
REVIEW OF SENTENCING FOR SEXUAL VIOLENCE OFFENCES AND AGGRAVATING FACTORS FOR DOMESTIC AND FAMILY VIOLENCE

20th June 2023

The Justice Reform Initiative welcomes the opportunity to provide preliminary feedback to the Queensland Sentencing Advisory Council ('the Council') regarding the review of sentencing for sexual violence offences and aggravating factors for domestic and family violence offences. We view this as an important opportunity to undertake a thoughtful and thorough review of alternative processes to traditional criminal justice prosecutions for sexual assault and family and domestic violence matters.

ABOUT THE JUSTICE REFORM INITIATIVE

The Justice Reform Initiative is an alliance of people who share long-standing professional experience, lived experience and/or expert knowledge of the justice system, further supported by a movement of Australians of goodwill from across the country who believe jailing is failing and that there is an urgent need to reduce the number of people in Australian prisons.

The Justice Reform Initiative is committed to reducing Australia's harmful and costly reliance on incarceration. Our patrons include more than 100 eminent Australians, including two former Governors-General, former Members of Parliament from all sides of politics, academics, respected Aboriginal and Torres Strait Islander leaders, senior former judges including High Court judges, and many other community leaders who have added their voices to end the cycle of incarceration in Australia.

We seek to shift the public conversation and public policy away from building more prisons as the primary response of the criminal justice system and move instead to proven alternative evidence-based approaches that break the cycle of incarceration.

We are committed to elevating approaches that seek to address the causes of contact with the criminal justice system including responses to housing needs, mental health issues, cognitive impairment, employment needs, access to education, the misuse of drugs and alcohol, and problematic gambling. We are also committed to elevating approaches that see Aboriginal and Torres Strait Islander-led organisations being resourced and supported to provide appropriate support to Aboriginal and Torres Strait Islander people who are impacted by the justice system.

DO HARSHER PENALTIES DECREASE THE LIKELIHOOD OF OFFENDING?

1. There is little evidence to support the notion that increased sentence severity provides an effective deterrence for the criminal conduct to which it is applied. There is significant evidence that suggests the certainty of apprehension and punishment for an act provides some deterrent effect, but there is little evidence to suggest that a

more severe penalty as a legal consequence is an effective deterrent.¹

2. The threat of harsher penalties (including longer prison sentences and mandatory sentencing) does not reduce crime.^{2 3 4} Even in the United States, which is the only Western democracy to retain the use of Capital Punishment, there is absolutely no evidence that the threat of the death penalty has any impact on homicide rates.⁵
3. There are a number of reasons why 'deterrence' in the form of the threat of harsher penalties is unsuccessful when it comes to improving community safety. Research has consistently shown individuals who commit crime are rarely thinking of the consequences of their actions. This is because the context in which most crime is committed often does not lend itself to someone rationally weighing up the consequences of their actions. Much crime is conducted in chaotic or desperate circumstances and is impacted by alcohol and other drug use, mental health conditions and disability. The threat of harsher penalties or longer sentences is not something that most people who engage in offending are considering at the moment they are committing crime.^{6 7}

WILL HARSHER PENALTIES INCREASE CONFIDENCE IN THE JUSTICE SYSTEM FOR VICTIMS?

4. The criminal justice system typically fails to engender a confidence among victims of sexual assault to engage in this process, whether by reporting offences or participating as witnesses in the prosecution of those who are charged with offences. This indicates a need to move beyond responses that purportedly advocate for stricter sentences, or redefinitions of legal defences aimed at making convictions more likely. If the justification of such proposed reforms is to prioritise the needs of the victim, the continuing decline in victim reporting and prosecution rates suggests alternative and innovative justice mechanisms should now be considered.
5. While many commentators suggest increased sentencing and stigmatisation will provide greater recognition and acknowledgment of the trauma experienced by victims of sexual assault and/or family and domestic violence, such responses can have unintended consequences. For instance, increasing the severity of sentences can result in more accused people pleading not guilty to offences.⁸ This can manifest in low reporting and conviction rates for sexual offences and significant risk of further trauma for complainants.

¹ North Australian Aboriginal Justice Agency (NAAJA). 2020. Submission on the 'Mandatory Sentencing and Community-Based Sentencing Options. Northern Territory Law Reform Committee. November 2020. 4-5; See also John Pratt. 2007. *Penal Populism*. London. Routledge. 2007. 3-4, 172-174.

² <https://newsroom.unsw.edu.au/news/business-law/do-harsher-punishments-deter-crime>

³ <https://www.crimsl.utoronto.ca/research-publications/faculty-publications/issues-related-harsh-sentences-and-mandatory-minimum>

⁴ <https://www.smh.com.au/national/nsw/when-it-comes-to-crime-harsher-punishment-doesnt-pay-20120313-1uykb.html>

⁵ <https://www.bocsar.nsw.gov.au/Publications/CJB/cjb84.pdf>

⁶ Anderson, A (2002) The Deterrence Hypothesis and Picking Pockets at the Pickpockets Hanging, in *American Law and Economics Review*, Vol. 4. No. 2

⁷ Ritchie, D (2011) Does Imprisonment Deter, Sentencing Advisory Council of Victoria

⁸ Naylor, B. (2010), 'Effective Justice for Victims of Sexual Assault: Taking Up the Debate on Alternative Pathways', (2010) 33(3) *University of New South Wales Law Journal*, 662-684; Daly, K (2014), 'Reconceptualizing Sexual Victimization and Justice, in I Van Fraechem, A Pemberton and F Ndahinda (eds), *Justice for Victims: Perspectives on Rights, Transition and Reconciliation*, Routledge 2014, 318.

VICTIM-CENTRED RESTORATIVE JUSTICE PROCESSES

6. The JRI recommends that the Sentencing Advisory Council consider, as part of this review, the potential to develop appropriate, victim-centred restorative justice processes for sexual offences.
7. The JRI acknowledges there is considerable dispute as to whether restorative justice conferencing is appropriate for sexual offences. In 2010, the NSW Law Reform Commission indicated that the dynamics of power in a relationship where sexual offences have been committed suggest the use of restorative justice processes for sexual offences is inappropriate and carries a risk of secondary victimisation for victims.⁹ However, given the failure of existing criminal justice processes to provide adequate recognition and acknowledgment of the primary trauma for sexual assault victims, the JRI considers that the Council should give careful consideration to more recent examples of sexual offence restorative justice processes in Australia and New Zealand. The evaluations for these programs have indicated positive results in terms of victim satisfaction, reduced offending, and a reduction in re-victimisation through the justice process.¹⁰
8. The JRI notes that in 2014 the Victorian-based Centre for Innovative Justice (CIJ), RMIT, undertook a comprehensive exploratory research project to identify innovative justice processes that display the potential to meet the needs of victims of sexual offending, to address public interest concerns, and to prevent reoffending in ways that the conventional justice system has limited capacity to achieve.¹¹
9. In its report the CIJ presented a model that is victim-centred, which does not compromise the legal rights of the person accused, and which addresses community safety objectives. The model is based on restorative justice conferencing, which has significant potential to expand the existing criminal justice response when combined with the criminal justice system and other therapeutic justice initiatives (despite only being appropriate in certain cases).
10. 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.
11. The JRI recommends that the Council consider the CIJ model presented in its report, which is linked [here](#).

For further information or clarification:

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⁹ Australian Law Reform Commission and New South Wales Law Reform Commission (2010), 'Family Violence: Improving Legal Frameworks', April 2010, Consultation Paper, 559, online at <<https://www.alrc.gov.au/family-violence-improving-legal-frameworks-cp-1>>

¹⁰ <https://www.transformingjustice.org.au/research>

¹¹ Centre for Innovative Justice (2014), *Innovative Justice responses to sexual offending – pathways to better outcomes for victims, offenders and the community*, Centre for Innovative Justice, RMIT University, Melbourne, May 2014.