Penalties and Sentences (Sexual Offences) and Other Legislation Amendment Bill 2025

Submission No:	15
Submitted by:	Legal Aid Queensland
Publication:	
Attachments:	See attachment
Submitter Comments:	

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Submission by Legal Aid Queensland

4 June 2025

Introduction

Legal Aid Queensland (LAQ) welcomes the opportunity to make submissions on the *Penalties and Sentences (Sexual Offences) and Other Legislation Amendment Bill 2025*.

LAQ provides input into State and Commonwealth policy development and law reform processes to advance its organisational objectives. Under the *Legal Aid Queensland Act 1997,* LAQ is established for the purpose of "giving legal assistance to financially disadvantaged persons in the most effective, efficient and economical way" and is required to give this "legal assistance at a reasonable cost to the community and on an equitable basis throughout the State". Consistent with these statutory objects, LAQ contributes to government policy processes about proposals that will impact on the cost-effectiveness of LAQ's services, either directly or consequentially through impacts on the efficient functioning of the justice system.

LAQ always seeks to offer policy input that is constructive and is based on the extensive experience of LAQ's lawyers in the day-to-day application of the law in courts and tribunals. LAQ believes that this experience provides LAQ with valuable knowledge and insights into the operation of the justice system that can contribute to government policy development. LAQ also endeavours to offer policy options that may enable government to pursue policy objectives in the most effective and efficient way.

This submission calls upon the knowledge and experience of LAQ's Criminal Law Services (CLS), which is the largest criminal law legal practice in Queensland and provides advice and representation across the full range of criminal law offences. CLS lawyers possess valuable knowledge and insight into potential impacts of this policy on criminal legal practice and the practical implications for defendants.

Submission

Amendments to the *Crimes at Sea Act 2001* and the *Criminal Code*

LAQ does not seek to make any comment on the proposed amendments to the *Crimes at Sea Act 2001* or the *Criminal Code*.

Amendments to section 9 of the *Penalties and Sentences Act 1992 (PSA)*: sentencing purposes

LAQ strongly opposes changes to the PSA section 9(1) sentencing purposes as provided for in Clause 12 of the Bill.

The sentencing principles and guidelines currently within section 9[1] allows the sentencing court to apply judicial discretion to appropriately determine the weight and relevance of each issue to an individual case. The amendment proposed is unnecessary, with s 9(2)(c)(i)[2] already providing that a court *must* have regard to any physical, mental, or emotional harm done to a victim. LAQ observes that s 9[3] has been revised and amended extensively, resulting in legislation which is detailed and sometimes prescriptive. It is important to ensure that judicial

[1] *Penalties and Sentence Act 1992*.
[2] Ibid.
[3] Ibid.

officers maintain a broad-ranging discretion to reflect the unique features of a case for which sentence must be passed.

Amendments to section 9 of the *PSA*: character evidence in sentencing

LAQ is of the view that no changes should be made to how good character can be considered by courts in relation to sexual assault and rape offenders. A sentencing court should impose a sentence having regard to the circumstances of each case and should be equipped to apply a broad discretion in order to do so. Any further amendments would curtail the ability of judges to engage in the process of instinctive synthesis.

In LAQ's view, the proposed amendments would limit the court's capacity to assess the *whole* offender, and so to do justice in *all* the circumstances.[4]

On a review of the common law in this area, as outlined in 'Annexure A', the following observations can be made:

a) It is clear the courts, when given the opportunity to take into account all the circumstances of the case, do so (including the aggravating factors of breach of trust).
b) Any character or reference material tendered at a sentence hearing is balanced according to the other factors contained in section 9.
c) There is a need to differentiate between those who come to court with a relevant criminal history or relevant history, and those who do not.

Protective measures are enshrined in the legislation to the effect that, if an offender's good character assisted the offender in committing an offence against a child under 16, the court must not take the good character into account. In line with the rest of the PSA, section 9(6A) should not be extended. It would be inconsistent with the remaining provisions under section 16(4) of the PSA.

It is LAQ's view that sentencing judges are best equipped to balance out evidence of good character with other factors under section 9 of the PSA, including the effects the offending has had on the complainant. Evidence of good character, in our experience, is appropriately scrutinised by courts. This evidence is regularly in the form of character references. Anecdotally, character evidence that a defendant relies on in a sentencing proceeding that omits reference by its author to the charges before the court carries little to no weight.

Amendments to section 9 of the *PSA*: aggravating factor in sentencing

LAQ does not seek to comment on this amendment.

Amendment of section 179K of the *PSA*: absence of a victim impact statement (VIS)

The Bill amends section 179K(5) to clarify that the court cannot draw any inference that an offence caused little or no harm to the victim from the fact that details of the harm caused by the offence are absent at the sentencing, including the absence of a victim impact statement.

LAQ does not support this amendment. It is the experience of LAQ's practitioners that the courts are unlikely to infer that little or no harm has been caused to the victim as a result of an absence of a VIS. Further section 179K(6), as in force, makes clear that the providing of the details of the harm caused to a victim is not mandatory. The provision is sufficient, in LAQ's view, to cover the concerns raised as the purpose behind this amendment.

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[4] Section 9(1)(a) *Penalties and Sentences Act 1992*

Further, LAQ submits the proposed amendment reaches beyond the scope of the matters canvassed in the *Sentencing of Sexual Assault and Rape: The Ripple Effect – Final Report* from the Queensland Sentencing Advisory Council ("the report"). Section 179K applies to all criminal sentencing matters. The concerns raised by the report would be more appropriately addressed through an increase in education and support to victims of crime about their rights and options in this area, including via existing organisations and programs such as Victims Assist and victim liaison officers.

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ANNEXURE A

Markarian v The Queen (2005) 228 CLR 357

Instinctive synthesis is the proper approach to sentencing which was approved by the High Court in *Markarian v The Queen*[5]:

> "… That is not to say that in a simple case, in which, for example, the circumstances of the crime have to be weighed against one or a small number of other important matters, indulgence in arithmetical deduction by the sentencing judges should be absolutely forbidden. An invitation to a sentencing judge to engage in a process of 'instinctive synthesis', as useful as shorthand terminology may on occasions be, is not desirable if no more is said or understood about what that means. The expression 'instinctive synthesis' may then be understood to suggest an arcane process into the mysteries of which only judges can be initiated. The law strongly favours transparency. Accessible reasoning is necessary in the interests of victims, of the parties, appeal courts, and the public. There may be occasions when some indulgence in an arithmetical process will better serve these ends."

R v Wruck [2014] QCA 39

In the Queensland Court of Appeal case of Wruck, her Honour Justice Holmes as she then was, observed at [36]:

> "There is no doubt that there are compelling mitigating circumstances in the applicant's favour: his relative youth and sexual immaturity at the time of the offending, his blameless life thereafter over a period of decades, his evident remorse and cooperation in the prosecution. Against that is the egregious breach of trust entailed in the offending: called on in a counselling role to provide the complainant with the male guidance he lacked because of his father's departure, the applicant abused his position utterly, in what were not isolated incidents. The other striking feature of the case, one which would not have been evident had the applicant been dealt with at the time of the offending, is the serious and lasting harm done to the complainant who, in middle age, remained deeply affected by what had occurred."

Wruck supports the proposition that good character is a factor taken into account on sentence. However, it is one that is balanced against the other factors contained in section 9 including the harm caused to the complainant.

Dick v The Queen (1994) 75 A Crim R 303

In Western Australia, the Court of Criminal Appeal considered this issue in *Dick v The Queen* and *R v Petchell*[6]:

> "That, in cases of offences of the nature with which we are concerned (sexual assaults committed by a stepfather against a juvenile), the offender is of otherwise good character is not without relevance but can have little weight. The offences are of such a nature that until brought to light, they generally do not impinge on others and so on

[5] (2005) 228 CLR 357 at 375

[6] Unreported, WA Court of Criminal Appeal, Number 157 of 1992.

> their perception of the offender and can co-exist quite comfortably so far as the offender is concerned with an otherwise good character."

R v Reid; Ex parte Attorney-General (Qld) [2001] QCA 301

Reid pleaded guilty to one count of indecent treatment of a child under 16 years along with non-sexual offences. He was sentenced to three years' probation with no conviction recorded.

The Attorney-General appealed on the basis the sentence was manifestly inadequate in that it failed to reflect the gravity of the offences and to sufficiently consider general deterrence, placing too much weight on mitigating factors.

> The respondent was 70 years old at sentence and had no previous convictions. He was a well-regarded former senior public servant who had been head of protocol in the Premier's Department. Many references were tendered attesting to his outstanding community service and good character. He had been actively involved in his church as a lay preacher since 1948 and had held lay positions in the church at local, State and national level. As a result of these charges, he informed his fellow parishioners of his conduct and resigned from all positions he held in the church.
>
> He had also given outstanding service to the community through the Blue Nursing Association over many years. He was treasurer and chairman of its Sandgate centre from its inception in 1957 until 1998 when it was regionalised. He was made a life member of Blue Nurses in 1983 and was State Treasurer and Queensland Director-General from 1960 till 1990. He was National President of the Australian Council of Community Nursing from 1970 to 1980.[7]
>
> In the light of the respondent's previous good character, which demonstrated that this behaviour was out of character and his significant health problems which contributed to his behaviour according to the undisputed report of Dr Curtis, the respondent in my view need not have been sentenced to a term of actual imprisonment and the concession made by the prosecutor at sentence was fairly and properly made.[8]

R v D'Arcy [2000] QCA 425

D'Arcy was convicted after trial of sexual offences committed 35 years prior. In relation to the sentence appeal, he argued that the sentencing judge erred in not giving adequate weight to mitigating factors. Those mitigating factors included becoming a Member of Parliament and having over 100 good character references tendered at his sentence hearing.

McMurdo:

> [133] the applicant submits the sentencing judge did not give sufficient weight to these references in that his Honour noted that "the weight of the references must be tempered by the fact that they got to know you and respect you without knowledge of these crimes you have committed".

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[7] Page 3.
[8] Page 9.

> [134] Whilst, as Mr Maher points out, the references were given in the knowledge that the appellant had been convicted of these offences, the learned judge's remarks remain apposite. Nevertheless, the references indicate that the appellant was of good character apart from the commission of these offences. The prosecution did not contend to the contrary other than to point out that there were outstanding charges but none which post-dated 1972. On the evidence before the sentencing court, the judge was obliged to take the appellant's good character since 1972 into account in sentencing, although when the gravity of the offending is looked at, that character evidence can only be a small mitigating factor in the sentencing process: see *Ryan v The Queen* and *R v L; Ex parte Attorney-General*. The learned sentencing judge's comments in themselves do not suggest however that his Honour failed to take into account the appellant's good character evidence.

McPherson P at [147] said:

> I am not, however, persuaded that the appellant's apparently unblemished record since the time when these offences were committed some 30 or more years ago can count for very much in his favour. If it had been known that he had offended in this way, it is certain that he would not have been nominated for or elected to Parliament, or appointed to the high offices of State which he has held, with all the advantages of status and remuneration that they entail. Instead, he has brought shame and disgrace on his party and the Parliament of which he was a member. Taking the risk, as he did, that he would one day be found out does not suggest to me that the appellant has ever had any real appreciation of or remorse for his serious criminal conduct.

Chesterman J regarded delay as being the important factor such that the duration between the offence and prosecution of the offender has become rehabilitated, it may be appropriate to mitigate the sentence.

Ryan v The Queen (2001) 206 CLR 267

Ryan was a priest who pleaded guilty to numerous sexual offending against a number of complainants in connection with his role as a priest. Testimonials were received from former parishioners, priests and others of the accused's good character, reputation and positive works and achievements as a parish priest. The sentencing judge said of Ryan's character that, whatever he had done and achieved, he was not a good man and he could see no good in him, and that his "unblemished character and reputation" did not entitle him to "any leniency whatsoever".

The court held (with Hayne J dissenting), that the accused had been entitled to some, though not significant, leniency for his otherwise good character and hence the judge had not applied a proper sentencing principle when he denied the prisoner any leniency on that account.

At 275, McHugh observed that there should be a two-step process when determining good character on sentence. First, it must determine whether the prisoner is of otherwise good character. In making this assessment, the sentencing judge must not consider the offences for which the prisoner is being sentenced. Secondly, if a prisoner is of otherwise good character, the sentencing judge must take that fact into account. However, the weight that must be given to the prisoner's otherwise good character will vary according to the circumstances of the case.

R v Smith (1981) 7 A Crim R 437

What weight is to be given to the evidence of good character is a matter for the sentencer. That will in turn depend on the nature of the subject offence. Some offences are of such a nature and seriousness that the previous good character of the offender is of little weight.

In *Smith*, Starke J said (at 442):

> What weight it will have depends … on the character of the offence committed. In some cases like armed robbery … the fact of good character would have very little weight at all. In other cases … where a man has lived an honest life and has found himself in circumstances through no fault of his own and fell into temptation, the situation is quite different.