SUPREME COURT OF QUEENSLAND

CITATION:	*R v Hansen* [2018] QCA 153
PARTIES:	**R** **v** **HANSEN, Craig Lindsay** (applicant)
FILE NO/S:	CA No 265 of 2017 DC No 1881 of 2015
DIVISION:	Court of Appeal
PROCEEDING:	Sentence Application
ORIGINATING COURT:	District Court at Brisbane – Date of Conviction: 12 October 2017 (Chief Judge O'Brien)
DELIVERED ON:	6 July 2018
DELIVERED AT:	Brisbane
HEARING DATE:	16 April 2018
JUDGES:	Fraser JA and Mullins and Bond JJ
ORDERS:	**1. Application for leave to appeal against sentence granted.** **2. Appeal against sentence allowed.** **3. The sentence for count 6 varied by setting aside the sentence of imprisonment and not further punishing the applicant.** **4. The sentences for each of counts 7 to 11 varied by substituting six months' imprisonment for three years' imprisonment.** **5. The sentence for count 13 varied by substituting three years four months' imprisonment for four years' imprisonment.**
CATCHWORDS:	CRIMINAL LAW – APPEAL AND NEW TRIAL – APPEAL AGAINST SENTENCE – GROUNDS FOR INTERFERENCE – JUDGE ACTED ON WRONG PRINCIPLE – where applicant was sentenced for one count of unlawful carnal knowledge of a person with an impairment of the mind under care, one count of indecent dealing with a person with an impairment of the mind and five counts of indecent dealing with a person with an impairment of the mind under care – where the sentencing judge was wrongly informed by the prosecutor and defence counsel that there was no power to fix a parole eligibility date – where the respondent conceded error was made – where applicant must be re-sentenced – where the applicant had an intellectual impairment and personality disorder – where the applicant

had 1,215 days spent in presentence custody that was not declarable – where the offences were committed whilst the applicant was on a supervision order made under the *Dangerous Prisoners (Sexual Offenders) Act* 2003 (Qld) – where the applicant had a relevant criminal history – where guilty pleas were late – where protection of the community paramount

Attorney-General v Hansen [2006] QSC 35, related
Attorney-General for the State of Queensland v Hansen [2011] QSC 123, related
R v Bell; ex parte Attorney General (Qld) [2002] QCA 344, considered
R v Bowley (2016) 262 A Crim R 93; [2016 QCA 254, cited
R v Cutts [2005] QCA 306, considered
R v Libke [2006] QCA 242, considered
R v Raphael [2009] QCA 145, considered
Veen v The Queen [No 2] (1998) 164 CLR 465; [1988] HCA 14, considered

COUNSEL: D A Holliday for the applicant
M B Lehane for the respondent

SOLICITORS: Legal Aid Queensland for the applicant
Director of Public Prosecutions (Queensland) for the respondent

[1] **FRASER JA:** I agree with the reasons for judgment of Mullins J and the orders proposed by her Honour.

[2] **MULLINS J:** The applicant Mr Hansen was on a supervision order made on 4 May 2011 pursuant to the *Dangerous Prisoners (Sexual Offenders) Act* 2003 (Qld) (DPSOA), when on 31 May and 2 June 2014 he committed the sexual offences against Ms X, to which he ultimately pleaded guilty in the District Court on 3 October 2017. They were counts 6, 7 to 11 and 13 on the indictment.

[3] On 12 October 2017 Mr Hansen was sentenced to four years' imprisonment for one count of unlawful carnal knowledge of a person with an impairment of the mind under care (count 13) and to three years' imprisonment for one count of indecent dealing with a person with an impairment of the mind (count 6) and each of five counts of indecent dealing with a person with an impairment of the mind under care (counts 7 to 11). The learned sentencing judge was wrongly informed by both the prosecutor and defence counsel (who were not the counsel who appeared on this application) that there was no power to fix a parole eligibility date and did not do so. The sentencing judge had not been referred to *R v George* [2013] QCA 302 at [13].

[4] Mr Hansen was given leave to amend the grounds of his appeal to add the ground that the sentencing judge erred in determining that he had no discretion to fix a date on which Mr Hansen would be eligible for parole. As the respondent appropriately conceded that error was made, this application proceeded on the basis that the application for leave to appeal must be granted, the appeal must be allowed, and this Court should re-sentence Mr Hansen.

Mr Hansen's antecedents

[5] Mr Hansen was 56 years old when he offended. He smoked cannabis from the age of 13 years. His criminal history dates from 1976 with offences associated with use of cannabis sativa. He was involved in a motor vehicle accident in 1982 in which he suffered a severe closed head injury that resulted in a significant personality change and a deterioration in his mental ability.

[6] The first relevant serious entry in his criminal history was a sentence of imprisonment of four years imposed in the District Court on 26 July 1995 when he pleaded guilty to maintaining a sexual relationship with a female child between 31 December 1989 and 1 April 1995. He also pleaded guilty to five other offences involving three different complainants, namely two charges of indecent dealing with a child under the age of 12 years with circumstances of aggravation, two charges of indecent dealing with a child under 12 years and one charge of wilfully expose a child under the age of 12 years to an indecent video tape with circumstances of aggravation.

[7] The next relevant serious entry in Mr Hansen's criminal history was the sentence of imprisonment of three years imposed in the District Court on 7 May 2004 for each of nine counts of indecent treatment of a child under 16 years with a circumstance of aggravation. Six of the counts related to a female complainant who was four and one-half years old at the time of the offending. On one occasion Mr Hansen had taken that child to a park. One of the remaining counts related to a girl who was in the park at the same time as the main complainant and the other two counts related to another girl who was also in the park. The offending against the two children in the park (which was inappropriate touching of their breasts and, in one instance, the child's bottom) occurred whilst they were playing on the swing.

[8] At the full time discharge date of the sentences imposed on 7 May 2004, the Attorney-General was successful in obtaining a supervision order pursuant to the DPSOA in respect of Mr Hansen: *Attorney-General v Hansen* [2006] QSC 35. Mr Hansen resided in the community between 15 March 2006 and 5 August 2010, when he was returned to custody following an allegation he had breached a condition of the supervision order, namely that he not establish and maintain a relationship with any woman who has any children under 16 years of age in her care. On 30 August 2010, Mr Hansen was convicted of an offence under s 43B of the DPSOA arising out of the breach of the supervision order and was sentenced to five months' imprisonment with a parole release date after serving two months. Mr Hansen was eventually released under an amended supervision order under the DPSOA on 4 May 2011, which was stated to apply until 6 March 2016: *Attorney-General for the State of Queensland v Hansen* [2011] QSC 123.

[9] After being charged with offences committed against Ms X, Mr Hansen was held in custody. The Attorney-General applied for orders pursuant to s 22 of the DPSOA, on the basis that his conduct in relation to Ms X also amounted to a contravention of requirements of the supervision order. The requirements that Mr Hansen was alleged to have contravened included not to commit an offence of a sexual nature during the period of the order and to disclose to an authorised Corrective Services officer upon request the name of each person with whom he associates. By order made in the Trial Division on 10 June 2014, the contravention hearing pursuant to s 22 of the DPSOA was adjourned to a date to be fixed and pursuant to s 21(2)(a) of the DPSOA, Mr Hansen was ordered to be detained in custody until the final decision of the court under

s 22 of the DPSOA. He has therefore been the subject of an interim detention order under the DPSOA since 10 June 2014. That contravention hearing had not proceeded to a final hearing at the time Mr Hansen's application to appeal against his sentences was heard, as the Attorney-General was awaiting the finalisation of the criminal matters before proceeding with the contravention hearing under the DPSOA.

Circumstances of the offences

[10] Ms X was 26 years old at the time of the offending. She has dyspraxia which is a severe speech and language disorder which resulted in her communicating through writing and gestures. At the time of the offending Ms X was in a relationship with a man who lived some distance from where Ms X resided and she was in the habit of travelling via bus each Saturday from her residence to spend the weekend with her partner and then return home on Monday morning. Her partner had met Mr Hansen in February 2014 and Mr Hansen met Ms X through her partner.

[11] Count 6 related to a visit by Mr Hansen to the complainant's partner's caravan on Saturday, 31 May 2014, when the complainant was visiting. Mr Hansen told the partner to go outside and then touched Ms X on the breasts. Ms X said "no", but Mr Hansen kept touching her.

[12] On Monday 2 June 2014 Ms X agreed to Mr Hansen driving her home. After they arrived at Mr Hansen's home, Mr Hansen kissed Ms X. He then touched her breasts (count 7) and licked her vagina (count 8). Ms X then had a shower, while Mr Hansen cleaned her. In the course of doing so, he washed her vagina and breasts (count 9). Ms X did not require assistance in washing herself.

[13] After the shower, Mr Hansen took Ms X into bed with him. He touched her vagina (count 10) and her breasts (count 11). Later in the night, they had sexual intercourse (count 13). When subsequently interviewed, Mr Hansen admitted having sexual intercourse with Ms X, but said it was consensual.

[14] Psychologist Dr Luke Hatzipetrou did a psychological assessment and report on Ms X for the purpose of determining the degree of her intellectual impairment. Dr Hatzipetrou's report dated 5 June 2014 was in evidence before the sentencing judge. From the testing undertaken of Ms X, Dr Hatzipetrou concluded that Ms X. was "currently functioning within the extremely low range of intelligence with measured impairments in both verbal and nonverbal reasoning skills", and that she met the diagnostic criteria for intellectual disability.

[15] Ms X provided a very brief victim impact statement for the purpose of the sentencing. She wrote three words on a piece of paper "upset", "angry" and "scary".

Procedural history

[16] Mr Hansen was arrested on 5 June 2014 in respect of the offending. On 6 June 2014 a warrant issued pursuant to s 20 of the DPSOA that was executed upon Mr Hansen for alleged contraventions of the supervision order. Mr Hansen was remanded in custody on 6 June 2014.

[17] The indictment containing 13 counts was presented on 20 October 2015 in the District Court. On 8 December 2015, Ms X was declared a special witness pursuant to s 21A of the *Evidence Act* 1977 (Qld). The pre-recording of her evidence during which she was cross-examined took place on 29 September 2016. The matter was then set down

for trial. An application on behalf of Mr Hansen to recall Ms X for cross-examination was heard on 24 March 2017 and dismissed. At a review on 31 July 2017, the matter was listed for sentence. After Mr Hansen pleaded guilty to counts 6 to 11 and 13 on 3 October 2017, the prosecution accepted the guilty plea to count 13 in full satisfaction of the alternative charge of rape in count 12 and entered a *nolle prosequi* in respect of counts 1 to 5 on the indictment. Counts 1 and 5 related to sexual offences alleged to have been committed by Mr Hansen against Ms X on dates earlier than the dates of the offences to which Mr Hansen pleaded guilty. Count 4 was a charge of rape with count 5 being the alternative charge of unlawful carnal knowledge of a person with an impairment of the mind.

[18] At the date the submissions were made before the sentencing judge, Mr Hansen had been held in custody for a period of 1,215 days, which was not declarable.

The respondent's submissions relevant to re-sentencing

[19] Mr Hansen's plea of guilty was a late plea, made not only after the pre-recording of Ms X's evidence, but an unsuccessful application to recall her for further cross-examination. It was an aggravating factor that the supervision order to which Mr Hansen was subject at the time of the offending had been made for the protection of the community and had not deterred his offending against a vulnerable person.

[20] From the versions that Mr Hansen gave to Dr Andrews and Dr Beech, it should be concluded he had no remorse for his conduct. In those versions, Mr Hansen described Ms X as playing with his penis while he was driving and texting him (which was the way she communicated), asking to go back to his house. He described Ms X as a "normal" girl, except that she could not talk, and as a friend "with benefits".

[21] Mr Hansen's intellectual impairment and personality disorder were a "double-edged sword" in that the extent to which his impairment and disorder may reduce his moral culpability had to be balanced with their negative consequences for his rehabilitation. The inference should be drawn from Mr Hansen's criminal history, performance on the supervision order and attitude to his offending, that there were no realistic prospects for his rehabilitation. Deterrence and community protection are the dominant sentencing considerations.

[22] On the basis of the sentences of between five and six years' imprisonment that were imposed or not disturbed on appeal in *R v Cutts* [2005] QCA 306, *R v Libke* [2006] QCA 242 and *R v Raphael* [2009] QCA 145, the starting point for a notional head sentence (before taking into account the plea of guilty or time spent in pre-sentence custody) should be imprisonment of seven or eight years. This case is more serious than the offending in any of these comparable authorities. The maximum penalty applicable to count 13 is life imprisonment which is higher than the maximum penalty applicable in *Raphael* where the finding was merely that a sentence of five years' imprisonment was not manifestly excessive in that case. The rape in *Libke* involved digital penetration of a short duration where the complainant was not as impaired as Ms X and where the age disparity was not as great as between Mr Hansen and Ms X. *Cutts* was a sentence of six years' imprisonment for rape where the finding on appeal was the sentence was not manifestly excessive.

[23] The lateness of the plea and the absence of both remorse and prospects of rehabilitation do not favour the setting of an early parole eligibility date.

The applicant's submissions relevant to re-sentencing

[24] The main submissions on behalf of Mr Hansen were that it was a relevant consideration to take into account the effect Mr Hansen's psychiatric and psychological conditions had on his offending and that the sentence had to reflect the time spent in custody prior to the sentencing.

[25] Mr Hansen had been referred to Dr Michele Andrews who is a clinical psychologist and neuropsychologist for cognitive assessment. Her two reports dated 7 November 2014 and 14 February 2016 (but meant to be 14 February 2017) were tendered in evidence before the sentencing judge.

[26] As a result of testing, Dr Andrews in her first report assessed Mr Hansen's intellectual functioning as falling within the lower limits of the borderline range. Dr Andrews recorded that, in addition to formal test results, "Mr Hansen demonstrated significant impairment across multiple domains of executive functioning". During the assessment, Mr Hansen was observed to be impulsive and disinhibited and "demonstrated a rigid, thinking style with limited ability to engage in flexible thought". Mr Hansen also demonstrated "a poor ability to regulate his emotions" and had "minimal insight into his emotional and cognitive difficulties". Mr Hansen reported to Dr Andrews that he did not believe the victim suffered from an intellectual impairment. Dr Andrews was of the opinion that:

> "Mr Hansen minimized his behaviours in the situation, displayed no empathy or concern for the victim, and placed blame on the victim and her boyfriend. Mr Hansen's confusion regarding the charges, denial and minimization appeared to reflect a combination of enduring personality traits (i.e. prior reports indicate psychopathic personality traits) and impairments in higher order reasoning, self awareness and generally low intelligence secondary to his acquired brain injury."

[27] Dr Andrews concluded in her first report:

> "Mr Hansen appears to have a basic understanding of the concept of consent for sex. Yet his ability to fully comprehend that the victim herself may not have capacity to consent because of her intellectual difficulties regardless of her actions, was impaired by virtue of his own low intelligence and cognitive deficits. While Mr Hansen may have a factual understanding of consent, his ability to apply this knowledge in a reasoned manner in relation to the offences was impaired."

[28] The second report was obtained from Dr Andrews for the purpose of assessing whether Mr Hansen believed on reasonable grounds that the complainant was not a person with an impairment of the mind. Dr Andrews reported that Mr Hansen's presentation at the second assessment on 15 December 2016 was "entirely consistent" with the first assessment undertaken by her.

[29] Dr Andrews concluded in her second report:

> "Taking into account his self reported history and results of his cognitive assessment, I am of the opinion that Mr Hansen would have had the capacity to identify that Ms [X] had some form of an impairment. However, it is unlikely that he was able to conceptualise

> with any sophistication the level of her impairment or why she suffered from an impairment. In line with this I agree with Dr Beech that Mr Hansen's ability to detect or know that Ms [X] had an impairment of the mind would have been reduced or impaired by virtue of his own cognitive impairments, but I do not believe he is so cognitively impaired that he was deprived completely of this capacity."

[30] Mr Hansen was interviewed on 25 February 2016 by psychiatrist Dr Michael Beech for a psychiatric medico-legal report relating to Mr Hansen's soundness of mind and fitness for trial. His report dated 6 April 2016 was before the sentencing judge.

[31] Dr Beech also reviewed other psychological and psychiatric assessments of Mr Hansen. Dr Beech was of the opinion that Mr Hansen has an antisocial personality disorder. He also has a polysubstance use disorder which was in remission. As a result of the severe head injury in the motor vehicle accident, Mr Hansen has a major neurocognitive disorder with associated organic personality change. Dr Beech considered the nature of Mr Hansen's earlier offences indicates he has the paraphilia paedophilia, which is the non-exclusive type.

[32] In relation to whether Mr Hansen had the capacity to appreciate the intellectual impairment of Ms X, Dr Beech stated:

> "It is my opinion that as a result of his brain injury, Mr Hansen does have impaired judgment. It is likely that he is impulsive. He has though a significant premorbid antisocial personality traits and it is possible that these have been aggravated further by his brain injury.
>
> These difficulties, I believe, would have affected his ability to know that the complainant had an impairment of the mind. However, I do not think it would have deprived him of that capacity. His reference to many of her capabilities I think reflects a dispute of the facts, a dispute that she had a significant impairment. It is likely that he doesn't have a very fine-tuned appreciation of a person's mental capacity, but I do not believe he has a disorder that deprived him of the capacity to know that someone was significantly impaired, as the complainant allegedly is.
>
> In my opinion, his disorders would not have deprived him of the capacity to know that the complainant did not have the capacity to consent or the ability to convey that she was not consenting."

[33] Dr Beech concluded that Mr Hansen was not of unsound mind at the time of the offending and that he was fit for trial, but that he would meet the criteria of a person with an impairment of mind.

[34] The sentence should be mitigated to give effect to the opinions of Dr Andrews and Dr Beech that Mr Hansen had cognitive impairment. Mr Hansen's intellectual impairment diminished the degree of his culpability in the manner described by McMurdo P in *R v Mrzljak* [2005] 1 Qd R 308 at [36], when dealing with the effect of Mr Mrzljak's low IQ on sentence, if he were convicted on any retrial of the rape of the complainant who was intellectually impaired, "because it places him outside the more serious category of offenders deliberately taking advantage of young women with intellectual disability".

[35] The sentence should give recognisable credit to Mr Hansen for the guilty pleas, as he was facing even more serious charges on the indictment than those in respect of which the prosecution ultimately accepted Mr Hansen's guilty pleas.

[36] The facts in *Raphael* were more serious than in Mr Hansen's offending, as the complainant had sexual intercourse with both the offender and his son in circumstances that involved a breach of trust by the offender. The maximum penalty for the offence of rape in *Libke* was life imprisonment which is the same as the maximum for count 13 in this case, the offender was convicted after trial, and the sentence was five years' imprisonment imposed after a successful appeal against the sentence. The sentence of six years' imprisonment for rape in *Cutts* was for offending that was more serious than committed by Mr Hansen, as the offender was a complete stranger who restrained a very disadvantaged complainant in her home, whilst he committed the offences in a gross breach of trust, and then showed no remorse.

[37] Taking into account Mr Hansen's intellectual impairment, but acknowledging that Mr Hansen had the aggravating factors of a criminal history for offences of a sexual nature and being on the supervision order when he offended, the starting point for the sentence on count 13 was five years' imprisonment. This should have been reduced to 20 months to give full credit for the period of approximately three years four months spent in pre-custody that could not be declared and with a parole eligibility date fixed at seven months from the date of the sentence. An alternative approach to count 13 would be to reduce the head sentence to take account of both the pre-sentence custody and the guilty plea. Lesser concurrent terms should be imposed on the remaining counts.

The comparable authorities

[38] In *Cutts*, a taxi driver was convicted after trial of rape and three counts of indecent assault on a wheelchair bound complainant who had caught his taxi and allowed him to enter her home to use the toilet. The rape was committed by penile penetration of the mouth. The maximum penalty for the offence of rape was life imprisonment. The complainant was vulnerable because of her significant physical disabilities and the taxi driver was in a position of trust which he abused. The taxi driver had prior convictions for dishonesty, but none for sexual offending. The application for leave to appeal against a sentence of six years' imprisonment for the rape was refused, as it was not manifestly excessive.

[39] The applicant in *Libke* was successful on an appeal against the sentences imposed after trial for one count of rape and two counts of unlawful carnal knowledge of an intellectually impaired person which were each reduced to five years' imprisonment. He was also found guilty of two other sexual offences for which he was given lesser concurrent sentences. The applicant and the complainant met in a dog park. The complainant who had a mild intellectual disability was 18 years old and the applicant was 39 years old. On their second meeting in the park, they were sitting on a bench, when the applicant put his hand in the complainant's shorts and put his finger in her vagina which constituted the rape offence. The complainant then invited the applicant to her home a couple of days later when the other offences were committed. The applicant had a minor criminal history and had been diagnosed as a paranoid schizophrenic who suffered from paranoid delusions. The offending was not attributed to this condition. The applicant was unremorseful.

[40] The applicant in *Raphael* was convicted after trial of a number of offences where the complainant was a 24 year old intellectually impaired woman who was a friend of the applicant's 17 year old son. The applicant was 47 years old at the time of the offending. The applicant not only had sexual intercourse with the complainant, but procured the complainant to perform oral sex on his son and have sexual intercourse with his son. A sentence of five years' imprisonment for each of one count of unlawfully procuring an intellectually impaired person to commit an indecent act, one count of having unlawful carnal knowledge of an intellectually impaired person, and one count of procuring an intellectually impaired person to engage in carnal knowledge was not disturbed on appeal. The applicant suffered from bipolar disorder and his intellectual function was at the lower end of normal, but they played no significant role in the applicant's abuse of a vulnerable person. The maximum penalty for each of the carnal knowledge offences was 14 years' imprisonment.

Re-sentencing

[41] The maximum penalty for carnal knowledge of a person with an impairment of the mind, under care, is life imprisonment. The maximum penalty for count 6 (which did not have the circumstance of aggravation that Ms X was under Mr Hansen's care) is 10 years' imprisonment. The maximum penalty for the other counts is 14 years' imprisonment.

[42] Mr Hansen's guilty plea to count 13 was an admission by him that he knew Ms X was a person with an impairment of the mind, when he had sexual intercourse with her, and also an admission of the aggravating circumstance that, at that time, she was under his care.

[43] Mr Hansen's prior criminal history for committing sexual offences against young girls is a relevant and an aggravating factor on this sentencing: s 9(10) of the *Penalties and Sentences Act* 1992 (Qld). Section 9(11) then provides that, despite s 9(10), the sentence imposed must not be disproportionate to the gravity of the offence for which the offender is being sentenced.

[44] It is recognised there are a number of respects in which mental abnormality may be relevant in the sentencing process: *R v Bowley* [2016] QCA 254 at [34]. Because of the nature of Mr Hansen's offending whilst under a supervision order and his criminal history, the only respect in which his mental abnormality could be taken into account as mitigating is in the reduction of his moral culpability.

[45] The "double-edged sword" effect of mental abnormality was referred to by the plurality in *Veen v The Queen [No 2]* (1988) 164 CLR 465, 476-477:

> "And so a mental abnormality which makes an offender a danger to society when he is at large but which diminishes his moral culpability for a particular crime is a factor which has two countervailing effects: one which tends towards a longer custodial sentence, the other towards a shorter. These effects may balance out, but consideration of the danger to society cannot lead to the imposition of a more severe penalty than would have been imposed if the offender had not been suffering from a mental abnormality."

[46] Any reduction in Mr Hansen's moral culpability due to his impaired mental functioning was cancelled out, in effect, by the circumstances that point to the need to protect the community from Mr Hansen.

[47] Even allowing for the fact that the indictment contained charges other than those to which Mr Hansen pleaded guilty, there was no suggestion that he had been prepared to plead guilty to those charges to which he ultimately did plead guilty at an earlier time than he did. In fact, it was to the contrary, as it was in March 2017 that he applied to recall Ms X for further cross-examination. The characterisation of his guilty pleas as late is therefore appropriate.

[48] For the reasons advanced by the respondent, Mr Hansen's offending was more serious than that of the offender in *Libke*. Because of his criminal history and that he offended despite being under a supervision order, Mr Hansen's offending can be viewed as more serious than the offenders in *Cutts* and *Raphael*. His prospects of rehabilitation must be considered poor.

[49] Before allowing for the non-declarable time in custody and the guilty plea, an appropriate head sentence for count 13 to reflect Mr Hansen's criminality for all the offences to which he pleaded guilty would therefore have been seven years' imprisonment.

[50] Mr Hansen should be given full credit for the period in which he was held in custody after he was arrested, but which cannot be declared, because he was also detained under an interim detention order. Because of Mr Hansen's poor prospects of rehabilitation, the late guilty plea is better reflected in a slight reduction of the sentence, rather than setting a parole eligibility date at a point that is less than half the sentence. I would therefore reduce the sentence by four months to recognise the guilty plea. That would result in a sentence of three years four months' imprisonment for count 13.

[51] The pre-sentence custody was in excess of any term of imprisonment that was appropriate for count 6 which was committed separately from the balance of the offending and without the circumstance of aggravation of Ms X being under Mr Hansen's care. That means that the sentence for count 6 should be varied by setting aside the sentence of imprisonment and not further punishing the applicant for that offence. He will therefore remain convicted of that offence.

[52] The effective sentence at first instance for each of counts 7 to 11 was six years four months' imprisonment. In view of the particulars of each of counts 7 to 11, it is difficult to justify that sentence, before the reduction for the non-declarable custody. Without the complication of the non-declarable time in custody, a sentence of four years' imprisonment would have been appropriate: see *R v Bell; ex parte Attorney-General (Qld)* [2002] QCA 344 where a sentence of three years' imprisonment suspended after 12 months with an operational period of four years was imposed for similar offending against an intellectually impaired complainant (but without the aggravating circumstance of the complainant being under the care of the offender) where the respondent had a prior conviction for rape. I would further reduce the sentences for each of these counts slightly to reflect the late guilty pleas. This results in a sentence of six months' imprisonment in lieu of the sentence of three years' imprisonment for each of counts 7 to 11.

Orders

[53] The following orders should be made:

1. Application for leave to appeal against sentence granted.
2. Appeal against sentence allowed.

3. The sentence for count 6 varied by setting aside the sentence of imprisonment and not further punishing the applicant.
4. The sentences for each of counts 7 to 11 varied by substituting six months' imprisonment for three years' imprisonment.
5. The sentence for count 13 varied by substituting three years four months' imprisonment for four years' imprisonment.

[54] **BOND J:** I agree with the reasons for judgment of Mullins J and with the orders proposed by her Honour.