and were 'apt to retraumatise victim[survivors': Women's Safety and Justice Taskforce, *Hear Her Voice – Report Two: Women and Girls' Experiences Across the Criminal Justice System* (2022) ('*Hear Her Voice, Report Two*') 273. This work has commenced and is ongoing, but changes have included changing the term 'carnal knowledge' used in rape to 'engage in penile intercourse'.
292 Australian Institute of Family Studies and Victorian Police, *Challenging Misconceptions About Sexual Offending: Creating an Evidence-based Resource for Police and Legal Practitioners* (Reference Booklet, 2017) 3.
293 Victorian Law Reform Commission, *Improving the Justice System Response to Sexual Offences* (Report, September 2021) 23,27; Ibid 3.
294 *Hear Her Voice*, *Report Two* (n 291) 103.

Judicial officers can help to break down 'systemic barriers to reporting sexual violence by establishing a court environment where victim survivors are confident their wellbeing safety will be prioritised'.[295] Importantly, the language used and/or accepted without comment by the Court of Appeal set precedents for how sexual violence is understood and framed by legal practitioners and judicial officers.

As discussed in **Chapter 6,** the way legal practitioners and judicial officers describe the seriousness of an offence is important to ensure the gravity of offending is appropriately recognised and sentenced. When language is used to describe offending that may not reflect the offending gravamen, it minimises both the harm caused and the culpability of the perpetrator, as well as not properly denouncing the offender's conduct.

Problematic language in sentencing sexual offences potentially impacts the adequacy of sentencing practices because it may:

- influence or be perceived to influence the way judicial officers determine seriousness for the purposes of sentencing;[296]
- retraumatise the victim survivor by appearing to minimise the seriousness of the offending and/or the offender's culpability;
- provide inadequate information about the offence and offending for both parties, as well as other essential parts of the justice system including for QCS to risk manage and provide treatment to the sentenced person and the Parole Board to make informed decisions about the person's parole suitability.

We also heard from victim survivor and advocacy groups that the way the offender's prior 'good character' is discussed in a hearing, and in particular the language used by judicial officers in their remarks, can be deeply distressing for victim survivors and undermine the sentencing purpose of denunciation. In **Chapter 9**, we considered research into the use of language and 'good character' in sentencing sexual assault and rape. A South Australian study of sentencing transcripts suggested 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'.[297] The researchers pointed to several negative consequences arising from its use and the 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.[298]

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.

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295 Vicki Lowik et al, 'The Trauma-informed Court: Specialist Approaches to Managing Sexual Offence Proceedings – Part 1' (2024) 33(1) *Journal of Judicial Administration* 1-2.
296 See comments in *WA v Wynne* [2024] WASCA 20 [73] 21 (Buss P, Mazza JA and Hall JA agreeing).
297 Ibid 106.
298 Ibid.

Impartial and unprejudiced sentencing of child sexual offenders

Judicial officers are required to sentence in an impartial and unprejudiced manner, with the High Court stating that the test 'is whether a fair-minded lay observer might reasonably apprehend that the judge might not bring an impartial and unprejudiced mind to the resolution of the question the judge is required to decide'.[299]

In relation to sentencing child sex offenders, the High Court has said it is important for sentencing courts to avoid emotion, including disgust or revulsion towards when sentencing this cohort. Sentencing remarks should be confined to 'relevant legal and factual analysis'.[300] This is to ensure 'disgust and revulsion for the offender and sympathy for the victims cannot be allowed to cloud the sentencer's vision'.[301] In *Ryan v The Queen*,[302] ('*Ryan*') Kirby J observed that:

> As far as possible, emotions must be put aside. Otherwise, the offender, and society, may be left with a belief that judicial emotion and prejudice against the offender, rather than proper factual and legal analysis of the offences, lies behind the sentence that is imposed … Putting emotion to one side is the best way that the justice system has devised for avoiding both the appearance and actuality that extraneous considerations have entered the sentencing process. This may be well be particularly relevant to sentencing offenders convicted of multiple offences against minors because of the specially heavy demand which that task places upon judicial dispassion and professionalism.[303]

Hayne J further commented:

> As I said at the start of these reasons, sentencing an offender requires consideration and balancing of many different and often conflicting matters. What the offender did and why, and who the offender is, will be central to that task. If those matters provoke a particular reaction towards the offender by society at large, or a section of it, they are matters which the sentencer has already considered. Society's reaction to them neither adds to nor detracts from their significance in the sentencing process. If, by contrast, the reaction of society to the offender is not based in such considerations but is, for example, based in emotional responses to the offender or the offender's actions, they are matters which a sentencer should not take into account in mitigation of sentence. There is an irreducible tension between the proposition that offending behaviour is worthy of punishment and condemnation according to its gravity, and the proposition that the offender is entitled to leniency on account of that condemnation.[304]

The High Court's commentary in *Ryan* was particularly focused on denunciatory remarks by the sentencing judge, which had included 'debasing', 'degrading', 'wicked', 'abhorrent', 'almost beyond belief' and 'enormity',[305] rather than the language used to describe the offending conduct.

Trauma informed remarks

Trauma-informed practices are increasingly being used in Australian courts. We discussed the importance of this approach and our recommendations to improve trauma-informed practice in Queensland courts in **Chapter 13**.

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299 *Johnson v Johnson* [2000] HCA 48.
300 *Ryan v The Queen* (2001) 206 CLR 267 [121] (McHugh J). (*'Ryan'*)
301 Ibid [134] (Hayne J).
302 (2001) 206 CLR 267.
303 Ibid [119] and [122].
304 Ibid [157].
305 Examples cited from the original sentencing remarks in the decision of Kirby J [82].

15.4.3 Sentencing remarks analysis

This section presents some of the problematic language examples we identified in the thematic analysis of rape and sexual assault sentencing remarks, which could be seen to minimise the offender's culpability and/or the harm experienced by the victim survivor.

Characterisation of sexual offending

Not fitting words to deeds

Research on language in sentencing of sexual violence offences has found 'language which mutualizes violent behaviour implies the victim is at least partly to blame and inevitably conceals the fact that violent behaviour is unilateral and solely the responsibility of the offender'.[306]

We found examples in textual remarks where the language used to describe the offending was more suitable to consensual acts than to rape or sexual assault. Using this type of language does not properly denounce the conduct, nor does it hold the person to account for their actions.

In sexual assault sentencing remarks, we found examples where forced mouth-to-mouth contact was described as kissing without reference to the victim's lack of consent.

> you kissed her and gently pushed her on to a bed.[307]
>
> you hugged her from behind and kissed her on the neck.[308]
>
> kissed her on her mouth and put your tongue inside her mouth.[309]
>
> you grabbed her with his hands on either side of her head and kissed her on the lips.[310]

We also found examples where vaginal or anal rape was described as sex or sexual intercourse, which may characterise the offender's conduct as sexual rather than violent.[311]

> you inserted your penis into her vagina and had sex with her until you ejaculated.[312]
>
> Each involve you having sexual intercourse with her while she was asleep.[313]
>
> You removed her pants, held her down by the throat so that she could not breathe and had sexual intercourse with her without her consent until you ejaculated.[314]

Although, 'ostensibly the same physical act, they suggest very different characterisations of the act (e.g. affectionate versus violent) and call for radically different actions (e.g. not intervention versus legal intervention)'.[315] Further, describing the conduct in this way minimises the perpetrator's culpability, as well as the violence (and fear) involved with non-consenting sexual contact.

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306 Linda Coates and Allan Wade, 'Telling it Like it Isn't: Obscuring Perpetrator Responsibility for Violent Crime' (2004) 15(5) *Discourse and Society* 501.
307 Sexual assault, regional/remote, higher courts, custodial, #9.
308 Sexual assault, major city, lower courts, custodial, #1.
309 Sexual assault, regional/remote, higher courts, custodial, #4.
310 Sexual assault, major city, lower courts, non-custodial, #12.
311 Coates and Wade (n 306) 503.
312 Rape, major city, imprisonment < 5 years, #12. This is the only way the rape offending was described in the remarks and no details were given of each count, only this description.
313 Rape, major city, imprisonment < 5 years, #5. The judge did describe this conduct later in the remarks as 'two separate acts of rape on a sleeping woman, one of them involved anal penetration which I accept should be approached as a more serious act than the vaginal penetration, at least in the circumstances before me'.
314 Rape, regional/remote, imprisonment > 5 years, #14.
315 Coates and Wade (n 306) 503.

Further, language used by the court that mutualises the conduct may result in the person seeking to justify their behaviour to themselves and others as being purely sexual rather than violent (and therefore criminal).

Describing the offending in passive language

Similarly, research has found that remarks written (or spoken) in the passive voice reduce attributions of responsibility – that is, passive constructions were 'more likely to attribute less harm to the victim and significantly less responsibility to the offender'.[316] For examples identified by the Council in sentencing remarks for rape and sexual assault sentenced recently, see **Chapter 6**, section 6.5.1.

We found examples where the court used language that omitted or minimised the culpability of the perpetrator in cases involving rape. For example, judicial officers would describe the offending conduct with passive or neutral terms, such as 'insert' or 'put', rather than language more reflective of the non-consenting nature of these offences, such as 'forced' or 'penetrate'. This may diminish the offender's agency and the degree of force used to commit the offence.

> you pulled her pants down and then you proceeded to climb on top of the complainant and insert your penis into her vagina.[317]
>
> Count 20, rape, inserting your penis into [the victim survivor's] vagina, which was very painful…covering her mouth, inserting your penis into her vagina.[318]
>
> You then took your pants down and put your penis inside her vagina.[319]
>
> Count 2, the insertion of your finger or fingers into her vagina without her consent.[320]

It is likely that this language was used in the Statement of Fact and may reflect language used in police records or in victim survivor statements. However, the effect of this choice of language is to minimise the offender's culpability as well as the harm caused, including the fear, violence and pain inherent in the offending.

Not calling rape conduct rape

As discussed in **Chapter 6**, we observed differences in the ways types of rape conduct were discussed, with some types of conduct not being called 'rape'.

Generally, we found that the term 'rape' was primarily used for penile–vaginal penetration and not for digital penetration of a person's vulva, vagina or anus, or rape involving penile penetration of the mouth. Often, those forms of offending were described as digital penetration or oral sex. This may reflect the broader social constructs of sexual activities that 'real' sex is heterosexual penile/vaginal sex and oral and digital sex are foreplay activities, and therefore less important in the hierarchy of sexual activity.

Describing penile–mouth rape as oral sex is also an example of not fitting deeds to words. Using this language minimises the violence inherent in the act, as well as the offender's culpability in forcing their penis into another person's mouth.

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316 Ibid, 502.
317 Rape, major city, imprisonment < 5 years, #15.
318 Rape, major city, imprisonment > 5 years, #19.
319 Rape, major city, imprisonment > 5 years, #17.
320 Rape, major city, imprisonment < 5 years, #7. For contrast in Rape, regional/remote, imprisonment > 5 years, #15 the judge stated, 'Then you forced your fingers into her vagina despite her resistance and repeatedly telling you to stop.'

The Western Australian Court of Appeal, in *The State of Western Australia v Wynne*,[321] commented on the importance of using language that 'accurately capture the gravamen of the offence'.[322] In that case, the sentencing judge had repeatedly referred to rape conduct as 'touching', which the Court said was 'more apt to describe an offence of indecent assault'; this offence has a much lower maximum penalty and the offence in this case was 'one of sexual penetration without consent, and the sentence imposed was required to reflect that fact and the maximum penalty for the offence'.[323]The Court said the judge's words 'failed' to 'accurately capture the gravamen of the offence' and there was speculation that her 'repeated use of the word touching may indicate' how the judge 'arrived at the conclusion that an Intensive Supervision Order was an available disposition'.[324]

Rape involved 'no violence at all'

We found a tendency for judicial officers to describe rape as involving 'no violence', which may minimise the inherently violent nature of rape cases.

This phrasing was often used in cases where the victim survivor had been asleep or unconscious:[325]

> I also have regard to the fact that you did not use any weapons and that there was no overt violence or, indeed, there was no application any force more than what was required to achieve penetration.[326]

> You violated a woman, your friend, sleeping in her own bed. I accept that it is not suggested that you were violent, and that no threats were made.[327]

> [defence counsel] confirms the absence of aggravating features, such as there was no violence, no threats, no intimidation, and no force used to overcome resistance. Indeed, it seems given the state that the complainant was in [semi-conscious due to heavy intoxicated], she did not offer any resistance, but nonetheless, the point should be made that there is the absence of those aggravating features which occurs in some cases.[328]

There was an example where the court clearly articulated that violence was inherent in the rape offences but that the aggravating factors of additional physical violence were absent:

> Balanced against those aggravating features, I note the complainant suffered no physical injuries, that there was no additional violence over and above that required to secure her submission and that inherent in the acts of penetration and conduct themselves, and that there was no weapon used.[329]

15.4.4 Stakeholder views

Submissions from victim survivor and advocacy stakeholders

While submissions did not focus on language, many stakeholders thought the criminal justice system did not adequately consider harm to victim survivors.[330]

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321 [2024] WASCA 20
322 *WA v Wynne* [2024] WASCA 20 [73] 21 (Buss P, Mazza JA and Hall JA agreeing).
323 Ibid 21 [74].
324 Ibid 21 [73].
325 *R v Hutchinson* [2010] QCA 22 [22] (Keane JA, de Jersey CL and Douglas J agreeing). See also *R v Enright* [2023] QCA 89 (Mullins P, Bond JA and Boddice AJA), where it was stated at [86] that '[t]he sentencing judge found that the offending conduct did not involve other aggravating features such as violence, although that was not unusual in offences involving the sexual assault of a sleeping person'.
326 Rape, major city, imprisonment < 5 years, #5.
327 Rape, regional/remote, imprisonment < 5 years, #14.
328 Rape, regional/remote, imprisonment > 5 years, #2.
329 Rape, regional/remote, imprisonment > 5 years, #8.
330 See, for example, Submission 24 (QSAN) 3.

QSAN thought sentences for sexual violence 'should better reflect community expectations about the seriousness of these crimes and be more reflective of the actual impact of the crime and the trauma caused to the victim survivor'.[331]

It was suggested that for courts to 'adequately denounce sexual offences'[332] and ensure sentences are appropriate, language should reflect 'the objective gravity and the moral culpability of the offending'.[333]

Submissions from legal stakeholders

Legal stakeholders did not raise concerns about the language used in current sentencing practices for rape and sexual assault.

Submissions from individuals

One submission in response to our Consultation Paper focused on the importance of transparency in sentencing decisions and on increasing public understanding of reasons through published remarks that are 'in simple, jargon-free' language.[334]

Rita Lok referred to research showing that when people were given more information about a case, their punitiveness decreased. She was concerned about the lack of accessible remarks in Queensland courts, particularly in the Magistrates Courts, suggesting there could be 'more consistent publishing of sentencing remarks in lower courts' and noting the 'publishing mechanisms adopted by superior courts, namely the Supreme Courts and Court of Appeal, which consistently produce and publish written decisions'.[335]

Victim survivor views

Structure of remarks

Consultation with victim survivors

The Council consulted with victim survivors about their experience of sentencing, including attending a sentence hearing and listening to the judge deliver their remarks.

As commented on elsewhere in this report (for example, see **Chapter 14**) most victim survivors did not think the impact of the offending was properly understood by the courts, which diminished their satisfaction with the sentencing outcome.

One victim survivor told us that while 'everyone was very respectful' in the sentencing process, and the sentencing judge had been 'fantastic', she still thought the court didn't understand the harm she had experienced:

> He is a fantastic judge. I don't have any bad words about him. But I just don't think the whole court system understands the impact of what happens. (Victim Survivor (rape) Interview 2).

331 Ibid 8.
332 Submission 20 (DVConnect) 5.
333 Submission 24 (QSAN) 12.
334 Submission 4 (Rita Lok) 2.
335 Ibid.

Another victim survivor had similar experiences with prosecutors and the judge being respectful and fair, although she felt the judge had understood the harm she experienced. However, regarding the defence counsel, she told us:

> I felt the defendant's lawyer like didn't give a care at all. Didn't give a f**k basically. Basically, about the trauma, I had, they just wanted to win. (Victim Survivor (rape) Interview 6).

The mother of one victim survivor said although they submitted a victim impact statement, the judge focused more on the offender:

> The judge barely read [the victim impact statement]. And he didn't care. But then [the judge] read the evidence that his lawyer put in about how this happened, and he just basically, you know, it just felt like we weren't important. He quickly mentioned that it did harm to our family and it wasn't okay. But, yeah, about how [the offender's] changing his life and how [the offender's] got good references, and it just made us feel like … (Victim Survivor Parent Interview 1)

Problematic language

Consultation with victim survivors

In relation to problematic language, one victim survivor told us that the way the judge talked about her offender's actions minimised his culpability and any denunciatory or deterring effect and resulted in her feeling dissatisfied with the sentence:

> The words that the judge said that he can't … be sure of the motivation [for offending] but the perpetrator must have felt so strongly he couldn't help himself. That has created an after effect of feeling less safe in the world, because if a judge says 'oh you must just have been overcome with temptation', okay you can walk out and you can go back to your life. Then when I'm walking down the street and there's a man, or I'm in a situation where I feel uncomfortable, the thought is, what if he's just overcome by temptation. (Adult victim survivor (sexual assault) Interview 7)

Victim survivor support advocate views

One victim survivor advocate briefly commented on how language used in sentencing can impact victim survivors; however, this topic was not the focus of these discussions.[336]

Subject matter expert interview participants

Purpose of sentencing remarks

Generally, SME participants thought sentencing was hard and most judges got the balance right on details about the offender and the victim survivor. It was recognised that sentencing remarks serve many functions and audiences, although the primary purpose is to communicate to the offender. Some participants were aware that remarks were considered by QCS[337] and the Parole Board,[338] with one practitioner expressing concern that the Board is not automatically provided with the exhibits on file.[339]

336 Victim support advocate interview 1.
337 SME Interview 1.
338 SME Interviews 10, 16
339 SME Interview 16.

However, some participants thought remarks were often 'talking to the Court of Appeal, rather than the offender or to the victim',[340] and there was not enough focus on the victim survivor and their experience.[341] It was recognised that victim survivors might be frustrated if they attend a sentence and hear 'ad nauseam about the offender's background and antecedents'.[342]

One participant suggested courts could

> have a little bit more focus towards explaining to the victim, particularly if they are in the back of the court, why a particular concept plays out the way that it does. Because just calling it rehabilitation or general deterrence doesn't do much to the victim. It's just a name, but it's really about explaining it in very basic English as to why I've come to the view that I have so that he and or she understands in the back of the court. And I'm not sure that the sentencing court does that very well.[343]

The *ex tempore* nature of sentencing in Queensland was raised, with some practitioners commenting that it expedites decisions.[344] One practitioner observed it is challenging to deliver remarks in a busy court schedule that 'makes everybody feel heard and reflects all the relevant sentencing considerations'.[345] Another participant noted how Queensland differed from other Australian jurisdictions in its approach to sentencing, and commented:

> I find it interesting, like obviously Queensland, there's such a diversity in the way in which sentencing remarks are presented. Whereas in some other jurisdictions, it's a lot more formulaic. It's a totally different process. But they don't ex tempore either, in other jurisdictions. So you don't get to hear the result there and then, which is what we're trying to do.[346]

Some participants commented on the value of detailed remarks for legal practitioners to use as a comparison in future. Pointing out that some judicial officers' remarks 'would be quite brief all the time', just capturing 'every single appeal point' and nothing further,[347] legal practitioners noted that the quality of remarks really depends on the judicial officer.[348] One practitioner stated:

> A lot of times you have some magistrates who'll just go, I've had regard to all the things in section 9" and then they'll just move along and go, 'here's your penalty'. Where you have others that will go into significant detail about the defendant's circumstances but also the victim's circumstances. So, you know, I couldn't give you a definitive answer, just to say this, it depends on the magistrate but you certainly do have ones that will take everything into account on the victim's side and others that will just gloss over it.[349]

Another commented on the brevity of remarks and that relying on judges' sentencing remarks alone will likely mean that 'there would be things that are missing in terms of context telling'.[350] The participant used the example of investigating a case for merit for an appeal and that they 'would get the whole court file and I would get all of the documents that were tendered … [and] then I actually understand what went on'.[351]

340 SME Interview 1.
341 SME Interviews 15 and 17.
342 SME Interview 17.
343 SME Interview 11.
344 SME Interview 14.
345 SME Interview 23.
346 SME Interview 14.
347 SME Interviews 7. Similar comments were also made in SME Interviews 15 and 22.
348 SME Interviews 4, 7, 17.
349 SME Interviews 4, 22, 23.
350 SME Interview 16.
351 Ibid.

There were mixed views about whether remarks should be detailed or brief. One practitioner thought it could be re-traumatising for victim survivors when the offence facts are repeated during sentencing remarks – especially when the victim survivor is present in the court room.[352]

Structure of sentencing remarks

Some participants who were judicial officers shared their own approach to sentencing with the Council. There was a general consistency to the approach taken by judges to delivering remarks.

> I try to keep them as brief as possible, but I kind of always think they're going to be used for those reasons and for other judges when they're resentencing someone. And they need to see the facts of what happened on an earlier occasion, or it's a breach of an order … I do at least, which some judges don't do, I do try and put a summary of the facts and basically a summary of what I've done. Yeah, so I make them as comprehensive as possible without quoting the law or quoting cases, passages out of cases and things like that. So, they probably normally might be about three pages.[353]

> The way I approach it is fairly standard and consistent with, I think, most of the judges. I state the most critical facts and the relevant antecedents and the principles and cases to the extent necessary, and then impose the sentence. We have a reasonably efficient system in Queensland, so most sentences are passed immediately after the close of the submissions. We appreciate, of course, that corrective services and perhaps others, including the Parole Board, might need to look at the remarks down the track. So we try and ensure that the content is going to be adequate for those purposes. But primarily we are speaking to the person being sentenced, and sometimes we have the victim in court, and they need to hear things. And getting that balance between the victim and the offender as part of that statement is important.[354]

> I do it a little bit differently to others. So, I say, what has happened to you is this. I'm told this is where you were born. I'm told that this is what your background is and that you come to offend against this woman in this way. And I know you say you have an issue with alcohol and I now can see that, for example, you're addressing that through these things. But let me just get to what this proceeding is really about, which is what you actually did. And then I go into the facts. And I think it's very impactful because although it's different to the way other people do it, I think it sort of gives me a background of the person and what this is about. And then we get to the main thrust. This is this concept of general deterrence I was telling you about. For me, it has to be the meat of the sentencing remarks. And so, I then very, very finally go through the factual features. And although they are often contained in the schedule of facts, it's important to actually outline them all. By that stage, I've said all the good things about him. Now it's up to the bad things. Why the offending is so serious. [355]

> What I try to do in the sentencing remarks is identify the basis of, without going into, depends, every case is different, I suppose, but I give a summary of the allegations, which are the basis of each of the charges, so that there is at least in the record some identification that this is what the offence was made up of, without going through all of the details of it. And I'll identify the serious aspects of the offending, if it's, for example multiple instances of sex offending, if it's a position of responsibility in respect of the child, the child is in the care of the offender, those sort of things…work out what the aggravating features are or the mitigating features out of the offending.[356]

> Well, I have a structure that I pretty much follow every single time, which is here's what the facts are, here's what the antecedents are, here's what the evidence is. And then I'll go through and I'll say, here's what the facts are, here's what the antecedents are of the defendant. And here is where he pleaded guilty or not guilty. Here's what I have to take it, here's what I have to turn my mind to in determining the appropriate sentence. The seriousness of the charge, the maximum penalty, protection of the community, impact upon the victim. And then I talk about, if I know something about it, the impact upon the victim. I know the particularly serious aspects of this offence. It was protracted over a long period of time and involved breach and egregious breach of trust, etc, etc, etc, whatever it might be. And then

352 SME Interview 5.
353 SME Interview 9.
354 SME Interview 10.
355 SME Interview 12.
356 SME Interview 13.

> balancing all this up together, this is the end result. So, I approach them all that way because I find that that helps me to think through what the sentence should be.[357]

Problematic language

Some participants in expert interviews referred to opportunities to enhance understanding of legal practitioners about the harm caused by sexual violence offending.[358]

One practitioner highlighted the importance of language used in the courtroom and in sentencing remarks, and that practitioners need to be mindful of not using words which minimise or trivialise a victim survivor's experience and/or the offender's conduct.[359] The interviewee referred to comments made by Cardinal George Pell's defence barrister to describe the alleged crimes as 'no more than a plain vanilla sexual penetration case' and suggested that remarks such as those were unhelpful:

> I've always said it's a real challenge … there is relativity of offending and that's fine. But this is what happened to this child. This is what happened to this particular woman. And so, you don't need to characterise it anything other than this is what you did to her. That is the conduct. So, I think, of course, everything is relative and comparable. But I think once you start labelling it, it undermines it to that person. And it objectively undermines it overall. So, I think language is a huge thing for judicial officers. We really could learn a thing or two about particularly with sexual offenses, I think.[360]

15.4.5 The Council's view

In **Chapter 13** we examined the experiences of victim survivors and their justice needs. Improving communication emerged as a central issue, and part of this is the way judicial officers and legal practitioners engage with victim survivors in sentencing hearings and in remarks. Despite the rights of victim survivors enshrined in the Charter of Victims' Rights, we found many victim survivors of rape and sexual assault are dissatisfied with their experiences engaging with the criminal sentencing process (**Key Finding 12**). The Council is concerned that current sentencing practices and processes may retraumatise victim survivors (**Key Finding 13**); not be culturally safe for some victim survivors (**Key Finding 14**); and should use trauma-informed language (**Key Finding 15**). To address these findings, we recommended incorporating trauma-informed practices to sentencing in Queensland through enhanced resources and professional development for judicial officers and legal practitioners (**Recommendations 17, 18, 19 and 20**).

The approach of ex tempore sentencing remarks should continue

The Council supports the continued use of ex tempore sentencing in Queensland. We share the legal sector's view that this approach enables matters to be dealt with expeditiously which is in the interests of victim survivors and perpetrators.

Comprehensive sentencing decisions ensure sentencing outcomes are better understood and may increase community awareness of sentences for sexual assault and rape

We note the High Court's commentary that 'accessible reasoning is necessary in the interests of victims, of the parties, appeal courts and the public' and that judicial officers must give reasons for their

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357 SME Interview 14.
358 SME Interview 9.
359 SME Interview 11.
360 Ibid.

decision.[361] This is particularly pertinent when sentencing a person to imprisonment and, where possible, courts should use accessible language in their remarks.

Sentencing remarks have many functions, but first and foremost their purpose reflects the courts' role as the 'sole legitimate administrator of criminal justice' and 'as the trustees of the power of the community to judge and, where appropriate, punish its members'.[362] As Kirby J stated in *Ryan*, the sentence represents 'a symbolic, collective statement that the offender's conduct should be punished for encroaching on our society's basic code of values as enshrined within our substantive criminal law'.[363]

Sentencing remarks not only communicate to the perpetrator that what they did was wrong and against the law; they serve a broader function of making the community aware of the type of sentences imposed for that kind of criminal conduct. Greater community awareness of sentences imposed for sexual assault and rape offences may act as a deterrent to others in the community who are inclined to commit similar offences and may help strengthen confidence in the operation of the criminal justice system.

The Council heard repeatedly during this review that victim survivors are very keen that perpetrators do not reoffend, so effective programs are critical. Fulsome sentencing remarks are vital for QCS to better enforce the order made by the court, and for the Parole Board to determine whether the person is ready for parole. While we noted concerns that restating details of the offending may be retraumatising for a victim survivor in the courtroom, we think there is greater risk that an incomplete record for QCS and the Parole Board to inform their assessments will be more upsetting for victim survivors.

Characterising rape and sexual assault in language suggesting mutual conduct or passive terms may undermine perpetrator accountability and be distressing to victim survivors

The way offences are described in sentencing remarks matters, but it is particularly important for sexual offences because '[p]erpetrators often misrepresent their own actions garnish support, avoid responsibility, blame the victim and conceal their activities'.[364] If legal practitioners and judicial officers use language that does these things, it may be easier for the offender to excuse their actions and not take responsibility.

The Council is concerned about problematic language used in sexual assault and rape cases, which does not clearly reflect the actions of an offender and/or minimises their culpability by using consenting, pleasurable sexual terms rather than language that reflects the inherently violent and non-consensual nature of these offences. For example, using passive language to describe the offender's actions, such as 'insert' or 'put' rather than 'forced' risks minimising that person's agency and culpability in committing a serious, non-consensual offence. As discussed in **Chapter 6**, the language used by judicial officers and legal practitioners has the potential to minimise offence seriousness, which could impact sentencing outcomes.

The Council is mindful of High Court jurisprudence on the 'importance of avoiding "emotion", including disgust or revulsion towards child sex offenders, when sentencing'.[365] However, like the Victorian Sentencing Advisory Council ('VSAC') we suggest for non-consensual sexual offences, substitutions like

361 *Markarian* (n 271) [39].
362 *WCB* (n 287) [34].
363 *Ryan* (n 300) [118].
364 Coates and Wade (n 306) 503.
365 Victorian Sentencing Advisory Council, *Sentencing of Offenders: Sexual Penetration with a Child Under 12* (Report, 2016) 25.

'put' or 'insert' instead of 'forced' or 'penetrate' go beyond neutrality and that such language 'instead fails to both accurately describe the act itself and convey the inherent violence of that act'.[366] VSAC's comparison of sentencing remarks for rape and sexual penetration with a child under 12 offences identified several issues with language and found the type of language used in sexual penetration cases 'did not given adequate weight to the degree of violence', with judicial officers explicitly saying 'no violence was involved'.[367] VSAC found that, '[i]n making such a finding, judges seem ostensibly concerned with physical violence over and above that inherent in the basic physical element of the offending'.[368] They suggested that given understanding that the trauma of these offences was 'only very recently accepted as fact', it meant current sentencing practices 'reflect an understanding of "violence" … that conforms to historical norms of overt, inter-adult stranger assaults involving visible injuries, the use of weapons, and/or disguises'.

Regarding the tendency of courts to say 'no violence was used' in cases of a person raping an asleep or unconscious victim, we suggest this type of language risks undermining the court's denunciation of the offences. We suggest legal practitioners and judicial officers should instead emphasise that these offences may have involved 'no additional violence'. Legal practitioners should not lose sight of the fact that a sleeping or unconscious victim survivor cannot resist, and the perpetrator may be more likely not to be caught.[369]

366 Ibid 25.
367 Ibid 24.
368 Ibid 23.
369 The Western Australia Court of Appeal's recent decision of *Brown v The State of Western Australia* [2024] WASCA 106, was an appeal of manifest excess for a sentence of 3 years and 6 months involving the digital rape of an adult woman who had been asleep. It was an aggravating factor at sentence that 'the complainant was asleep, minimizing any chance that the appellant would get caught or meet resistance' [72]. The Court said this allowed the appellant to take 'advantage' of the victim survivor in order to commit the offence [84].

Chapter 16 – Alternative and complementary justice models

16.1 Introduction

The Terms of Reference ask us to advise on options for reform to the current penalty and sentencing framework to ensure it provides an appropriate response to sexual violence offending.[1]

In this chapter, we explore the use of complementary and alternative justice models in Queensland's adversarial system of justice, including restorative and transformative justice, and look at the potential implications for sentencing rape and sexual assault matters should a legislative restorative justice model be introduced in Queensland.

We consider current alternative justice models available in Queensland, as well as models used in other jurisdictions. We also present our key finding and recommendations for reform to enable the use of restorative justice pathways for sexual assault and rape matters in Queensland.

16.2 Alternatives to the adversarial system of criminal justice

As discussed in **Chapter 2**, only a small proportion of sexual violence offences are reported to police and, of these, an even smaller proportion result in a conviction and sentence. Based on data published in 2024 by the NSW Bureau of Crime Statistics and Research, only 7 per cent of sexual assaults result in an offence being proven and sentenced.[2]

There are myriad complex reasons for current low rates of reporting by victim survivors of sexual violence and the high levels of attrition of these cases, of which sentencing practices and processes form just one part.

Various alternatives to traditional court processes have been introduced in Queensland, as well as in other jurisdictions, as alternatives or complementary to traditional forms of justice in recognition that restorative and transformative pathways may provide a more trauma-informed and beneficial approach to respond to the harm caused by this form of offending.

In this chapter, we explore restorative justice and transformative justice approaches to sexual violence matters as examples of these models.

16.3 Restorative justice for sexual violence offences

16.3.1 Overview of restorative justice

Restorative justice is a philosophical and practical approach to addressing crime that focuses on repairing the harm that has been caused to people, relationships and communities, rather than serving a purely

1 Appendix 1, Terms of Reference.
2 Brigitte Gilbert, 'Attrition of Sexual Assaults from the New South Wales Criminal Justice System' (Crime and Justice Statistics Bureau Brief No 170, NSW Bureau of Crime Statistic and Research, May 2024).

punitive purpose.[3] The process involves all parties with a 'stake' in the offending coming together and working collectively to find a solution.[4]

The idea of restorative justice is to bring together of victims of crime, offenders and communities to restore the rights, sense of dignity, empowerment and harmony that have been lost or damaged. Restorative justice is:

> A way to do justice that actually includes the people impacted by crime - victims, offenders, their families and communities. Its goal is to respect and restore each as individuals, repair broken relationships and contribute to the common good.[5]

Restorative justice processes can take various forms, including through victim–offender conferences, mediation, forum sentencing and circle sentencing. The process can occur at any point before conviction as a diversionary option away from a criminal prosecution, at the sentence or post-sentencing as an alternative to imprisonment. [6] Programs often have different eligibility criteria, models of delivery and rules surrounding mandatory attendance (prescribing the attendance of a victim survivor or their surrogate, or not).[7]

Irrespective of the form, the core feature of restorative justice is to provide an 'opportunity for parties directly affected by a crime to come together to acknowledge the impacts and discuss the way forward'.[8] Generally, this process requires the offending person to admit 'they have caused the harm and then engag[e] in a process of dialogue with those directly affected and discussing appropriate courses of action which meet the needs of victims and others affected by the offending behaviour'.[9]

Restorative justice processes were initially introduced as an alternative to traditional criminal justice options for young people – mostly in relation to minor, non-violent offences.[10] Every jurisdiction in Australia has implemented restorative justice processes within its juvenile justice system. [11]

However, there has been broad recognition that the restorative justice framework can theoretically apply across all offences, independent on the age of the offender or the nature of the offence, provided that appropriate safety concerns are addressed, and there are no cultural barriers to implementation.[12] As a consequence, an increasing range of restorative justice approaches have been utilised for adult offenders and victims of more serious types of crimes.[13]

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3 Francis T Cullen and Cheryl Lero Jonson, *Correctional Theory: Context and Consequences* (Sage, 2nd ed, 2012) as cited in Lacey Schaefer et al, *Sentencing Practices for Sexual Assault and Rape Offences: Literature Review* (Final Report prepared for the Queensland Sentencing Advisory Council, 2024) 66.

4 Jacqueline Joudo Larsen, 'Restorative justice in the Australian criminal justice system' (Research and Public Policy Series No 127, Australian Institute of Criminology, 2014) vi, citing T F Marshall, 'The evolution of restorative justice in Britain' (1996) 4(4) *European Journal on Criminal Policy and Research* 21, 37.

5 Jane Bolitho et al (eds), *Restorative Justice: Adults and Emerging Practice* (Sydney Institute of Criminology Monograph Series, 2012) 19.

6 Ibid 21.

7 Ibid.

8 Victorian Law Reform Commission, *The Role of Victims of Crime in the Criminal Trial Process* (Report, 2015) [7.238]. A similar position is reflected in Bolitho et al (n 5) 2012) 20.

9 Commonwealth, Royal Commission into Institutional Responses to Child Sexual Abuse, *Criminal Justice Report Parts VII–X and Appendices* (2017) 299, 183.

10 Bolitho et al (n 5).

11 *Youth Justice Act 1992* (Qld) Pt 3; Children, *Youth and Families Act 2005* (Vic) s 415; *Young Offenders Act 1997* (NSW); *Young Offenders Act 1993* (SA) Div 3; *Young Offenders Act 1994* (WA) Part 5; *Crimes (Restorative Justice) Act 2004* (ACT); *Youth Justice Act 2005* (NT) Pt 39, 64, 84; *Youth Justice Act 1997* (Tas) Part 2, Div 2-3, Part 4 Div 4.

12 Bolitho et al (n 5) 20—21.

13 Ibid 13.

Within this context, it has been acknowledged that restorative justice approaches may provide an opportunity for victim survivors of rape and sexual assault to communicate the impacts of the crime to their offender, which may assist with their recovery process, as well as enabling their offender to better understand the consequences of their own offending. [14] However, it is important for victim survivors to have a choice to engage in this process, rather than having it imposed upon them, as this may lead to further harm.

16.3.2 Restorative justice processes for sexual violence offences

In 2021, the Australian Productivity Commission reported that the ARJC was a cost-effective and suitable alternative to traditional criminal justice responses.[15]

It has been widely recognised that restorative justice conferencing models can benefit both the people who have experienced harm and those responsible for causing it.

Studies have revealed enhanced satisfaction for victim survivors of serious crimes committed by adults where they participated in restorative justice, rather than the traditional justice system.[16] For example, a review of post-sentence restorative justice programs for serious crimes (including sexual offences) found greater victim satisfaction through restorative justice pathways than the traditional criminal justice system, which they said had not 'allay[ed] their fears, their bewilderment, or their struggles with memories after the crime'.[17]

For victim survivors of sexual violence, the benefits of these processes can include:

- being more involved, contributing to the outcome and holding their offender to account without proceeding through the criminal prosecution process;[18]
- obtaining a sense of voice, power, agency and resolution – empowering the victim through the ability to decide whether to engage in this process based on their own individual circumstances, as well as the trauma they experienced as a consequence of the offence; [19]
- having the opportunity to tell their story without restriction and to have their voice heard, including by directly telling the person who committed these offences about the impact it has had on them;[20]
- asking unresolved questions and receiving answers directly from their offender;[21]
- obtaining validation and seeking reassurance that they are not to blame;[22]
- seeing their offender accept responsibility, and endeavour to make amends;[23]

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14 Ibid 18.
15 Nous Group, *An Updated and Contemporary Adult Restorative Justice Conferencing model for Queensland Department of Justice and Attorney General* (Report, 2020) 1; Taskforce meeting with Dispute Resolution Branch staff, 11 February 2022, Brisbane.
16 Bolitho et al (n 5) 12.
17 Ibid 23.
18 Paul Gavin et al., 'Restorative justice in cases of sexual violence: current and future directions in the UK' (2023) 24(4) *Contemporary Justice Review* 393, 395.
19 Ibid 395; RMIT University, Centre for Innovative Justice, *Restorative Justice Conferencing Pilot Program, Background Paper* (2016) 2–3 ('*CIJ RJC Pilot Program Background Paper*').
20 Ibid
21 Ibid.
22 Ibid.
23 Ibid.

- gaining a deeper understanding of the impact of the offending on them;[24]
- repairing the relationship (where appropriate);[25] and
- opportunities for an earlier resolution of the matter.[26]

However, to support these outcomes, appropriate safeguards are needed. In particular, research has found:

- The risks of re-victimisation or re-traumatisation may be enhanced where the victim survivor is not provided with sufficient information to understand the restorative justice process and to decide whether they would like to participate, or where they hold unrealistic expectations with respect to its potential outcome which then does not eventuate.[27]
- While genuine apologies can benefit victim survivors, an insincere apology or an offender who shows no remorse can result in a victim survivor feeling worse after the process.[28]
- Where a victim enters these processes with fear or anger, their suffering may be exacerbated, impacting their recovery.[29]
- It is important for victim survivors to actively participate in those processes if the full benefits of their participation are to be realised.[30]

For those responsible for causing harm, studies have revealed potential benefits, including opportunities to:

- take responsibility for their actions and understand the impact of their crime on the victim survivor, including enhancing the person's sense of empathy for the victim survivor;[31]
- gain a sense of motivation to account for the harm;
- repair relationships with the victim survivor, where safe and appropriate;
- access appropriate treatment, rehabilitation programs and other support services to better understand the consequences of the offending and their reasons for doing so, and to discourage future recidivism;
- apologise and make amends by agreeing to the outcomes sought by the victim survivor.[32]

For more information, see section 10.8 of the **Consultation Paper: Background**.

It is challenging to assess the 'effectiveness' of restorative justice schemes for adults who have committed sexual offences as a means of reducing re-offending.[33] However, the evidence suggests these

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24 Bolitho et al (n 5) 23.
25 *CIJ RJC Pilot Program Background Paper* (n 19) 2–3.
26 Gavin et al (n 18) 396.
27 Ibid 397.
28 Ibid.
29 Ibid 396–7.
30 Bolitho et al (n 5) 20–4.
31 Gavin et al (n 18) 396.
32 *CIJ RJC Pilot Program Background Paper* (n 19) 2–3.
33 There have been limited studies into the experiences of those who engaged with these processes, and the existing literature relates to a broad range of programs, which operate at varying stages of the criminal process, for different types of offences, and involving different degrees of participation and consequences for non-compliance with any agreements.

processes can have a small positive impact on recidivism rates for violent crimes and are a better process for both parties than traditional justice mechanisms.[34]

Despite these findings, there remain mixed views on whether restorative justice processes should be made available for sexual violence matters, primarily due to concerns that it may be a retraumatising experience and may subject the victim survivor to further harm.[35] For this reason, it is critical that victim survivors retain the ability to choose to participate.

Those opposed to its use express concerns that diverting sexual violence offences away from the criminal justice system minimises the seriousness of sexual violence offending, fails to hold the offender to account and 'hides' these offences from the public eye.[36] Concerns have also been raised regarding the risks of re-traumatisation for victim survivors and that these processes are not psychologically or physically safe for the victim survivor to engage with, particularly when there are power imbalances between the parties, or where there is a risk of them being pressured into participating.[37] This is of particular concern where the sexual violence was perpetrated by a member of the victim survivor's family (intrafamilial sexual abuse). [38]

Advocates recognise that restorative justice processes may more appropriately meet the needs of victim survivors who do not want to proceed through the court system, restore relationships (where appropriate) as well as educating the offender about the consequences of their behaviour, with a view that this will encourage positive behaviours in the future.[39] Research also suggests the use of these approaches may be supported by the community.[40]

It is further recognised that restorative justice processes can be used as in addition to traditional criminal justice processes rather than just as alternatives to them, which may impact the extent to which they are viewed as appropriate. For example, if used as a post-sentence option, some of the concerns about the person failing to be held properly to account or of minimising the seriousness of the offending might not be as pronounced.

Universally, those who support restorative justice being made available have identified a need for proper safeguards and appropriate support for victim survivors to be built into the program model. Ensuring these processes do not infringe upon the human rights of either party, particularly where they are vulnerable or from culturally or linguistically diverse populations, is part of this.

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34 Heather Strang et al, 'Restorative Justice Conferencing (RJC) Using Face-to-Face Meetings of Offenders and Victims: Effects on Offender Recidivism and Victim Satisfaction. A Systematic Review' (2013) 9(1) *Campbell Systematic Reviews* 1, 2, 47.

35 Meredith Rossner and Helen Taylor, 'The Transformative Potential of Restorative Justice: What the Mainstream Can Learn from the Margins' (2024) *Annual Review of Criminology* 357, 368.

36 Bolitho et al (n 5) 23.

37 Gavin et al (n 18) 396; Bolitho et al (n 5) 23.

38 Gavin et al (n 18) 396.

39 Bolitho et al (n 5) 23.

40 See, for example, Jennifer Duff, *Perceptions of and Confidence in Canada's Criminal and Civil Justice Systems: Key Findings from the 2023 National Justice Survey* (Research in Brief, 2024). A majority of respondents (58%) supported the use of restorative justice processes for these offences provided both the victim and offender wished to participate. This was, however, the lowest of all offences supported as being eligible for restorative justice, with property offences and robbery being viewed as the most suitable (by 82% of respondents).

16.3.3 The current position in Queensland

Queensland has two separate restorative justice pathways, depending on whether the offence was committed by a young person (a person under 18 years) or an adult. The Council's analysis within this review predominantly focuses on restorative justice pathways as they apply to adults.

Adult restorative justice pathways

Queensland offers Adult Restorative Justice Conferencing ('ARJC') (formerly known as 'justice mediation') through the Dispute Resolution Branch ('DRB') of the Department of Justice ('DOJ').

Unlike its use in the juvenile justice system - which has been formally legislated[41] - there is no legislative framework that expressly allows a court in Queensland to order an adult, with their consent, to participate in ARJC either as part of the conditions of their sentence or prior to/after the sentence. ARJC processes have developed through an application of the *Dispute Resolution Centres Act 1990* (Qld) ('DRC Act') in combination with the power of the courts to adjourn proceedings.

Through the DRB, accredited mediators (convenors) support victims of crime to meet with those who have perpetrated harm against them in a conference format outside the court system, to encourage perpetrators to take responsibility for their actions and take steps towards repairing that harm. As distinct from traditional criminal justice models, ARJC provides an opportunity for the victim to tell their story in their own words and to hold the perpetrator accountable for their actions outside of the courtroom. Families, friends and other support persons can attend the conference with the victim survivor.

The DRB operates ARJC services from the Brisbane, Ipswich, Townsville, Cairns and Gold Coast regions. Additionally, the local community justice groups from Mornington Island (Junkuri Laka) and Aurukun provide restorative justice services.[42]

At the time of the Women's Safety and Justice Taskforce ('WSJ Taskforce') review, the DRB facilitated approximately 200 mediation sessions (conferences) in response to the 350 referrals it received annually.[43] DRB reported a small but increasing number of domestic violence and sexual offences cases being referred to ARJC, with an even smaller number proceeding to conference (due to an intensive suitability assessment process).[44] DRB reports there is a high satisfaction rate of 93 per cent for both victims and offenders.[45]

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41 *Youth Justice Act 1992* (Qld) Part 3.

42 Queensland Police Service, *Operational Procedures Manual* (Issue 102, Public Edition, 1 October 2024) Chs 3 'Prosecution process', 3.3 'Adult Restorative Justice Conferencing' 9 ('QPS OPM').

43 Women's Safety and Justice Taskforce, *Hear Her Voice, Report Two: Women and Girls' Experiences Across the Criminal Justice System* (2022) 386 ('*Hear Her Voice, Report Two*').

44 Ibid.

45 Dispute Resolution Branch submission to the Queensland Sentencing Advisory Council's review of sentencing for child homicide offences, 14 August 2018, <https://www.sentencingcouncil.qld.gov.au/__data/assets/pdf_file/0011/580871/Submission-37-DisputeResolution-Branch.pdf>.

Participation in ARJC is entirely voluntary[46] and discussions within the conference setting are both confidential[47] and subject to privilege. [48] Any agreement reached through a mediation session is not enforceable.[49]

Referrals to ARJC can be made by the court, police, prosecutors, corrective services and victims of crime or suggested by defence practitioners.[50]

The service is currently used primarily as a diversionary option for criminal matters at the pre-conviction stage, although an ARJC can also be requested at other stages of the criminal justice process – including as a pre-sentence and post-sentence option, as follows:[51]

- Pre-sentencing options: A referral can be made before a person is charged with an offence (via a police referral), or before a court hearing (by either the prosecution or a judicial officer).
- Post-sentencing options: A referral can be made after sentence (Queensland Corrective Services).

The DRB may refuse a referral or return the matter to the prosecution service where it is deemed unsuitable for ARJC processes, such as where either party withdraws, there is a disagreement about the facts of the offence, the parties cannot come to a resolution or there is a risk of further harm in continuing.[52]

Where the ARJC process is used as a pre-sentence option and is 'successful' (i.e. results in an agreement that is completed or complied with), the criminal investigation or proceeding will usually cease (either by way of paper nolle or offering no evidence to the charges), unless there are exceptional circumstances.[53]

While conferencing is most commonly used for offences sentenced in the Magistrates Court (such as wilful damage or common assaults), it can also be used for more serious offences – including domestic violence offences (with the approval of the officer in charge of police prosecutions).[54] Similarly, the Office of the Department of Public Prosecutions ('ODPP') can refer any matter to ARJC where it is deemed to be in the public interest.[55] However, its use for sexual violence offences has traditionally been limited;[56] the Director's Guidelines outline that it is usually in the public interest to proceed with the criminal prosecution of these offences.[57]

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46 *Dispute Resolution Centres Act 1990* (Qld) s 31.
47 Under the *Dispute Resolutions Centres Act 1990* (Qld), a 'relevant person' (including a mediator or member of the DRB staff) must not disclose information obtained in connection with the administration of the Act unless authorised under s 37 of the DRCA. This includes where the person from whom the information was obtained consents to this, or in accordance with a requirement imposed by or under a law of the State (other than imposed by a subpoena or other compulsory process) or the Commonwealth.
48 *Dispute Resolution Centres Act 1990* (Qld) s 36.
49 Ibid s 31(3).
50 QPS OPM (n 42) Part 3.3 and the Office of the Director of Public Prosecutions' *Directors' Guidelines* (as at 30 June 2023) ('*ODPP Director's Guidelines*') sets out the operational procedures of ARJC in Queensland.
51 *Hear Her Voice, Report Two* (n 43) vol 1, 386-7.
52 QPS OPM (n 42) 3.3.5. Reflected in Submission 21 (Dispute Resolution Branch) 4.
53 QPS OPM (n 42) 3.3.6.
54 Ibid 3.3.1.
55 *ODPP Director's Guidelines* (n 50) 3, 3.
56 Submission 19 (Basic Rights Queensland) 4.
57 *ODPP Director's Guidelines* (n 50) 3(iv), 3.

Restorative youth justice conferencing

Queensland has a separate Youth Restorative Justice Conferencing ('YRJC') model, which applies when an offender was under 18 years of age at the time they committed the offence. As discussed above, this model has been formally legislated in the *Youth Justice Act 1992* (Qld).[58]

The sentencing court is required to consider engagement with pre-sentencing restorative justice processes at sentence, including any participation, obligations or actions taken by the child as part of YRJC, and any information provided by the chief executive in relation to the sentencing of the child.[59]

Referrals can be made for sexual violence matters committed by children, including rape and sexual assault offences.

There are various ways in which a YRJC referral can be made, as outlined in Table 16.1 [60]

58 *Youth Justice Act 1992* (Qld) pt 3.
59 Ibid s 167(6).
60 Ibid pt 3.

Table 16.1: Youth Restorative Justice Conferencing Referral Types

Type of referral	The referral is made when the young person:	Consequence of non-compliance or non-completion
Police referral to restorative justice conference	Admits the offence to police and is referred to RYJC rather than court. Charges are dismissed.	**Returned to police**, who will either: return the charges to court; provide another chance to attend a conference; issue a caution; or take no action.
Court referral to a police diversion referral	Enters a plea of guilty to the court, but the court decides that it is a matter where police could have referred them to RYJC, and subsequently does so. Charges are dismissed.	**Returned to police**, who will either: return the charges to court; provide another chance to attend a conference; issue a caution; or take no action.
Court diversion referral to a restorative justice conference	Enters a plea of guilty to the court and is offered the chance to proceed to RYJC instead of being sentenced for the offence.	**Returned to court**, who will either: re-sentence them; provide another chance to attend a conference; or take no action.
Court referral to a police diversion referral	Enters a plea of guilty to the court, but the court decides that is a matter where police could have referred them to RYJC, and subsequently does so. Charges are dismissed.	**Returned to police**, who will either: return the charges to court; provide another chance to attend a conference; issue a caution; or take no action.
Police referral to restorative justice conference	Admits the offence to police and is referred to RYJC rather than court. Charges are dismissed.	**Returned to police**, who will either: return the charges to court; provide another chance to attend a conference; issue a caution; or take no action.
Pre-sentence referral to restorative justice conference	Enters a plea of guilty to the court and is referred to RYJC prior to sentencing. Their participation in this conference can be considered by the court when determining the appropriate sentence.	**The sentencing court will be told** and will have regard to this in sentencing the young person for the offence.
Restorative justice order (with supervision)	The young person is ordered to participate in RYJC as part of their sentence. The young person must agree to participate in the conference for this order to be made.	**Returned to court**, and the young person will be resentenced for the original offences.

Source: 'Restorative justice for young people and their families (Department of Youth Justice, accessed 6 November 2024: https://desbt.qld.gov.au/youth-justice/parents-guardians/programs-initiatives/initiatives/restorative-justice-conferences/for-young-people>).

YRJC processes are intended to divert children away from the criminal justice system, and involve the participation of the young person, a convenor and a victim participant - either the attendance of the victim survivor, their representative or a representative from an organisation that advocates for victims of crime.[61] The young person must be informed about the process and be willing to participate and comply with the referral or restorative justice order and to otherwise be found suitable to participate.[62]

61 Queensland Family & Child Commission, 'Restorative Justice Conferencing in Queensland' (Report, June 2023) 7.
62 See *Youth Justice Act 1992* (Qld) ss 22(3), 163(1)(b)–(c), 192A(1)(b)–(c).

WSJ Taskforce recommendations

The WSJ Taskforce recognised the value of restorative justice conferencing as an alternative pathway to the criminal justice system for women and girls who experience crime in *Hear Her Voice – Report Two: Women and Girls' Experiences Across the Criminal Justice System* ('*Hear Her Voice – Report Two*').[63] They also found that these processes should be made available for sexual violence offences.

The WSJ Taskforce subsequently made three recommendations in support of the expansion of adult restorative justice in Queensland:

- identifying options for the expansion of a sustainable and accessible ARJC;[64]
- co-designing a victim-centric legislative framework with people with lived experience, Aboriginal and Torres Strait Islander peoples and service and legal system stakeholders. This framework will include the consideration of a set of overarching principles, operational processes, eligibility criteria, expertise of convenors and inbuilt safeguards for its use.[65]
- undertaking a pilot restorative justice program for adult sexual and domestic and family violence offences.[66]

In developing a legislative framework to support this model, the WSJ Taskforce considered the Queensland Government's previous commitment to developing an updated ARJC model, as well as considering its expansion, as a response to a recommendation by the Queensland Productivity Commission.[67]

Within this context, the WSJ Taskforce recommended that the risks specific to sexual offending and domestic and family violence be considered and tested through a dedicated pilot program 'to enable the safe use of restorative justice in sexual offence cases'.[68] The Taskforce also recommended that legislative amendments be made to encourage the use of diversionary options including ARJC processes.[69] Consultation with women with lived experience as accused persons and offenders, service systems and legal stakeholders who support them and First Nations peoples was also recommended within the context of the consideration of recommendations regarding the expanded use of restorative justice in Queensland and development of a victim-centric legislative framework in support of this.[70]

In response, the former Queensland Government committed to 'explore options for a sustainable long-term plan for the expansion of adult restorative justice services in Queensland', and for the 'content and design of the legislative framework' to be informed by this work.[71] It further committed to 'fund and undertake' a pilot program and for this to be evaluated after the required legislative framework is in place.[72]

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63 *Hear Her Voice, Report Two* (n 43) recs 90–92, 97, 125.
64 Ibid rec 90.
65 Ibid rec 91.
66 Ibid rec 92.
67 Queensland Productivity Commission, *Inquiry into Imprisonment and Recidivism* (Report, August 2019) rec 8.
68 *Hear Her Voice, Report Two* (n 43) 395.
69 Ibid rec 97.
70 Ibid rec 125 with references to recs 90 and 91.
71 Queensland Government, *Queensland Government Response to Hear Her Voice - Report Two - Women and Girls' Experiences Across the Criminal Justice System* (2022) ('*Response to Hear Her Voice, Report Two*') 8.
72 Ibid.

In May 2023, the Legal Affairs and Safety Committee also supported the Taskforce's recommendation regarding the expansion of adult restorative justice services in its report on its inquiry into support provided to victims of crime.[73]

DRB in DOJ is leading the response to these recommendations, with funding allocated to undertake the first stage of this project, including considering options that are sustainable, victim-centric, culturally safe, trauma-informed and accessible to all Queenslanders.[74]

DRB reports it temporarily expanded ARJC services in 2023–24 to increase its accessibility for all Queenslanders, which was reflected in an increased number of conferences held.[75]

The 2023–24 annual report on progress of implementation of the WSJ Taskforce recommendations reports that work is continuing to develop restorative justice services for adult sexual and domestic and family violence offences and to explore options for a staged expansion.[76] It reports that '[r]esearch-based analysis of the key elements of restorative justice conferencing services' has been completed, and '[s]takeholder consultation on options for a sustainable long-term plan to expand adult restorative justice conferencing' has commenced.[77] It also notes that a Restorative Justice Sexual and Gender-based Violence practice guide is also being developed and is expected to be delivered in 2024.[78]

As the model is still in development, the planned pilot program has not been established or evaluated.

16.3.4 Restorative justice processes in other jurisdictions

There is currently no national framework for the application of adult restorative justice in Australia. Restorative justice schemes for adult offending exist in the Australian Capital Territory ('ACT'),[79] and to a limited degree, in New South Wales ('NSW') (after the person has been convicted while serving their sentence)[80] and Victoria.[81]

Restorative justice schemes for adult sexual violence offending are only available in the ACT and NSW (albeit limited), but they are used to a greater extent overseas, including in several European countries,[82] England and Wales, Ireland, Canada and New Zealand ('NZ').[83]

Unlike Queensland's approach, the ACT and NZ have statutory schemes that both consider the relevance of restorative justice processes when sentencing. These models have been recognised as best practice.[84]

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73 Queensland Parliament, Legal Affairs and Safety Committee, *Inquiry into Support Provided to Victims of Crime* (Report No 48, 57th Parliament, May 2023) Recommendation 9.
74 Submission 21 (Dispute Resolution Branch) 1–4.
75 Department of Justice and Attorney-General, *Annual Report 2023–24* (2024) 126.
76 Queensland Government, *Women's Safety and Justice Reform: Second Annual Report 2023–24* (May 2024) 14.
77 Ibid 79 (rec 90 - status).
78 Ibid.
79 See *Crimes (Restorative Justice) Act 2004* (ACT).
80 Victorian Law Reform Commission, *Improving the Justice System Response to Sexual Offences* (Report, September 2021) [9.12] ('*Improving the Justice System Response to Sexual Offences*').
81 For more information, see Queensland Sentencing Advisory Council, *Sentencing of Sexual Assault and Rape: The Ripple Effect – Consultation Paper – Background* (March 2024) and Women's Safety and Justice Taskforce, *Hear Her Voice Report Two* (n 43) 388.
82 Including Belgium, Denmark and Norway.
83 *Improving the Justice System Response to Sexual Offences* (n 80) [9.15].
84 Ibid.

- In the ACT, a matter can be referred to restorative justice processes either pre-sentence[85] or as a part of the sentence as a 'sentence-related order'.[86] Where the offending person participates in a restorative justice conference prior to sentence, their participation must be considered by the judge as an acceptance of responsibility for the offence when deciding how they should be sentenced (if at all).[87] However, while the court can consider a person's participation in restorative justice processes, the court may not increase the severity of the sentence because the person chose not to take part, or to continue to take part, in restorative justice.[88]
- In NZ, the sentencing court must take into account the outcomes of any completed restorative justice processes, or that the court is satisfied are likely to occur, in relation to the particular case.[89] A facilitator's report is provided to the sentencing judge, who decides whether to include any agreements made at the restorative justice conference as part of the sentence.[90] When considering the extent to which any offer, agreement, response or measure to make amends should be taken into account in sentencing, the court must consider whether or not it was genuine and capable of fulfilment, and whether or not it has been accepted by the victim as expiating or mitigating the wrong.[91]
- In England and Wales, participation in restorative justice processes can form part of a 'rehabilitation activity requirement' that can be attached as a condition to community sentence or suspended sentence.[92] This condition requires the person to comply with any instructions they are given by a responsible officer to participate in activities, which can include those whose purpose is reparative, such as restorative justice activities.

The legislative models and reviews in other jurisdictions are discussed in more detail in Chapter 10 of the **Consultation Paper: Background**.

16.3.5 What we know from earlier reviews of restorative justice processes as they apply to sexual offences

Evaluations of restorative justice processes that apply to sexual offending offer some evidence of the efficacy of these processes in meeting the needs of victim survivors, in repairing the harm caused by the offending and in reducing reoffending.

The Justice Reform Initiative in its submission to our review, particularly highlighted that more recent examples of restorative justice processes in Australia and New Zealand had 'indicated positive results in

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85 The ACT prescribes a legislative framework for restorative justice processes, which outlines an intention to 'enhance the rights of victims of offences by providing restorative justice as a way of empowering victims to make decisions about how to repair the harm done by offences': *Crimes (Restorative Justice) Act 2004* (ACT) s 6. This framework outlines who is eligible to participate in restorative justice conferencing, including the victim survivor, an immediate family member if the victim is younger than 10 years old and a parent of a child victim and the offending person who must accept responsibility for the offence (or in the case of a young offender, not deny responsibility) and agree to take part in restorative justice: *Crimes (Restorative Justice) Act 2004* (ACT) ss 17–19.

86 Ibid s 13.

87 *Crimes (Sentencing) Act 2005* (ACT) s 33(1)(y).

88 Ibid s 34(1)(h).

89 *Sentencing Act 2002* (NZ) ss 8(j), 10(3).

90 New Zealand, Department of Justice, 'How Restorative Justice Works' (19 December 2022). <https://www.justice.govt.nz/courts/criminal/charged-with-a-crime/how-restorative-justice-works>.

91 *Sentencing Act 2002* (NZ) s 10.

92 *Sentencing Act 2020* (UK) ss 200, 286 and sch 9, pt 2. Parts 2–13 of this Act constitute the 'Sentencing Code': s 1.

terms of victim satisfaction, reduced offending, and a reduction in re-victimisation through the justice process'.[93]

Australian Capital Territory

A recent evaluation conducted by the Australian Institute of Criminology ('AIC') found that its expansion of restorative justice conferencing to include sexual violence offences and domestic and family violence ('DFV') offences (Phase Three)[94] had 'provided an important mechanism for persons harmed to seek redress in the aftermath of sexual violence and DFV victimisation, and for persons responsible to address the factors associated with their offending' through access to treatment options.[95]

The evaluation identified that victim survivors of sexual violence offences or DFV who participated in the program were motivated to pursue restorative justice processes as an alternative to formal criminal proceedings, particularly where they wanted to confront their offender within a 'safe' conference setting and to 'have their experiences heard, to encourage the person responsible to get help or give back to the community, and to try and make sure that the person responsible would not reoffend'.[96]

However, the AIC evaluation found that referrals for sexual violence offences were lower than expected, which was attributed to factors including referring agencies perceptions that restorative justice 'privatised' responses to sexual violence.[97] Restrictive eligibility criteria that require a finding of guilt prior to a referral being made were also seen to have contributed to low rates of referral.[98] Those interviewed noted that these cases were unlikely to be referred during later stages of the criminal justice process, due to high levels of attrition associated with these cases[99] and low levels of guilty pleas.[100]

The AIC evaluation also identified a need for more methodologically rigorous evaluations of restorative justice processes, recognising the limited numbers of peer-reviewed evaluations.[101]

Victoria

A review conducted by the Victorian Law Reform Commission ('VLRC') in 2021, which considered improvements to justice system responses to sexual offences in Victoria, found strong support for the development and implementation of a restorative justice program as a mechanism to enable all parties

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93 Submission 13 (Justice Reform Initiative) 2.

94 The Restorative Justice Scheme in the ACT is administered by the Restorative Justice Unit (RJU) within the Justice and Community Safety Directorate of the ACT Government. There have been three stages of delivery to date: Phase One commenced in the early 2000's and enabled police diversions through restorative justice conferencing for young people who had committed minor offences; Phase Two commenced in 2016 and involved an expansion of the program to adult offences, as well as serious offences; Phase Three commenced in 2018 and involved the expansion of the program to include DFV and sexual violence offences.

95 Siobhan Lawler, Hayley Boxall and Christopher Dowling, *Restorative Justice Conferencing for Domestic and Family Violence and Sexual Violence: Evaluation of Phase Three of the ACT Restorative Justice Scheme* (Final Report prepared for the Australian Institute of Criminology, 2023) 9–12.

96 Ibid 10.

97 Ibid.

98 Ibid 14.

99 Ibid.

100 Ibid 47.

101 Ibid 15 citing Daye Gang, Bebe Loff, Bronwyn Naylor and Maggie Kirkman, 'A Call for Evaluation of Restorative Justice Programs' (2021) 22(1) *Trauma, Violence, & Abuse* 186. The only evaluation which met the criteria was of the Arizona RESTORE program, based on 22 cases (Koss, 2014). The program was found to decrease the rates of diagnosed post-traumatic stress disorder in survivor victims, most participants agreed or strongly agreed that their preparation for the conference achieved its intended goals, and all survivor victims who attended their conference were satisfied with the conference.

who have been affected by a sexual offence to better understand the harm, and to work together to repair it.[102]

The VLRC outlined risks associated with employing restorative justice processes for sexual offences, including concerns that it minimises the seriousness of this type of offending and 'hides' sexual offending from the public eye, and that it could retraumatise victim survivors by transplanting them back into the 'dynamics of the original violence' or having their offender deny responsibility.[103]

The VLRC subsequently proposed a set of guiding principles to ensure that restorative justice processes are appropriate for sexual offences by:

- managing the risks associated with using these processes for sexual violence offences;
- governing the interaction between the proposed model and the existing criminal justice system; and
- assigning responsibility for oversight of the restorative justice scheme, including training requirements for convenors/facilitators. [104]

Guiding principles recommended were:

> Voluntary participation: Consent is informed and participants are free to withdraw at any time.
>
> Accountability: The person responsible accepts responsibility. Outcome agreements are fair and reasonable.
>
> The needs of the person harmed take priority: The process centres on the needs and interests of the person harmed.
>
> Safety and respect: Safety measures are provided. The process is flexible and responsive to diverse needs, including the needs of children and young people, and of Aboriginal communities. Power imbalances are redressed, and the dignity and equality of participants is respected. The process is supported by skilled personnel with specialist expertise in sexual violence, and it is well resourced.
>
> Confidentiality: What is said and done during restorative justice is confidential, with some exceptions.
>
> Transparency: De-identified results are publicised to contribute to continuous program improvement. Programs are regularly evaluated.
>
> An integrated justice response: The process is part of 'an integrated justice response'. Other criminal and civil justice options are available, as well as therapeutic treatment programs.
>
> Clear governance: Legislation sets out the guiding principles, provides for implementation and oversight, and explains how restorative justice interacts with the criminal justice system.[105]

New South Wales

Qualitative research undertaken by KPMG, in partnership with RMIT University's Centre for Innovative Justice, found that many victim survivors who reported sexual violence offending to police did so to ensure their offender understood their behaviour to be criminally wrong. However, the study also found that many

102 *Improving the Response of the Justice System to Sexual Offences* (n 80) Chapter 9.
103 Ibid [9.49]–[9.58].
104 Ibid Chapter 9.
105 Ibid [9.64].

victim survivors regretted making a report to police as they would have preferred an alternative approach to the criminal justice system, which exposed them to further trauma ('new trauma'). [106]

It recommended that the NSW government explore the development of a victim survivor-led sexual violence restorative justice service to operate alongside traditional legal processes to 'enable victim-survivors to pursue a justice response that suits their experience and recovery', including providing them with a voice, recognition, information, receiving an apology and having reparations made.[107]

United Kingdom

A 2022 United Kingdom ('UK') study into the utility of restorative justice conferencing found support for restorative justice conferencing in sexual violence matters. [108] However, the study concluded that additional empirical evidence was required to better understand best practice and to ensure its safe optimisation for victim survivors of sexual violence.[109]

One aspect of the study involved a panel discussion with eminent restorative justice researchers and scholars, which revealed five key themes:

- There is broad dissatisfaction with using the term 'justice' to describe these processes as, while they have a restorative focus, they may not always result in a justice outcome.
- There is a belief these processes will be too hard for a victim survivor to engage with, without recognising that qualified convenors can manage any risks.
- It is important for there to be sufficient flexibility to allow the parties to participate in a conference model that best suits their needs.
- Trauma-informed processes are required to ensure the safety of both parties.
- It is critical that victim survivors understand the process and the potential outcomes before entering the process.[110]

The post-conference survey revealed broad support for the use of restorative justice processes in sexual violence matters that are victim survivor-led (only available where they choose to participate) and where there is enhanced training of facilitators to appropriately address risks of revictimization, re-traumatisation, and power imbalances.[111] It was suggested that facilitators and convenors must have: '(1) a deep appreciation of sexual trauma and its impact, (2) an understanding of the psychology of the offender and (3) a working knowledge of the dynamics of sexual violence'.[112] Inter-agency collaboration (particularly where the offender is incarcerated) was recognised as being important to assist the facilitator to gain a deeper understanding of the offending person.[113]

The survey also revealed that enhanced public awareness of restorative justice processes is required.[114]

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106 KPMG and Centre for Innovative Justice, ' This is my story. It's your case, but it's my story'. Interview study: Exploring justice system experiences of complainants in sexual offence matters' (Research report, NSW Department of Communities and Justice, NSW Bureau of Crime Statistics and Research, 31 July 2023) 114.
107 Ibid xii, 114 (Recommendation 13).
108 Gavin et al (n 18) 393.
109 Ibid 404.
110 Ibid 398.
111 Ibid 401–3.
112 Ibid 403.
113 Ibid 404.
114 Ibid 399–400.

Australian Law Reform Commission review

The ALRC has been asked by the Commonwealth Attorney-General to consider 'alternatives to, or transformative approaches to, criminal prosecutions, including restorative justice, civil claims, compensations schemes and specialist court approaches' as part of its current inquiry into justice responses to sexual violence.

The ALRC has invited feedback from victim survivors and members of the community regarding whether restorative justice pathways should be available in sexual violence matters and, if so, how.[115] The ALRC has also sought feedback on current restorative justice reforms and their effectiveness, as well as broader views surrounding how to implement restorative justice pathways as a way of responding to sexual violence.[116]

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

16.3.6 Stakeholder views

In our Consultation paper, we invited feedback on the Queensland Government's existing commitment to 'explore options for a sustainable long-term plan for the expansion of adult restorative justice services in Queensland'. We specifically invited feedback on:

- how pre-sentencing restorative justice processes for adults convicted of rape and sexual assault might be considered at sentence (Q.20); and
- whether there are any relevant sentencing considerations that might arise should a new legislative restorative model be introduced in Queensland (Q.21).

Submissions from legal stakeholders

Intersection between ARJC pathways and the Queensland sentencing regime

In its submission, DRB acknowledged that there has been a shift in Queensland from the question of whether ARJC processes should be available for sexual violence offences to how they can be safely and effectively used for offences involving sexual violence.

In considering the work currently underway to establish a formalised process for adult restorative justice, as well as progressing a pilot program for adult sexual and DVO offences,[117] the DRB raised various factors for consideration, including:

- 'Any proposed use of ARJC outcomes in sentencing should be trauma-informed and not cause further harm to the victim'. The importance of assessing a participant's suitability to engage with ARJC processes was raised.[118]
- 'The protection of the victim's rights and needs, including confidentiality, must be considered'. This includes consideration of how information should be shared by the court in a way that is confidential. Suggestions included the provision of either a general or detailed statement by the ARJC outlining the general or specific outcome of the conference, or enabling a victim to comment

115 See Australian Law Reform Commission, 'Justice Responses to Sexual Violence' (web page, 23 January 2024) <https://www.alrc.gov.au/inquiry/justice-responses-to-sexual-violence>.
116 Ibid.
117 Submission 21 (Dispute Resolution Branch) 1.
118 Ibid 2.

on the outcomes within their Victim Impact Statement to provide the court with increased insight into the outcome of ARJC, while maintaining a victim-centric approach.[119] Whether this process requires victim survivor permission is also a relevant factor for consideration, particularly where the victim survivor is not happy with the outcome.[120]

- 'The time to complete ARJC outcomes may not meet the court's needs'. For example, it may take longer for the victim survivor to 'ready' themselves to participate in ARJC conferencing. Current ARJC processes also allow 6 months after conferencing for any agreed outcomes to be carried out. [121]
- 'With proper protection of victims' rights, justice could be promoted through the consideration of ARJC outcomes in sentencing'. It was suggested that a statement could be prepared by ARJC outlining the general outcome of the conference and any steps taken by the offender for the consideration of the court at sentence.[122] Alternatively, this information could be reflected within a VIS, as a victim-centric mechanism for the victim survivor to inform the court about the rehabilitative steps that have been taken.[123]
- 'Sentences or community-based orders that include participation in a future ARJC are problematic'. This is particularly so where a person or the circumstances may subsequently be deemed unsuitable for ARJC processes.[124]
- 'A sentence should not be increased if an offender did not choose to take part in ARJC'. This is because it is important for participants to engage on a voluntary basis for ARJC to be a safe and successful process.[125]
- 'A sentence should not be increased because a referral does not progress to conference'. This recognises that a variety of reasons exist for why it may not occur, and the person being sentenced should not be penalised for this.[126]

Legal Aid Queensland ('LAQ') supported restorative justice outcomes being considered at sentence to enable a sentencing court to take into account a person's 'participation in the restorative justice process, and whether the terms of an outcome agreement were met, or whether an offender has made progress towards meeting the terms of the agreement',[127] as this 'would incentivise meaningful engagement in the process.'[128]

LAQ recommended that the new Queensland ARJC model should combine elements of the ACT and NZ legislative approaches to require a court to take into account any engagement with, or agreement reached through, restorative justice processes in sentencing the person, noting:

119 Ibid.
120 Ibid.
121 Ibid 2–3.
122 Ibid 3.
123 Ibid.
124 Ibid.
125 Ibid 4.
126 Ibid.
127 Submission 23 (Legal Aid Queensland) 32.
128 Ibid.

> LAQ recommends a model which combines these approaches, which allows a court to explicitly take into account the agreement made and any steps made towards meeting the agreement, but that also reflects the voluntary nature of the process.[129]

To ensure compliance with any outcome agreement, it suggested:

> A sentencing court could use its powers to defer sentencing after conviction for a period of time sufficient to determine if the terms of the agreement were met. If the terms of the agreement were not met, a sentencing court would be able to take this into account.[130]

Critically, both the DRB and LAQ submitted that, as this should be a voluntary process, 'a sentencing court should not increase a sentence because an offender chose not to take part in the process or stopped taking part'.[131]

LAQ made further recommendations, including that:

- Any legislative reform should be 'accompanied with significant resources to the Restorative Justice branch … to ensure the option is available through the state and that delays are minimised' – recognising the limited options to access ARJC outside of Brisbane. It was suggested that technology could be leveraged to enhance access.[132]
- Any sentences or restorative justice processes should be 'both culturally informed and sensitive' to support the rehabilitation of sexual offenders.[133] Recommendations for achieving this included: prescribing that a convenor must consider inviting a respected member of the person's community or a community justice expert to attend;[134] ensuring that parties are notified of their right to legal representation within this process; [135] and ensuring that convenors have 'adequate training to support understanding of First Nations defendants and defendants suffering from disadvantage and complex needs'.[136]
- Opportunities should be explored for remote attendance (such as through pre-recorded communication or through a representative).[137]
- Where a victim survivor refuses to participate, there should be an obligation on the prosecution to provide evidence that they have informed the victim survivor about ARJC and the court process.[138]
- Alternative mediation models should be considered to accommodate for circumstances where the victim survivor does not want to participate, but the perpetrator does.[139]

It was recognised by the Youth Advocacy Centre that pre-sentence youth restorative justice processes 'have been effective in assisting the [Childrens] Court in determining the appropriate sentence', particularly as 'willingness to participate in the restorative justice process prior to sentencing' has been

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129 Ibid 33.
130 Ibid 32.
131 Ibid; Submission 21 (Dispute Resolution Branch, DJAG) 4.
132 Submission 23 (Legal Aid Queensland) 34.
133 Ibid 11.
134 As is required for the YRJC model.
135 As is required for the YRJC model.
136 Submission 23 (Legal Aid Queensland) 34.
137 Ibid.
138 Ibid.
139 Ibid.

considered to be a factor in the offender's favour.[140] They viewed this as beneficial as it 'demonstrates to the victim the offender's willingness to see the harm caused to the victim and helps [identify] the offender's remorse and willingness to repair harm'.[141]

In considering when in the proceeding these processes should occur, Basic Rights Queensland ('BRQ') emphasised the importance of ensuring that restorative justice pathways can be accessed at any stage throughout a proceeding, similar to the New Zealand Project Restore model.[142]

Subject matter expert interview participants

Potential use of RJ processes for sexual violence matters

The majority of subject matter expert ('SME') participants were generally supportive of exploration of restorative justice processes to better meet the needs of victim survivors of sexual violence.[143] Some participants raised concerns,[144] and two were opposed to its use in sexual violence matters.[145]

Participants were broadly in support of exploring restorative justice processes for lower-level sexual offending where an adult was the victim.[146] In particular, this was seen as 'a huge missed opportunity particularly for some lower level assaults' against an adult woman where a desired outcome might be an apology and acknowledgement that they had been wronged.[147]

If a perpetrator was willing to engage in the process, one participant considered the process to hold educational value,[148] and to be meaningful to their rehabilitation.[149] Another participant acknowledged that restorative justice processes may be less traumatic for victim survivors than an adversarial trial process (which may result in an acquittal),[150] and that this may also represent a faster way to finalise the matter, which can be beneficial for victim survivors.[151]

The Council also heard that private mediation was being used in cases of low-level sexual violence.[152] One legal practitioner advised that some private mediators in the Brisbane region already work with families to help them work through the offending and its impact on the family; where appropriate, this may be a relevant sentencing factor.[153] Another practitioner referred to it being used successfully in cases of sexual assault in the context of a friendship where excess alcohol was consumed.[154]

Other participants recognised a need for restorative justice processes for sexual violence matters,[155] and highlighted the importance of avoiding blanket rules that prevent these processes from being engaged in circumstances where it is appropriate.[156] For example, one legal practitioner reflected that restorative

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140 Submission 30 (Youth Advocacy Centre) 9.
141 Ibid.
142 Submission 19 (Basic Rights Queensland) 4.
143 SME Interviews 3, 6, 7, 8, 9, 13, 14, 16, 17, 20, 21, 22, 23, 25, 26.
144 SME Interviews 7, 13.
145 SME Interviews 4, 10.
146 SME Interviews 7, 8, 14. SME Interview 10 had doubts about the process for child sexual abused matters.
147 SME Interview 14.
148 SME Interview 14.
149 SME Interview 16.
150 SME Interview 8.
151 SME Interview 8.
152 SME Interview 2.
153 SME Interview 2.
154 SME Interview 14.
155 SME Interview 14.
156 SME Interviews 6, 22.

justice 'shouldn't necessarily be put to one side merely because of the [seriousness of the] offences themselves'.[157]

However, nearly all participants who supported the extension of restorative justice processes recognised that it should only be done in appropriate circumstances where the victim survivor consented to engage with this process,[158] which some participants thought may be unlikely or unusual.[159]

Not all participants supported restorative justice processes for sexual violence matters. For example, participants expressed concerns that restorative justice processes:

- may involve power imbalances between the victim survivor and the offending person which puts them at risk, with this participant also concerned about the use of these processes where the victim survivor and perpetrator were unknown to one another;[160]
- are not 'suitable' pathways, and that allowing them to be used in these cases may not meet community expectations;[161]
- may be exploited by 'more well-off' individuals who use them to 'buy their way out of a conviction';[162]
- would not be meaningful in circumstances where their perpetrator had pleaded guilty for convenience, not out of a sense of remorse;[163]
- may not be useful where the victim survivor is a child, and their parent is heavily involved in directing the restorative justice conference.[164]

Another participant said that, in their experience, most victim survivors do not wish to participate or be involved in conferences with their offender, and a restorative justice process is diminished where the victim survivor does not wish to be involved and a victim survivor representative is arranged.[165] However, another participant thought this process should still be available in circumstances where the victim survivor does not wish to be involved, because of the meaningful benefits for the perpetrator's rehabilitation.[166]

Challenges with current restorative justice pathways and processes

When discussing the current restorative justice process more broadly, practitioners raised challenges with the existing model. For example, one participant noted that while the Office of the Director of Public Prosecutions' *Director's Guidelines* have been changed to enhance consideration of restorative justice pathways, submissions to refer a matter are still being rejected by the DPP without reasons being provided.[167]

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157 SME Interview 26.
158 For example, SME Interviews 24, 25.
159 SME Interviews 15, 22.
160 SME Interview 4.
161 SME Interview 10.
162 SME Interview 4.
163 SME Interview 7.
164 SME Interview 21.
165 SME Interview 15.
166 SME Interview 16.
167 Ibid.

Other participants noted there is currently a significant delay in engaging with adult justice mediation processes (for all offences). Matters must be adjourned for a lengthy period for the process to occur, which impacts when a matter is finalised.[168]

Some SME participants also raised funding and access challenges – particularly for matters heard in rural, regional and remote areas where these restorative justice processes may not be available.[169] For example, one participant reflected that they were unable to refer a sexual assault matter in a regional centre for restorative justice because of a lack of funding in the area, even though the victim was very motivated to do so and 'everyone would have been more satisfied out of that process than the sentencing process'.[170] Another participant shared that they had had to transfer a matter to Brisbane to access restorative justice.[171]

There were also differing views on when restorative justice processes should take place and how or whether it should impact sentencing. For example, one participant thought restorative justice processes should take place prior to sentence to inform the sentencing decision and not be a penalty option.[172] Another participant agreed that participation should occur prior to sentence, but not pre-conviction.[173] Another participant thought that if there was agreement for a matter to be referred to restorative justice, criminal charges should not proceed, otherwise there is no reason for an offender to want to engage in this process.[174]

Consultation with victim survivors of rape and sexual assault offences

Potential use of restorative justice processes for sexual violence matters committed by adults

The victim survivors we interviewed who participated in the sentencing process were either of the view that ARJC processes should not be made available at all for sexual violence matters committed by adult offenders, or they did not personally consider this to be an option they would consider:

Consultation with victim survivors

When asked whether she would be interested in participating in a RJ conference with her offender, a victim survivor said that she was not interested, and that she would 'not [have] very much to say to him'.[175]

Another victim survivor was adamant that restorative justice processes should not be made available for sexual violence matters, reflecting that it would have caused her so much trauma to go through that process.[176] The victim survivor reflected that she had to have a screen erected during the sentence hearing so that she did not have to see her offender. [177] Her partner told us they could not understand how the Queensland Government could be thinking of providing a space for a victim to have to listen

168 SME Interview 13.
169 SME Interview 12, 19, 22.
170 SME Interview 21.
171 SME Interview 19.
172 SME Interview 12, 22.
173 SME Interview 9.
174 SME Interview 23.
175 Victim Survivor Interview 4.
176 Victim Survivor Interview 6.
177 Ibid.

to their offender say sorry, as 'no amount of sorry could ever take away what I've witnessed her go through'.[178]

Similarly, another victim survivor told the Council that, even if it was available, she would not have wanted to participate in a RJ conference with her perpetrator, as she was scared of both him and his family, and she did not believe that the process would have helped her.[179] She further reflected that she believed that it would have been more traumatic for her to have to face her offender again in a conference setting – noting that having to see him in the courtroom was already 'pretty scary'.[180] However, the parent of that victim survivor thought it would have helped her (not necessarily the victim survivor) to heal, by requiring the offender to 'sit there and listen to what he did to us – what he's done to our whole family'.[181]

Another victim survivor reflected that her perpetrator had offered to participate in a justice mediation (diverted away), and that it was described as: 'you and him will sit in a room. You'll have a conversation. He'll ask you to sign a non-disclosure statement, maybe give you some money to keep you quiet and it'll go away.'[182] However, she reflected that she didn't 'want his money. I wanted the community to be safe.'[183]

However, one victim survivor expressed the view that restorative justice processes should be made available after conviction, as it would be difficult to sit across from the person if they had not yet accepted responsibility.[184]

Victim survivor experience of the current juvenile restorative justice processes for sexual violence offending[185]

A mother of three daughters, each of whom had been raped by a juvenile offender,[186] discussed with the Council her experience of engaging with the YRJC process with her daughters, as the juvenile offender was 17 years old at the time of the conferencing process.

Broadly, the victim survivor expressed her view that the YRJC scheme was too offender-focused and did not adequately reflect the serious nature of this type of offending. She further indicated that, in her experience, she was not given sufficient information prior to the matter being referred to YRJC, and that the convenors were not equipped to facilitate a conference involving serious sexual offences and did not appropriately address her daughter's experiences. However, she recognised that there could be value in this process for victim survivors who wanted to receive an apology from their offender. Her views are presented below.

Consultation with victim survivors

The victim survivor stated they proceeded through restorative justice conferencing process because they were told that a criminal prosecution would likely not result in any period of detention. However,

178 Ibid.
179 Victim Survivor Interview 1.
180 Ibid.
181 Ibid.
182 Victim Survivor Interview 7.
183 Ibid.
184 Ibid.
185 Victim Survivor Interview 3.
186 Ibid.

she expressed her view that she did not entirely understand what the process would involve prior to engaging with it:

> I think the information we had, we kind of still felt like we didn't quite understand, understand it all, and there was a lot of questions around it, but we sort of, you know, for them to try to provide us guidance, something they couldn't really do directly, and kind of with a very generalised guidance around certain areas of what this process looks like. (Victim Survivor Interview 3)

She also noted that the conference was held over a Microsoft TEAMS call, as she was living in a regional centre, which 'made it all the more uncomfortable and awkward at times'.

While she acknowledged that she and her daughters could not have expected the young offender to have been punished more than he would have been had they progressed through the criminal justice process, she did not believe the process adequately reflected the seriousness of the offending, or 'like there was any punishment' at the end of the conference:

> It didn't feel like it was a real outcome in any sense of justice for the girls, or him feeling any real consequence or having any real effect on his life, or... to take any seriousness out of what had happened ... the outcome didn't reflect the seriousness of what he had done to those girls...
>
> I understand that spending time in jail doesn't really rehabilitate at the end of the day. So, I don't know. It just didn't seem enough. I would like to think that there's something in between, and I would have liked to have seen mandatory counselling [for the offender] as an enforced process for a lengthy period of time. (Victim Survivor Interview 3)

When asked whether she thought that her daughters had any choice or control over the conference outcome, or the process, she responded:

> I think it was a perceived choice. I think they were given, you know, 'you get to decide what happens', but you don't really. (Victim Survivor Interview 3)

The victim survivor noted that her daughters were required to come up with ways for the offender to rectify the harm within a limited scope of available actions:

> the girls had to go to a lot of effort, [put] a lot of thought into this, and do all the work for everyone else, come up with their own expected outcome from this, and they had to choose what would happen, but they were only given a few options of what they could ask at the end of this process. And so, I guess, I think it was kind of defeating, really. It just didn't seem like it was worth the effort. (Victim Survivor Interview 3)

In doing so, the conference convenors tried to compare ways for the young offender to repair the harm using an analogy of a stolen bike, which the victim survivor felt was not appropriate:

> when we were dealing with the youth justice team, they all, they seemed like they didn't really understand ... they kept referring to examples of stolen bike. So, the purpose would be to then have, 'you could get that victim to pay the price of that bike', or 'you could replace the bike or work it off' or different, you know ... there was no more serious example for us ... to be guided by, through this. (Victim Survivor Interview 3)

It was acknowledged that, as part of that process, the young offender was required to engage in counselling sessions, but that:

> It was, you know, government implemented, so I think there was only five or something, it was only limited time. And he was, you know, as soon as they decided he was alright and wasn't deemed to be a paedophile or anything like that, they went, you know, "all good, we're done here." So, it wasn't a huge amount of counselling or anything like that ... (Victim Survivor Interview 3)

The victim survivor noted that the young offender had a significant degree of control over the restorative justice process, including whether he was 'ready' to participate and the number of people supporting

him. She noted that he was supported by his mother, his sister and a support person. The victim survivor raised that the offender's mother asked for her own support person to be present, which she vetoed:

> we're going to sit in this room and expect that he gets ... five random people in a room that we don't know, and they don't know, hearing about what he's done to them, and what they've been through ... I couldn't put ... the girls through just one more stranger in that room ... when they ... weren't even comfortable talking to someone familiar about, you know, about this. (Victim Survivor Interview 3)

The victim survivor believed that, even after the conference, the juvenile had little insight into the actual harm caused to her daughters or the family:

> I think he understood. I think he knew what he'd done... but I don't know how, if he could understand or empathise with what he had actually, you know, put them through, or what they went through. And I don't know that he empathised or could understand what he had actually done to them, emotionally or mentally. (Victim Survivor Interview 3)

The victim survivor expressed her broader view that, while she can accept that 'some of them [women], they may just want that acknowledgement' from their offender, she does not believe restorative justice conferencing should be available for adult sexual violence matters:

> I think to me this sort of offence [sexual violence] is a bit too serious ... [and] it felt like it was taken, not as seriously as it should have been ... it feels like ... if there's no result that ... makes someone think twice about maybe doing it next time, [and then] what's the purpose of having gone through this process? ... So, you know, in the long run I don't know that it would be much of a deterrent, and certainly as far as community standards go, I mean, what does that tell everybody? (Victim Survivor Interview 3)

In doing so, she raised concerns that people who commit sexual violence offences face no consequences for their actions, and are not supervised in the community:

> I think I would have liked to have seen something ... I think on the criminal record there should be a flag for sexual offences. That should come up, you know, in times when, you know, maybe when they do have children or at certain moments where checks and balances can be put in place to make sure that other people are safe ... I just think that should follow somebody for, you know, maybe not stop employment and things like that, maybe in certain areas. But definitely, you know, how do we know he's not at risk? Nobody knows he's not at risk. Really, what do they do to prove that he wasn't at risk to the community anymore? (Victim Survivor Interview 3)

Interviews with victim survivor support advocates

Victim support advocates reflected on their experiences supporting victim survivors and their families through restorative justice processes, and expressed their views about whether they believe it should be made available for sexual violence offences committed by adults.

Potential use of restorative justice processes for sexual violence matters committed by adults

Some victim support advocates reflected that while they were initially opposed to domestic or sexual violence matters proceeding through RJ processes, they have since recognised that RJ processes may prove beneficial for some victim survivors, 'depending on the victim and what they want to do'.[187] In doing so, the support advocate reflected that they had observed some women have their needs met through this process, but that this was usually where the offending was – towards the less-serious end of the continuum.[188] Others have found the process beneficial where the purpose was to educate an offender

187 Victim Support Advocate - Group Interview 3.
188 Ibid.

who was from another culture and/or where the victim survivor did not want to proceed with a court proceeding:

> The offender was a taxi driver from another culture and she wanted him to know that … what he did was not okay. And it was not only not okay, that it was a crime. She wanted him to understand that and the impact on her and her safety. She wanted him to go to some kind of counselling – and he agreed to go to counselling - and she got some small monetary gain out of it. And she was happy with that because she didn't want to go to court, [she was] an older woman. (Support Advocate - Group Interview 2)

Advocates also recognised that there can be benefits where the offender is part of a community that holds that person accountable:

> I mean, some cultures, yeah, there's some unspoken, you know, there's more of a detrimental impact of a community punishment. For example, being shunned from the community, you know, there's more of a punishment than an actual prison sentence. (Support Advocate - Group Interview 2)

> And I mean, in terms of restorative justice models, I think New Zealand probably works quite well in that way because in the cultural context, you have got a community holding that person accountable, which is different from urban. You know, here, you come in, two individuals, thank you, goodbye and out you go. Where's the accountability? There is in Indigenous communities. If you're going back to that community, there's lots of eyes on. And I think that's it, the eyes on for future offending in different cultures and in different situations, you know, where you've not just, you know, raped this person, you've not offended against this person, you've offended against the whole community. And that's not acceptable. So that more holding, there's the accountability in that cultural context, which is some in Canada as well, but New Zealand, I think, is probably one of the working well in terms of models in the world. (Support Advocate - Group Interview 2)

Support advocates also noted challenges with the current model of ARJC, including:

- Despite saying that RJ is 'victim-focused', current processes are 'mostly offender driven', and initiated by defence counsel.[189] Although a victim survivor may want to proceed via RJ processes, this can only occur where the offender is willing to participate in that process, and to admit their offending behaviour.[190]
- The criminal charges are adjourned for a lengthy period for the RJ processes to occur, and are then 'dropped' or discontinued. [191]

One victim survivor support advocate reflected that while she acknowledged the merits of restorative justice processes, she did not believe it was appropriate for serious crimes, including sexual violence offences:

> I think the damage is too significant. And, like, restorative justice is for, well, I'll go, and I'll fix it … in recognition of what you've done and to make it right. This is a serious offence, and you can't make that right again. There's no making this right. So that's my personal opinion on the restorative justice space, is that a sexual assault is not the space for that … The damage is too significant. (Victim Survivor Interview 1 – Support advocate)

Another support advocate expressed a strong view that restorative justice processes can be appropriate for young people where the offence involves property theft, but that their use in sexual violence matters is inappropriate:

> One, she's not a bicycle, she's not a car. She was raped over a series of years by this [person] who was 17 at the time of the [youth justice] conference. (Support Advocate - Group Interview 1)

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189 Ibid.
190 Ibid.
191 Ibid.

The support advocate was sceptical that the young perpetrator could have gained a full understanding of the consequences of his offending within the short conference period such that he did not require further assistance, or was 'ready' to be unsupervised:

> The other thing was his 'ready' report came through within a couple of weeks … I'm sure he's at that age, and that nature, and that amount of time, I'm sure this young man has completely understood the whole thing - the nuanced nature of gendered violence of a sexual nature. I'm sure that in 4 weeks or 6 weeks or whatever it was, he was ready to go. That was ridiculous. (Support Advocate - Group Interview 1)

The support advocate indicated that, in that particular circumstance, the victim survivor had no real interest in participating in this process, and that it predominantly benefited her offender.[192] She also raised concerns that the victim survivors were required to think of what the 'consequences' should be for the juvenile as part of the restorative justice process, which was referred to as an 'abomination as far as I'm concerned, especially under the nature, the length of time, the amount of harm that was done'.[193] The advocate reflected that 'there was no outcome that would have been at all satisfactory'.[194]

Another victim support advocate reflected on their own experience supporting a 16–17-year-old girl through restorative justice who had been raped by her older brother. It was noted that the parents made the decision to refer the matter to restorative justice because they did not want their son to have a criminal record.[195] However, she reflected that she was not sure whether this had been the best outcome for the victim survivor – who, she noted, had not returned to counselling after going through this process.[196]

A need for alternative restorative justice pathways and what these should include

Victim support advocates recognised that the current adversarial justice system is 'not working for victim survivors of sexual violence', and that alternative pathways need to be considered:

> And I mean, in terms of like what we heard at the [Women's Safety and Justice] Taskforce as well, like, okay, the criminal justice system is not working. It's not working for victim survivors of sexual violence. So it's like we've still got to try and do what we can with that system. We don't want to go, right, we're giving up on this and let's funnel everything through here, because that's not the answer either. We need a number of options … we need options that focus on accountability and the human rights of the victim survivor for them to be able to tell their reality, for them to be seen, to be heard and asked what is it that you want to happen, and is it realistic.[197]

In considering the important features of a restorative justice model for sexual violence offending, victim advocates reflected that safety for the victim survivor should be paramount:

> I mean, I think it's safety, safety, safety, emotional and physical safety throughout and constant checking on that as well. Not just agreeing at the outset that this is what I want to do. And then they get there, and they don't feel safe. It's that checking. Have you got a support person with you? Are you briefed before you've got the support person with you checking into your levels of safety and some debriefing and support beyond? And that's why, that's why if women are connected with a sexual assault service, that criminal justice process is an intersection point in their life that talks about what happened to them. But if they're connected, if sexual assault services were appropriately funded, then you would look at the support leading up to and preparation for court support through court and support at sentencing and beyond sentencing because their life continues beyond sentencing. It's good for them to have that support. It's

192 Victim Support Advocate - Group Interview 1.
193 Ibid.
194 Ibid.
195 Ibid.
196 Ibid.
197 Ibid.

> looking at, we want, it's the balancing, the balancing of accountability versus victim safety and them being able to tell their truth, to tell the reality, which they've been sidelined from in the criminal justice system.[198]

Consultation events

Participants in consultation events expressed broad general support for enabling improved restorative justice processes to be available for sexual violence matters, provided these are genuinely driven by the victim survivor (not by the offender).

It was recognised that restorative justice pathways can provide greater agency to victim survivors to decide whether they would like to pursue restorative justice processes as an alternative to traditional criminal justice processes, which may not always be appropriate. These processes can also provide both sides with a greater understanding of the consequences of the offending.[199] As most sexual violence offences are committed by a family member or a friend, it was recognised that restorative justice could help navigate these complexities.[200]

Participants were of the view there should be enhanced education and capacity-building in the community to build knowledge and understanding of restorative justice processes, and the positive impacts restorative justice can have.[201] For example, educating the community that the ARJ system is not merely a way to avoid a criminal conviction, but rather can also be a more meaningful process where the victim survivor gets to explain the harm done to them, and for the perpetrator comes to understand the consequences of the offending and has the opportunity to articulate an apology.

However, participants expressed similar concerns with the current ARJC model to those expressed by subject matter expert interview participants and victim survivor advocacy and support organisations, including that:

- there are currently significant delays with ARCJ processes, which can cause dissatisfaction in the system;
- victim survivors do not have access to protection or support if criminal processes are not engaged; and
- police have no power to refer a criminal prosecution matter to restorative justice pathways themselves.

Although outside the scope of the current review, there were also concerns that the current YRJC mode is too focused on the perpetrator being rehabilitated, rather than also focusing on the experience of the victim survivor - which can be ignored through this process. Participants who had experiences with these processes reflected that many young people do not appreciate the opportunity to participate in YRJC, and do not engage meaningfully with it. Comparatively, adult offenders who participate in the ARJC often understand that without this process, they may be subject to incarceration.

Contrary to this view, some participants expressed the view that restorative justice is more appropriate for offences committed by young people than adults, as they are young, their brains have not yet been fully formed, there may be a variety of reasons why they committed the offence (such as trauma-

198 Ibid.
199 Brisbane Consultation Event, 11 March 2024.
200 Cairns Consultation Event, 21 March 2024.
201 Brisbane Consultation Event, 11 March 2024.

responses, disability, etc) and restorative justice can assist them to change their behaviour. [202] Less tolerance was granted for adult offenders, with some participants stating that adults should be more aware of the outcomes of criminal offending.[203]

Despite some support, a small number of participants thought restorative justice processes were not appropriate at all for sexual violence matters, highlighting that it is too offender-focused, and can result in outcomes that are unexpected or unwanted by the victim survivor.

Participants in online consultation sessions thought more options needed to be considered regarding the model of delivery – for example, for some being in the same room as the person who has offended against them would be too overwhelming, and other options may need to be considered - such as an exchange of letters.[204] This option was viewed as being 'very powerful' for young perpetrators and it was viewed as a useful 'complement' to sentencing.[205]

It was acknowledged that many victim survivors 'would like find this a very, very difficult thing to engage with', particularly taking into account power dynamics where the offending is within the family.[206] Where the charges are discontinued, one participant reflected that many victim survivors may not be happy with this outcome as there is no recording of a conviction and no punishment.[207]

When RJ processes should be available within the context of the criminal proceeding

There were mixed views on when RJ processes should occur and how they should be conducted. For example, participants expressed a view that there should be greater opportunities to engage in improved restorative justice pathways, including:

- before police charge the person; [208]
- as part of the sentencing order (such as including a restorative justice component as a condition of what might otherwise be viewed as a less severe form of penalty); [209] and
- as an alternative or complementary form of sentencing outcomes, with further regard to be had to how this would operate to avoid future harm being caused to victim survivors.[210]

However, other participants expressed strong views that restorative justice processes should not be used in lieu of a criminal justice process – recommending that, if it is to occur, this should occur after sentence, or at the end of the custodial component of the sentence order, so that the offending person can demonstrate to the victim (and the community) that they have changed their behaviour in a positive way.[211]

It was also suggested that victim survivors should be provided with an opportunity to meet with the offending person after a sentence hearing, or after they have engaged in sexual offender programs, to understand whether those processes have impacted the person's likelihood of reoffending. [212]

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202 Cairns Consultation Event, 21 March 2024.
203 Ibid.
204 Online Consultation Event, 3 April 2024.
205 Ibid.
206 Online Consultation Event, 16 April 2024.
207 Ibid.
208 Brisbane Consultation Event, 11 March 2024.
209 Ibid.
210 Ibid.
211 Cairns Consultation Event, 21 March 2024.
212 Brisbane Consultation Event, 11 March 2024.

How RJ processes should function for sexual violence matters

As noted above, most participants in support of restorative justice processes recognised that the process must be driven by the victim survivor, not the offender.[213] Ensuring the safety of the victim survivor was viewed as being critical, which would require significant resourcing. [214]

Some participants thought these processes could still prove beneficial for the perpetrator if a counsellor attended on behalf of the victim.[215]

It was recommended that both parties have access to counselling prior to a decision being made to proceed through RJ pathways, to ensure that both parties are deemed suitable, prior to engaging.[216]

There was a suggestion from some participants that victims should have full autonomy to decide whether RJ orders are made public, or whether they remain confidential. For example, it was suggested that there could be a record of the agreement between the victim survivor and the offender held by the court, with an option for the victim to decide whether to release it. However, some participants expressed concerns that the rights of young offenders need to be protected and the outcomes of these processes should not be made public. Other participants commented that they 'do not support a systemic NDA' for restorative justice processes. While there was no broad agreement about the treatment of these agreements, participants generally agreed that the age of the offender was relevant to this decision.

Submissions from victim survivor support and advocacy stakeholders

Support for restorative justice processes

Victim survivor support advocates endorsed the development of an appropriate, victim-centred restorative justice pathway for sexual offences matters in Queensland in response to concerns that the victim survivors of rape and sexual assault lack confidence in the current criminal justice system, which can be re-traumatising for them.[217]

BRQ provided strong support for community restorative justice programs more broadly, as well as in relation to rape and sexual assault offences, to 'support victims and their wellbeing'.[218]

BRQ highlighted the importance of ensuring that Queensland's new model of restorative justice is victim driven (similar to New Zealand's program, Project Restore) to 're-balance power between the parties and assist victim healing'. [219]

BRQ also supported restorative justice pathways being accessible for victims throughout the legal process (similar to the position in New Zealand).[220]

However, BRQ also raised concerns with restorative justice models that rely on community volunteers, who are not paid for services rendered (as per the pilot underway in South Australia). [221]

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213 Ibid.
214 Ibid.
215 Ibid.
216 Ibid.
217 Submission 13 (Justice Reform Initiative) 2; Preliminary submission 4 (Justice Reform Initiative) 2–3; Submission 19 (Basic Rights Queensland) 4; Preliminary submission 11 (DVConnect) 5; Preliminary submission 6 (Brisbane Rape & Incest Survivors Support Centre) 2.
218 Submission 19 (Basic Rights Queensland) 4.
219 Ibid.
220 Ibid.
221 Ibid.

Submissions outlined the potential benefits associated with restorative justice processes, including reduced recidivism, improved community outcomes and enhanced victim survivor experiences.[222]

However, submitters pointed out that these processes may not be suitable for all victim survivors, and that individualised processes must be enabled. For example, the Brisbane Rape & Incest Survivors Support Centre ('BRISSC') recognised that the emotional and physical harm and justice needs of victim survivors needs to be considered and supported though these processes, as they may not always be suitable and will not always meet the justice needs of every victim survivor.[223]

Within this context, submitters recommended that regard be had to the form of these processes to ensure that they are victim-driven, safe and trauma-informed.[224]

The Justice Reform Initiative ('JRI') recognised the importance of mitigating any power imbalances between the offender and victim survivor,[225] and proposed that the Council consider research conducted by the Centre for Innovative Justice ('CIJ') at RMIT University in 2014, which recommended the development and implementation of restorative justice conferencing for sexual offending:[226]

> The model the CIJ presents aims to achieve greater justice for more victims and hold more people who commit sexual offences to account. The CIJ argues the damaging and widespread nature of sexual assault requires an appropriately tailored and flexible response from the justice system – one that seeks to tackle and unpack the complicated nature of sexual crimes; to operate as part of the solution, not only to individual offences, but also to the systemic nature of sexual violence.[227]

Victim-centred restorative justice and therapeutic justice approaches were also supported by the Uniting Church in Australia Queensland Synod (Queensland Synod).[228] In its submission, the Queensland Synod raised concerns that the adversarial court process is limited, in that it does not enable the courts to respond to the unique needs of people experiencing marginalisation and disadvantage, or to divert them away from the criminal process and into alternative options to incarceration.[229]

The Queensland Synod recognised that there are increased numbers of Queenslanders being held in custody and on remand (including a disproportionate representation of First Nations people),[230] which is expensive,[231] ineffective and fails to promote rehabilitation and reintegration. The Queensland Synod concluded that crime in the community is therefore not being reduced, communities are not being made safer and social drivers of criminogenic behaviours or antisocial tendencies are not being addressed.[232]

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222 Preliminary submission 6 (Brisbane Rape & Incest Survivors Support Centre) 2.
223 Ibid.
224 Submission 19 (Basic Rights Queensland) 4.
225 Submission 13 (Justice Reform Initiative) 2; Preliminary submission 4 (Justice Reform Initiative) 2–3. The JRI referred to the 2010 findings of the Australian Law Reform Commission and the New South Wales Law Reform Commission that these processes may not be appropriate, due to a power imbalance between the victim survivor and offender which makes it difficult to achieve the aims of the RJ process.
226 Preliminary submission 4 (Justice Reform Initiative) 3.
227 Ibid [6]-[10], citing the Centre for Innovative Justice, Innovative Justice responses to sexual offending – pathways to better outcomes for victims, offenders and the community (2014).
228 Submission 16 (Uniting Church in Australia Queensland Synod) 2.
229 Ibid 4.
230 Ibid 2: an average of 'over two-thirds (66.6%) of children and over one-third (36.4%) of adults in Queensland prisons identify[ing] as Aboriginal or Torres Strait Islander, despite making up only 4.6% of the general population.' Justice Reform Initiative report, *Alternatives to incarceration in Queensland* (Report, 2023) ('*Alternatives to incarceration in Queensland*').
231 The Uniting Church in Australia Queensland Synod noted that it costs the Queensland Government $240.81/day or $2,068.32/day to house an adult or juvenile in a correctional centre respectively ($87,896/year or $761,507/year): *Alternatives to incarceration in Queensland* (n 230).
232 Submission 16 (Uniting Church in Australia Queensland Synod) 3.

The Queensland Synod concluded that there is a need to make innovative, evidence-based, community-led programs and services available in conjunction with the traditional justice model to provide 'more opportunities for victims to experience a sense of justice, for offenders to take accountability for their offending, and for broader public policy objectives to be met'.[233]

The Queensland Synod also recommended that significant investment be made into the community sector to divert people away from the system and towards approaches that seek to address causes of their contact with the criminal justice system, such as 'responses to housing needs, mental health issues, cognitive impairment, employment needs, access to education, the misuse of drugs and alcohol, and problematic gambling'. [234] It was also suggested that additional funding be invested in early intervention and prevention strategies to address drivers of criminogenic tendencies.

The Queensland Family & Child Commission ('QFCC') also expressed the view that sentencing in the youth justice system is more beneficial to young offenders and victims if it operates on principles of restorative justice and rehabilitation, rather than adopting a purely punitive approach.[235]

However, Fighters Against Child Abuse Australia ('FACAA') were strongly opposed to making restorative justice conferencing available for rape or sexual abuse offences, stating that they were 'universally not welcomed by our members'.[236] FACAA stated that '[r]estorative justice might be applicable for car theft or even robbery but there is no reasonable excuse for rape or sexual assault so why should there be a way for the perpetrators to feel better about the crime?'[237]

Recognition of societal contributions to offending behaviours

Some victim survivor advocates recognised that people who perpetrate harm have often experienced socio-economic disadvantage and cultural barriers that can be contributory factors to their offending behaviour. For example, DVConnect noted that

> we are not ignorant to the challenges that people who use violence experience in their lives, the systemic barriers, and the contributors to their ultimate choice to use violence. We are aware of how the complexity of trauma, poverty, and the patriarchal and colonist society that we live in can impact how people who use violence end up at that choice. We recognise the human rights of people, including those that choose to use violence.[238]

Notwithstanding this, DVConnect acknowledged that this does not excuse offending behaviour, as it is always the perpetrator's choice to use violence; however, it is a relevant factor for consideration of their experiences.[239]

16.4 Transformative justice and other alternative justice models

16.4.1 Overview of transformative justice

Transformative justice is an alternative approach to the traditional criminal justice system, which calls for a re-evaluation of conceptions of justice, retribution, rehabilitation and punishment. [240]

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233 Ibid 5.
234 Ibid 4.
235 Preliminary submission 12 (Queensland Family & Child Commission) 2.
236 Submission 15 (Fighters Against Child Abuse Australia) 13.
237 Ibid.
238 Submission 20 (DV Connect) 4.
239 Ibid.
240 Alana Abramson and Melissa Roberts, 'Restorative, Transformative Justice' in Shereen Hassan and Dan Lett, *Introduction to Criminology* (A Canadian Open Education Resource, 2023).

Transformative justice has been described as 'a political framework and approach for responding to violence, harm and abuse', which 'seeks to respond to violence without creating more violence and/or engaging in harm reduction to lessen the violence'.[241] Transformative justice approaches and interventions:

> 1) do not rely on the state (e.g. police, prisons, the criminal legal system, ICE, foster care system (though some transformative justice responses do rely on or incorporate social services like [counselling]);
>
> 2) do not reinforce or perpetuate violence such as oppressive norms or vigilantism; and, most importantly
>
> 3) actively cultivate the things we know prevent violence such as healing, accountability, resilience, and safety for all involved.[242]

Transformative justice is part of the critical tradition in criminology arguing for 'a paradigm shift in criminal justice and changes to the social structures and perpetuate injustice and inequality'.[243] This includes shifting the focus towards 'healing, accountability, resilience, and safety',[244] and seeking to empower local communities to develop their own strategies to respond to and prevent future instances of violence within their own communities without relying on state-led systems.[245]

Transformative justice is founded on a strong belief that the community delegates

> responsibility for producing safety to police, prosecutors, and prisons, and accepting the violence they perpetrate as the inevitable price of safety … [but] the state stokes our fear of one another, discouraging and interfering with our ability to care for each other.[246]

While representing a range of values, attitudes and approaches, transformative justice seeks to repair the harm done to a person by enhancing connections within communities and focusing on systemic change, healing and growth. Often, these processes can involve facilitated conversations, community-based interventions and long-term engagement to address and resolve conflicts:

> [Transformative justice] interventions can take different forms, but more often than not, they include (1) supporting survivors around their healing and/or safety and working with the person who has harmed to take accountability for the harm they've caused, (2) building community members' capacities so that they can support the intervention, as well as heal and/or take accountability for any harm they were complicit in, and (3) building skills to prevent violence from occurring, and supporting community members' skills to interrupt violence while it is happening.[247]

Critically, while transformative justice relies on elements of restorative justice and has strong overlap with these processes, it is a separate and distinct process to formal, state-led restorative justice pathways, that seek to repair a specific harm or wrong caused to a particular victim survivor.[248] Transformative justice takes a broader approach – seeking to address the social or structural issues that contributed to the harm and 'treat the root causes of violence',[249] including racism, gender inequality, poverty and colonialism, through societal change and dismantling harmful systems (including the prison system).[250]

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241 Mia Mingus, 'Transformative Justice: A Brief Description', TransformHarm.com, <https://transformharm.org/tj_resource/transformative-justice-a-brief-description>.
242 Ibid.
243 Alana Abramson and Melissa Roberts, 'Restorative, Transformative Justice' in Shereen Hassan and Dan Lett, *Introduction to Criminology* (2023).
244 Rossner and Taylor (n 35) 362.
245 Ibid 358.
246 Submission 32 (Sisters Inside) 3, citing Mariame Kaba and Andrea J Ritchie, *No More Police: A Case for Abolition* (The New Press, 2022).
247 Mingus (n 241).
248 Rossner and Taylor (n 35) 363.
249 Submission 32 (Sisters Inside) 4.
250 Rossner and Taylor (n 35) 362.

These systems also remain 'completely separate from the criminal punishment system to ensure [they are] not co-opted by the state as another coercive too'.[251]

16.4.2 Transformative justice in practice

While there has been an increased focus on alternative options within the criminal justice system, transformative justice frameworks have not yet been implemented in any country.[252] However, some countries have begun to explore options for integrated transformative justice principles through community-led programs that focus on healing, accountability and community-led responses to harm.[253]

In some cases, these processes are complementary, rather than used as alternatives, to criminal justice system responses, although there are also many examples of community-led initiatives that operate outside of and entirely independently of the criminal justice system.

However, it is important to recognise that these processes are not true transformative justice processes, as they operate within the existing legal framework.

The use of transformative justice in Australia

In New South Wales, Transforming Justice Australia provides voluntary, confidential and free community-based restorative justice responses with a focus on people who have experienced sexual abuse and related harm. Those who are responsible for the harm can participate, but only if the survivor wishes them to be involved.

Transforming Justice also provides advocacy, research and community information about restorative justice, with a focus on developing

> a service that responded to the needs, wishes and hopes of survivors; to provide survivors choice and opportunities for meaningful justice; to encourage active accountability from those responsible and to recognise the importance of family members and community in responding to sexual abuse. Transforming Justice Australia honours these motivations, incorporates their experience and builds upon the existing evidence-base of good restorative practice.[254]

Transforming Justice delivers services in the community and alongside the criminal justice system. The process is run in a flexible way to prioritise the needs of the person harmed and address issues arising from the harm.

It uses a co-facilitated model involving two facilitators who work together with participants throughout the restorative process. The organisation has a team with 'deep experience working with people who have experienced complex trauma, as well as families, First Nations communities, young people, adults, LGBTIQ community and culturally and linguistically diverse communities'.[255]

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251 Submission 32 (Sisters Inside) 4.
252 Rossner and Taylor (n 35) 357.
253 Ibid.
254 Transforming Justice Australia, 'Our story and origins' (web page) <https://www.transformingjustice.org.au>.
255 Transforming Justice Australia, 'Questions about restorative justice – How is restorative justice different to criminal justice?' (web page) <https://www.transformingjustice.org.au>.

16.4.3 Potential risks and benefits of transformative justice in responding to sexual violence

Advocates see the benefits of transformative justice, including over restorative justice alone, that it 'attends to both the interpersonal aspects of harm as well as the systemic and structural issues. In this way, the justice lens is widened to offer innovative, collaborative, and healing approaches to harm.'[256]

The risks identified in relation to restorative and transformative justice and factors impacting its widespread adoption include:

- a lack of support by the general public of alternative approaches to justice, which may also be viewed as being 'soft on crime';
- resistance by criminal justice stakeholders who are 'trained in and conditioned to the punitive system' to the adoption of new practices;
- concerns about 'the practicality of shifting an entire criminal justice system to a new paradigm. Just as the criminal justice system is not the most appropriate response for every case, the same is true of restorative justice';
- the costs of moving to and maintaining a restorative justice system (although the existing costs of maintaining the current criminal justice system needs to be factored in);
- potential net-widening effects, meaning more people being dealt with through restorative justice approaches;
- inconsistent processes adopted in different locations and facilitators having 'varying levels of expertise, which may cause harm or lessen faith in the fairness and efficacy of the system';
- risks of reproducing inequalities and involving elements of coercion or pressure on participants to participate.[257]

16.4.4 Other alternative justice approaches

There are several different models of justice approaches proposed to better meet the needs of victim survivors.

One example, proposed by Lacey and Pickard, is the adoption of a 'dual-track' justice model that would separate out the objective of meeting needs of victim survivors from the current criminal justice system 'track' designed to determine criminal responsibility and convict and sentence perpetrators delivering punishment and seeking to promote reform and rehabilitation.[258] Under this model, victims would be required to participate in the 'offender-oriented track' only insofar as necessary to establish the facts of the case, but otherwise their involvement would be minimised. Instead, the focus of the 'victim-oriented track' would be on a response that:

- is victim-centred, focusing on what victims want by way of support and service provision;

256 Ibid.
257 Abraham and Roberts (n 243).
258 Nicola M Lacey and Hanna Pickard, 'A Dual-Process Approach to Criminal Law: Victims and the Clinical Model of Responsibility without Blame' (2019) 27(2) *The Journal of Political Philosophy* 229.

- is supported by adequate funding provided by the state which has a legislative basis and has specialised staff with therapeutic, social work and legal skills;
- includes financial support for victims in support of recognition of harm, healing and restoration; and
- has the resources to facilitate apologies or direct recompense by perpetrators where victim survivors express a desire for this.

While not explicitly framed as a 'victim-centred track', there are several elements of this model that have already been adopted in Queensland, or proposed for introduction in response to the WSJ Taskforce recommendations including the development and piloting of a professional victim advocate service in Queensland[259] and the implementation of a victim-centric trauma-informed service model for responding to sexual violence drawing on the Sexual Assault Response Team model that operates in Townsville.[260]

Queensland has also established victim support agencies, including Victim Assist Queensland and the more recently established Office of the Victims' Commissioner, which together have a range of responsibilities and functions with respect to victim survivors, including the provision of financial support, providing assistance about where to seek help, publishing information and responding to complaints. There are also a range of community-led services non-government organisations, including the services that form part of the Queensland Sexual Assault Network.[261]

The concept of a victim 'advocate' In Queensland is similar to that advocated in Victoria by Sexual Assault Services Victoria of 'Justice Navigators' embedded within specialist sexual assault services, which has now been funded by the Victorian Government.[262] The functions these navigators are intended to perform include:

- acting as an entry point to the justice system;
- supporting victim survivors to understand and exercise their rights;
- helping victim survivors navigate support services, compensation, recovery and justice options, including by through accompanying them to court proceedings; and
- being experts in their jurisdiction's victims' rights charter and acting to advocate to ensure a victim survivor's charter rights are upheld.[263]

The model is based on the Independent Sexual Violence Advocates (ISVA) scheme operating in England and Wales since 2007, which has been reported as being successful in halving the number of survivors withdrawing from legal procedures.[264]

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259 *Hear Her Voice Report Two* (n 43) rec 11.
260 Ibid rec 11. For more information, see Chapter 13.
261 For more information, see 'About us', Queensland Sexual Assault Network (web page) <https://qsan.org.au/about>.
262 Victorian Government' 'Changing Laws and Culture to Save Women's Lives (Media Statement 30 May 2024) <https://www.premier.vic.gov.au/changing-laws-and-culture-save-womens-lives>.
263 Respect Victoria, Submission to the Australian Law Reform Commission, *Inquiry into Justice Responses to Sexual Violence* (June 2024) 18, citing Sexual Assault Services Victoria, *Justice Navigator Stakeholder Brief* (2024).
264 'SASVic welcomes the introduction of Justice Navigators as part of the government's new funding package', *Sexual Assault Services Victoria* (web page) <https://www.sasvic.org.au/news/justice-navigators>.

Other complementary and alternative approaches include community-led and driven initiatives, such as the establishment of victim survivor hubs,[265] First Nations healing circles[266] and healing centres.[267]

16.4.5 Submissions from legal stakeholders

While not a focus of consultation, several submissions from participants in consultation sessions held by the Council were concerned that current justice responses are failing victim survivors and that the current response to sexual violence is in need of reform.

Comment was consistently made regarding the small number of cases that are reported, successfully prosecuted and make it to sentence. The adequacy of sentencing responses was viewed as an issue not just of ensuring the sentence imposed in an individual case reflected the harm caused and met the broader purposes of sentencing, but what it signalled to victim survivors about whether it was 'worth' reporting these offences at all.

TASC Social Advocacy ('TASC') and LAQ both reinforced the importance of recognising factors that contribute to the commission of sexual violence offences. For example, TASC reflected:

> While a small proportion of individuals come into the world with the makings of psychopathy, it is much more likely that sexual violence stems at least to a significant degree to adverse experiences during development – experiences which include insecure attachment to maternal caregivers (frequently due to domestic and family violence or their own histories of trauma); direct and indirect exposure to violence; consistently harsh punishment; financial strains; and ongoing exposure to social networks where criminal [behaviour] is often the norm.
>
> Over time, these experiences contribute to a rising up of emotions such as anger, shame, impulsivity, lack of frustration tolerance, self-disregard, and antisocial [behaviours] – [behaviours] strongly associated with interpersonal violence, sexual violence, and the loss or shutting down of empathy and compassion towards others.[268]

In concluding that people 'carry society within them',[269] they reflected that:

> 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.[270]

TASC concluded that, within the context of current formal criminal justice responses, restorative justice processes have the greatest chance of 'proactively reducing the rate of rape and other forms of violent sexual assault. While important, it is also possible that society – through acts of sentencing if possible – look to ways of rehabilitating itself'.[271]

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265 See, for example, 'The Survivor Hub' (web page) <https://www.thesurvivorhub.org.au/>, although there are many examples of these forms of support services and networks established through not-for-profit and non-government organisations.
266 Many Young, 'Aboriginal Healing Circle Models' (National Indigenous Justice CEO Forum, 2007). This is based on the Canadian model of circle healing.
267 See Healing Foundation, 'Healing Centres' (web page) <https://healingfoundation.org.au/community-healing/healing-centres>.
268 Submission 22 (TASC Legal and Social Justice Services) 11.
269 Ibid 15.
270 Ibid 14.
271 Ibid 15.

To effectively reform the behaviours of people who commit these offences and to effect proactive change within the broader Queensland community society, TASC recommended that regard be had to:[272]

- assessing lengths of incarceration based on understanding that less punishment and not more may aid in efforts towards rehabilitation;
- increased use of community orders where programs are invested in ideas of therapeutic justice and offender related [pre-rehabilitation] (programs aimed at potential offenders and communities and [neighbourhoods] at risk before crime happens);
- when safe to do so, [educating] offenders not only so that they can better control themselves, but so they can pass this information on to younger generations at risk;
- [the use] of rehabilitation programs that stress accountability while also acknowledging the ways in which criminal [behaviour] develops in people;
- as part of [pre-rehabilitation] sentencing, [suggesting] the use of parenting support programs targeting families at risk due to parental stressors and structural inequity;
- in cases of offenders with wealth, [providing] fines where the funds go to supporting [pre-rehabilitative] programs;
- [the use] of specialised Sexual Violence Courts;
- sentencing offenders to accountability programs which also acknowledge the role of trauma and environmental factors in offending; and
- forming a collaboration between criminal law and public health law by finding creative ways to sentence offenders to participation in public health approaches to resolving the challenge of rape and sexual assault. Public health campaigns are able to confront society's rape culture and misogynistic myths.

LAQ also recognised that a 'history of systemic disadvantage and trauma is relevant to an understanding of at least some sexual offending and should therefore frame appropriate criminal justice responses'.[273] For example,

> the systemic disadvantage and intergenerational trauma caused by the destruction, disruption and separation from culture flowing from colonisation, dispossession, and persistent racially discriminatory government policy including the forced removal of children, is a factor to which sentencing courts must have regard in considering the context in which offending occurs and the moral culpability of the offender together with the need to support their rehabilitation.[274]

However, LAQ reflected that:

> 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 supports best managed outside the criminal justice system.[275]

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272 Ibid 15–16 (references omitted).
273 Submission 23 (Legal Aid Queensland) 6.
274 Ibid 5.
275 Ibid 9.

It was further recognised that, absent of these supports, 'the sentence only serves to expose a disadvantaged person to an almost inevitable risk of breach and further incarceration which serves to entrench their disadvantage'.[276]

In its preliminary submission, Sisters Inside recommended that the Council consider alternative models to the adversarial system of criminal justice, such as transformative justice models that seek 'real justice without reliance on the court systems'.[277] Their formal submission built on this initial position.

In its submission, Sisters Inside expressed its view that 'the criminal punishment system in Australia is not "broken" or "failing"', but rather working as it is intended to in order to 'contain, control and criminalise those in marginalised communities, particularly First Nations people'.[278] A call was made for Queensland to 'boldly reimagine how responses to sexual violence could look'.[279]

Three issues were highlighted within the current justice system for sexual violence offences, including that it is: [280]

- failing to meet the needs of most victim survivors;
- not supporting those who cause harm to take responsibility and account for their behaviour to reduce the likelihood of recidivist behaviour; and
- doing nothing to respond to or address 'cultural norms of patriarchal white supremacy that encourage sexual violence'.

Sisters Inside told us that many victim survivors of sexual violence want 'their story to be validated, their voice and agency respected, for the person who harmed them to take accountability for their behaviour, and for what occurred to not happen again', rather than seeking imprisonment or punishment. As current processes are focused on punishment, it was suggested they may not meet their needs.[281] Responding to people who caused harm through the traditional criminal justice system, it was suggested, results in them denying their behaviour, which makes it harder for victim survivors to receive help.[282]

It was also acknowledged that sexual violence offences affect everyone in the community, and that the community has a responsibility to help support the victim survivor, and to hold the perpetrator to account.[283] Suggestions for how the community can help can 'range from challenging cultural norms that enable and excuse sexual violence, such as racism and misogyny, to providing people with stable, housing, employment, food and education as pathways to strengthening individuals and their communities'.[284]

Sisters Inside advocated for consideration of transformative justice options that are flexible and responsive to the needs of all parties, as well as within the circumstances. [285] Options include providing avenues for victim survivors and their perpetrator to each be supported (potentially by members of their

276 Ibid 10.
277 Preliminary submission 28 (Sisters Inside) 3.
278 Submission 32 (Sisters Inside) 2.
279 Ibid 3.
280 Ibid.
281 Ibid 1.
282 Ibid 3.
283 Ibid 6.
284 Ibid.
285 Ibid 7.

family or friends), and to meet with each other at an earlier stage to attempt to resolve the harm through agreed outcomes or actions.[286]It was acknowledged that this process could take years to resolve.

While restorative justice pathways require perpetrators of harm to participate on a voluntary basis, transformative justice outcomes may deliver a response that does not necessarily require their participation, but still meets the needs of victim survivors. An example was given of where the perpetrator is 'made aware of their victims perspectives and face[s] community consequences, with the victim feeling heard, acknowledged and respected', which they suggested as a more successful outcome than by making use of the 'criminal punishment system'.[287]

In their subsequent submission, Sisters Inside reiterated the view that a model of transformative justice could include strategies focused on healing (such as mediation or healing circles) which are undertaken in appropriate circumstances (where both parties are agreeable) and with adequate support to resolve matters which would otherwise be dealt with by the courts.[288] Sisters Inside noted that this could be particularly beneficial for domestic and family violence matters.[289]

Basic Rights Queensland also reflected that it supports the facilitation of community restorative justice programs for rape and sexual assault matters to support victim survivors.[290]

Aboriginal and Torres Strait Islander Advisory Panel members' views

Members of the Council's Aboriginal and Torres Strait Islander Advisory Panel made several observations about current system responses, including that the reality is that no matter how long the sentence is, people will not view this as long enough.[291]

The Panel expressed a similar view that people are not sent to prison for rehabilitation, but rather for containment and to ensure community safety. It was recognised that prison is not a deterrent, and that there are other factors also that come into play, such as mental health considerations, a person's wellbeing and life circumstances that must be addressed to respond to sexual violence.[292]

The Panel recommended that the overarching question should be 'How can we ensure public safety and what will be effective in achieving rehabilitation to stop people from reoffending?' Within this context, the Panel advocated for responses to sexual violence that enhance perpetrator accountability as well as healing and harmony for the community. In doing so, they advocated for a model that holds the person responsible for their actions to account, then enables all parties to move on, heal and understand the trauma caused by these offences, while bringing a better awareness to sexual violence offending. [293]

The Panel recommended taking a cohesive approach in responding to sexual violence and avoiding siloed responses that fail to take into account the ripple effects. It was also considered critical that Human Rights Act considerations are taken into account, recognising that we need to do this right, and to start bringing in earlier and better responses to address sexual violence offending.[294]

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286 Ibid.
287 Ibid 8.
288 Preliminary submission 28 (Sisters Inside) 3.
289 Ibid.
290 Submission 19 (Basic Rights Queensland) 4.
291 Meeting of the Aboriginal and Torres Strait Islander Advisory Panel, 18 April 2024.
292 Ibid.
293 Ibid.
294 Ibid.

16.5 The Council's view

Key Finding

19. **Complementary and alternative approaches to traditional criminal justice processes may offer opportunities to better respond to victim survivors' justice needs and should be explored**

Complementary and alternative approaches to traditional criminal justice system responses, such as restorative or transformative justice, may offer an opportunity to better respond to the various justice needs of victim survivors. Provided victim survivors wish to participate, and these processes are appropriately managed, they may encourage healing and recovery within a safe environment that encourages perpetrators to take responsibility for their actions and enables victim survivors to have their voice heard and their experiences acknowledged and validated.

See **Recommendations 25 and 26**.

In considering whether the current penalty and sentencing framework provides an appropriate response to sexual violence offending in Queensland, or whether complementary and alternative approaches should be considered, the Council reflected on the findings in **Chapter 13** that traditional criminal justice system responses can operate in a way that is anti-therapeutic for victim survivors of rape and sexual assault, and can result in their re-traumatisation (**Key Finding 12**). In finding this sentencing 'problem', it was important for the Council to consider and 'advise on options for reform to the current penalty and sentencing framework to ensure it provides an appropriate response to this type of offending'.

We recognise that the criminal justice system, and the sentencing process more specifically, play an important role in maintaining order, reinforcing important collective societal values and providing a sense of justice within the Queensland community by responding to wrongdoing. In responding appropriately to criminal offending, the criminal justice system has an important and pivotal role to play in maintaining the rule of law.

There are few other rights more important to protect than preserving people's right to privacy and sexual and bodily integrity and autonomy. As discussed in **Chapters 6 and 7,** offences of sexual assault and rape constitute a serious violation of these rights. For this reason, the most appropriate resolution of a complaint made to police of sexual offending in most cases will be the prosecution of the person alleged to have committed the offence and, where a conviction follows, a penalty being imposed through the sentencing process.

At the same time, we recognise there are many occasions where criminal justice processes and outcomes fail to meet the needs of victim survivors. By limiting victims' involvement, the criminal justice system fails to allow victims to 'speak to their experience and emotions surrounding the crime, in an environment that feels safe and supportive' or to express their anger and desire for retribution 'in a way which may be raw or unconstrained', which may be an important part of their recovery and healing process.[295] Critics of current responses suggest that responding to the first need may not be possible with direct perpetrator

[295] Lacey and Pickard (n 258) 234. Similar comments were made during Victim survivor support advocate interview 3.

participation, while the second may be 'counter-productive to the therapeutic task of enabling offenders to take responsibility and begin to change'.[296]

We further acknowledge that most sexual violence offending goes undetected and unreported, and even when a complaint is made, a very small proportion of cases result in a criminal conviction being secured and the person being sentenced. On the basis of research undertaken by BOCSAR based on NSW data, the rate of conviction and sentence of sexual assault offences may be as low as 7 per cent, and possibly even lower.[297] As discussed in **Chapter 2**, some victim survivors also may be reluctant to report a sexual violence incident due to their concerns about going through the justice system process, fears about the potential consequences of reporting, including loss of familial relationships, and loss of housing and community, or even the implications for the person who may have perpetrated the harm against them.

In this context, we consider that alternative and complementary approaches to responding to sexual violence offending may offer an opportunity to better respond to the various justice needs of victim survivors while also promoting perpetrator accountability and placing a focus on addressing the underlying factors associated with that person's offending (see **Recommendations 25 and 26**).

Bringing together victims of crime, perpetrators of sexual violence and communities through these approaches serves to promote purposes of sentencing outlined in section 9(1) of the PSA, including with respect to the rehabilitation of the person being sentenced, and to recognise the harm done to victim survivors, as well as seeking to restore their dignity and repair relationships (where possible and appropriate).

Various models might be considered, of which restorative and transformative justice, which are discussed in this chapter, are just two.

In supporting the consideration of these complementary or alternative pathways, we recognise the significant work underway in Queensland to give effect to the WSJ Taskforce recommendations, including to expand the availability of ARJC, supported by a new legislative framework, and the commitment to progress a pilot restorative justice program for adult sexual and domestic and family violence offences.[298]

We also acknowledge the work undertaken by the ALRC in its current national inquiry into justice responses to sexual violence, which requires consideration of 'alternatives to, or transformative approaches to, criminal prosecutions, including restorative justice, civil claims, compensations schemes and specialist court approaches'.

Findings from these reviews should inform consideration of our recommendations (**Recommendations 25 and 26**).

296 Ibid.
297 Gilbert (n 2). Differences were found between attrition rates for offences against adults and children and contemporary and historic child sexual assaults.
298 *Hear Her Voice, Report Two* (n 43) recs 90-92.

16.5.1 Enhancement of the current ARJC model

Recommendations

25. Adult restorative justice program

The new legislative framework and pilot adult restorative justice program, once established, should incorporate the following features as it applies to sexual assault and rape offences:

a) Restorative justice processes should be available at any stage of the criminal justice process, but should be victim-centred and prioritise the needs and interests of victim survivors while also responding to the needs of defendants.

b) Assuming a new legislative framework is established, a legislative model, such as exists under the *Crimes (Restorative Justice) Act 2004* (ACT), should be considered to allow for any outcomes of pre-sentence restorative justice processes to be taken into account at sentence.

c) At sentence, a court should not be permitted to take into account the fact that the person chose not to take part, or not to continue to take part, in a restorative justice process for the offence [see s 34(1)(h) of *Crimes (Sentencing) Act 2005* (ACT)].

d) Flexibility should be provided regarding the mode of delivery – for example, personal attendance at a conference, the exchange of letters, mediated communications between the complainant and the perpetrator or other suitable process.

e) Principles such as those that apply in New Zealand to restorative justice for sexual offences, and recommended by the Victorian Law Reform Commission in its report on improving the justice system response to sexual offences, should be developed to guide practice.

f) As recommended by the Women's Safety and Justice Taskforce in its report *Hear Her Voice - Report Two: Women and Girls' Experiences Across the Criminal Justice System* (2022) (recommendation 91), the legislative framework for adult restorative justice in Queensland should be co-designed with people with lived experience, Aboriginal and Torres Strait Islander people, and service and legal system stakeholders, adopting a victim-centric approach. Such framework should:

   i) articulate overarching principles for the use of restorative justice in adult criminal cases, with particular principles and safeguards for its use in relation to sexual offences and domestic and family violence-related offences;

   ii) set out operational processes, including a clear framework for referrals and suitability assessment processes set out how restorative justice interacts with the criminal justice system;

   iii) establish criteria and processes to assess the qualifications, expertise and suitability of convenors and provide for their functions and powers;

   iv) consider the diverse needs of victim survivors, including First Nations victim survivors, and how best to structure the framework to meet individual needs;

   v) provide adequate protections and safeguards for participants, underpinned by a gender-sensitive and trauma-informed approach.

We acknowledge and support the work currently underway to legislate a formal adult restorative justice model in Queensland and that such a model should be available for sexual violence matters as recommended by the WSJ Taskforce.

However, it is critical that safeguards are established to enable these processes to be made readily accessible and safe at any stage of the criminal justice process for victim survivors of sexual violence. In particular, such framework should, as recommended by the WSJ Taskforce:

- articulate overarching principles for the use of restorative justice in adult criminal cases, with particular principles and safeguards for its use in relation to sexual offences and domestic and family violence-related offences;
- set out operational processes, including a clear framework for referrals and suitability assessment processes set out how restorative justice interacts with the criminal justice system;
- establish criteria and processes to assess the qualifications, expertise and suitability of convenors and provide for their functions and powers;
- consider the diverse needs of victim-survivors, including First Nations victim survivors, and how best to structure the framework to meet individual needs;
- provide adequate protections and safeguards for participants, underpinned by a gender sensitive and trauma-informed approach.

Restorative justice should be victim-centric, trauma-informed and prioritise the needs of victim survivors

A key finding of our review has been that current justice processes are not victim-centric, resulting in feelings of exclusion, despite being directly impacted by the offence. However, if restorative justice conferencing processes are to offer a complementary or alternative model, victim survivors must be given control and agency over the process. This includes ensuring any processes only proceed where the victim survivor is fully informed of what to expect and on being informed of this, expresses an individual desire to participate in the process without undue pressure placed on them by external parties to do so. They must have an opportunity to have their voice heard without restrictions, and to have the harm caused to them appropriately understood and acknowledged.

Importantly, sexual violence offences are not like other forms of offending, such as property offences. Restoring the harm caused by sexual offending is to some degree an unattainable and unrealistic objective. The fact that we heard that some YRJC conference organisers are drawing analogies between these very different forms of offending and placing the burden on victim survivors to suggest ways the wrong against them can be remedied is deeply concerning.

We also acknowledge views that in the context of YRJC processes (when utilised for sexual violence matters), these processes can place too much focus on the rehabilitation of the offender without appropriate acknowledgement of the harm caused. This led one victim survivor to share her views that there had been no 'justice' at the conclusion of the process.

Many current processes involve direct contact and communication between victim survivors and their offenders, giving rise to significant risks of re-traumatisation associated with direct participation in these processes. A victim survivor may experience strong and overwhelming feelings when confronted by the person who has committed an act of sexual violence against them and may not be able to face them

within a conference setting. Where they do meet, there is also a risk of physical or verbal confrontations, manipulation of processes or power imbalances between the parties.

We acknowledge that the Queensland ARJC model seeks to minimise these risks by requiring a person to admit the offence and agree to the facts as proposed by the prosecution before a referral is made to ARJC processes and through the processes around the management of the conference. However, there remains a risk that the person will either completely deny the offending, or an aspect of it, within the conference setting, even if this was not the case prior to the conference, which may cause further trauma for a victim survivor, leaving them without the closure they might have been seeking.

The above issues are illustrative of the need to place a strong focus on ensuring that convenors and facilitators are appropriately trained and that they have the necessary skills to understand sexual violence offending and the impacts it has on both parties. This may also enable them to identify any risks that may arise, particularly with respect to potential power imbalances or concerns that the victim survivor has been pressured into participating in these processes. Ensuring the availability of specialist facilitators who are equipped to manage any risks of re-traumatisation is critical, as is identifying when a conference should be ended early to protect the psychological safety of either party, but particularly the victim survivor.

Whatever model is ultimately adopted, it is important that restorative justice models elevate the needs of victim survivors to ensure their safety is prioritised and their needs are met. Conferences should be structured in a way that prioritises their need to speak to their experience and emotions, to have the harm understood and acknowledged by their offender, and to contribute to the outcome agreement (where appropriate to do so). Victim survivors should have control over the process, including control to decide whether they wish to withdraw from proceedings or the terms under which they would like to engage. Conferences involving Aboriginal and Torres Strait Islander victim survivors and/or perpetrators should be managed, convened and run by First Nations-funded organisations and individuals operating under agreed guidelines.

Consideration should also be given to whether it is appropriate to allow restorative justice conferencing to occur in the absence of a victim survivor where they do not wish to participate (either through a victim survivor advocate or the person's representative), but the offender does - as was suggested by Legal Aid Queensland. [299] If permitted, further regard must be had to how this should influence the sentence outcome.

Participation must be voluntary for both parties

Participation in restorative justice must be voluntary, and not coerced or influenced, to ensure that both parties have a sense of control over their participation, as well as any outcome from this process.[300]

It is therefore important for victim survivors and defendants to be provided with sufficient information to make an informed decision regarding whether restorative justice is an appropriate mechanism for them to engage with:

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299 Submission 23 (Legal Aid Queensland) 34.

300 Marie Keenan, 'Training for Restorative Justice Work in Sexual Violence Cases' (2018) 1(2) *The International Journal of Restorative Justice* 291, 292

- For victim survivors, this includes an understanding that restorative justice may not necessarily yield a particular justice outcome, and that their offender's participation may benefit them at sentence.
- For defendants, restorative justice requires an acceptance of responsibility and a willingness to be accountable for their offending and the impact it has had on the victim survivor, as well as the reality of the victim survivor's experience, which may be different from their own.

Legislated consideration at sentence, with no negative consequences for the perpetrator

Provided that participation is voluntary, information regarding a person's participation in a restorative justice conference ought to be provided to the judicial officer for consideration at sentence to incentivise the offender's 'meaningful engagement in the process'.[301] Such information could include whether the person engaged with the process and whether the terms of any outcome agreement have been met or any progress made.[302]

We also recognise the pre-sentence restorative justice processes involved in the YRJC model, which have assisted the court in determining the most appropriate sentence by considering participation to be an element in their favour, provides information for consideration in developing a legislative model.[303]

However, in recognition of the fundamental right of an accused person to be presumed innocent until found guilty within the Queensland adversarial criminal justice system, an accused person must be permitted to withdraw from participating in this process at any point without there being any negative consequences within the criminal prosecution process.

In developing a model for Queensland, regard should be had to the approach in taken in the ACT, which permits the court to consider any agreements reached in sentencing the person, but which prevents any negative inference being drawn where they do not participate, or withdraw from, restorative justice processes.[304]

Greater flexibility and resourcing is required

Information proved throughout this review on the application of current ARJC processes in Queensland highlights some of the challenges that are likely to arise in the development of the new restorative justice model, including issues surrounding current delays for ARCJ referrals, limited access to existing programs outside of specific delivery locations and issues with the availability of suitable community-based treatment options.

The Council recognises that these challenges will likely continue without a commitment by the government of significant additional funding and resourcing and consideration being given to alternative modes of delivery.

The framework adopted must also be sufficiently flexible to respond to the unique needs of victim survivors, rather than limiting the form, mode of delivery and outcomes available. For example, options should be made available to enable personal attendance at a conference, the exchange of letters,

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301 Submission 23 (Legal Aid Queensland) 32–3; Submission 21 (Dispute Resolution Branch) 3.
302 Submission 23 (Legal Aid Queensland) 33.
303 Submission 30 (Youth Advocacy Centre) 9.
304 *Crimes (Sentencing) Act 2005* (ACT) s 34(1)(h).

mediated communications between the complainant and the perpetrator or any other suitable process determined.

We endorse comments made by the WSJ Taskforce that these processes also must be appropriately funded to enable equal access across the state.

Principles should be developed to guide the implementation of ARJC processes

While we are mindful of the considerable risks inherent in these processes, not least due to the power imbalances involved and potential for these processes to cause secondary trauma, we are of the view that these risks can be managed through the implementation of an appropriately designed principle-based scheme - similar to the position taken by the Victorian Law Reform Commission in New Zealand.

We support the current development of a Restorative Justice Sexual and Gender-based Violence practice guide and this being supported with appropriate professional development and training for all stakeholders involved, including referring agencies and individuals. We acknowledge the important inclusion in the New Zealand Restorative Justice Standards for Sexual Violence cases of new principles underpinning their practice standards that emphasise the needs of sexual offence and family violence participants:

- The process is victim/survivor driven. It respects the right of the victim/survivor to hold the offender accountable. It recognises re-balancing of power between the victim/survivor and the offender as a key to victim healing.
- Processes are designed to maximise both the opportunity to experience a sense of justice and the chances for healing, and to minimise chances for harm.[305]

We recommend that a Queensland-based practice guide also given consideration to the inclusion of additional guidance and principles, where appropriate, for processes that are to involve Aboriginal and Torres Strait Islander participants, including family members, and for people from other cultural backgrounds or disadvantaged and marginalised communities, such as people with cognitive disability and LGBTQIA+ people.

The legislative framework should be co-designed with members of the community

As recommended by the Women's Safety and Justice Taskforce in *Hear Her Voice – Report Two* (Recommendation 91), the legislative framework for adult restorative justice in Queensland should be co-designed with people with lived experience, Aboriginal and Torres Strait Islander people, and service and legal system stakeholders, adopting a victim-centric approach.

This aspect of this work is critical and should be continued.

We also acknowledge the work being undertaken by the ALRC in its current national inquiry into justice responses to sexual violence, which requires consideration of 'alternatives to, or transformative approaches to, criminal prosecutions, including restorative justice, civil claims, compensations schemes and specialist court approach'.

Findings from these reviews should inform consideration of the Council's recommendations.

The Terms of Reference required the Council to 'advise on options for reform to the current penalty and sentencing framework to ensure it provides an appropriate response to this type of offending'. Within this

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[305] Ministry of Justice, *Restorative Justice Standards for Sexual Offending Cases* (Report, July 2013) 20.

context, the Council has recommended the consideration of transformative justice approaches as an alternative to the criminal justice system (**Recommendation 25**).

Feedback to the Council has reinforced the need to take care in the broader adoption of restorative justice processes for sexual violence matters and for appropriate safeguards to be put in place, particularly to ensure that the process prioritises the needs and interest of victim survivors and does not put them at risk of further harm. This feedback suggests a need for all stakeholders to be engaged throughout the process of developing the new legislative framework and pilot program to ensure there is clarity about the intended operation of the new program, including referral pathways and a supporting service-delivery model, and its potential benefits for victim survivors and defendants are understood to promote referrals being made in appropriate cases.

16.5.2 Alternative and complementary justice processes

Recommendations

26. **Alternative and complementary justice approaches**

Taking into account any outcomes of the Australian Law Reform Commission's current inquiry into justice responses to sexual violence, the Queensland Government consider exploring the merits and appropriate resourcing arrangements in support of alternative approaches to traditional criminal justice system responses to sexual violence offences to provide victim survivors with alternative avenues for healing and recovery, which also are effective in promoting perpetrator accountability.

Such approaches should be viewed as supplementary to existing criminal justice system responses and be victim survivor centred. They might include, for example, victim-centred approaches, including victim navigator schemes, victim survivor hubs, community-based restorative justice programs and transformative justice approaches.

As discussed above, many aspects of the criminal justice system do not operate in a way that meets the needs and interests of victims. It may be that the current system, which is designed to prosecute offences on behalf of the state, rather than the victim, and to hold perpetrators accountable for their behaviour, will never fully meet the needs of victim survivors, even if significant reforms are initiated.

In some cases, victim survivors may choose not to disclose the sexual offending at all if the choice is between going through the criminal justice process or not, and if there may be concerns about the consequences for the person who has harmed them in circumstances where they wish the relationship to continue – such as in the context of offending involving adult intimate partners or friends.

We are strongly supportive of reforms recommended by the WSJ Taskforce to improve current responses to sexual violence to improve the system's operation and promote better outcomes. At the same time, we accept that there will continue to be cases that will not result in a formal complaint being made, where the victim survivor may decide they do not wish to proceed or, for evidential reasons, the prosecution does not continue or a conviction is not secured.

In these cases, it is important that alternative and complementary pathways be offered to ensure victim survivors get the support and assistance they need to recover, and those who cause harm take responsibility for their actions and address the causes of their offending behaviour.

We do not consider one model superior to any others, and further investigation is required. It is likely that a range of options will work better in meeting the diverse needs and interests of victim survivors and perpetrators of sexual violence rather than just one.

Those models that may be considered include victim-centred approaches, including victim navigator schemes, victim survivor hubs, community-based restorative justice programs and transformative justice approaches.

Such approaches should be viewed as supplementary to existing criminal justice system responses rather than replacements.

16.5.3 Applying the Council's fundamental principles

The following principles relate to applying the Council's fundamental principles guiding the review[306] to the issues raised with respect to extending enhanced restorative justice pathways to apply to offences of rape and sexual assault to address **Key Finding 19**, and in making **Recommendations 24** and **25**.

- **Principle 1: Reforms to sentencing laws should be evidence-based with a view to promoting public confidence**: We have drawn on reports published by other research and law reform bodies regarding adult restorative justice processes in other jurisdictions, which have recognised the potential benefits of a well-developed, safe and victim-centric restorative justice process. We have also relied upon the evidence received through consultation with stakeholders, including victim survivors of sexual assault and rape to inform our key findings and recommendations. We note the conflicting views between victim survivors, victim support advocates, legal stakeholders and members of the broader community surrounding whether these processes are suitable for restorative justice conferencing, with some raising concerns that it does not reflect the seriousness of these offences, while others advocate its use – outlining benefits for both victim survivors and perpetrators of sexual assault and rape. The current evidence suggests that there is support for enabling complementary or alternative pathways, such as enhanced restorative justice processes and transformative justice approaches, to be made available for victim survivors to choose to engage with.
- **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):** We have considered the purposes of sentencing in recommending that restorative or transformative justice pathways be further explored, recognising that they seek to provide a pathway to the rehabilitation of the person who committed the offence, as well as recognising the harm done to the victim survivor and attempting to restore their dignity and repair relationships (where possible and appropriate). These approaches align with the purposes of sentencing, while providing complementary or alternative pathways to traditional justice responses to crime.
- **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**: Stakeholders expressed concerns that ARJC pathways do not appropriately reflect the serious nature of sexual violence offending, and that they do not sufficiently punish or deter those who commit sexual violence from reoffending, as there are no real consequences for the offender,

306 For a full list of the fundamental principles, see Chapter 3.

and no sense of justice for victim survivors. However, reports published by research bodies reflect that restorative justice conferencing can have impacts through reduced recidivism, as well as providing the offender with a greater sense of understanding of the consequences of their actions.[307] The work being led to develop an appropriate practice guide for these forms of offending with appropriate supporting principles, together with supporting guidelines, training and professional development, may assist in addressing current identified risks of ARJC processes. Complementary justice approaches should also be developed with a focus on ensuring that the seriousness of sexual offending is not minimised and promotes appropriate outcomes that hold perpetrators accountable for their actions and recognise the harm caused by their offending.

- **Principle 4: People serving sentences in the community for a sexual offence should have appropriate supervision**: Some stakeholders raised concerns that current restorative justice processes do not enable sufficient monitoring of the offending person in the community for a sufficient period of time. Restorative justice processes, however, enable convenors to monitor the offender's interactions with a victim survivor within a safe environment and can assist them with behavioural changes through facilitated discussions. Participation in counselling services can also be required as part of conferencing agreement, ensuring that people who commit crimes have access to services to assist with their behavioural changes.
- **Principle 6: Reforms should take into account likely impacts on the disproportionate representation of Aboriginal and Torres Strait Islander people in the criminal justice system**: We are conscious that Aboriginal and Torres Strait Islander people are over-represented within the criminal justice system, and that any recommendations will likely have a significant impact on First Nations persons, both as perpetrators and as victim survivors of sexual violence. We have had regard to the views of the Panel that alternative processes that focus on healing and restoration should be explored. We have also considered the concerns they raised perceptions of sexual violence offences as being 'women's business', which limits the willingness of victim survivors to discuss their experience and may create a power imbalance within a conference setting. The Council has taken these concerns into account in recommending that the ARJC model in Queensland be co-designed with Aboriginal and Torres Strait Islander people to ensure that these concerns are considered and addressed. These same principles should be applied to any complementary programs, services and responses developed.
- **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**: We recognise that the justice needs of victim survivors and the circumstances of each offence, and each person who commits these offences, are varied. We believe that offering complementary and alternative processes to traditional justice outcomes provide more options with which victim survivors and perpetrators of sexual violence can engage, promoting individualised responses to crime and promoting more positive outcomes. Victim survivor choice within these processes should be retained.
- **Principle 8: Sentencing orders should be administered in a way that satisfies the intended purpose or purposes of the sentence. Services delivered under them, including programs and treatment, should be adequately funded and available across Queensland both in custody and**

307 See, for example, Lindsay Fulham et al, 'The effectiveness of restorative justice programs: A meta-analysis of recidivism and other relevant outcomes' (2023) *Criminology & Criminal Justice*.

in the community: In considering the availability and accessibility of restorative justice processes and complementary justice models, we have had regard to the information provided to us that current ARJC processes are not accessible to victim survivors and perpetrators of crime who live in regional, rural and remote areas of Queensland. This has informed the consideration of our recommendation that the new restorative justice model should be adequately resourced to ensure that Queenslanders have equitable access to these services, irrespective of where they live. This should also be an objective of any victim-centred services developed, while noting that what will work well in one location may not work so well in another.

- **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 have had regard to the views of some legal stakeholders that a person's participation in pre-sentence restorative justice processes, as well as any outcomes agreed upon, is a matter that is relevant to the court's assessment of a person's risks of reoffending and rehabilitative prospects. We support these outcomes being taken into account as appropriate at sentence.
- **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**: Restorative and transformative justice pathways promote a person's human rights, such as 'rights in criminal proceedings'.[308] This is discussed in more detail below.

16.5.4 Systemic disadvantage considerations

As discussed throughout this report, Aboriginal and Torres Strait Islander peoples are over-represented both as perpetrators of sexual assault and rape offences and as victims of this form of offending.

We consider opportunities to enhance the availability of restorative justice processes as an alternative or complementary approach to traditional criminal justice processes may have a significant, positive impact upon the criminal justice experiences of both Aboriginal and Torres Strait Islander victim survivors and perpetrators of sexual violence offences. In doing so, the Council acknowledges feedback received during this review that restorative justice processes are 'more culturally aligned and familiar' for some communities within Australia than traditional justice models[309] – including for Aboriginal and Torres Strait Islander peoples – and that these processes may also benefit people from culturally and linguistically diverse backgrounds.

It is important to recognise that the extent to which such processes may support better outcomes for Aboriginal and Torres Strait Islander defendants and victim survivors, including healing from the impacts of these offences, will likely depend on the design and delivery of such programs. Critically, we recognise the importance of ensuring that appropriate protections are built into their implementation to ensure the safety of victim survivors. The potential of such processes to perpetuate power imbalances, thereby further disempowering Aboriginal victim survivors, is particularly acute.[310] In this context, we acknowledge

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308 *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'.

309 Submission 24 (QSAN).

310 Arielle Dylan, Cheryl Regehr and Ramona Alaggia, 'And justice for all? Aboriginal victims of sexual violence' (2008) 14(6) *Violence Against Women* 678, 680 citing Aileen Cheon and Cheryl Regehr, 'Restorative justice in cases of intimate partner violence: Reviewing the evidence' (2006) 1 *Victims and Offenders*; Kathleen Daly and Julie Stubbs, 'Feminist engagement with restorative justice' (2006) 10 *Theoretical Criminology*; Rashmi Goel, 'No women at the center: The use

the express recommendations of the WSJ Taskforce for the new Queensland model to be co-designed with people with lived experience and Aboriginal and Torres Strait Islander peoples, in addition to service and legal system stakeholders. Equitable access to ARJC processes across rural, regional and remote areas must be promoted to ensure that these processes are available for all Queenslanders.

Importantly, such processes should not be seen as a wholesale 'replacement' for the proper recognition of harm through traditional criminal justice system processes. The wishes of Aboriginal and Torres Strait Islander victim survivors, many of whom are women and children, must be paramount.

Members of the Council's Aboriginal and Torres Strait Islander Advisory Panel supported the consideration of restorative justice processes as a way of resolving or healing conflicts within the community while conveying a deeper understanding of the nature of the harm caused by sexual violence offending on the perpetrator. They further recognised the existence of cultural barriers that limit the reporting of sexual violence offences within community. Within this context, the Panel acknowledged the importance for women and children within these communities of having the offending person stop their behaviour, rather than necessarily seeking that they be incarcerated or otherwise punished.

In considering the development of an enhanced model, the Panel outlined various factors that should be considered, including the importance of ensuring ARJC processes are victim-led and driven, and that they respond to the unique justice needs of the victim survivor, including the need to receive a genuine (as opposed to tokenistic) apology from their offender, and to understand how this will be taken into account at any sentence hearing. Aboriginal and Torres Strait Islander victim survivors should be supported throughout the process by an Aboriginal and Torres Strait Islander person. Cultural concerns with respect to the 'shame' of sexual violence offending must be considered.

16.5.5 Human rights considerations

Restorative justice processes have been recognised as sharing 'common principles [with human rights] such as empowerment, inclusion, participation and individual responsibility'.[311]

The enhancement of restorative justice and transformative justice approaches seeks to promote human rights, including the rights of victims enshrined within the Charter of Victims' Rights, to be treated with 'courtesy, compassion, respect and dignity, taking into account the victim's needs'.[312] It also addresses the needs of perpetrators of criminal offences, by providing them with an opportunity to understand their offending and the impacts on the victim survivor.

Specifically, our recommendations seek to empower victim survivors by providing them with enhanced agency over the way the justice system responds to the harm they have suffered, as well as providing them with opportunities to have their voice heard within an environment where they are believed, and that encourages healing. The recommendations support alternative pathways for victim survivors based on their individual needs.

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of the Canadian sentencing circle in domestic violence cases (2000); 15 *Wisconsin Women's Law Journal*; Julie Stubbs, 'Domestic violence and women's safety: Feminist challenges to restorative justice' in Heather Strang and John Braithwaite (eds), *Restorative Justice and Family Violence* (Cambridge University Press, 2002).

311 Theo Gavrielides (ed), *Human Rights and Restorative Justice* (Restorative Justice for All Publications, 2018) 7.

312 *Victims' Commissioner and Sexual Violence Review Board Act 2024* (Qld), sch 1 ('Charter of Victims' Rights').

With respect to those who have caused harm, the recommendations of the Council would not result in any direct limitations being placed on a person's 'rights in criminal proceedings'.[313] However, the Council recognises that enhancements to ARJC has the potential to impinge upon the rights of perpetrators where appropriate safeguards are not built in.

In considering reforms to current restorative justice principles, the Council supports the consideration of the comprehensive set of standards and principles developed by Braithwaite.[314] The first of these categories, described as 'constraining standards', includes non-domination, empowerment, equal concern for all stakeholders, accountability, appealability and respect for human rights. These underpin the management of restorative justice encounters and may operate to promote rights protected under the HRA, such as:

- recognition and equality before the law (s 15);
- protection from torture and cruel, inhuman or degrading treatment (s 17);
- right to privacy and reputation (s 25);
- cultural rights (ss 27–28); and
- right to a fair hearing (s 31).

The second category of standards comprises 'maximizing standards', which include the restoration of relationships, emotional restoration and prevention of future harm/injustice (the achievement of which is conditional on the circumstances, wishes and capabilities of the parties).

The final category consists of 'emergent standards', such as remorse, apology, censure of the act, forgiveness and mercy (which it is suggested should 'only arise organically' and not be forced).

Maximising standards and emergent standards are described as representing the outcomes of restorative justice processes. While these are not guaranteed, advocates suggest they are more likely to be achieved through a restorative justice process than through traditional criminal justice processes.[315]

It is also important that such programs be continually evaluated to ensure that the rights of all participating parties are protected.

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313 *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.

314 John Braithwaite, 'Setting Standards for Restorative Justice' (2002) 42(3), *British Journal of Criminology* 563.

315 Meredith Rossner, 'Restorative Justice in the Twenty-First Century: Making Emotions Mainstream' in Alison Liebling, Shadd Maruna and Lesley McAra (eds), *The Oxford Handbook of Criminology* (7th ed, Oxford University Press, 2023) 725, 732.