SUPREME COURT OF QUEENSLAND

CITATION:	*R v KU & Ors; ex parte A–G (Qld) (No 2)* [2008] QCA 154
PARTIES:	**R** **v** **KU** (respondent) **AAC** (respondent) **WY** (respondent) **PAG** (respondent) **KY** (respondent) **KZ** (respondent) **BBL** (respondent) **WZ** (respondent) **YC** (respondent) **EX PARTE ATTORNEY-GENERAL OF QUEENSLAND** (appellant)
FILE NO/S:	CA No 343 of 2007 CA No 344 of 2007 CA No 345 of 2007 CA No 346 of 2007 CA No 347 of 2007 CA No 348 of 2007 CA No 349 of 2007 CA No 350 of 2007 CA No 351 of 2007 DC No 146 of 2007
DIVISION:	Court of Appeal
PROCEEDING:	Appeals against Sentence by A-G (Qld)
ORIGINATING COURT:	District Court at Aurukun and Cairns
DELIVERED ON:	13 June 2008
DELIVERED AT:	Brisbane
HEARING	13 May 2008; 14 May 2008

DATES:

JUDGES: de Jersey CJ, McMurdo P and Keane JA
Judgment of the Court

ORDERS: **In CA No. 350 of 2007, *R v WZ*:**

1. **Appeal allowed;**
2. **Set aside the sentence imposed in the District Court on 24 October 2007;**
3. **Order that the respondent be imprisoned for six years and fix a parole eligibility date of 13 June 2010;**
4. **There will be a declaration that 55 days pre-sentence custody (from 19 September to 5 November 2006 and 16 November to 22 November 2006) be treated as time served under this sentence;**
5. **Order that a warrant issue for the arrest of the respondent to lie in the registry for seven days.**

In CA No. 343 of 2007, *R v KU*:

1. **Appeal allowed;**
2. **Set aside the sentences imposed in the District Court on 24 October 2007;**
3. **On each count order that the respondent be imprisoned for concurrent terms of six years and fix a parole eligibility date in each case of 13 June 2010;**
4. **Order that a warrant issue for the arrest of the respondent to lie in the registry for seven days.**

In CA No. 345 of 2007, *R v WY*:

1. **Appeal allowed;**
2. **Set aside the sentences imposed in the District Court on 24 October 2007;**
3. **On each count order that the respondent be imprisoned for concurrent terms of six years and fix a parole eligibility date in each case of 13 June 2010;**
4. **Order that a warrant issue for the arrest of the respondent to lie in the registry for seven days.**

In CA No. 351 of 2007, *R v YC*:

1. **Appeal allowed;**
2. **Set aside the sentence imposed in the District Court on 24 October 2007;**
3. **Order that a conviction be recorded;**
4. **Order that the respondent be sentenced to three years probation on the usual conditions, with a further condition that the respondent attend the Griffith Youth**

Forensic Service or any other program as directed by the Department of Communities, comply with all reasonable requirements of the program and maintain a rate of progress which is satisfactory to the treatment program;

5. **Direct that the respondent's legal representative explain to the respondent the purpose and effect of this order in accordance with s 158 of the *Juvenile Justice Act* 1992 (Qld) and the consequences of non-compliance.**

In CA No. 347 of 2007, *R v KY*:

1. **Appeal allowed;**
2. **Set aside the sentences imposed in the District Court on 24 October 2007;**
3. **Order on each count that convictions be recorded;**
4. **Order on each count that the respondent be sentenced to three years probation on the usual conditions, with a further condition that the respondent attend the Griffith Youth Forensic Service or any other program as directed by the Department of Communities, comply with all reasonable requirements of the program and maintain a rate of progress which is satisfactory to the treatment program;**
5. **Direct that the respondent's legal representative explain to the respondent the purpose and effect of this order in accordance with s 158 of the *Juvenile Justice Act* 1992 (Qld) and the consequences of non-compliance.**

In CA No. 348 of 2007, *R v KZ*:

1. **Appeal allowed;**
2. **Set aside the sentence imposed in the District Court on 6 November 2007;**
3. **Order that a conviction be recorded;**
4. **Order that the respondent be sentenced to detention for three years to be released after serving 50 per cent of that term;**
5. **There will be a declaration that 41 days pre-sentence detention (from 1 to 3 July 2006, 19 to 20 September 2006, 5 October to 10 November 2006, 7 to 8 December 2006 and 19 to 20 March 2007) be treated as time served under this sentence;**

6. **Order that a warrant issue for the arrest of the respondent to lie in the registry for seven days;**
7. **Direct that the respondent's legal representative explain to the respondent the purpose and effect of this order in accordance with s 158 of the *Juvenile Justice Act* 1992 (Qld).**

In CA No. 346 of 2007, *R v PAG*:

1. **Appeal allowed;**
2. **Set aside the sentence imposed in the District Court on 24 October 2007;**
3. **Order that a conviction be recorded;**
4. **Order that the respondent be sentenced to three years probation on the usual conditions, together with a condition that the respondent attend the Griffith Youth Forensic Service or any other program as directed by the Department of Communities, comply with all reasonable requirements of the program and maintain a rate of progress which is satisfactory to the treatment program;**
5. **Direct that the respondent's legal representative explain to the respondent the purpose and effect of this order in accordance with s 158 of the *Juvenile Justice Act* 1992 (Qld) and the consequences of non-compliance.**

In CA No. 349 of 2007, *R v BBL*:

1. **Appeal allowed;**
2. **Set aside the sentence imposed in the District Court on 6 November 2007;**
3. **Order that a conviction be recorded;**
4. **Order that the respondent be sentenced to probation for three years, on the usual conditions, together with a condition that the respondent attend the Griffith Youth Forensic Service or any other program as directed by the Department of Communities, comply with all reasonable requirements of the program and maintain a rate of progress which is satisfactory to the treatment program;**
5. **Direct that the respondent's legal representative explain to the respondent the purpose and effect of this order in accordance with s 158 of the *Juvenile Justice Act* 1992 (Qld) and the**

consequences of non-compliance.

In CA No. 344 of 2007, *R v AAC*:

1. **Appeal allowed;**
2. **Set aside the sentence imposed in the District Court on 24 October 2007;**
3. **Order that a conviction be recorded;**
4. **Order that the respondent be sentenced to two years detention to be released after serving 50 per cent of that term;**
5. **There will be a declaration that one day pre-sentence detention (from 8 to 9 October 2007) be treated as time served under this sentence;**
6. **Order that a warrant issue for the arrest of the respondent to lie in the registry for seven days;**
7. **Direct that the respondent's legal representative explain to the respondent the purpose and effect of this order in accordance with s 158 of the *Juvenile Justice Act* 1992 (Qld).**

CATCHWORDS: CRIMINAL LAW – APPEAL AND NEW TRIAL AND INQUIRY AFTER CONVICTION – APPEAL AND NEW TRIAL – APPEAL AGAINST SENTENCE – APPEAL BY ATTORNEY-GENERAL OR OTHER CROWN LAW OFFICER – six respondents (AAC, PAG, KZ, BBL, WZ and YC) each pleaded guilty to one count of rape of a 10 year old girl – three respondents (WY, KU and KY) each pleaded guilty to two counts of rape of the same girl – sentencing judge referred to offence as 'hav[ing] sex with young girls' rather than as 'rape' in sentencing remarks on 24 October 2007 – sentencing judge stated that all the respondents would be treated the same 'in terms of the behaviour' – adults and juveniles are to be sentenced under different statutory regimes under the *Penalties and Sentences Act* and the *Juvenile Justice Act* – reasons for the sentence imposed are required by s 10 of the *Penalties and Sentences Act* and s 158 of the *Juvenile Justice Act* – whether sentencing judge gave adequate reasons to support the sentences imposed – whether the sentencing judge sentenced on an incorrect basis – whether the sentencing process miscarried – whether the Court of Appeal must re-sentence the respondents

CRIMINAL LAW – APPEAL AND NEW TRIAL AND INQUIRY AFTER CONVICTION – APPEAL AND NEW TRIAL – APPEAL AGAINST SENTENCE – APPEAL BY ATTORNEY-GENERAL OR OTHER CROWN LAW OFFICER – APPLICATIONS TO INCREASE SENTENCE – the adult respondents, WZ, KU and WY, were sentenced to fully suspended terms of six months imprisonment with an operational period of 12 months – the juvenile respondents, YC, KY, PAG, AAC, KZ and BBL, were sentenced to 12 months probation with no conviction recorded – sexual

offences by adults on children warrant custodial sentences except in exceptional circumstances – sexual offences by juveniles on children usually warrant a term of detention – whether sentences were manifestly inadequate

CRIMINAL LAW – JURISDICTION, PRACTICE AND PROCEDURE – JUDGMENT AND PUNISHMENT – SENTENCE – MISCELLANEOUS MATTERS – DUTY OF CROWN PROSECUTOR – officer of the Office of the Director of Public Prosecutions (Queensland) submitted that non-custodial sentences were appropriate for all respondents – Attorney-General on appeal submitted that orders for imprisonment for the adults, and detention for the juveniles, were appropriate for all respondents – considerations of a type of 'double jeopardy', given the concessions of the prosecution at sentence – whether prosecution submissions led sentencing judge into error – whether Attorney-General may resile from the submissions of the prosecution at sentence – whether, if satisfied that the sentencing process miscarried, the appeal should be dismissed because of the conduct of the prosecution

CRIMINAL LAW – JURISDICTION, PRACTICE AND PROCEDURE – JUDGMENT AND PUNISHMENT – SENTENCE – FACTORS TO BE TAKEN INTO ACCOUNT – ABORIGINAL OFFENDERS – all respondents and victim of Aboriginal descent and living in remote community at Aurukun – relevance of community dysfunction – rape and sexual relations with children not in accordance with Aboriginal customary law and not condoned by Aurukun community – whether only personal disadvantages suffered by each particular respondent should be taken into account – personal disadvantages must be considered with the seriousness of the offence and other relevant factors – whether the dysfunctionality of the community from which the offender came on its own warrants leniency

Child Protection (Offender Reporting) Act 2004 (Qld)
Corrective Services Act 2006 (Qld), s 180, s 192
Criminal Code 1899 (Qld), s 215(1), s 215(3), s 349(1), s 349(2), s 349(3), s 669A, s 671(2), s 671B(2)
Criminal Offence Victims Act 1995 (Qld), s 6, s 7, s 8, s 13
Juvenile Justice Act 1992 (Qld), s 2(e), s 3, s 8(1), s 150(1), s 132, s 134, s 141, s 150(1), s 150(2), s 158, s 176(1)(a), s 193(1), s 208, s 227, s 176(3), s 183(3), s 184(1), Sch 1, Charter of Juvenile Justice Principles, principles 1, 2, 6, 7, 9, 11, 12, 13, 14, 16, 17
Penalties and Sentences Act 1992 (Qld), s 9(1)(c), s 9(1)(d), s 9(1)(e), s 9(2)(a), s 9(2)(c), s 9(2)(e), s 9(2)(p), s 9(3), s 9(4), s 10, s 160D(3)

Dinsdale v The Queen (2000) 202 CLR 321; [2000] HCA 54,

considered
Everett v The Queen (1994) 181 CLR 295; [1994] HCA 49, cited
GAS v The Queen (2004) 217 CLR 198; [2004] HCA 22, applied
Hales v Jamilmira (2003) 176 FLR 369; [2003] NTCA 9, distinguished
Lovelock v The Queen (1978) 33 FLR 132, cited
Lowe v The Queen (1984) 154 CLR 606, cited
Neal v The Queen (1982) 149 CLR 305; [1982] HCA 55, applied
R v AS; ex parte A-G (Qld) [2004] QCA 259, cited
R v BBE [2006] QCA 532, considered
R v Bell; ex parte Attorney-General (Qld) [1994] QCA 220, considered
R v Bielefeld [2002] QCA 369, considered
R v Black; R v Sutton [2004] QCA 369, cited
R v C [1996] QCA 014, cited
R v Casey, unreported, Court of Appeal, Qld, CA No 262 of 1991, 3 March 1992, considered
R v Crossley (1999) 106 A Crim R 80; [1999] QCA 223, cited
R v D [2003] QCA 150, considered
R v Daniel [1998] 1 Qd R 499; [1997] QCA 139, considered
R v DJL, unreported, Britton SC DCJ, Childrens Court, Qld, Indictment No CC17 of 2006, 5 December 2006 (anonymised by this Court), considered
R v E; ex parte A–G (Qld) (2002) 134 A Crim R 486; [2002] QCA 417, considered
R v Fernando (1992) 76 A Crim R 58, considered
R v Fuller-Cust (2002) 6 VR 496; [2002] VSCA 168, considered
R v Gibuma; *R v Anau* (1991) 54 A Crim R 347, cited
R v GJ (2005) 196 FLR 233; [2005] NTCCA 20, distinguished
R v Irlam; ex parte A-G [2002] QCA 235, considered
R v JAJ [2003] QCA 554, considered
R v Jobson, unreported, Court of Criminal Appeal, Qld, CA No 325 of 1989, 6 August 1990, considered
R v L; ex parte A-G (Qld) [2000] QCA 123, considered
R v LY [2008] QCA 76, cited
R v M; ex parte Attorney-General [2000] 2 Qd R 543; [1999] QCA 442, considered
R v MAC [2004] QCA 317, considered
R v Maygar; ex parte A- G (Qld); R v WT; ex parte A-G (Qld) [2007] QCA 310, cited
R v Melano; ex parte Attorney-General [1995] 2 Qd R 186; [1994] QCA 523, considered
R v Mick, unreported, Wallace J, Supreme Court, WA, No 129 of 1988, 14 October 1988, considered
R v MSB, unreported, O'Brien DCJ, Childrens Court, Qld,

Indictment No 33 of 2005, 3 November 2006 (anonymised by this Court), considered
R v Myers [2002] QCA 143, considered
R v P [2001] QCA 25, considered
R v Pham [1996] QCA 003, considered
R v Pont [2002] QCA 456, considered
R v PZ; ex parte A–G (Qld) [2005] QCA 459, considered
R v Quick; ex parte A-G (Qld) (2006) 166 A Crim R 588; [2006] QCA 477, considered
R v Richardson; ex parte A-G (Qld) (2007) 175 A Crim R 244; [2007] QCA 294, considered
R v Riley (2006) 161 A Crim R 414; [2006] NTCCA 10, considered
R v Rogers and Murray (1989) 44 A Crim R 301, considered
R v S [2003] QCA 107, considered
R v SAS [2005] QCA 442, considered
R v TAS, unreported, White DCJ, Childrens Court, Qld, Indictment No 28 of 2005, 27 January 2006 (anonymised by this Court), considered
R v Tuki [2004] QCA 482, considered
R v Wilton (1981) 28 SASR 362, considered
R v Woodley, Boogna, Charles & Ors (1994) 76 A Crim R 302, cited
R v Wykes, unreported, Court of Criminal Appeal, Qld, CA No 149 of 1987, 18 August 1987, considered
The Queen v Haar, unreported, Court of Appeal, Qld, CA No 351 of 1991, 24 June 1992, considered
The Queen v Harris (No 2) (1971) 2 SASR 255, cited
The Queen v Homer (1976) 13 SASR 377, cited
York v The Queen (2005) 225 CLR 466; [2005] HCA 60, cited

COUNSEL: W Sofronoff QC SG with E S Wilson for the appellant
K C Fleming QC with P F Mylne for the respondents

SOLICITORS: Director of Public Prosecutions (Queensland) for the appellant
Aboriginal and Torres Strait Islander Legal Service for the respondents

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[1] **THE COURT**: On 24 October 2007 the adult respondents whom we will call WZ, KU and WY, and some of the juvenile respondents, whom we will call YC, KY, PAG and AAC, each having pleaded guilty to the rape of a 10 year old girl, were sentenced for that offence. Some respondents pleaded guilty to additional offences. WY, KU and KY pleaded guilty and were sentenced for a second offence of rape of the same girl. PAG was sentenced for the offence of unlawful carnal knowledge of a different girl but the sentence imposed for that offence is not the subject of any appeal. WZ, KU and WY were sentenced as adults: they were each sentenced on each charge to six months imprisonment suspended immediately for an operational period of 12 months. YC, KY, PAG and AAC were dealt with under the *Juvenile Justice Act* 1992 (Qld): they were each sentenced on each charge to 12 months probation without any conviction being recorded.

[2] On 6 November 2007 the two other juvenile respondents, whom we will call KZ and BBL, also pleaded guilty to the rape of the complainant. They were also sentenced to 12 months probation without a conviction being recorded.

[3] Pursuant to s 669A of the *Criminal Code* 1899 (Qld), the Attorney-General has appealed against the sentence imposed on each respondent on the ground that it was manifestly inadequate for a number of reasons reflecting errors of principle on the part of the learned sentencing judge.[1] Section 669A(1) provides relevantly: "The Attorney-General may appeal to the Court [of Appeal] against any sentence pronounced … and the Court may in its unfettered discretion vary the sentence and impose such sentence as to the Court seems proper."

[4] The notices of appeal whereby the Attorney-General sought to exercise the right of appeal conferred upon him by s 669A were filed on 10 December 2007 and, in the case of the youth YC, on 11 December 2007. In each case, the notice of appeal was filed outside the period of one calendar month prescribed for the commencement of appeals by s 671(2) of the *Criminal Code*. Accordingly, the Attorney-General sought an extension of time for the commencement of these appeals. On 13 February 2008, this Court granted the extensions of time sought by the Attorney-General.[2]

1. The circumstances of the offences

[5] The complainant was 10 years old at the time the offences were committed. She was the cousin of, at least, the respondents, KU and PAG.

[6] At the time of the offences, the respondents were aged as follows:

WZ	-	25 years old
KU	-	18 years old
WY	-	17 years old
YC	-	15 years old
KY	-	14 years old
KZ	-	14 years old
PAG	-	14 years old
BBL	-	13 to 14 years old
AAC	-	13 years old

[7] The respondents and the complainant were all Aborigines living in the Aurukun community.

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1 Cf *R v Melano; ex parte Attorney-General* [1995] 2 Qd R 186 at 188 – 190.

2 The reasons for that decision were published on 19 February 2008: [2008] QCA 20.

[8] From the schedule of facts used in the course of sentencing the respondents the following brief details of the offending emerge. The incidents the subject of count 1 occurred between 1 May and 12 June 2006. The respondents WZ, KU, WY, PAG, BBL and KZ had sexual intercourse with the complainant in an unoccupied house at Aurukun. They each had sexual intercourse with her, in turn, in a bedroom while the others waited in another part of the house. The complainant had sex with all of these respondents, without objection, except in the case of BBL who admitted that the complainant objected to his having intercourse with her. BBL claimed that another male (who was not charged) forced him to have sex with the complainant. BBL wore a condom. PAG told police the complainant asked him if she could have sex with him. Initially he refused "because she was just a little kid". She kept asking him. He put on a condom and had sex with her even though he did not want to. KZ was with him when he was having sex. PAG said that KY was telling the complainant to have sex. KU thought the complainant was 11 years old. He wore a condom when he had sex with her. His "brother", WY, "forced him to go see the complainant".

[9] The incidents the subject of count 2 occurred when KU and WY had sexual intercourse with the complainant on another occasion and in another house in Aurukun between May and mid-June 2006. KU said he again wore a condom.

[10] The incident the subject of count 3 occurred on 30 May 2006[3] when AAC had sex with the complainant at a birthday party. He did not wear a condom.

[11] The incident the subject of count 4 occurred between late May and mid-June 2006 when YC had sexual intercourse with the complainant in the male toilets behind the church at Aurukun. According to YC's version of this incident, which was not contradicted at the sentencing hearing, the complainant asked YC to go with her to the toilet to have sex. The complainant took off her clothes and YC's pants. She lay on the ground and he lay on top of her. He did not wear a condom.

[12] The incidents the subject of counts 5 and 6 occurred when KY had sexual intercourse with the complainant on two occasions between 26 May and 10 June 2006. No other males were present. On one occasion, the intercourse took place at the house where WZ lived when no-one else was at home. KY wore a condom. He claimed the complainant wanted to have sex. On the other occasion, intercourse occurred behind a commercial building in the town.

[13] KZ denied any wrongdoing to police and WZ declined to be interviewed by police. All other respondents made admissions to police. KZ and WZ were implicated by others.

[14] No alcohol or substance abuse was said to be involved in any of the offending.

2. The sentencing process

2.1 20 August 2007, Cairns

[15] The sentencing process began on 20 August 2007 in Cairns, when PAG, BBL, KZ, KU, WY and WZ each pleaded guilty to having raped the complainant on a date unknown between 1 May 2006 and 12 June 2006 (count 1). The respondents WY and KU also pleaded guilty to raping the complainant on another occasion on a date

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[3] This date is stated on the indictment. The schedule of facts states this count occurred on 13 May 2006.

unknown between 1 May 2006 and 12 June 2006 (count 2). The juvenile KY pleaded guilty to two counts of raping the complainant, the first on a date unknown between 26 May and 8 June 2006 (count 5) and the second on or about 10 June 2006 (count 6).

[16] The schedule of facts to which we have referred was tendered by the prosecution. Pre-sentence reports were ordered in respect of the respondents present in court, that is, all respondents other than the juveniles, YC and AAC. The court, with the concurrence of the parties, intended that the sentences would be heard at the Aurukun sittings of the District Court in October 2007.

2.2 21 September 2007, Cairns

[17] The matter was next mentioned in the District Court, Cairns, on 21 September 2007. The respondents were not present but were represented by their lawyer. All parties supported the order made by the judge that the registry forward a copy of the schedule of facts and a transcript of the hearing on 20 August 2007 to the Department of Communities. This was to assist departmental officers in preparing the pre-sentence reports.

2.3 24 October 2007, Aurukun

[18] On 24 October 2007 all respondents other than BBL and KZ were sentenced at Aurukun. AAC pleaded guilty to one count of raping the complainant on 30 May 2006 (count 3) and YC pleaded guilty to one count of raping the complainant on a date unknown between 26 May and 12 June 2006 (count 4). The other respondents were arraigned again and pleaded guilty again in respect of these offences. The respondent PAG also pleaded guilty to another sexual offence involving a different female complainant. The learned sentencing judge referred to the schedule of facts which had already been tendered, and invited the prosecutor to state any facts pertinent to the case of particular individuals.

[19] In the course of responding to her Honour's request in relation to the juvenile PAG, the prosecutor, an officer of the Office of the Director of Public Prosecutions (Queensland), said:

> "My submission in relation to this particular offence is the same that I make in relation to children of that age, of similar or the same age of that age, is to quote - well, they're very naughty for doing what they're doing but it's really - in this case, it was a form of childish experimentation, rather than one child being prevailed upon by another, although - as I said, although she was very young, she knew what was going on and she had agreed to meet the children at this particular place and it was all by arrangement, so - for that purpose.
>
> I'd ask your Honour to take that into account and if this was standing alone, the Crown would not be asking anymore than for some form of supervisory order, form of probation, or some order of that - similar order to that, your Honour."

[20] The prosecutor went on to say:

> "MR CARTER: I've been given certain instructions as to the penalties for these, your Honour. None of the penalties that I've been instructed to seek have been - involve custodian (sic) penalty - immediate custodial penalty, not even for the adults.
>
> HER HONOUR: What about in the light of the PSRs though?

MR CARTER: Even with those, your Honour, yes. I know that other forms of penalty are difficult but I would submit that if your Honour's seeking to impose any form of custodial penalty on the adults, that they be dealt with by way of a - yes, suspended sentence or a parole-----

…

MR CARTER: Yes. But that's the - that's the other course that I've been instructed to take, your Honour. As to the children, I would submit some form of supervised re-orders for them, something that involves possibly a little bit of education, or counselling in relation to matters such as these. But that's all I'd be seeking, that some form of supervisory order of - in the vicinity of no less than 12 months, if it please your Honour, for each of them, having - taking into account the nature of the offence, their admissions and pleas and also the contents of the histories.

It must be stated, I won't resile from this, that the charges of rape and as I'm instructed, it's - that arises in part, due to the age of the complainant and her ability to actually consent to the acts and I ask your Honour to take that into account too, whereas it is called rape, because of that and because of the absence of a proper consent and while that isn't - doesn't excuse them, it does in some way lessen the fact that there was no actual force in the sense-----

HER HONOUR: But she was only 10 at the time, wasn't she-----

MR CARTER: Yes, that's right, and there's no possible way that she could have consented willing - knowingly, with the full knowledge to these offences, even though - that she'd gone through the motions of having sex with these people and I'd submit that that's something as well. They didn't force themselves on her, threaten her, or in any way engage in any of that sort of behaviour.

So, to the extent I can't say it was consensual in the legal sense but in the other - in the general sense, the non-legal sense, yes, it was. So, I then ask on that basis not to seek any periods of detention, not to seek any periods of custody, immediate custody. Unless there's anything further, your Honour, that's - those are my submissions. I can expect that not all of them will have clean histories."

[21] When the learned judge drew attention to the circumstance that one of the respondents (WZ) was a 25 year old man, the prosecutor said:

"MR CARTER: Yes. Yes. Yes, that's correct. He may be chronologically 25 but I don't - I would not - I'd submit that there wouldn't have been much thought given to the age disparity or the legal niceties of consent or that sort of thing. That's why I'm asking in any event that he be given a - either parole or a sentence that's suspended, operational period for 12 to 18 months. If it please your Honour."

[22] No victim impact material was placed before the court either by way of a statement from the victim or oral submissions from the prosecutor.

[23] The learned sentencing judge heard submissions in mitigation of sentence from counsel on behalf of the respondents. Her Honour noted that both the reports for KU and WZ "raise concerns about their ability to understand English". Her Honour enquired whether interpreters were needed. Defence counsel responded that he was satisfied no interpreters were needed "particularly in light of the Crown's admissions".

[24] In the course of his submissions, counsel on behalf of the respondents said that:

> "… there'd be a number of sexual relationships that occur at Aurukun between teenagers under the age of 16 … I'm not saying it makes it right, but it just reinforces the lack of education and resources that are given to this community to assist with what clearly is a significant problem."

(i) PAG

[25] Defence counsel made the following submissions on behalf of PAG. He was 14 at the time of the offence. He went to year 9 at school and was now keen to gain employment. He was not presently entitled to Centrelink benefits. He lived with his grandmother and was "keeping out of trouble now". He had "amended his peer group list … he plays rugby league. He goes out fishing with relatives on the weekend. He also goes out night hunting, he is learning how to make spears and he is learning more about his culture … [He] is a young juvenile offender who has committed these offences and admitted to these – this offending behaviour." Defence counsel agreed with the prosecutor's submissions "in relation to the appropriateness of a community based order, which would allow for continuing supervision of [PAG]".

[26] Her Honour then referred to PAG's pre-sentence report which recorded that he was enrolled in year 10 and enquired whether he was attending school. Defence counsel confirmed that he was not attending school.

[27] PAG's tendered criminal history was extensive for his age. In February 2006 he was placed on 12 months probation without conviction for breaking and entering premises and committing an indictable offence. In May 2006 he was placed on 12 months probation and ordered to do 80 hours community service and his licence was disqualified for six months for two counts of entering premises and committing an indictable offence, two counts of unlawful use of motor vehicles and one count of dangerous operation of a vehicle. He had therefore only recently been placed on probation at the time of the commission of the rape offence. He continued to commit offences throughout 2006 after the commission of the rape. On 19 December 2006 he was convicted and sentenced to seven weeks detention for wilful damage, attempted unlawful use of a motor vehicle and burglary committed in mid-October 2006. He was also convicted and sentenced to seven weeks detention for unlawful use of a motor vehicle committed on 1 June 2006 (about the time of the present offence) and three further property offences committed on 8 March 2006 (before the present offence). On 22 May 2007 he was placed on 12 months probation without conviction for receiving stolen property in December 2006 and for unlawful use of a motor vehicle in February 2007.

[28] PAG's pre-sentence report noted that his then current probation order involved:

> "… weekly phone reporting, monthly face to face contact with his Caseworker and other Departmental officers in the community and engaging in programs as directed by his Caseworker. [PAG] has been meeting some of the requirements of his Orders. He meets his

case worker and other Departmental officers at Aurukun Justice Group Building and engages in programs with them. [PAG] has participated in the following programs:

- Alcohol, Tobacco and other Drugs Awareness Program. [PAG] has no substance use issue
- Cultural Activities - he helped collect barks to erect traditional huts.
- Recreational Activities - Community Disco, BBQ and Games
- Sports- Basketball and Touch Football
- Victim Empathy Awareness Programs
- Unpaid community service work

For the last few weeks due to family and cultural activities [PAG] has not been attending youth justice programs. Two of [PAG's] family members died; his family had a 'Tomb Stone Opening Ceremony' and a 'House Opening Ceremony'.

At the time of the current offence [PAG] was subject to supervised orders, 12 month Probation Order linked to 80 hours Community Service Order. The Orders were made on 23 May 2006 in the Aurukun Childrens Court. The Orders had already expired and [PAG] had successfully complied with the requirements of the Orders."

[29] The report referred to the various sentencing orders open under the *Juvenile Justice Act*. These included probation which would require PAG:

"… to phone report to his caseworker on a weekly basis, accept visits from his caseworker and other departmental officers in the community, actively take part in developing his case plan and attend programs as directed by his caseworker.

Under a Probation Order, a case plan would be developed for [PAG] that would include:

Problem Solving Skills Training - to help improve reasoning skills to walk away from a similar situation and to stay away from the influence of negative peer groups.

Sexual Health Education or Counselling can help assist in re-enforcing age of consent, consensual sex between adult persons as well as addressing any negative sexual beliefs.

Ending Offending Program - to help address offending behaviour and learn relapse prevention.

Victim Empathy Program - to understand the impact his offending has on his victims.

A period of probation would enable the Department to supervise and monitor [PAG's] activities and allow him to participate in community and family life. Further support would be provided by way of re-engaging [PAG] into education or vocational opportunities."

[30] The report noted that a community service order of up to 200 hours could be imposed and that this "would help to provide a clear consequence for [PAG's] offending and be beneficial for his self-worth by allowing him to make positive and meaningful reparation to the community for his actions". Other options included a combined probation and community service order or a combined detention and probation order. Such an order "would provide a clear consequence to [PAG] for this offence and offer him extended support upon release from custody. The detention order can be made for a maximum of six months which is then followed by a probation order for a maximum of twelve months upon release from custody."

[31] Another option was a conditional release order which would allow PAG "… to participate in three separate components to reintegrate him into society, address his offending behaviour and provide some reparation to the community. [PAG] would be required to attend programs to address his offending behaviour as well as educational programs offered and approved by the Department of Communities."

[32] The report also considered the option of detention, noting:

> "In considering the sentencing principles outlined in the *Juvenile Justice Act* 1992, it is requested that Your Honour take into account the following when considering this option:
>
> - [PAG] would be exposed to a cohort of offending peers in detention, which may serve to exacerbate his offending behaviour;
> - [PAG's] relationship with his family and his community may be further eroded if he were ordered to serve a period of detention.
> - [PAG] has spent 8 days in pre-sentence custody for these offences.
> - [PAG] is attending school and a period of detention will interrupt his education and consequently it could affect his school engagement in a long run.
>
> Should Your Honour order [PAG] to serve a period of detention, he would have access to therapeutic programs to address his offending behaviour and would be provided with educational and vocational opportunities via the Queensland Education System.
>
> Upon release [PAG] will be subject to a Supervised Release Order. During the Supervised Release Order period, the Department would provide the assistance necessary for [PAG] to gain employment or educational options as well as to pursue other interests of a recreational nature. [PAG] would be subject to regular reporting requirements and other statutory restrictions. Should [PAG] fail to comply with the terms of the order or re-offend, the Department of Communities may make application to the Court for cancellation of the Supervised Release Order."

[33] PAG's counsel submitted that the most appropriate sentencing option for PAG was probation. A representative from the Department of Communities, Ms Hall, informed the court that a departmental officer was based in Aurukun although there had been difficulties in maintaining this presence because of "all the troubles that do happen in this community". Ms Hall stated that the Department now had "sexual health and life

skills programs in Aurukun, which look at all of those issues appropriately with Indigenous males – young males". Her Honour enquired whether this was an appropriate case in which to receive a more detailed psychological report from the Griffith Youth Forensic Service ("GYFS"). Ms Hall responded:

> "With respect, Your Honour, it might be overkill with this particular set of facts.
>
> HER HONOUR: It's just that [PAG's] here on two charges.
>
> MS HALL: Yes.
>
> HER HONOUR: Two different girls.
>
> MS HALL: Yes. [PAG] certainly needs a lot of education but then he's - there are a lot of children in this community who think the same way about sexual matters as [PAG] does.
>
> HER HONOUR: Mmm.
>
> MS HALL: So, you know, there but for the grace of God goes most of the children in this community. So general sexual health programs and amongst that the appropriateness of who your sexual partner will be. Those programs I think would be more effective for these boys. And it's only very recently that we've done that. We've had about a year's gap where we've had not a lot of continuity. Back to about October of last year when the first riots happened. So we lost our worker then, but we have now been stable for a few months with Mr Savage, and there are other officers who also travel in. But those programs are running although it's new, but we've got good programs up."

[34] PAG's grandmother was present in court. The transcript records that what she said to the judge was not recorded because it was indistinct. It seems, however, that she spoke favourably and in support of PAG.

(ii) KY

[35] Defence counsel made the following submissions in respect of KY. He grew up in Aurukun and had the support of his great-grandmother with whom he was living and who "grew him up". He was 14 years old at the time of his offending. He played rugby league. Since getting into this trouble he has taken a new direction and is staying home more and doing the right thing. He was currently completing a community service order and was progressing reasonably well, complying with the order and making an effort to turn his life around.

[36] His grandmother addressed the judge. She confirmed that KY was "doing well" and "always home helping his great-grandmother".

[37] Ms Hall from the Department of Communities confirmed that although KY "hasn't had much of a chance to do much, … he is reporting and he is engaging with [the supervising officer]".

[38] KY had some significant criminal history. In December 2005 he was placed on a good behaviour bond for two counts of unlawful use of vehicles and entering or remaining in

a dwelling or yard, the offences occurring on 22 October 2005. On 22 March 2006 he was dealt with for unlawful use of a motor vehicle and entering or remaining in a dwelling or yard in October 2005, and to two further charges of entering premises and committing indictable offences in early 2006. He was sentenced to six months probation without conviction. On 24 May 2006 (about the time of the present offending) he was dealt with for entering premises and committing an indictable offence by break in early 2006 and sentenced to a further six months probation without conviction. On 20 June 2006 he was sentenced for entering premises and committing an indictable offence by break in May 2006 to six months probation without conviction. The commission of that offence and his court appearance in respect of it bridged the time period in which his present offending occurred. He continued to commit offences after his rapes of the victim. On 16 January 2007 he was convicted of entering premises and committing an indictable offence by break, and entering premises with intent, in December 2006. He was sentenced to 29 days detention, with the time spent in pre-sentence detention declared to be time served under the sentence. On 20 February 2007 he was ordered to perform 20 hours community service for entering premises and committing an indictable offence by break in October 2006. On 6 March 2007 the sentence imposed on 16 January 2007 was re-opened and he was re-sentenced: on each charge no conviction was recorded and he was ordered to perform 20 hours community service.

[39] KY's pre-sentence report recorded the following. KY had completed 30 hours of his outstanding community service orders but he had not been compliant with them. He was raised in Aurukun by his aunt and now resides with his grandmother and grandfather. His parents separated when he was young. His problems with the law only commenced when he began to associate with negative peers. His grandmother stated that she had tried very hard to bring him up properly so that he could be a respected person in the community and she had given up drinking alcohol to care for her family. KY's mother often consumed alcohol and was not always available to care for her son. Departmental records showed that KY's family had past and ongoing issues but managed to remain a cohesive family unit through adversity. The family had adequate external supports that might provide a bolster to assist KY in "turning his life around". Environmental and cultural issues, inconsistent education, boredom, peer interaction, lack of adult supervision and poor decision-making skills had contributed to KY's offending. The report included the following:

> "People who work with Aboriginal youths observe an excessively negative outlook on life with low self-esteem being characteristic. Cultural dislocation and dispossession appear to have disrupted and even removed traditional rites of passage into adulthood and a cultural vacuum is the result. As a result of the crisis of identity in not knowing traditional culture, young people tend to find a sense of identity in a subculture where offending behaviour, drug taking and work avoidance become the new rites of passage.
>
> …
>
> [KY] appears to be an example of a young person experiencing the cultural vacuum. [KY's] school attendance has been irregular and non compliant as he only attended school until Grade 8. [KY] does not work and has little contact with his biological father. Boredom and the influence of other young offenders from the Aurukun community has been a heavy influence on his offending behaviour. [KY] is involved with a peer group who regularly offends in the area.

The company consists of friends and family members and as a result this ties the group together. Coupled with a lack of legitimate outlets for self expression, offending has become almost compulsive for [KY] and some of his friends. Research nominates boredom as playing a major part in the involvement of young people in criminal activities.

…

[KY] stated he is involved with a peer group who regularly offend in the area. The company consists of friends which reinforces the group bond. [KY] states that there is nothing to do in Aurukun.

…

[KY's] capacity to deal with peer pressure and consequently his ability to make positive life decisions is very limited. [KY] is easily influenced by his peers into making negative life decisions such as engaging in offending behaviour.

…

[KY] expressed a lot of frustration with his behaviour in this regard. At the same time he understands that the price that he may have to pay for these particular offences could be high.

…

[KY] stated that his grandmother and grandfather were home at the time he committed the offences, however he left home those nights without permission. [KY] said that when he went out with his friends there was hardly ever an adult present. He said he could leave the household as he pleased. At the time of the offences they were unaware of his exact whereabouts. Without adult supervision, [KY] is free to act as he pleases.

The minimal supervision and lack of strong boundaries has provided [KY] the opportunity to associate with negative peers and participate in harmful behaviours. Stronger boundaries and supervision are required to lessen the chance of [KY] re-offending.

…

It is the author’s assessment that [KY] has issues around making decisions about the type of people he chooses to associate with and the morality of certain actions. [KY's] poor decision making skills may be due to several factors including, his age, the need to be accepted by his peer group and a lack of positive role models. With support, [KY] may improve his decision making skills through ongoing interaction with his family and particularly through contact with appropriate community personnel and external services. Ongoing Departmental support would assist [KY] in making decisions whilst thinking through the associated consequences and ramifications of the decisions that he makes.

…

[KY] showed reluctance to talk about the actual offences … This could have been through shame and guilt expressed by his body language. It appeared that he also carried shame for his behaviour and was not comfortable speaking about the offences. … [KY] stated that he was "very sorry". [KY] said that he was not under the

> influence of substances … [and] that it was the victim who had encouraged him to have sex with her.
> …
> [KY] stated that he did not like the time he had spent in the Aurukun watch house and found it to be daunting, even though it was 1 day …
> …
> [KY] said he wishes to make a positive change and would be willing to participate in programs … to assist him with curbing his offending behaviour. [KY] emphasised during interviews … that he does not wish to go to Detention again and will work on maintaining an affirmative attitude to ceasing his offending behaviours. [KY] also understands that he maybe sentenced to a period of detention for the offences that he has committed."

[40] The report then discussed the various sentencing options under the *Juvenile Justice Act* in the following terms. KY could be sentenced to up to 36 months probation and, if so, would participate in programs including Challenging Offending Behaviour (to help him recognise and understand why he offends and how he may otherwise utilise his time) and Responsible Decision Making. He would also be expected to have weekly telephone contact with a case worker and monthly face to face contact when the case worker visited the community. KY would be further supported by seeking to re-engage him with education or vocational opportunities. KY had expressed a willingness to comply with a probation order or an order for further community service or a combined order. A combined probation and community service order would enable KY to benefit from continued departmental support through probation and also make reparation to the community for his offending behaviour.

[41] The report included a prepared conditional release order (CRO) initial planning/consultation. The purpose of a CRO is to provide a final option other than detention enabling a young person to be released into the community in a structured program with strict conditions for up to three months. Were KY to be sentenced to such a program he could work with the Aurukun youth workers on community projects and do volunteer work to enhance his work readiness skills and learn respect for his community; be assisted to re-enrol and attend school or to find an apprenticeship; and he would benefit from a mentoring/self-esteem program with a Youth Justice Program Team member. He would also be referred to the "Griffith sex offenders program".

[42] Finally, the report referred to the option of detention, noting:

> "It is the Departments' view that while a Detention Order may provide some protection to the community, it may have a detrimental effect of further entrenching [KY] in a pattern of institutionalisation, anti-social attitudes and beliefs, while exposing him to interaction with serious offenders. [KY] has previously been to detention and is at risk of becoming institutionalised should he return there.
> …"

(iii) YC

[43] Defence counsel then made submissions in respect of YC, who was 15 years old at the time of his offending and was 16 at sentence. He was raised in Aurukun by his grandmother. He left school in year 10 and was working at the library in Aurukun two days a week for which he earned $160. He enjoys playing rugby league, hunting and

fishing. Defence counsel submitted that a community based order should be imposed to enable him to continue working.

[44] The judge noted that YC was placed on probation and community service only the previous month and enquired how these orders were progressing. Ms Hall for the Department of Communities responded that YC was reporting and was engaging with the supervising officer. YC's grandmother told the judge that he was helpful in minding his grandfather, who was on dialysis, when she was working at the guesthouse.

[45] YC too had a lengthy criminal history for a young person. On 17 November 2004 he was reprimanded for two breaches of bail undertaking and his eight days of pre-sentence detention was taken into consideration. On 6 April 2005 he was convicted of two counts of entering or being in premises with intent to commit an indictable offence on 11 July and 29 November 2004; entering or being in premises and committing an indictable offence and break on 1 September and 5 and 6 November 2004; entering or being in premises and committing an indictable offence on 13 July 2004; and three counts of unlawful use of motor vehicles on 5, 6 and 30 November 2004. He was convicted on all charges and placed on 12 months probation. On 14 June 2005 he was ordered to perform 80 hours community service without conviction for two counts of entering or being in premises and committing an indictable offence on 3 May 2005 and 1 September 2004 and three counts of unlawful use of motor vehicles, the first committed on 3 May 2005 and the others on 1 September 2005. On all charges no conviction was recorded and he was ordered to perform 12 months probation. On 13 September 2005 he was ordered to perform 40 hours community service without conviction for street and weapon offences. On 15 November 2005 he was ordered to perform 40 hours community service for unlawfully using a motor vehicle on 22 October 2005. On 28 March 2006 he was convicted of multiple property offences committed between June 2005 and February 2006, as well as some traffic matters. He was sentenced to four months detention with pre-sentence detention declared to be time already served under the sentence with the balance suspended to be served by way of a conditional release order and a further order for 20 hours community service. On 17 July 2006, soon after the present offending, he was convicted and ordered to perform a further 100 hours community service for entering premises and committing an indictable offence between 7 and 10 July 2006 (conduct subsequent to the present offending) and entering premises with intent and unlawful use of a motor vehicle, both on 1 June 2006 (about the time of the present offending). He was convicted and ordered to perform 100 hours community service. On 22 May 2007 he was ordered to perform 40 hours community service and 12 months probation without conviction for entering premises and committing an indictable offence by break and entering premises and committing an indictable offence in February 2007. On 18 September 2007 he was ordered to perform 12 months probation and 40 hours community service for two counts of wilful damage and one count each of unlawful use of a motor vehicle and trespass, all committed on 20 August 2007, the day many of his present co-offenders pleaded guilty to raping the complainant.

[46] YC's pre-sentence report prepared in respect of the offences dealt with on 17 July 2006 had been updated in respect of the current offending by a departmental officer. The original report noted the following. YC was willing to try to change his behaviour through counselling and therapeutic programs and had expressed remorse and shown insight. He "had made conscious efforts to remove himself from his co-offending peer group, even though that has sometimes meant he has been 'alone in his room with no-

one to talk with'." He had left school and did not wish to return. He was interested in working on the Community Development Employment Program ("CDEP") when old enough and had shown himself to be a reliable worker when engaged on community based orders. With adult supervision, he has shown he can excel. A supervising youth worker had described him as "reliable, mature beyond his years and well above his Aurukun peers". He has admitted to "sniffing" solvents in the past but he has taken a current positive stance against sniffing and smoking marijuana. He has low self-esteem but has no-one in his immediate or extended family with whom he can obtain guidance. He is easily influenced by peers and this is evident in his offending history. If he were influenced by positive peers in a positive environment he would excel. He is not known as a chronic "sniffer" but admits to sniffing in the past and this has led to his offending when he is in the company of youths who also sniff. He has made a commitment not to sniff but will need the support of resistance strategies. With that support he could also improve his decision-making skills, thinking through the consequences of them so that he is able to say no to his peers. He resides with his mother and younger siblings. The general view in the community was that YC was "a good kid unlike the other boys that he hangs around with and needs to get out of Aurukun before he gets caught up here". The report continued:

> "He is part of the Top End part of the community. The Top End / Bottom End division was originally partly a geographical division between inland and coastal people or between eastern (top end, two clans) and western (bottom end, three clans). This division has been broken down somewhat by intermarriage and by a new housing division near the airport.
>
> [YC] is keen to learn about traditional values and customs. He enjoys traditional pursuits such as fishing, camping out bush and singing. He is an accomplished spear maker. He also enjoys less traditional activities such as football and playing guitar. While [YC] has not enjoyed mainstream schooling, he has always been a good and attentive student when receiving instruction on cultural matters or when learning traditional ways."

[47] The handwritten note updating that report included the following. YC was currently unemployed but was "a **very** good attender at Youth Justice (Aurukun-based) programs". He was "reliable, mature (beyond his years and **well** above his Aurukun peers (very good communicator amongst various age groups -; as well as being a positive young man." YC does not have alcohol issues or smoke marijuana and through personal choice and maturity is resisting peer pressure. The complainant told YC that she wanted to have sex with him. He did not seek her out for sex and was embarrassed by her invitation because of her young age and because he did not want to do it. YC cried during the interview with the author of the report who considered YC was:

> "‧confused by event, and still doesn't understand why he allowed himself to behave in this way. A **very** sincere remorse and deep **shame**.
>
> ‧ [YC] very angry with himself. Told no-one about incident.
>
> ‧ [complainant] female 'kept on asking me'
>
> ‧ [complainant] female **not** angry after alleged incident."
>
> (Emphasis as in the original)

[48] The author of the updated report emphasised that this was YC's first offence of a sexual nature and that YC was willing to allow the author to support and assist YC in his efforts to separate from his peers.

(iv) KU

[49] Defence counsel made the following submissions on behalf of the adult KU, who was 18 at the time of the offence and 20 at sentence. KU, too, was raised in Aurukun. He had completed his year 8 education and was currently working under the CDEP as a cleaner two days a week earning $190. He had also recently commenced work as a driver at the justice centre. KU plays rugby league. His grandmother was present in court to support him. He was remorseful and ashamed of his actions and recognised that as an 18 year old he should not have been involved in the offending. He was not a robust or mature individual for his years and, although older than the juveniles, these factors made the age difference less significant. Defence counsel urged the judge to impose a penalty like that sought by the prosecutor, but submitted that, because of the serious nature of the offending an immediate recommendation for parole may not be acted upon, so that a wholly suspended prison term would be preferable.

[50] The judge enquired whether it was likely that KU would be able to comply with a suspended term of imprisonment, given that he had not been complying with community service and probation orders. His counsel emphasised that KU's problems were more with meeting commitments than with re-offending. Her Honour, having read the pre-sentence report in respect of KU, invited the Corrective Services officer present in court, Ms Dewar, to add to her report. Ms Dewar declined the invitation. In response to a query from her Honour, KU's counsel stated that he understood KU had stayed out of trouble for almost two years. In the light of KU's criminal history to which we will refer directly, this statement can be seen to be inaccurate. KU's counsel submitted that some of KU's difficulty in complying with orders related to his inability to read and write and his difficulty with language.

[51] KU's grandmother addressed the judge in these terms:

> "Your Honour, I know that my grandson always be home because he don't walk around at night … so he never give me a cheek and just lived home and stay with his father … at Aurukun. He always behaving himself. That's all, your Honour."

[52] KU's criminal history was as follows. On 18 January 2005 he was placed on a 12 month good behaviour bond for four counts of offences relating to the entering of premises in November and December 2004. On 15 February 2005 he was placed on a six month good behaviour bond for entering or being in premises with intent to commit an indictable offence and attempted unlawful use of a motor vehicle, committed a few days earlier. On 16 August 2005 he was placed on eight months probation without conviction for entering premises and committing an indictable offence on 11 May 2005. On 15 November 2005 he was sentenced to a total of 120 hours community service for offences of unlawful use of a motor vehicle, wilful damage and trespass, committed in October 2005. He was also convicted and fined for breaching his probation order imposed on 16 August 2005. On 20 September 2006 he was convicted and fined for possessing implements used in relation to particular offences and trespass. These offences occurred in February 2006. On 21 March 2007 he was convicted but not further punished for breaching both his probation order imposed on 16 August 2005 and his community service order imposed on 15 November 2005. He was also convicted of offences related to entering premises and unlawful use of a

motor vehicle. These offences occurred between January and March 2006. He was placed on two years probation and ordered to perform community service with convictions recorded. He had no offences committed subsequently to the present offences.

[53] KU's pre-sentence report prepared by officers from the Cairns Probation and Parole Office was tendered. It recorded the following information. KU stated that his offending was the first time he had sexual intercourse with the complainant. He was unsure whether she had previously had sexual intercourse. In relation to the community service orders imposed on 21 March 2007, KU had completed 76 hours with 44 hours remaining. He said he was unable to read or write. He was able to recite the alphabet, the days of the week and to count to 10. After completing year 8 he commenced a traineeship through Comalco in Weipa for six months but on its completion returned to Aurukun where he gained employment through the CDEP doing community work. He was currently working as a cleaner for two days a week receiving $195 a fortnight. He said he had never tried alcohol, illicit substances or solvent sniffing. He plays competition football and trains once or twice a week. His mother died in 2005 from kidney problems. He was shocked at her death and still feels sad about it. His father has a leadership position in Aurukun. His parents separated when he was two years old. His father has formed a new long-term relationship. When KU's mother died, he moved in with his father. His father and his father's partner do not have alcohol in the house and do not drink. KU advised that he had been raised in households without violence or alcohol. He takes prescribed medication to assist with blood pressure and diabetes. He did not feel sorry for the complainant because she was asking for sex. He would not behave in the same manner again because he got into too much trouble. He was "not sure whether the behaviour is wrong as everyone seems to have 'sex' with young girls". He thought she was about the same age as his half-sister aged 12. He seemed to show little remorse and stated that "he was surprised when he was charged". He said he was unsure of the legal age limit on minors having sexual relations. The report concluded:

> "[KU] has previously had a mixed response to community based supervision and due to his apparent lack of remorse and reluctance to accept responsibility for his actions it appears that he is unsuitable for a further community based order at this time.
>
> If your Honour was considering a period of imprisonment, then it is noted that your Honour may fix a Parole eligibility date under Section 160D (3) of the *Penalties and Sentences Act* 1992 … ".

(v) WY

[54] Defence counsel next made submissions in respect of WY, who was 17 years old at the time of the offences and 18 at sentence. He was required to be dealt with as an adult offender. He was also raised in Aurukun and lived with his grandfather and his auntie. His grandfather was on dialysis and WY assisted in his care when his auntie was at work. WY had completed year 10. He was working under the CDEP as a town cleaner two days a week earning about $150. He would like to increase his hours of work through the CDEP. WY had a great sense of shame about his offending.

[55] The learned sentencing judge noted that WY's pre-sentence report did not suggest that he felt sorry for the complainant. Defence counsel emphasised that WY was not a mature person, could not read or write and had limited comprehension. This affected his understanding of situations and his ability to express himself, especially about

embarrassing episodes, so that what was apprehended in the report may not have conveyed his true feelings. Her Honour was concerned that the report stated that WY did not have remorse and that he considered having sex with a 10 year old girl was normal. Defence counsel responded:

> "Well, perhaps that reinforces Ms Hall's point about the level of understanding that the young men in this community have in relation to the offending behaviour. Maybe it reinforces the fact that not to say that they don't feel ashamed - I do submit they do feel - but to say their level of understanding as to appropriate sexual conduct isn't good, and maybe it's because their experience in relation to other people within the community and their sexual conduct isn't good, and has not been good in the past.
>
> There's a number of them - I mean to say, [WY] near the time was 17. Still of high school age, but is an adult under the terms of the law, when this occurred. And without being flippant about it, your Honour, there'd be a number of sexual relationships that occur at Aurukun between teenagers under the age of 16.
>
> HER HONOUR: We're talking about a 10-year-old, Mr Curtin.
>
> MR CURTIN: Well, including - we've been through this, your Honour, where there's children having babies at 14.
>
> HER HONOUR: Yes. It doesn't make it right, Mr Curtin.
>
> MR CURTIN: I'm not saying it makes it right, but it just reinforces the lack of education and resources that are given to this community to assist with what clearly is a significant problem. We're back to where we started, your Honour. There's A and P's without rehabilitation centres. There's a number of sexual offences occurring without constructive sex offender programs. And not even sex offender programs, but sexual training programs throughout the schools, throughout the community. It's not been addressed in the appropriate manner. I'm sure that the offenders are charged by the police in the appropriate manner. The offenders are sentenced in the appropriate manner. But the rest of the actions prior to that aren't being dealt with in an appropriate manner. Hopefully the programs of Ms Hall won't stop just with juveniles. They'll extend under Ms Dewar's watch to adults, so that young adults are getting this training as well."

[56] WY's tendered criminal history records only that on 13 December 2005 he was placed on nine month good behaviour bond without conviction for unlawful use of a motor vehicle and trespass, the offences being committed on 28 October 2005. WY's pre-sentence report had attached to it a further criminal history indicating that on 21 June 2006 WY was convicted and ordered to perform 40 hours community service for unlawful use of a motor vehicle in February 2006. It seems this caused the judge to note that WY's criminal history with which she had been provided was not up to date. Her Honour requested the prosecutor to remedy this.

[57] WY's pre-sentence report noted the following. WY failed to report as directed under the latest order and so was ultimately charged with breaching it, as well as for committing further offences. The hearing of these matters had been adjourned. At sentence, WY had not completed any of the most recent community service order. WY had trouble reciting the days of the week, reading a short sentence and counting to 10. He attended school at Aurukun until the end of grade 10. He gained employment through the CDEP as a groundsman earning $150 a fortnight. He said he enjoyed his work and was reliable, does not abuse alcohol and does not take illegal drugs or sniff solvents. He enjoys fishing, hunting, camping, competition football and football training. He grew up in Aurukun where his parents still reside. They separated when he was young. He resides with his mother, her present partner and his younger half-brother. He assists his mother and her partner in caring for his baby brother. He said he thought the complainant was about 10 years old and that "having sex with a girl that's only 10 is normal". He now appreciates the consequences of such conduct and if the same opportunity arose he may not behave in the same way. He said he was unsure of the legal age of a minor having sexual relations. Whilst WY had limited English and a very low literacy level, the author was able to communicate with him by re-phrasing questions and using simple phrases so that he could understand. The interview process was "quite lengthy as [WY] often took some time to respond to the questions".

[58] The report recommended the following:

> "Due to [WY's] poor response to the Community Service order and due to the seriousness of the offending, it is respectfully recommended that he is presently unsuitable for community based supervision.
>
> If your Honour was considering a period of imprisonment, then it is noted that your Honour may fix a Parole eligibility date under Section 160D (3) of the *Penalties and Sentences Act* 1992 …"

[59] Defence counsel submitted that WY should be sentenced to a short term of imprisonment wholly suspended. He submitted that because WY was still under a probation order, he would have useful supervision even if a fully suspended sentence were imposed for the rape offence.

(vi) AAC

[60] Defence counsel next made submissions in respect of AAC, who was 13 years old at the time of the offending. He was raised in Aurukun by his grandmother (who was present at court to support him) and to some extent by his mother. He completed grade 9. He was unemployed but had been doing volunteer work at the Aurukun Arts Centre, helping his uncle and learning arts and crafts. He hopes to become an artist and to do cultural work. His grandmother is happy with this positive change in attitude. The relatives who are supporting him are quite well known artists. AAC had a significant criminal record but was now complying with his community orders.

[61] The judge noted that AAC 's criminal history with which she had been provided was also not up to date. The prosecutor then provided a current criminal history. AAC's criminal history began when he was 11 years old and was sentenced in July 2003 to six months probation without conviction for common assault committed in April 2003. On 28 June 2005 he was convicted but not further punished for an assortment of assaults and property offences committed between December 2003 and November

2004. On 13 September 2005 he was placed on nine months probation without conviction for property offences and common assaults committed between April and August 2005. He was also admonished and discharged for a trespass offence committed on 26 December 2003. On 28 February 2006 he was ordered to perform 50 hours community service, sentenced to 48 days detention with time spent in pre-sentence detention deemed to be time served and to 12 months probation, all without conviction, for serious assault (13 February 2006) and three charges of entering premises and committing an indictable offence by break (between May 2005 and January 2006). On 23 May 2006 he was reprimanded for escaping lawful custody (22 March 2006). On 17 October 2006 (after the present offending) he was admonished and discharged and time spent in pre-sentence detention was deemed to be served under the sentence for three charges of entering premises and committing an indictable offence by break. These offences were committed in March 2006 and so preceded the present offending.

[62] AAC's pre-sentence report had been prepared in relation to further offences to which AAC pleaded guilty in the Aurukun Children's Court on 20 February 2007: rioters injuring building or machinery, entering premises and committing an indictable offence by break, unlawful use of a motor vehicle, attempted entering premises with intent, wilful damage and entering premises and committing an indictable offence by break. These offences occurred in January and February 2007. That report noted the following. AAC has a lengthy history of inhalant abuse since aged 10. He has refused to follow the guidance of his grandmother who has attempted to divert him away from "chroming" (solvent sniffing). He does not seem to care that chroming is damaging his mind and body. It is an outlet for him when he is frustrated or angry and his peers engage in it. AAC requires intense substance abuse counselling and education and a full medical assessment to ascertain the damage that has resulted from his chronic chroming. He holds his peers who engage in anti-social behaviours in high esteem. His grandmother has always been a good support for him but he refuses to follow her guidance and has threatened her with violence to counter her attempts to place structures and boundaries in his life. He has learnt that emotional and sometimes violent outbursts push people away and allow him to make his own rules.

[63] The report further noted:

> "[AAC] has grown up in an environment where verbal, emotional and physical violence are the primary tools to deal with conflict. [He] has been forced to take this belief on in order to maintain a level of identity, and power within the community. [He] simply does not currently have the skills to deal with conflict appropriately. [His] inability to successfully deal with strong emotions such as anger lead him to seek an outlet for release, often through engagement with negative peers and associated, anti-social and criminal activity.
>
> … [he] requires intense anger control skills training.
>
> …
>
> … As a result of [AAC] not being engaged in school, employment or employment training he is able to socialise with friends during late hours of the night, and sleep till late hours of the morning on most occasions.
>
> … [He] has to be successfully engaged in employment, employment training or school."

[64] The report recorded that probation would provide much needed support to AAC to assist him in engaging in programs to address his chroming, negative peer influence, unwillingness to comply with supervision, lack of anger control and employment and chronic truancy. It could be combined with a community service order which would provide a tangible consequence for his offending. AAC had performed well on past community service orders.

[65] Ms Hall, representing the Department of Communities, informed the judge that AAC had performed only eight of the 100 hours of his current community service orders. He was not engaging. He actively ran away when an officer called to collect him to perform his community service. He had served 70 per cent of a six month detention order for property offences. Ms Hall explained that in terms of compliance with probation and community service orders, he was erratic: if he wished to be compliant he was, but if he was not interested he would leave.

[66] AAC's grandmother addressed the judge in this way:

> "I know my little grandson. He's always at home watching tele and during the day, my big son … and my brother … , they take him to the Arts Centre. He does the paintings and he helps my brother with the carving and when he comes back home he always at home watching tele, 'cos I'm always at home, your Honour. I does the washing and the mopping but he does his own bedroom. He makes his own bed. He does the [indistinct] but – so I'm very proud of my little grandson for what he's doing to himself."

(vii) WZ

[67] Defence counsel's final submissions relating to WZ included the following. WZ was 25 years old at the time of his offending. He too had lived all his life in Aurukun. He was raised by his mother. His grandmother was at court. He completed his education to grade 8. He had an ear injury which affected his balance and hearing. He was unemployed. He had a previous conviction for unlawful carnal knowledge. He was sorry for the shame he caused his mother and his family. He wanted to be sentenced so he could start a new life within the community. He was "probably slow from an intellectual standpoint. He's not someone who has a high intellect or a robust intellect or personality. He's very withdrawn and he's certainly what may be regarded as someone who is a follower rather than a leader." Although he was "the oldest of the pack" he was "someone who follows". In the circumstances, defence counsel submitted WZ's offending would warrant a custodial sentence, but because of parity principles the sentence should be suspended so he can remain in the community with his family.

[68] WZ's criminal history was as follows. On 5 July 1995 he was convicted and ordered to perform 60 hours community service for aggravated assault on a female and unlawful use of a motor vehicle in May 1995. On 28 May 1998 he was convicted and reprimanded for wilful damage committed in April 1998. On 21 October 2003 he was convicted and sentenced to 80 hours community service and fined for two counts of entering or being in a dwelling and committing an indictable offence and break, one count of unlawful use of a motor vehicle and one count of contravening a direction or requirement. These offences occurred in July and August 2003. On 17 February 2004 he was convicted and fined for breach of the community service order imposed on 21 October 2003. He was also convicted and ordered to perform 120 hours community service for entering offences committed in January 2004. On 19 May 2004 he was

convicted and sentenced to 12 months probation and 100 hours community service with $50 restitution for an entering offence, and two charges of attempted unlawful use of a motor vehicle with circumstances of aggravation committed in April 2004. On 19 October 2004 he was convicted and fined for being in a dwelling house without lawful excuse in April 2004. He was also convicted and sentenced to 18 months probation and 200 hours community service with a curfew from 7.00 pm until 6.00 am for entering and unlawful use offences committed between July and September 2004. On 8 May 2005 he was convicted and fined for unlawfully being in an enclosed yard and convicted but not further punished for breach of the probation order imposed on 19 May 2004. On 29 March 2006 (a few months before the present offending) he was convicted and ordered to perform 100 hours community service for carnal knowledge of a girl under 16 between December 2004 and March 2005. On 23 May 2006 (shortly before the present offending) he was sentenced to 12 months probation and 40 hours community service for unlawful use of a motor vehicle and trespass on 3 February 2006. On 31 October 2006 he successfully applied for an amendment of the community service order imposed on 29 March 2006. On 6 November 2006 he successfully applied for revocation of that order and he was re-sentenced, convicted and fined $500.

[69] WZ's pre-sentence report noted the following. WZ said that he knew the complainant and attended the house where the offence was committed with the intention of having sex with her. He knew others had had sex with her beforehand because the bedroom door was open and he could see in. The complainant called his name and invited him into the room. She was already naked and they had sexual intercourse. He thought she wanted to have sex with him. Because of his conviction in March 2006 for carnal knowledge of a girl under 16 years, he is now registered on the Australian National Child Offending Registry (ANCOR) so that he must submit any change of details to police. WZ attended school at Aurukun but he could not read or write a short sentence when asked and was unable to count to 10 or recite the alphabet and had trouble reciting the days of the week. The interview process was lengthy. He had no formal work qualifications or training. He was not employed. He said that he did not use drugs or sniff solvents and nor did he abuse alcohol. He trained for and played competition football. He enjoyed fishing. His father died long ago as a result of "black magic". He was reluctant to discuss details of the death.

[70] WZ told the author of the report that he "felt sorry for the victim because so many boys were having sex with her". He did not think he had done the right thing, but the complainant had "made her own decision". He thought she wanted to have sex with him and that was why he had sex with her. He said that "he felt he made the victim feel sad and would not like to think he would behave in the same manner if he were faced with the same situation". He said he was not sure of the legal age at which a minor could have sexual relations. He said he did not know how old she was.

[71] The report additionally noted the following matters. WZ was currently in breach of a probation order for failing to notify a change of address. He was unsure why previous community based orders had been revoked. He said he would prefer to remain in the community than be in custody but "he did not seem to be too concerned". He appeared to have a limited capacity to understand English but was able to communicate by the interviewer re-phrasing questions. He intended to continue to reside in Aurukun. There were limited resources in Aurukun but the probation and parole service was planning to open an office there in the near future. WZ was presently unsuitable for community supervision. This was because he had responded poorly to previous

community based supervision and had a history of various offences including carnal knowledge of a girl under 16 years so that he did not seem to have benefited from prior leniency. If imprisonment were imposed the judge could fix a parole eligibility date under s 160D(3) *Penalties and Sentences Act* 1992 (Qld).

(viii) The judge's sentencing remarks

[72] The judge's sentencing remarks were brief. They included the following:

> "HER HONOUR: All of you have pleaded guilty to having sex with a 10 year old girl …
>
> All of you have to understand that you cannot have sex with a girl under 16. If you do, you are breaking the law, and if you are found out, then you will be brought to Court and you could end up in gaol.
>
> I accept that the girl involved, with respect to all of these matters, was not forced and that she probably agreed to have sex with all of you, but you were taking advantage of a 10 year old girl and she needs to be protected, and young girls generally in this community need to be protected.
>
> This is a very serious matter. It is a very shameful matter and I hope that all of you realise that you must not have sex with young girls. Anyone under 16 is too young.
>
> Some of you are still children yourselves. Others of you are adults, but I am treating you all equally in terms of the behaviour. I am not treating any of you as the ringleader or anything like that."

[73] The judge then sentenced each of the adult respondents to six months imprisonment suspended immediately for 12 months and each of the juvenile respondents to 12 months probation without conviction. The judge explained in the simplest and most basic way to each respondent the effect of the sentence imposed in each case.

(ix) The District Court's workload in Aurukun on 24 October 2007

[74] The transcript records the re-arraignment of the respondents WZ, KU, WY, YC, KY, PAG and AAC occurred at Aurukun at about 3.40 pm. The proceedings set out above then unfolded.

[75] Ms Thelma Schwarz, solicitor for the respondents, deposed to the following facts in an affidavit filed in this appeal. The District Court commenced sitting at Aurukun on 24 October 2007 at about 9.30 am. The court dealt with "at least 18-20 separate matters" before the respondents' arraignment or re-arraignment and sentencing which commenced at 3.40 pm. Her recollection is that the sentencing proceedings finished at 5.00 pm that day. Ms Schwarz deposed that chartered planes were used to transport the judge, court officials, legal representatives and officers from the Department of Communities and the Probation and Parole Service to and from Aurukun that day. At about 5.00 pm the pilot of one of these planes came into court and advised of the need for the planes to leave Aurukun shortly because company policy required a mandatory number of rest hours before flying the next day. The transcript records the Court adjourned at 5.03 pm.

2.4 6 November 2007, Cairns

[76] On 6 November 2007 the primary judge sentenced the remaining juvenile respondents, BBL and KZ, in Cairns. In addition to the rape charges, they each pleaded guilty to ex officio indictments charging each with break, enter and steal. KZ was also charged with assault occasioning bodily harm and breach of a curfew condition of his bail. These additional offences were committed in October 2007, more than a year after the rape offence. The prosecutor tendered copies of their criminal histories and pre-sentence reports.

(i) BBL

[77] BBL's criminal history was as follows. He was reprimanded on 18 January 2006 for possession of suspected stolen property. On 21 February 2006 he was placed on nine months probation without conviction for two counts of unlawful use of motor vehicles committed on 28 October 2005 and 1 February 2006 and one count of trespass, committed on 28 October 2005. On 23 May 2006 (at about the time of the rape) he was convicted, reprimanded and sentenced to six months detention to be served by way of a conditional release order for a large number of property offences committed between January and May 2006. On 6 March 2007 a sentence said to have been imposed on 16 January 2007 (but not in the tendered criminal history) for entering premises and committing an indictable offence by break was re-opened and he was sentenced to 36 days detention with pre-sentence detention deemed as time already served under the sentence. On 21 March 2007 he was sentenced without conviction for setting man-traps in August 2006 and entering premises and committing an indictable offence by break in February 2007 to 27 days detention; 12 months probation; and 40 hours community service. Time spent in pre-sentence detention was deemed to be time already served under the sentence. (Defence counsel later explained that the offence of setting man-traps involved BBL and other juveniles placing nails in the lid of a drum and burying it outside the Aurukun clinic in a shallow ditch. The contraption was intended to puncture the tyres of police cars. Their actions posed a risk to people near the clinic but fortunately no person or property was in fact injured or damaged.) On 21 August 2007 he was ordered to perform 40 hours community service without conviction for entering premises and committing an indictable offence in June 2007.

[78] BBL's pre-sentence report was prepared without the benefit of a personal interview but others who had recently interviewed him passed on relevant information to the author. The report recorded the following. BBL had complied and co-operated in respect of earlier community based orders. He had demonstrated maturity and was "helpful, a keen worker and 100 per cent co-operative". He was working steadily through his community service orders. He was in breach of community based orders, however, because of his re-offending. He grew up in Aurukun. His father was killed in a plane crash in Weipa when he was two years old. He was raised by his mother. He has four brothers and a sister. His elder brothers have been imprisoned and have spoken to him about his offending as they do not want him to end up in jail. He feels his elder brothers, whom he describes as "good hunters" are positive role models. BBL was said to have completed year 10 but he attended his school, in the flexible learning centre at the Western Cape College, for only four days during the year. BBL aspires to be an artist at the Aurukun Arts Centre with his grandfather who has been a positive role model. One factor that may have contributed to BBL's offending was the negative influence of peer groups. The report noted that BBL:

> "… is from a community that experiences high levels of social and economic stress due to its level of crime, child protection

notifications, levels of violence, and unemployment levels. To a certain extent [BBL's] lifestyle and behaviour is normalised in this context. This may be because the environment into which he has been socialised and which, since the onset of adolescence, [BBL] has found such a strong sense of identity, is one where offending behaviour is the norm. Cotterel (1996) points out that in this circumstance it is not peer pressure, per se, but the presence of a whole way of life, of which offending and drug use are but two factors out of many that need to be addressed. [BBL's] connection with negative social groups situates him in a 'high risk' category, increasing his likelihood of committing an offence …

…[T]he offence occurred while [BBL] had … the opportunity to associate with his peers … [He] felt forced to perform sex with the complainant by a co-offender.

[BBL's] grandmother has previously stated that she believes that his association with a negative peer group is a major contributing factor to his offending. … [BBL] may benefit from participation in programs or activities with a focus on positive peer association, further programs such as cognitive behavioural therapy, ending offending and victim empathy …" … [BBL] has admitted .. the complainant did not want to have sex … [He] also did not want to have sex but felt compelled to by a co-offender. … [BBL] felt sorry for what he had done and would feel very angry should a similar offence occur to one of his own family. He was able to identify that the complainant would have been scared during the event. … It is the author's assessment that [BBL] does not recognise the true seriousness of the offence.

… [BBL] identified the need for intervention and support and has agreed to participate in all options available. … .

… A probation order would provide an opportunity for BBL to build on his strengths and abilities as well as personal, educational and vocational skills … . [A] community service order … would provide [BBL] with a tangible consequence for his offending and allow him to participate in and make reparation to the community.

… [BBL] currently has outstanding 61.5 hours of community service …

[A combined probation and community service order] would give the opportunity to make reparation to the community through unpaid work. …

… [A] combined order of Probation and Detention … would provide a clear consequence to [BBL] for this offence and offer him extended support upon release from custody. The detention order can be made for a maximum of six months which is then followed by a probation order for a maximum of twelve months upon release from custody.

…

Should Your Honour wish to impose a period of detention, you may consider suspending the period of detention in favour of a Conditional Release Order for a maximum period of three months. This … would allow [BBL] to be supported and … to make reparation to the community, allow him to work towards educational/work goals as well as address the causal factors to his

> offending behaviour. … [BBL] is assessed as suitable for such a program due to his willingness to utilise support and supervision effectively. [BBL] is aware that should he not comply with the components of such an order he risks the consequence of being placed in detention. [BBL] has expressed his willingness to comply with this type of order.
>
> …
>
> Your Honour may consider a detention order as an appropriate sentence … [to] impress upon [BBL] the seriousness of his offending, however as outlined in the Charter of Juvenile Justice Principles contained in schedule 1 of the *Juvenile Justice Act*, 1992, detention should be considered as a last resort.
>
> Your Honour may wish to take the following factors into account if contemplating a period of detention for [BBL]:
>
> - [BBL] is 15 years of age
> - A period of detention may serve to foster a relationship with offending peers.
> - [BBL] has demonstrated through previous Probation order[s] that he is able to utilise support and assistance where required.
> - Other sentence options canvassed in this report would hold [BBL] accountable for his actions and encourage him to take responsibility for his offending behaviour.
>
> …"

(ii) KZ

[79] KZ's criminal history was as follows. On 17 March 2004 he was reprimanded without conviction for three property offences committed in early 2004. On 15 December 2004 he was sentenced to a six month good behaviour bond without conviction for common assault committed in November 2004. On 13 July 2005 he was sentenced without conviction to a six month good behaviour bond, six months probation and 40 hours community service for property offences committed between December 2004 and May 2005. On 13 July 2005 he was sentenced to six months probation and 40 hours community service for two counts of wilful damage committed in January and February 2005. On 13 December 2005 he was sentenced without conviction to 40 hours community service and 12 months probation for property offences committed between 23 and 28 October 2005. On 28 June 2006 (shortly after the commission of the present offence) he was sentenced without conviction to 12 months probation and 100 hours community service for a large number of property offences and some traffic matters. These offences occurred between December 2005 and June 2006. On 17 April 2007 he was sentenced without conviction for an assortment of property offences and traffic matters to 26 days detention with time spent in pre-sentence detention deemed as time served under the sentence and to 12 months probation. These offences occurred in March 2007 after the present offence. On 21 August 2007 he was reprimanded without conviction for committing a public nuisance.

[80] KZ's pre-sentence report recorded the following. The author had been unable to interview KZ personally, although, as in BBL's case, others had recently interviewed him in Aurukun and passed on the information obtained. KZ had spent 41 days in pre-sentence custody. He had completed all his community based orders and attended

several programs addressing his offending behaviour. He was born and raised in Aurukun. He is the eldest of six brothers and sisters. He has had greater family responsibilities since the birth of his youngest sister who has required regular medical treatment in Cairns. He carries the burden of supporting his grandparents and supervising his younger siblings during his mother's absence with his baby sister. He does however spend time away from his family with his friends who influence him to offend. He attended school in Aurukun to grade 9. He failed to acquire basic numeracy and literacy skills and found it hard to participate in school because he was teased by other juveniles. Negative peer influence, lack of adult supervision and poor social skills in relationships have contributed to his offending. He showed remorse for his actions and was worried about what he did. He said that his friends encouraged him to have sex with the complainant. He was ashamed and embarrassed to face his family and other community members. He did not want to be sent to detention but understood this was an option because of his criminal history and the nature of the offence. He has no history of substance abuse. He shoulders his many home responsibilities with little complaint. He blames others for his mistakes and does not take responsibility. His mother will have to make greater efforts to supervise him. It will be hard for him to stop offending if he does not have consistent guidance and support from his family. The sentencing options included probation which would allow him to participate in programs under a case plan focused on victim empathy, impulse control counselling, peer relationship counselling and social skills and relationships. Community service would not offer the personal support afforded by probation but would provide clear consequences for his offending. He has completed community service in the past in an exemplary manner. Probation and community service orders could be combined. This would enable KZ to benefit from continued departmental support through probation and make reparation to the community for his offending behaviour. He has been complying with such orders in the past satisfactorily. He could also take part in a conditional release order and a three month program had been devised to address KZ's offending behaviour and enable him to make reparation to the community. As an option of last resort, detention was open but before imposing such an order the court should consider that he had already spent 41 days in custody and that detention would affect his personal development as it would remove him from his family, community and traditional way of life.

(iii) Prosecutor's submissions

[81] The prosecutor, who also appeared in Aurukun on 24 October 2007, stated that he received the file at 9.15 am that morning. According to the transcript, the sentencing proceedings commenced at 9.23 am. The prosecutor submitted that there seemed to be no alternative to detention for BBL and KZ. They had not reacted favourably to community based orders. They did not have adequate supervision available to them in the community. A period of detention of between three and six months was warranted, taking a global approach to the rape offence and their subsequent offending. He submitted, however, that probation should be imposed for the rape offence because of the sentences imposed on their co-offenders on 24 October 2007. The prosecutor emphasised the serious nature of the property offence committed by both BBL and KZ. Whilst they were on bail and under community based orders they were part of a gang breaking into the Aurukun Tavern and stealing property. KZ's additional offence, an assault on his younger sibling, may have been borne of frustration when the younger child entered KZ's bedroom but it was serious.

(iv) Defence counsel's submissions

[82] Counsel appearing for BBL and KZ also appeared for their co-offenders in Aurukun on 24 October 2007. He emphasised that the breaches of probation through re-offending occurred in the context of KZ and BBL being given very little effective supervision or programs to aid their development in the isolated Aurukun community. Issues of parity required the imposition of a probation order in relation to the rape charge. The primary judge expressed concern about their lengthy criminal histories, especially in KZ's case. Counsel emphasised their age, pleas of guilty, co-operation with police and the time spent in pre-sentence custody in respect of various offences. He urged the judge not to take the "… view that Aurukun's a terrible place, [KZ] has terrible relatives, therefore we should send him to detention". He submitted that KZ was now aware that he would soon be turning 17 so that he would in future be dealt with under the adult justice system. Defence counsel stated that BBL's mother, with whom he would live in Aurukun, had difficulties in managing her own affairs so that his family situation was not perfect, but at least he had a family to whom he could return.

[83] Ultimately the defence urged the judge to fashion a sentence which would take into account the pre-sentence custody by releasing both KZ and BBL into a supervisory order such as probation, perhaps for a little longer than for the juvenile co-offenders on the rape offence. He contended that this would take into account KZ and BBL's additional offending and other distinguishing features.

[84] Defence counsel and the judge had the following somewhat astounding discussion as to whether convictions should be recorded:

> "HER HONOUR: Okay. Mr Curtin, what about recording convictions?
>
> MR CURTIN: Your Honour took a certain view with regard to the other matters, I gather, with regard to-----
>
> HER HONOUR: I did with the rape-----
>
> MR CURTIN: Yes.
>
> HER HONOUR: -----but I'm more concerned about the break and enter."

(v) Observations from the Department of Communities' officer

[85] Ms Hall for the Department of Communities stated that KZ and BBL had completed various programs covering victim empathy, substance abuse and diversionary methods. She spoke to the judge about the practicalities of offering community based programs to KZ and BBL in Aurukun and other remote Indigenous communities:

> "… community service in Aurukun is always something that - we actually do that very well. We've got a consistent presence there, except for - there's been three riots over the past 12 months so we haven't been able to get in there, but we have, apart from those things, kept a fairly consistent presence particularly around community service, so - and I think both of them have expressed a wish to do that. They actually enjoy that. It's something that keeps them occupied and tires them out as well so that they're not perhaps roaming the streets so much at night."

[86] Ms Hall noted that both KZ and BBL had expressed some interest in returning to school. Mainstream schooling was unsuitable but a new program commencing in 2008 in Aurukun may enable them to participate in some form of schooling. KZ was to become a father in 2008 and this may help "realign his thinking". BBL had relatives in Pormpuraaw (another Cape York Indigenous community). Previously when BBL had been in Pormpuraaw he had not re-offended. Although it was difficult, the Department could supervise him in Pormpuraaw.

(vi) The judge's sentencing remarks

[87] The judge's sentencing remarks were again succinct. They included some brief exchanges in simple terms between the judge, BBL and KZ about their offending and the need for it to stop. The judge referred to the offences in question as rape. In conformity with the approach taken by the judge to the sentencing of their co-offenders, on the rape offence BBL and KZ were each placed on probation for 12 months, and no conviction was recorded. The court adjourned at 10.10 am.

3. The Attorney-General's appeals

3.1 The offence of rape under the *Criminal Code*

[88] At this point it is necessary to refer to s 349 of the *Criminal Code* which, by sub-section 2(a), defines rape as occurring, inter alia, if a "person has carnal knowledge with or of [another person] without the other person's consent". By sub-section (3) it is provided that for the purposes of s 349 "a child under the age of 12 years is incapable of giving consent".

[89] Under sub-section (1) the maximum penalty for the crime of rape is life imprisonment. Under s 176(3) and s 8(1) of the *Juvenile Justice Act* the maximum penalty for a juvenile offender is 10 years detention.

[90] Section 215(1) of the *Criminal Code* provides that "[a]ny person who has or attempts to have unlawful carnal knowledge with or of a child under the age of 16 years is guilty of an indictable offence". Section 215(3) provides that "[i]f the child is under the age of 12 years, the offender is guilty of a crime, and is liable to imprisonment for life".

3.2 The parties' submissions in the appeal

[91] On behalf of the Attorney-General it is said that the circumstances of this case reveal an exceptional departure from due process and proper sentencing principle, in that the sentencing remarks of the learned judge were inadequate to explain the basis on which the sentences were imposed, and that her Honour's approach to sentencing the respondents erroneously equated the criminality of the respondents to an offence against s 215(1) of the *Criminal Code* rather than the distinctly more serious offence of rape. Further, it is argued that her Honour, for no good reason, erroneously treated adults as no more responsible for their crime than children.[4] Finally, it is said that her Honour allowed the proper exercise of the sentencing discretion to be overwhelmed by consideration of the extreme disadvantage suffered by Aboriginal children growing up at Aurukun.

[92] For the respondents, it was submitted that the sentencing discretion did not miscarry, but that, if it did, this Court should nevertheless dismiss the appeals because of the approach taken by the prosecution. The respondents argue that the sentences imposed

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[4] Cf *Lowe v The Queen* (1984) 154 CLR 606 at 609; *R v Woodley, Boogna, Charles & Ors* (1994) 76 A Crim R 302 at 307.

by the learned judge reflect her Honour's acceptance of the approach urged upon her Honour by the prosecutor which, in turn, reflected acceptance of the proposition that custodial sentences were not appropriate in these cases. The respondents urge that the prosecuting authorities should not be allowed to disavow that approach on appeal. It is also said that the respondents were induced by the attitude consistently expressed to their counsel and the sentencing judge by the prosecutor, ie that a custodial sentence would not be sought, to refrain from placing before the learned sentencing judge evidence in mitigation of sentence which might have been adduced had it been suggested that a custodial sentence was to be sought by the prosecution. If the appeals are allowed and the respondents re-sentenced, they should not, it was submitted be imprisoned or detained.

3.3 The roles of prosecutor and sentencing judge

[93] The respondents relied upon statements in *GAS v The Queen*[5] where Gleeson CJ, Gummow, Kirby, Hayne and Heydon JJ confirmed that, while it is for the sentencing judge alone to determine the sentence to be imposed in any given case,[6] there is a discretion in an appellate court in a criminal matter "to dismiss [an] appeal on the ground that the prosecution led the sentencing judge into a material and decisive error".[7]

[94] Of particular relevance in relation to the circumstance that the non-custodial sentences were imposed on the respondents in this case at the urging of the prosecution, is the following passage from the judgment of King CJ, with whom Mitchell and Williams JJ agreed, in *R v Wilton*:[8]

> "It is necessary to consider whether the prosecution should be allowed to raise on the appeal the contention that the sentence ought not to have been suspended when that contention was not put in the Court below. The consequences of allowing the prosecution to do so are serious. The respondent has faced the prospect of deprivation of his liberty by way of imprisonment and has been spared, subject to observance of the conditions of the bond. If the prosecution is allowed to raise the contention he must again face the prospect of imprisonment. This is what the Federal Court meant in *Reg v Tait and Bartley* ((1979) 24 ALR 473) by 'double jeopardy'. In my opinion, this Court should allow the prosecution to put to it, on an appeal against sentence, contentions which were not put to the sentencing Judge, only in exceptional circumstances which appear to justify that course. I endorse with respect what was said in *Tait and Bartley* ((1979) 24 ALR 437) as to the duty of prosecuting counsel before the sentencing judge. In particular where a submission is made by counsel for a convicted person that a sentence should be suspended or a possible suspension is mentioned by the judge, and this course is regarded by the prosecution as beyond the proper scope of the judge's discretion, a submission to that effect should be made. Generally speaking, if the submission is not made to the sentencing

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5 (2004) 217 CLR 198 at 213 [40].

6 *R v Black; R v Sutton* [2004] QCA 369.

7 See also *R v Richardson; ex parte A-G (Qld)* (2007) 175 A Crim R 244; [2007] QCA 294 at 250 – 251 [32] – [34].

8 (1981) 28 SASR 362 at 367 – 368 (citations footnoted in original).

> judge the prosecution should not be able to advance that contention successfully on an appeal by the Attorney-General."

This passage was referred to with approval by Brennan, Deane, Dawson and Gaudron JJ in *Everett v The Queen*.[9]

[95] The proper sentencing of offenders is, of course, a matter of public interest; but the principles reflected in the passages cited above show that that interest will only exceptionally justify an appellate court acting upon an argument advanced on appeal on behalf of the prosecution that a sentence imposed in accordance with the prosecution's submission was not a proper sentence. As the passages cited above show, the abiding reason for this constraint upon the exercise of the appellate function is that, in the administration of criminal justice, the interests of finality are, save in exceptional cases, of paramount importance as a protection of the individual from ongoing harassment by the state.

3.4 Should this Court entertain the appeals despite the prosecutor's attitude at sentence?

[96] In *GAS v The Queen*, Gleeson CJ, Gummow, Kirby, Hayne and Heydon JJ said that the discretion to dismiss an appeal by a prosecuting authority on the ground that the prosecution contributed to the error the subject of complaint should not be exercised to dismiss an appeal as to sentence in a case where it was not the submission of the prosecution which "accounted for the sentencing judge's error" but the sentencing judge's "failure to appreciate, and give sufficient weight to, exactly what the appellants were admitting, in the circumstances of the case, by their pleas of guilty".[10] The present is such a case; and this is so whatever reasons may have led the prosecutor to adopt the position he did in relation to the sentencing of the respondents.

[97] We have concluded that the sentencing judge proceeded to sentence seven of the respondents on 24 October 2007 on a footing which did not reflect the gravity of the offence of rape. Each respondent's offence was not merely "having sex with young girls" or unlawful carnal knowledge of a girl under 16 years of age; yet that was the express focus of the learned sentencing judge's sentencing remarks on 24 October 2007. Our conclusion does not, however, depend solely upon the terms in which her Honour expressed herself. It is well-established by decisions of this Court that sexual offences committed by adults against children under the age of 12 should attract a sentence involving actual imprisonment or detention save in exceptional circumstances.[11] In *R v Quick; ex parte A-G (Qld)*,[12] it was accepted by all members of the Court that the course of decisions in this Court support an approach to sentencing whereby the sexual abuse of children by adults is regarded as so serious that it "should ordinarily mean detention in custody of the offender, in the absence of exceptional circumstances" at least where the victim is a child under 12 years of age.[13] Reference may also be made, for statements to similar effect, to this Court's decisions in *R v L; ex parte A-G (Qld)*,[14] *R v M; ex parte Attorney-General*[15] and *R v Pham*.[16]

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9 (1994) 181 CLR 295 at 302.

10 *GAS v The Queen* (2004) 217 CLR 198 at 213 – 214 [40].

11 See *R v Quick; ex parte A-G (Qld)* (2006) 166 A Crim R 588; [2006] QCA 477 at 589 [5] and the cases there cited.

12 (2006) 166 A Crim R 588; [2006] QCA 477 at 589 – 590 [5] – [8]. See also at 594 [34].

13 [2006] QCA 477 at [5]. See also at [18] – [19].

14 [2000] QCA 123.

15 [2000] 2 Qd R 543; [1999] QCA 442.

[98] So far as the juvenile offenders are concerned, non-custodial sentences for rape, even of very young victims, are less extraordinary.[17] A series of decisions of this Court suggests that the rape of a 10 year old girl by 13 to 15 year old juveniles will usually warrant a sentence of actual detention in the absence of significant exculpatory circumstances.[18]

[99] The learned judge's sentencing remarks of 24 October 2007 do not articulate any reasons which would warrant a departure from that course. Nor were any reasons given for deciding that, in the case of the juvenile offenders, no conviction should be recorded for the serious offence of rape of a 10 year old girl.[19] These omissions were themselves errors of law demonstrating a miscarriage in the sentencing process which resulted in manifestly inadequate sentences in relation to each of the respondents dealt with on that day. Those errors were repeated in the judge's sentencing remarks relating to BBL and KZ in Cairns on 6 November 2007.

[100] We have considered the argument advanced on behalf of the respondents that because the approach of the prosecutor meant that the sentencing hearing was effectively a "no contest", in that it was common ground between the parties that non-custodial sentences should be imposed on all the respondents, the appeal should be dismissed. That argument cannot be accepted. The prosecutor cannot shift the burden of responsibility for imposing a proper sentence from the sentencing judge. Nor can the prosecutor absolve the sentencing judge of the duty of explaining the reasons for the sentence.

[101] As to the duty of a sentencing judge to explain the reasons for the sentence which is imposed, even if, under the general law, it is open to the parties to relieve a court of the need to give reasons justifying its decision, the learned sentencing judge here was under a statutory obligation to give reasons for the imposition of the suspended sentences by virtue of s 10 of the *Penalties and Sentences Act*. So far as the juvenile offenders were concerned, s 158 of the *Juvenile Justice Act* requires that the Court ensure that the child understands "the purpose and effect of the order".[20] All these statutory requirements are imposed, not merely for the benefit of persons being sentenced, but also to advance the public interest in the rationality and transparency of the administration of criminal justice: these statutory requirements cannot be waived by the parties. We appreciate that, for many of the respondents, English was a second language, they were poorly educated and they were young. The transcript also suggests that some others who had an interest in understanding the judge's sentencing remarks, such as the adults supporting the juvenile respondents, also had limited English language skills. We accept that the judge was probably attempting to express her sentencing remarks in the simplest and briefest of terms so that the respondents and those supporting them could understand "the purpose and effect of the order" made by the judge. The additional burden imposed on sentencing judges under s 158 of the *Juvenile Justice Act* does not relieve a judge from the duty to give full and adequate

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16 [1996] QCA 003.

17 See, e.g., *R v MSB*, unreported, O'Brien DCJ, Childrens Court, Qld, Indictment No 33 of 2005, 3 November 2006 (anonymised by this Court).; *R v DJL*, unreported, Britton SC DCJ, Childrens Court, Qld, Indictment No CC17 of 2006, 5 December 2006 (anonymised by this Court).

18 *R v JAJ* [2003] QCA 554 esp at [42]; *R v MAC* [2004] QCA 317 at [13] - [14]; *R v PZ; ex parte A–G (Qld)* [2005] QCA 459 esp at [26] – [29]. See also *R v E; ex parte A–G (Qld)* (2002) 134 A Crim R 486; [2002] QCA 417 esp at 493 [37].

19 See *Juvenile Justice Act*, s 183(3) and s 184(1).

20 See also *Juvenile Justice Act*, Sch 1, Charter of Juvenile Justice Principles, principle 6.

reasons for imposing a particular sentence. The requirement to give those reasons is so that the community, as well as an appellate court, can understand why the judge decided the particular sentence imposed was appropriate in the circumstances. The obligation to give reasons is all the more important where the sentence imposed is outside the usual range.

[102] The judge's failure to impose sentences reflecting the seriousness of the respondents' conduct and to give adequate reasons for the extraordinarily lenient sentences imposed for such a serious offence was contributed to by a number of factors. The first, and major factor, was the prosecutor's attitude to which we have already referred in some detail.

[103] The second was the heavy workload taken on by the judge in Aurukun on 24 October 2007 when she sentenced seven of the nine respondents. The transcript records that this sentencing proceeding effectively commenced at 3.40 pm and concluded at 5.03 pm, a few minutes after the planes which flew in the judge, lawyers and court and departmental officers that day were due to depart. It seems that the judge had dealt with some 18 to 20 other matters that day before commencing this complex matter. It is apparent from the summary of the proceedings set out above that the judge had perused the detailed pre-sentence reports prepared in respect of each of the seven respondents. The one hour and 23 minutes of court time allocated to their sentencing was not, therefore, an accurate reflection of the time spent by the judge in considering their case. The sentencing proceedings concerned the serious charge of raping a 10 year old girl by seven offenders, all of whom had significant criminal histories and complex personal circumstances. Because some of the offenders were adults and others juveniles, the sentencing was of some particular complexity involving the consideration of two disparate sentencing statutes involving sometimes competing sentencing principles. Her Honour is a very experienced judge, and no stranger to sittings of the District Court in Aurukun. She was, no doubt, conscientiously seeking to dispose of all the matters listed for hearing that day. But even taking into account the judge's perusal of the pre-sentence reports prior to the hearing of this matter, the sentencing process appears to have been conducted with excessive haste and in too summary a fashion to ensure that justice was both done and seen to be done to all interested parties: the victim and her family, the respondents and their families, and the wider community.

[104] The third factor contributing to the error in this complex sentencing process was that the judge was not assisted by the provision by the prosecutor of a victim impact statement or any information about the effect of the offending on the victim.[21]

[105] The fourth factor contributing to the error related to the first. The judge was not given any real assistance by either counsel by way of comparable cases as to the appropriate sentencing range. Indeed, as noted earlier, the judge was actively led into error by both counsel's submissions as to the appropriate sentence. We understand that there were unique features in the present offences to which we will refer later in these reasons, but neither counsel attempted to assist the learned sentencing judge in her difficult task by reference to relevant decisions of judges, either at first instance or on appeal.

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[21] See *Criminal Offence Victims Act* 1995 (Qld), s 6, s 7, s 8, s 13; *Penalties and Sentences Act*, s 9(2)(c) and (e) and s 9(4)(c); *Juvenile Justice Act*, s 150(1)(h) and Sch 1, Charter of Juvenile Justice Principles, principle 9.

[106] These factors also infected the sentencing proceedings of BBL and KZ on 6 November 2007 in Cairns which commenced at 9.23 am and concluded less than 50 minutes later at 10.10 am.

[107] We note that public concern about dealing with serious and complex sentences in such a summary way is longstanding. The December 1999 report of The Aboriginal and Torres Strait Islander Women's Task Force on Violence identified this area as requiring improvement if violence in Indigenous communities is to be controlled. The report recommended that:

> "court services to rural and remote areas must be increased and improved. Sittings must be more frequent, hearings less expeditious, access to legal help better, presentation of cases improved and client information services upgraded."[22]

[108] We have concluded that, in the extraordinary circumstances of this case, the sentencing process miscarried. First, the respondents were not sentenced on a basis which reflects the gravity of the crime of which each was convicted as a result of his own plea of guilty, ie the rape of a 10 year old girl. Secondly, the learned sentencing judge erred in treating the respondents "equally in terms of the behaviour" [sic]. While it may have been correct, in the light of the factual basis on which the sentence proceeded, to regard none of the respondents as a clear "ringleader", there were obvious differences in the personal circumstances of the respondents which were material to the individual responsibility of each of them. In a case where, without compelling and articulated reasons, an adult, such as WZ, who was 25 years of age, is sentenced on the same footing as a 13 year old boy, such as AAC, in terms of criminal responsibility for raping a 10 year old girl, "the lack of disparity … bespeaks an error of some kind".[23]

[109] The sentencing process can also be seen to have miscarried in that the adult offenders were given fully suspended sentences of six months imprisonment, while the juveniles were given sentences of 12 months probation. To the extent that it was thought that probation would ensure that the juveniles would receive some degree of supervision, the full suspension of the short sentences imposed on the adult offenders reflects a contradictory failure to recognise that, at the very least, the young adult offenders, too, should be subject to supervision while they remain at liberty. They would not receive any supervision at all under a fully suspended sentence. The respondents' prior criminal histories raise queries as to whether a sentence which relies upon supervision of any of them within the community reflects an unwarranted degree of optimism. That may or may not be a fair observation. But the point for present purposes is that the inconsistency in approach reflected in the suspending of the sentences imposed on the adult offenders without clear reasons also "bespeaks error" on the part of the learned sentencing judge.

[110] It is said on behalf of all of the respondents that the non-custodial sentences imposed in this case can be understood and justified as an acknowledgment that the offending by the respondents was due to the dysfunctional nature of the community in which the respondents have been brought up, rather than to deviant criminality on their part.

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22 Boni Robertson, Department of Aboriginal and Torres Strait Islander Policy and Development, *The Aboriginal and Torres Strait Islander Women's Task Force on Violence Report* (1999) 263.

23 *Lovelock v The Queen* (1978) 33 FLR 132 at 136 – 137; *Lowe v The Queen* (1984) 154 CLR 606 at 618; *R v Woodley, Boogna, Charles & Ors* (1994) 76 A Crim R 302 at 305 – 307.

[111] A large body of material has been placed before this Court about the Aurukun community. For example, the GYFS psychological reports in respect of a number of the juvenile offenders tendered by the respondents note the following by way of background to the juvenile respondents' offending:

> "13. Both the theoretical and research literature highlight the influence of environmental factors on the commission of sexual offences against children (eg. Smallbone, Marshall & Wortley, 2008; Wortley & Smallbone, 2006; Marshall, Serran & Marshall, 2006; Marshall & Barbaree, 1990). Therefore offending behaviour cannot be fully understood in isolation of the context in which it occurred.
>
> 14. [The juvenile respondents have] lived the majority of [their lives] in Aurukun, a remote Aboriginal Community in Western Cape York. Aurukun has a population of approximately 1000 people. (Australian Bureau of Statistics, 2007), the majority of whom are Indigenous. Part of the population is transient, moving between a number of remote Indigenous communities in the Western Cape region. The people of Aurukun and the surrounding areas are referred to as the Wik people and constitute five different clan groups. The current community is split into two primary clan groupings separated at the top and bottom ends of town. Due to historical differences between these family and clan groups there is a cultural understanding that guides social behaviour and governs who can interact. Tension and retaliation may occur in response to perceived harm or disagreements. However the community has now taken steps to minimise this segregation, with new town planning strategies to make it difficult to geographically identify top and bottom end groups. The majority of people in Aurukun, including [the juvenile respondents] speak an Australian Aboriginal Language (the language used in this area is Wik, the primary dialect is Wik Mungkan), with English as a second language.
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> 15. The township of Aurukun was originally established as a church mission in 1904 with people relocated from the surrounding area to the mission, in accordance with government policies at that time. Aurukun was officially closed as a mission community in 1978 (Queensland Government, undated). The Aurukun township and the surrounding land is now managed by the Aurukun Shire Council and there have been several high profile State and Federal legal proceedings involving the Wik people and the land surrounding Aurukun in relation to ownership (Native Title) and mining leases (Martin, 1997).
>
> 16. The Aurukun community strives to maintain positive links with traditional language, culture and heritage. For example cultural programs are facilitated within the school; within some family groups younger generations are taught traditional hunting practices, painting and sculpture; and at a community level efforts are being made to record traditional knowledge and language to preserve this for future generations. Aurukun also has an internationally recognised Arts Centre. Traditional social rules and norms remain strong within the community, including a strict division of Men's and Women's business, tasks and responsibilities.

17. However, as in other Indigenous communities, colonisation and subsequent practices of dispossession, forced relocation, discrimination and disempowerment have manifested in multiple and significant social problems including violence, substance abuse, reduced health outcomes, breakdown of traditional values and social structures, unemployment and poverty (Robertson, 2000).

18. Like many other remote Indigenous communities, Aurukun faces numerous social and health problems including substance abuse, domestic violence, poverty, overcrowding, gambling, limited employment opportunities, limited education opportunities, limited organised recreational activities, and within some families, a disconnection from culture and traditional beliefs. The 1996 Index of Relative Socioeconomic Disadvantage indicated that Aurukun was the most disadvantaged Statistical Local Area in Queensland (Queensland Council of Social Services, 1999). High rates of child sexual abuse in remote Indigenous communities have also been cited in a number of inquiries and reports commissioned by both state and federal governments (eg. Wild & Anderson, 2007; Robertson, 2000).

19. Reports from both the Aurukun Community Justice Group and GYFS cultural consultant indicate that under-age sex is prevalent within Aurukun. This behaviour is not condoned by the general community and thus is a cause of concern. This behaviour is not confined to the Aurukun community however, with other remote Indigenous communities acknowledging similar issues (eg. Wild & Anderson, 2007). It is further noted that sexual assault and rape are not culturally accepted practices and are of significant concern to the Aurukun community. It is understood that inappropriate sexual behaviour would have traditionally been dealt with severely.

20. Within the age cohort of the peer group currently before the court, it appears that under-age sexual behaviour has to some extent become normalised, with youth sharing stories with each other of such activity. This sexual behaviour in part appears to be for the purposes of 'experimentation', to gain experience for later more significant relationships or to gain status with peers. The social process is intricate and includes young people expressing an interest in another and sending a message to them via a peer within their network. The relationships seem to be based in sexual contact rather than in romantic attachments, and rarely last longer than the sexual encounter.

21. A range of factors appears to have contributed to the development of this behaviour, including a breakdown in some traditional values and practices within the community. Indeed, the Northern Territory Inquiry into the Protection of Aboriginal Children from Sexual Abuse (Wild & Anderson, 2007) reports that "as traditional Aboriginal and missionary-imposed norms regarding sex broke down, they were being replaced with rampant promiscuity amongst teenagers" (p. 66). Peer pressure appears to perpetuate this behaviour within Aurukun, with stories about sexual experiences from peers acting as a disinhibitor for others to engage in similar acts. Broader social problems experienced within the community,

> including substance abuse, further limit the natural protection and supervision that can be afforded by families, creating an environment where there is less supervision and subsequently greater opportunities for access to vulnerable young people. In addition, young people may fail to access the limited sexual education available within the community due to issues of shame and embarrassment. Finally, there appears to be a decline in the respect shown by some young people for traditional Lore and to elders within the community.
>
> 22. According to the GYFS cultural consultant, education about appropriate sexual behaviour would traditionally have been provided by men within the young person's extended family. If this does not occur (due to the absence or inability of appropriate male role models) young people may gain knowledge about such issues from less appropriate or accurate sources, including peers and pornography. It appears that sexuality education offered within the Aurukun community has primarily focused on condom use as a safe sexual practice rather than on appropriate sexual behaviour, consent, and decision making about sexual activity."

[112] So far as it may be argued as being relevant, it is manifestly clear that there is no suggestion that Aboriginal customary law had any bearing on the criminal behaviour of any respondent towards the 10 year old victim.[24] Nor is there any suggestion that any of the respondents have suffered, or will suffer, significant punishment under Aboriginal customary law in addition to the punishment imposed through Queensland's criminal justice system.[25]

[113] The material tendered to the Court relating to the background of the juvenile respondents is relevant to the question of sentence. But to accept the proposition so broadly stated by the respondents that custodial sentences are not warranted because of it, would be to abandon the role of the courts, and, indeed, of the law, in relation to the need for protection of the entire community, in Aurukun and beyond, by preventing or deterring the commission of crime. That need is all the more compelling where a community is demonstrably unequal to the task of providing protection for some of its innocent members. Furthermore, if, as the respondents' argument suggests, the local community is truly a breeding ground for serious offences against innocent members of its community, the usual reluctance of the courts to expose young offenders to custodial sentences is not so compelling a consideration when determining an appropriate sentence. And the rehabilitation of youthful offenders is less likely to be achieved by community based sentences which leave a peer group of co-offenders within the local community. Community based sentences may achieve nothing in terms of rehabilitation of individual offenders, while at the same time leaving innocent members of the community at the mercy of groups of lawless young men. Those observations are subject to the sentencing principles set out in the *Juvenile Justice Act* to which we will refer shortly.

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24 Cf *R v GJ* (2005) 196 FLR 233 at 239 [30] and *Hales v Jamilmira* (2003) 176 FLR 369.

25 Cf Fitzgerald P's observation in *R v Daniel* [1998] 1 Qd R 499 at 523-524 and the cases there referred to by his Honour, including *Jadurin* (1982) 7 A Crim R 182 at 187.

[114] The courts have consistently said that the claims of innocent members of the community to the protection afforded by the criminal law must be recognised and upheld. As Fitzgerald P observed in *R v Daniel*:

> "It would be grossly offensive for the legal system to devalue the humanity and dignity of members of Aboriginal communities or to exacerbate any lack of self-esteem felt within those communities by reason of our history and their living conditions and, as was stated in Bell, Aboriginal women and children who live in deprived communities or circumstances should not also be deprived of the law's protection. To revert to the matters discussed in the previous paragraph, they are entitled to equality of treatment in the law's responses to offences against them, not to some lesser response because of their race and living conditions."[26]

[115] More recently, in *R v Riley*[27] in the Court of Criminal Appeal in the Northern Territory, Martin (BR) CJ said:

> "The crimes committed by the respondent are particularly abhorrent to right thinking members of our community. There is widespread concern about crimes of violence, particularly crimes of sexual violence committed against children. The following remarks of Wells J in *R v Myer* (1984) 35 SASR 137 are applicable to all sections of the community, including Aboriginal communities throughout Australia (at 140):
>
> > The maintenance of safety for children in our streets and elsewhere is a task to which many persons and organisations must contribute, but the courts have an especially important contribution to make. There are few misfortunes worse for a community than for parents and guardians to be affected by a gnawing fear, every time children go unaccompanied by an adult, that they may come to some serious harm – physical or psychological. Streets ought to be safe, and children ought to be free of threat. It follows that the object of general deterrence must be given a prominent place in the sentencing process.
>
> In many Aboriginal communities crimes of violence, including sexual violence, against women and children are prevalent. The victims frequently live in deprived and dysfunctional circumstances without significant support. They are particularly vulnerable. Such victims are entitled to look to the courts for protection against these types of crimes: *R v Wurramara* (1999) 105 A Crim R 512. General deterrence is a matter of particular importance."[28]

[116] Riley was 20 years old. His offending involved the violent digital vaginal and digital anal rapes of a two year old girl who was screaming and crying in pain and who suffered significant injuries. For those reasons it was even more serious than the

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26 [1998] 1 Qd R 499 at 531.

27 (2006) 161 A Crim R 414.

28 (2006) 161 A Crim R 414 at 419 [16] – [17].

present offending. The principle set out above is nevertheless of relevance to the present appeals.

[117] A sentencing court must recognise the gravity of the offence or offences and impose a sentence which is apt to serve to protect the innocent members of the offender's immediate community, and the community generally, from a repetition of criminal misconduct by the offenders and others who may be of a like mind if not deterred.

[118] For these reasons, we have concluded that this Court should not be constrained from allowing these appeals because the prosecution contributed to the sentencing judge's error.

3.5 Statutory requirements in relation to sentencing

[119] So far as the adult respondents are concerned, the *Penalties and Sentences Act* provides that purposes for which sentences can be imposed include:

(a) to deter the offender and other persons from committing the same or similar offences;[29]

(b) to make it clear that the community, acting through the court, denounces the sort of conduct in which the offender was involved;[30]

(c) to protect the Queensland community from the offender.[31]

[120] As the adult respondents pleaded guilty to the offence of rape, s 9(4) *Penalties and Sentences Act* required the sentencing court to have regard primarily to:

" (a) the risk of physical harm to any members of the community if a custodial sentence were not imposed;

(b) the need to protect any members of the community from that risk;

(c) the personal circumstances of any victim of the offence;

(d) the circumstances of the offence, including the death of or any injury to a member of the public or any loss or damage resulting from the offence;

(e) the nature or extent of the violence used, or intended to be used, in the commission of the offence;

(f) any disregard by the offender for the interests of public safety;

(g) the past record of the offender, including any attempted rehabilitation and the number of previous offences of any type committed;

(h) the antecedents, age and character of the offender;

(i) any remorse or lack of remorse of the offender;

(j) any medical, psychiatric, prison or other relevant report in relation to the offender;

(k) anything else about the safety of members of the community that the sentencing court considers relevant."

[121] The juvenile respondents were, of course, subject to a different sentencing regime. So far as the juvenile offenders are concerned, the objectives of the *Juvenile Justice Act* include:

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29 *Penalties and Sentences Act*, s 9(1)(c).

30 *Penalties and Sentences Act*, s 9(1)(d).

31 *Penalties and Sentences Act*, s 9(1)(e).

"to recognise the importance of families of children and communities, in particular Aboriginal and Torres Strait Islander communities, in the provision of services designed to –

(i) rehabilitate children who commit offences; and

(ii) reintegrate children who commit offences into the community."[32]

[122] The Juvenile Justice Principles in Sch 1 underlie the operation of the *Juvenile Justice Act*.[33] The first principle is that the community should be protected from offences. The second principle is that the youth justice system should uphold the rights of children, keep them safe and promote their physical and mental wellbeing. Other relevant principles not previously referred to in these reasons include:

"12. A person making a decision relating to a child under this Act should consider the child's age, maturity and, where appropriate, cultural and religious beliefs and practices.

13. If practicable, a child of Aboriginal or Torres Strait Islander background should be dealt with in a way that involves the child's community.

14. Programs and services established under this Act for children should –

(a) be culturally appropriate; and

(b) promote their health and self-respect; and

(c) foster their sense of responsibility; and

(d) encourage attitudes and the development of skills that will help the children to develop their potential as members of society.

…

16. A child should be dealt with under this Act in a way that allows the child to be reintegrated into the community.

17. The child should be detained in custody for an offence, whether on arrest or sentence, only as a last resort and for the least time that is justified in the circumstances.

…"

[123] The sentencing principles relevant to the juvenile respondents include:

"…

(d) the nature and seriousness of the offence; and

(e) the child's previous offending history; and

(f) any information about the child, including a pre-sentence report, provided to assist the court in making a determination; and

(g) if the child is an Aboriginal or Torres Strait Islander person – any submissions made by a representative of the community justice group in the child's community that are relevant to sentencing the child, including, for example -

(i) the child's relationship to the child's community; or

(ii) any cultural considerations; or

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32 *Juvenile Justice Act*, s 2(e).

33 *Juvenile Justice Act*, s 3 and s 150(1)(b).

(iii) any considerations relating to programs and services established for offenders in which the community justice group participates; and

(h) any impact of the offence on a victim; and

(i) a sentence imposed on the child that has not been completed; and

(j) a sentence that the child is liable to have imposed because of the revocation of any order under this Act for the breach of conditions by the child; and

(k) the fitting proportion between the sentence and the offence.

…"[34]

[124] Under s 150(2) of the *Juvenile Justice Act* the special considerations to be taken into account as sentencing principles are:

"(a) a child's age is a mitigating factor in determining whether or not to impose a penalty, and the nature of a penalty imposed; and

(b) a non-custodial order is better than detention in promoting a child's ability to reintegrate into the community; and

(c) the rehabilitation of a child found guilty of an offence is greatly assisted by–

(i) the child's family; and

(ii) opportunities to engage in educational programs and employment; and

(d) a child who has no apparent family support, or opportunities to engage in educational programs and employment, should not receive a more severe sentence because of the lack of support or opportunity; and

(e) a detention order should be imposed only as a last resort and for the shortest appropriate period."

[125] In *R v JAJ*,[35] McMurdo P said in relation to the sentencing of a juvenile offender for rape under the *Juvenile Justice Act*:

> "The maximum penalty for this offence under the Act is ten years imprisonment. Section 208 of the Act requires that a detention order may be made against a child only if the court, after considering all other available sentences and taking into account the desirability of not holding a child in detention, is satisfied that no other sentence is appropriate in the circumstances. One of the Charters of Juvenile Justice Principles is that 'a child should be detained in custody for an offence, whether on arrest or sentence only as a last resort and for the least time that is justified in the circumstances'. This must be read in the context of the other principles also relevant to this case. These include that the community should be protected from offences; that a decision affecting a child should, if practicable be made and implemented within a time frame appropriate to the child's sense of time; and that the child's age and maturity are appropriate considerations."[36]

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34 *Juvenile Justice Act*, s 150(1).

35 [2003] QCA 554.

36 [2003] QCA 554 at [20].

[126] In the same case, Chesterman J said:

> "The youthfulness of an offender and his prospects of rehabilitation are obviously most germane to the exercise of a sentencing discretion but it is, I think, a mistake to concentrate too greatly on the personal circumstances of the offender, which will often be unfortunate, and not pay sufficient regard to the protection of the community which is affected by the imposition of appropriate punishments. It is desirable to indicate to youths who might be inclined to satisfy their sexual appetites on young children that such activity will result in substantial loss of personal liberty. This is the first principle of juvenile justice, just as it is in the case of adults."[37]

[127] In *R v E; ex parte A-G (Qld)*,[38] Jerrard JA said:

> "… courts sentencing juvenile offenders are instructed by both the statutory commands in the *Juvenile Justice Act*, and the shared wisdom of other experienced judges, to have as a principal object the rehabilitation if possible of the juvenile offender while the offender is still a juvenile. Nevertheless, courts are not to overlook the fact that the protection of members of the community from the infliction of harm can be achieved not only by the means of rehabilitation of the individual causing that harm in the past, but also by sentences having a generally deterrent effect in the community."

[128] None of these statutory provisions to which we have referred was adverted to by the sentencing judge. It cannot be said that the relevance of these considerations to the sentencing process was so obvious that express reference to them was unnecessary. We take that view because the sentences which were imposed in the present circumstances for raping a 10 year old girl were, for reasons which we will explain, so manifestly inadequate that the considerations cannot have been taken into account in any meaningful way.

3.6 The relevance of an offender's personal disadvantages

[129] In *Neal v The Queen*,[39] Brennan J (as his Honour then was) said:

> "The same sentencing principles are to be applied, of course, in every case, irrespective of the identity of a particular offender or his membership of an ethnic or other group. But in imposing sentences courts are bound to take into account, in accordance with those principles, all material facts including those facts which exist only by reason of the offender's membership of an ethnic or other group. So much is essential to the even administration of criminal justice."[40]

[130] In *R v Rogers and Murray*[41] Malcolm CJ pertinently observed that the criminal law "must be interpreted and applied so as to confer protection on all persons from sexual assault irrespective of their race. It should not be thought that [there is] one range of sentences for offences committed by non-Aboriginals and another for offences committed by Aboriginals or Aboriginals in the particular area".[42] His Honour

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37 [2003] QCA 554 at [42].
38 (2002) 134 A Crim R 486; [2002] QCA 417 at 493 [37].
39 (1982) 149 CLR 305.
40 (1982) 149 CLR 305 at 326.
41 (1989) 44 A Crim R 301.
42 (1989) 44 A Crim R 301 at 308.

observed that, while ordinary sentencing principles apply, mitigating factors relevant to a particular offender may include economic and other disadvantages associated with or related to a particular offender's Aboriginality.[43]

[131] In *R v Bell; ex parte Attorney-General (Qld)*,[44] the Court of Appeal, constituted by Fitzgerald P, Davies JA and Demack J, expressed their disagreement with the approach of a judge to the sentencing of an Aboriginal offender. The sentencing judge had said that he would approach the matter "in a different way from the way I would approach the problem if [the offender] were a standard member of the white community".[45] The sentencing judge had said that he regarded this approach as justified because of "the pressures … and disadvantages"[46] experienced by the offender as a member of an Aboriginal community. The Court of Appeal said:

> "There are aspects of what his Honour said with which we must record our disagreement. It was right for him to have regard to the respondent's disadvantages and open to him, as a result, to sentence the respondent as leniently as the circumstances of his offence admitted. However, such disadvantages do not justify or excuse violence against women or, to take another example, abuse of children. Women and children who live in deprived communities or circumstances should not also be deprived of the law's protection. A proposition that such offences should not be adequately penalised because of disadvantages experienced by a group of which an offender is a member is not one which is acceptable to the general community or one which we would expect to be accepted by the particular community of which an offender and complainant are members."[47]

[132] Similar statements of principle have been made by Martin (BR) CJ in *R v Riley*[48] and by Batt JA[49] and Eames JA[50] in *R v Fuller-Cust*. In *R v Fernando*, Wood J said:[51]

> "… in sentencing persons of Aboriginal descent the court must avoid any hint of racism, paternalism or collective guilt, yet must nevertheless assess realistically the objective seriousness of the crime within its local setting and by reference to the particular subjective circumstances of the offender."

[133] Relevant personal disadvantage must be established by evidence relevant to the particular offender even if that disadvantage arises by reason of the offender's membership of a particular ethnic group.[52] To adopt an approach which proceeds on the basis that the courts may take judicial notice of the supposed effects of a community's dysfunction upon all or any of its members, is to engage in the kind of stereotyping which was deprecated by this and other Australian courts in the cases to which we have referred. This approach diminishes the dignity of individual defendants

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43 (1989) 44 A Crim R 301 at 307.
44 [1994] QCA 220.
45 See [1994] QCA 220 at 4.
46 See [1994] QCA 220 at 4.
47 [1994] QCA 220 at 6.
48 (2006) 161 A Crim R 414 at [14] - [17].
49 (2002) 6 VR 496 at 515.
50 (2002) 6 VR 496 at 520 - 523.
51 (1992) 76 A Crim R 58 at 62 - 63.
52 See also *R v Gibuma*; *R v Anau* (1991) 54 A Crim R 347 at 349 (McPherson SPJ, Shepherdson J and de Jersey J (as he then was) agreeing).

by consigning them, by reason of their race and place of residence, to a category of persons who are less capable than others of observing the standards of decent behaviour set by law. A choice to implement measures specially adapted to the problems of particular local communities is a legislative choice open to the Parliament as a matter of policy; but, as a matter of principle, it is not the kind of choice open to the courts. In *R v Daniel*, Moynihan SJA said:

> "It may be appropriate to reflect particular considerations relevant to a particular community in sentencing. It may be, for example, that an [A]boriginal community has a regime for dealing with classes of offences or offenders which it is appropriate for the court to consider and reflect in a sentence. No such issue arises in this case. It was submitted to the effect that the applicant should receive a lower sentence than might otherwise be the case because he and his victim lived in a deprived and dysfunctional community where alcohol abuse and violent crime was more prevalent and more tolerated than in the general community. As is pointed out by the President, the latter contention in particular was not established by evidence. It is not apparent that it is a situation such as might be the subject of judicial notice …"[53]

[134] Sentencing courts must also recognise the special considerations applicable to the juvenile respondents under the *Juvenile Justice Act*; under principle 17 of the Charter of Juvenile Justice Principles contained in Sch 1 to the *Juvenile Justice Act*, "[a] child should be detained in custody … only as a last resort and for the least time that is justified in the circumstances".[54] But, whether an offender is an adult or a juvenile, the courts must discharge their function of denouncing serious offending as unacceptable to the broader community and of protecting innocent members of the local community against its repetition.

[135] The effect of these statements is, we think, that the "pressures and disadvantages" shown by the evidence to have been suffered by a particular offender must be taken into account in order to fix a sentence for that individual offender which is as lenient in the circumstances as is consistent with punishment proportionate to the gravity of the offence committed by that offender and the need to protect the community from a repetition of such offences. That was not the approach taken in this case before the learned sentencing judge. The approach which was taken by the learned sentencing judge, after strong encouragement by the prosecutor, was erroneous.

[136] The errors to which we have referred affect the sentence imposed on each of the respondents. We have, therefore, concluded that the Attorney-General's appeal should be allowed in each case and the sentences imposed on each respondent should be set aside.

[137] It is, therefore, necessary for each respondent to be re-sentenced by reference to the circumstances of that individual's offence and the personal circumstances of that individual.

4. Should this Court re-sentence the respondents?

[138] On behalf of the respondents, it was initially submitted that, if this Court were to come to the view that any of the respondents' sentences should be set aside, this Court should

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53 [1998] 1 Qd R 499 at 534.

54 See also s 9(2)(e) *Penalties and Sentences Act*.

remit the fresh sentencing of that respondent to the District Court. This position was adopted by Mr Fleming QC on the first day of the hearing of the appeals because of a concern that the fresh materials provided to this Court might not be adequate to present an accurate picture of the circumstances of all of the respondents. On the second day of the hearing of the appeals, Mr Fleming informed the Court that the respondents accepted that this concern was groundless.

[139] The Solicitor-General submitted that the terms in which s 669A of the *Criminal Code* created the right of appeal in the Attorney-General were inconsistent with the remitter of the function of sentencing the respondents to any other court. It is not necessary to decide whether this submission by the Attorney-General is correct. Even if this Court were vested with a power to remit the sentencing of the respondents to another court, it is not a power which this Court would exercise in this case. It would delay the conclusion of the sentencing process. Delay is a matter of special concern in respect of the seven juvenile respondents.[55] It would, of course, be undesirable to separate the sentencing proceedings of the juvenile co-offenders from those of the adult co-offenders, absent good reason. Having regard to the extraordinary circumstances of this case, the absence of any decision of this Court on comparable facts and the undesirability of further delay in sentencing the respondents, we would not remit the question of sentence. This Court must proceed to sentence the respondents afresh.

5. Further evidence

[140] As we have said, to the extent that any offender may be said to have suffered personal disadvantages which should moderate the punishment of that offender, that disadvantage should be established by evidence. To that end, each respondent was afforded, by directions made by the Court,[56] the opportunity to adduce such evidence of any personal disadvantage suffered by him as might be relevant by way of mitigation of sentence which was not adduced at the original sentencing hearing because of the approach adopted by the prosecutor.

[141] Mr Fleming QC, who appeared with Mr Mylne for the respondents, tendered in relation to each of the respondents a further pre-sentence report prepared by officers of the Department of Communities or the Probation and Parole Service, and a report by a psychologist.[57] Mr Fleming also tendered a report by Dr Martin, a social anthropologist.

[142] We note that, by virtue of s 671B(2) of the *Criminal Code*, the Attorney-General is precluded from urging this Court to increase the sentence imposed upon any respondent by reason of any new evidence which might be adduced by the respondents.

[143] We also note s 150(1)(g) of the *Juvenile Justice Act*, which obliges a court sentencing an Aboriginal child for an offence to have regard to "any submissions made by a representative of the community justice group in the child's community that are relevant to sentencing the child". Although no such submissions were formally put before this Court, we note the comprehensiveness of the consultation preceding the

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55 See *Juvenile Justice Act*, s 3 and Sch 1, Charter of Juvenile Justice Principles, principles 7(a) and 11.

56 See *R v KU, AAC, WY, PAG, KY, KZ, BBL, WZ & YC; ex parte A-G (Qld)* [2008] QCA 20 and *R v KU, AAC, WY, PAG, KY, KZ, BBL, WZ & YC; ex parte A-G (Qld)* [2008] QCA 15.

57 Those reports were ordered by this Court: see *R v KU, AAC, WY, PAG, KY, KZ, BBL, WZ & YC; ex parte A-G (Qld)* [2008] QCA 20 and *R v KU, AAC, WY, PAG, KY, KZ, BBL, WZ & YC; ex parte A-G (Qld)* [2008] QCA 15.

preparation of the pre-sentence reports and the psychological reports tendered by the respondents, which in the latter case included interviews with the co-ordinator of the Aurukun Community Justice Group.

[144] In respect of the adult offenders, a court is also required to take into account any submissions made by a representative of the Community Justice Group in the offender's community that are relevant to sentencing the offender.[58] No such submissions were placed before the primary court or this Court.

[145] Before we turn to address the circumstances of each of the respondents, we should make some general comments on the further evidence which has been adduced in relation to their personal circumstances as members of the Aurukun community. The first point to be made is that there is no suggestion that their behaviour is in conformity with, or condoned by, or acceptable to, the cultural norms of the Aurukun community. Indeed, the evidence actually suggests the contrary. In the psychological reports prepared by GYFS, the authors observed "that sexual assault and rape are not culturally accepted practices and are of significant concern to the Aurukun community."

[146] Dr Martin summarised his opinion in the following terms:

> "In this affidavit, I have outlined certain historical, cultural and social factors which in my opinion are relevant to understanding the situation of young Aboriginal men in Aurukun. In doing so, I have sought to explain aspects of the social circumstances in which their values are formed. This is not to be read as constituting agreement with or support of these values or as excusing the practices in which many of these young men engage. Rather, it is to give substance to what in my professional opinion is a key insight of anthropology as a social science; an individual's values are not formed nor are their activities conducted in isolation, but in the social and cultural context in which that individual is socialised, and to which they in turn contribute.
>
> This is not to say that is my opinion that individuals raised in and living as part of communities such as Aurukun suffering major social problems are not in a position to exercise choice, including moral choice, as to their practices. Nor is it to claim that all individuals within those communities, or within subgroups such as young men between 15 and 24, have aberrant values or exhibit antisocial and aberrant behaviour. It is very clear to me from my own knowledge of Aurukun that despite increasing social problems, especially for young people, not all that happens in Aurukun can be categorised as dysfunctional, and neither are all Aurukun families dysfunctional. For instance, many Aurukun people I know actively seek to maintain domestic order and care for their families in circumstances of considerable adversity.
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> However, it is my summary opinion that there has been a major breakdown in intergenerational relations within Aurukun society, and that as a consequence, for some decades now many young Aurukun men have established their identities through problematic practices

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58 *Penalties and Sentences Act*, s 9(2)(p).

> and values which effectively have become normalised within their peer groups, but which have highly deleterious impacts on those around them as well as on succeeding generations."

[147] Secondly, to the extent that it is suggested on behalf of each of the respondents that he did not appreciate that having sex with a 10 year old girl was wrong, there is evidence in relation to a number of the juvenile respondents that they have not had the benefit of the usual forms of socialisation into ordinary norms of behaviour because of the absence from their young lives of an appropriate male authority figure. But, it must also be said, this consideration is not applicable to all of the respondents. Some appear to have had the benefit of a male authority figure. In making that observation, we are cognisant that in respect of the adult offenders, psychologist Dr Madsen queries whether their account of their upbringing has been "somewhat idealised". But the theory also fails to fit the facts insofar as a number of the respondents actually acknowledged that they knew what they were doing was wrong. It must also be understood that to say, as WY said, that "having sex with a girl that's only ten years is normal", is not to say that it was not known to be wrong by the offender: it is to say no more than that it is a common occurrence amongst this peer group of young males who have little or no inhibition in engaging in what Dr Martin described as "problematic practices and values which effectively have become normalised within their peer groups". In the psychological reports by the GYFS relating to a number of the juvenile respondents, it is said that:

> "Within the age cohort of the peer group currently before the court, it appears that under-age sexual behaviour has to some extent become normalised, with youth sharing stories with each other of such activity … [T]he Northern Territory Inquiry into the Protection of Aboriginal Children from Sexual Abuse (Wild & Anderson, 2007) reports that 'as traditional Aboriginal and missionary-imposed norms regarding sex broke down, they were replaced with rampant promiscuity amongst teenagers' (p 66). Peer pressure appears to perpetuate this behaviour within Aurukun, with stories about sexual experiences from peers acting as a disinhibitor for others to engage in similar acts. Broader social problems experienced within the community, including substance abuse, further limit the natural protection and supervision that can be afforded by families, creating an environment where there is less supervision, and subsequently greater opportunities for access to vulnerable young people."

[148] It should also be said that, to the extent that it is suggested that the local community at Aurukun is a dysfunctional community in which lawlessness among young males is endemic, it also follows that the removal of young offenders from that environment to a custodial setting is not as unattractive a sentencing option as would otherwise be the case. We appreciate that there is a tension between this observation and applicable sentencing principles, including, with respect to the juveniles, s 150(2)(d) and s 150(2)(e) of the *Juvenile Justice Act*.[59]

[149] On the evidence, the most immediate of the serious personal disadvantages suffered by all of the respondents is that they have grown up in an isolated, economically disadvantaged community where many young men, lacking any real domestic guidance or discipline, do not regularly go to school or to work and mix with other young men in

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[59] Set out at paragraph [124] of these reasons.

a similar situation. That this is so is apparent from the evidence of Dr Martin and from the GYFS reports prepared in respect of the juvenile respondents. The disadvantage suffered by each of the respondents is real, and must be recognised in any sentence imposed upon him. Nevertheless, the very nature of that disadvantage suggests that, if a sentence is to be effective to promote the rehabilitation of the respondent as well as the protection of the community, two things must be accepted. First, the usual domestic and social structures which provide for order within a community cannot necessarily be relied upon to rehabilitate the respondent or to afford necessary protection to innocent members of the community. Secondly, the breaking up of peer groups which have a negative effect upon their individual members may be the only effective strategy to achieve any immediate ameliorative impact on the primary causes of offending of each respondent.

[150] The pre-sentence reports of the Department of Communities, both those tendered in the primary court and in these appeals, and the psychological reports of the GYFS tendered in these appeals, suggest that, in the case of some of the juvenile respondents, some real progress has been made by the individual respondent in distancing himself from the negative influence of his peer group within the community. This development is, we think, the kind of exceptional circumstance which deserves encouragement by the Court by the imposition of a non-custodial sentence.

[151] By way of general observation, first, we note that there is no evidence that any of the respondents, save AAC, has himself been subjected to sexual abuse prior to the rape of the complainant. AAC was subject to serious sexual abuse when he was younger. PAG was the victim in an incident of unlawful carnal knowledge with an older woman, but that incident occurred on an unknown date between 30 April and 12 June 2006, ie during the approximate period when he raped the complainant. The perpetrator of this offence committed on PAG was sentenced at Aurukun on 24 October 2007 prior to PAG's sentence.

[152] Secondly, we note that all the respondents pleaded guilty at an early stage. This is an important mitigating factor in sexual offences, especially those involving children. It means that the young complainant has not been subjected to the trauma of multiple trials. She has been saved the prospect of lengthy cross-examination by potentially nine or more barristers. The State has also been saved the cost of multiple trials, some of which could have been lengthy. The early guilty plea is a significant mitigating factor in the case of each respondent.

[153] Thirdly, as will become apparent, there is a substantial difference in severity between the sentences which we consider should be imposed on the adult respondents WZ, KU and WY and the sentences which we consider should be imposed on the juvenile respondents. This is so, even though WZ has mild intellectual impairment and is immature and KU and WY are not much older, for example, than YC and KY. There are a number of reasons for this disparity. There are, of course, significant individual differences in the circumstances of their offending or their personal circumstances. More importantly, however, WZ, KU and WY must be sentenced under the law relating to adults, whereas the juvenile respondents must be sentenced under the regime established by the *Juvenile Justice Act* which is informed by strong considerations of child protection and leniency towards juvenile offenders. In *R v Maygar; ex parte A- G (Qld); R v WT; ex parte A-G (Qld)*,[60] Keane JA, with whom

[60] [2007] QCA 310 at [58].

Williams JA and (on this point) Mullins J agreed, approved of the statement by Mackenzie J, with whom Jerrard JA agreed, in *R v Tuki*:[61]

> "… there is no general principle that the mere fact that co-offenders are dealt with differently because one is dealt with as an adult and one as a child, requires this court to reduce the sentence from what is otherwise an appropriate level for the adult offender by resort to the principle of parity. The fact that the sentences are imposed under different schemes of sentencing necessarily implies that there will be differential treatment …"

[154] This view accords with the approach taken earlier in this Court in *R v Crossley*[62] and by the Full Court of the Supreme Court of South Australia in *The Queen v Harris (No 2)*[63] and *The Queen v Homer*.[64] It is a view recently reaffirmed by this Court in *R v LY*.[65]

[155] Finally, it must be kept in mind that the respondents have completed a significant portion of the original sentences imposed on them and have lived for some months with these appeals over their heads.

[156] The Solicitor-General urged this Court to follow what Kirby J, in *Dinsdale v The Queen*,[66] described as the "conventional" approach whereby an appellate court sentencing afresh imposes "a substituted sentence towards the lower end of the range of available sentences".[67] We are mindful of what was said in this Court in *R v AS; ex parte A-G (Qld)*,[68] and in the High Court in *York v The Queen*,[69] as to this Court's "unfettered discretion" under s 669A of the *Criminal Code*. Whatever the impact of the discussion in those cases upon the operation of s 669A in respect of the present cases, a particular reason warranting re-sentencing in these cases toward the lower end of the applicable range rests in the "pressures and disadvantages" to which we referred in paragraph [135] above.

6. Re-sentencing the adult offenders

[157] The adult respondents must be sentenced in accordance with the principles set out in the *Penalties and Sentences Act*. Because the offence of rape involves physical harm to another, s 9(2)(a) which provides that a sentence of imprisonment should only be imposed as a last resort and a sentence that allows the offender to stay in the community is preferable, has no application.[70] Instead, the relevant sentencing principles are those set out in s 9(4) and s 9(2)(b)-(r). The offence of raping a 10 year old child is one of the most serious offences against the criminal law. The punishment is life imprisonment. There are, however, a number of significant mitigating features in this case which, in addition to any "double jeopardy" factor, warrant the sentencing of each of the adult respondents at the low end of the appropriate sentencing range. These include their early plea of guilty; their youthfulness (especially in respect of KZ and WY); their social and economically disadvantaged backgrounds and the contextual

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61 [2004] QCA 482 at [7].
62 (1999) 106 A Crim R 80 at 87, 88.
63 (1971) 2 SASR 255 at 256 – 257.
64 (1976) 13 SASR 377 at 382 – 383.
65 [2008] QCA 76 at [26], [31], [45].
66 (2000) 202 CLR 321 at 341 [62].
67 See also *R v Peterson* [1984] WAR 329 at 330 – 331.
68 [2004] QCA 259 at [30].
69 (2005) 225 CLR 466 at 474 – 476 [25] – [29], 477 [35], 484 – 486 [60] – [65].
70 *Penalties and Sentences Act*, s 9(3).

circumstances in which the offending occurred; and the fact that there were no aggravating features in the commission of the offence such as physical violence, force, coercion or breach of trust. The difficulty is in ascertaining the appropriate range in this most complex case.

[158] It must be accepted, as the Solicitor-General submitted, that only limited assistance can be derived from previous decisions because none of them deal with the rape of a 10 year old girl by a group of young males. A comprehensive review of approximate comparable cases does give some assistance, however, in establishing the sentencing range for the adult offenders. The decisions of this Court in *R v Bielefeld*,[71] *R v Pont*,[72] *R v Myers*,[73] *R v P*,[74] *R v SAS*,[75] *R v Casey*,[76] *The Queen v Haar*,[77] *R v D*,[78] *R v Wykes*,[79] *R v Jobson*,[80] *R v Irlam; ex parte A-G*,[81] *R v BBE*[82] and the other cases discussed in those decisions, affirm that the nature of the rape of a 10 year old girl is so serious that a sentencing range of between five and eight years imprisonment, after allowing for an early plea of guilty, is the appropriate range of head sentence for an adult whose offence did not involve actual or threatened violence or breach of trust, in the sense that concept is used in the cases.

[159] *R v Rogers and Murray*[83] and the unreported decision of *R v Mick*[84] suggest that in Western Australia, at least, the range may be slightly lower. Rogers, an 18 year old Aborigine pleaded guilty to aggravated sexual assault of a girl under the age of 16 without consent. The victim was his seven year old niece. He was sentenced to six years imprisonment with an order for parole eligibility. Murray, also an Aborigine, pleaded guilty to sexual assault of an adult woman by sexually penetrating her without consent. He received a similar sentence. Both appealed to the Western Australian Court of Criminal Appeal contending that the sentences were manifestly excessive. Malcolm CJ observed that Rogers was remorseful, was a young first offender and was relatively inexperienced in the use of alcohol which was a factor in the commission of the offence. His Honour referred[85] to a number of unreported decisions involving disadvantaged Aboriginal offenders including that of Wallace J in *R v Mick*.[86] In *Mick*, a number of young Aboriginal offenders from Noonkenbah were convicted after a trial of aggravated sexual assault involving a "pack rape". The victim had sexual intercourse with consent with one Aboriginal male and was then the victim of aggravated sexual assault by others. The effective term of imprisonment imposed on the offenders in *Mick* was three years with eligibility for parole. Murray's appeal was dismissed but Rogers' sentence was reduced to three years imprisonment with parole eligibility.

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71 [2002] QCA 369.
72 [2002] QCA 456.
73 [2002] QCA 143.
74 [2001] QCA 25.
75 [2005] QCA 442.
76 Unreported, Court of Appeal, Qld, CA No 262 of 1991, 3 March 1992.
77 Unreported, Court of Appeal, Qld, CA No 351 of 1991, 24 June 1992.
78 [2003] QCA 150.
79 Unreported, Court of Criminal Appeal, Qld, CA No 149 of 1987, 18 August 1987.
80 Unreported, Court of Criminal Appeal, Qld, CA No 325 of 1989, 6 August 1990.
81 [2002] QCA 235.
82 [2006] QCA 532.
83 (1989) 44 A Crim R 301.
84 Unreported, Wallace J, Supreme Court, WA, No 129 of 1988, 14 October 1988.
85 (1989) 44 A Crim R 301 at 308.
86 Unreported, Wallace J, Supreme Court, WA, No 129 of 1988, 14 October 1988.

[160] In *R v Pont*,[87] this Court upheld a sentence of eight years imprisonment imposed after a trial in July 2002 for two counts of rape of a 10 year old girl in 1970 and 1971. Pont was between 39 and 42 years old at the time of the offences. He was a workmate of the victim's father. He offered her a lift, took her to a forestry road and raped her. She gave evidence of six uncharged acts of rape on various occasions. The second charge of rape occurred after she turned 11 when she was helping Pont feed some horses. She told him she had her period but he said it did not matter. At the time of these offences, Pont had some minor criminal history for which he had been sentenced to community based orders. He had relevant subsequent convictions. They included a 1975 entry for indecent treatment of a boy under 14 for which he was fined $500 and placed on a three year good behaviour bond. In 1977 he was convicted and fined $50 for behaving in an indecent manner. In 1992 he was convicted of exposing a child to an indecent video tape and of indecent dealing with a child under 16. He was placed on three years probation. On 25 July 2000 he had pleaded guilty to two counts of sodomy and five counts of indecent treatment of two boys aged between 12 and 15. No force was involved but one complainant suffered a great deal of pain over a long period as a result. Pont was sentenced to an effective term of three years imprisonment suspended after 12 months with an operational period of three years in respect of those offences. That had the result that he was released from prison on a suspended sentence in July 2001, a year before his trial on the present offences. That is why this Court, in applying the totality principle, noted that the total head sentence for all Pont's offending could be said to be 11 years requiring him to serve a total of five years imprisonment before becoming eligible for parole. Pont was 63 years old and in poor health at sentence. He had not re-offended for 11 years. As a result, considerations of protection of the community did not loom large in the sentencing of this offender. The sentencing judge stated that had he sentenced Pont at the time of the present offences in 1971 he would have imposed 10 years imprisonment, but because of Pont's decreased life expectancy and ill-health instead imposed eight years imprisonment. There was no suggestion at all that the sentence was at or near the top of the appropriate range for the rape of a 10 year old girl. Pont's eight year sentence was imposed after a trial. He had committed like offences on other young people. As a family friend he abused the trust placed in him by the girl's father. The age difference was much greater than in the present case.

[161] In *R v Myers*,[88] this Court upheld a sentence of eight years imprisonment imposed in respect of five counts of rape of a girl aged between nine and 10 years. Myers pleaded not guilty to maintaining a sexual relationship with a circumstance of aggravation and to the rape charges which were particulars of the maintaining charge. He had some minor criminal history for offences of dishonesty. The rape offences were committed over an eight month period when Myers was 54 or 55 years old. The complainant was living at a caravan park with her mother. Myers also resided there. Myers was sentenced to 11 years imprisonment on the maintaining count and to eight years imprisonment in respect of each of the rapes. This Court noted that he took advantage of the victim's domestic situation and on one occasion told her not to tell anyone or he would kill her. There had been "an enormous detrimental impact on the complainant".[89] Unlike the present case, Myers went to trial; the offending involved a breach of trust; the offences had produced a known detrimental effect on the complainant child and the age difference was much greater than in the present case.

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87 [2002] QCA 456.

88 [2002] QCA 143.

89 [2002] QCA 143 at 12.

[162] In *R v P*,[90] the complainant was P's 12 year old step-daughter. He touched her when her mother was out shopping. She told him to stop and tried to walk away. He grabbed her and pushed her down saying he would stop touching her if she had sex with him. She replied, "no". He lay on top of her so she could not move and had sexual intercourse with her. He threatened to harm her or her mother if she complained. He was convicted after a trial. He had no prior convictions. He was sentenced to eight years imprisonment. This Court refused his application for an extension of time to apply for leave to appeal against sentence because his sentence was not manifestly excessive having regard to the age of the victim and the aggravating circumstance of the relationship of trust between them.

[163] The decisions in *Pont*, *Myers* and *P* support a sentence closer to five rather than eight years for the adult respondents in the present case.

[164] In *R v SAS*,[91] the applicant pleaded guilty to two counts of rape, three counts of indecent dealing with a child under 16 and one count of deprivation of liberty. The applicant was sentenced to an effective term of nine years imprisonment with a recommendation for parole after four years. The complainant was 14 years old and living on the streets. She awoke to find the applicant performing oral sex on her. She called 000. The police did not arrive for 50 minutes. The applicant said, "[i]f I'm going to jail for this I might as well finish". He threatened to assault her with a pool cue if she did not do as he wanted. By threatening her he induced her to insert her fingers into her vagina while he masturbated. He licked her breast and again performed oral sex on her. He had sexual intercourse with her after threatening her with the pool cue. His plea of guilty was late. This Court considered that the appropriate sentencing range was seven to nine years so that the effective sentence of nine years imprisonment with a recommendation for parole after four years was at the high end.[92] The limited force used in the commission of the offence meant that the sentence should have been at the middle of the range.[93] This Court allowed the appeal and substituted a sentence of eight years imprisonment with a parole recommendation after three and a half years. Although the complainant was older than in the present case, SAS' plea of guilty was late and the offences committed were more numerous and more frightening for the victim; significantly they involved threats of physical violence with a weapon.

[165] In *R v Casey*,[94] the applicant pleaded guilty at an early stage to raping the nine year old daughter of his de facto wife. He was sentenced to eight years imprisonment with parole recommendation after two years. He was a father figure to the victim. His offending was fuelled by alcohol and he suffered from post-traumatic stress syndrome following a mining accident. He over-powered the girl but did not use further violence. He was otherwise of good character. He showed great remorse for his actions and made admissions to police. This Court considered the sentence was within range but only because of the parole recommendation. The breach of trust made *Casey* more serious than the present offending.

[166] *SAS* and *Casey* demonstrate that a head sentence as high as eight years could have been imposed on the adult respondents.

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90 [2001] QCA 25.
91 [2005] QCA 442.
92 [2005] QCA 442 at [22].
93 [2005] QCA 442 at [23].
94 Unreported, Court of Appeal, Qld, CA No 262 of 1991, 3 March 1992.

[167] In *The Queen v Haar*,[95] the applicant pleaded not guilty to two counts of raping a 12 year old girl, indecent assault and administering alcohol with an intent to stupefy. He was convicted after a trial of one count of rape but acquitted of the remaining counts. He was 20 years old. He had spent eight and a half months in pre-trial custody. He was sentenced to 10 years imprisonment. On appeal, his sentence was considered manifestly excessive and reduced to seven years and six months imprisonment. The imposition of this sentence after a trial supports a sentence of five or six years imprisonment in the present case.

[168] In *R v D*,[96] the applicant was convicted after a trial of four counts of rape and one count of indecent dealing with a circumstance of aggravation. The offences occurred over a six and a half year period when the complainant, his step-daughter, was aged between eight and 14. He was sentenced to an effective term of seven years imprisonment. He showed no remorse. He had rehabilitated himself by not committing any further offences since 1988. He had no prior convictions. This Court considered that taking into account the prolonged period of the offending and the shocking breach of trust by a father-figure and moderating the sentence by the fact that he had rehabilitated himself, the effective sentence of seven years imprisonment was "by no means manifestly excessive".[97] The sentence imposed on the adult respondents who pleaded guilty at an early stage should be noticeably less than the seven years imposed on D.

[169] In *R v Wykes*,[98] the applicant pleaded not guilty to raping an unsophisticated 13 or 14 year old grade 8 school girl who lived near him and was a playmate of his own daughter. He called her into his home and then proceeded to pull her into the bathroom to commit the offence. The medical evidence as to the state of the hymen suggested that penetration had not been complete. He was 36 years old and had no prior criminal history. He was sentenced to seven years imprisonment. Although the court considered the sentence "rather high", his application for leave to appeal against sentence was refused.

[170] In *R v Jobson*,[99] the applicant was convicted after a trial of rape, attempted rape and two counts of indecent dealing. He was sentenced to an effective seven years imprisonment. The victim was his step-daughter and the acts were committed over a number of years when the mother was away from home. The victim was said to be under 14 years of age. A child was born of the rape. Jobson appealed against sentence but the appeal was dismissed, the seven year sentence being considered not "at all severe".[100]

[171] In *R v Irlam; ex parte A-G*,[101] the applicant was convicted after a trial of three counts of indecent dealing with a girl under 12, one count of indecent dealing with a girl under 16[102] and one count of rape. He was sentenced to five years imprisonment suspended after 12 months. The Attorney-General appealed against the sentence. The appellant was the head teacher of a two teacher school in North Queensland. The complainant was a student at the school in grades 5, 6 and 7 when she was aged 10 to 12 years. The

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95 Unreported, Court of Appeal, Qld, CA No 351 of 1991, 24 June 1992.

96 [2003] QCA 150.

97 [2003] QCA 150 at [48].

98 Unreported, Court of Criminal Appeal, Qld, CA No 149 of 1987, 18 August 1987.

99 Unreported, Court of Criminal Appeal, Qld, CA No 325 of 1989, 6 August 1990.

100 Unreported, Court of Criminal Appeal, Qld, CA No 325 of 1989, 6 August 1990 at 6.

101 [2002] QCA 235.

102 The judgment denotes this offence as indecent dealing with a girl under 17: [2002] QCA 235 at [2], but see *Criminal Code*, s 215.

offences occurred over the period 1969 to 1971, and Irlam was 75 years old at sentence He raped her when she was in grade 6 and in addition digitally penetrated her, and forced her to rub his penis until he ejaculated and to perform oral sex on him. He was in his mid 40s with no prior convictions. He was in poor health at sentence. This Court held that the sentence was manifestly inadequate, taking into account the breach of trust over two and a half years when she was only 10 to 12 years old, and substituted a sentence of seven years imprisonment with a recommendation for parole after two years to reflect his parlous health.

[172] The offending in *Wykes*, *Jobson* and *Irlam* is not closely comparable to the present offending. Those cases demonstrate, however, that in the present case following an early plea of guilty a head sentence of five to six years imprisonment was appropriate for each of the adult respondents.

[173] In *R v BBE*,[103] the applicant pleaded guilty to three counts of rape and one count of indecent dealing with a circumstance of aggravation with a child under 12. BBE was an intellectually impaired young man aged 21 and 22. The victim was his five year old niece. The offences of rape involved two counts of vaginal penetration with his finger and one count of licking and sucking her vagina. The fourth count also involved licking her vagina. The child resisted and was "screeching a little". A psychologist's report said the applicant had partial insight into the seriousness of his actions but his judgment and reasoning were impaired. The offences came to light when he admitted them to his sister who alerted the victim's family. BBE expressed remorse. He appeared motivated to address his deviant behaviours and to develop strategies to reduce the risk of recidivism. He had been sexually assaulted by a male friend in 2004. He was sentenced to an effective term of four years imprisonment with parole eligibility after 12 months. His application for leave to appeal against sentence was granted. He was re-sentenced to three years imprisonment suspended after six months with an operational period of five years. On the fourth count he was placed on probation for three years with special conditions that he receive medical, psychiatric and psychological treatment with a particular emphasis on sexual problems and treatment of sex offending. The exceptional mitigating factors pertaining in *BBE* were greater than in the present case but it, too, tends to support a head sentence of five to six years imprisonment with an early parole eligibility date.

[174] In *R v Bielefeld*,[104] this Court upheld an effective sentence of eight years imprisonment with a declaration that the offence was a serious violent offence, where the offender pleaded guilty to the abduction, rape (sodomy) and indecent assault (digital vaginal penetration) of a nine year old girl. The offender was 19 years of age at the time of the offence. There was only limited violence involved but he held his hand over the girl's mouth to stop her screaming and after sodomising her pushed her to the ground before making his escape by motorbike. The child waited for several minutes before running home to tell her mother. She was "shaking, as white as a ghost, crying and her clothes were dusty".[105] The child had been emotionally traumatised by the offences. Bielefeld was on probation at the time for property offences. He was re-sentenced on these offences to lesser concurrent terms of imprisonment. This Court rejected the suggestion that the effective eight year global sentence was manifestly excessive. There was no suggestion that the sentence was at or near the top of the appropriate

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103 [2006] QCA 532.

104 [2002] QCA 369.

105 [2002] QCA 369 at 3.

range for that offence. *Bielefeld* was more serious than the present case because of the force used on the complainant and known emotional trauma caused to the victim. It also suggests than an eight year sentence was at the top of the range applicable to the adult respondents' offending in the present case.

[175] When one bears in mind that the maximum penalty for this offence in the case of offenders who fall to be sentenced as adults is life imprisonment, and the general guidance to be derived from the decisions discussed above, one can say that, in cases of the rape of a girl of 10 years of age by an adult offender acting in company where no violence is used or threatened and where there is not the aggravating feature of a breach of trust, a proper sentence might range up to 11 years imprisonment after a trial, depending on the consequences of the offence for the victim. It is difficult to see how the range could fall lower than seven years before taking into account available circumstances in mitigation including an early plea of guilty and other co-operation with the authorities by the offender.

[176] Having made these general observations, we turn to consider the circumstances of the individual adult respondents.

6.1 WZ

[177] WZ was 25 years of age at the time of his offence. He is now 27 years old. He has a criminal history, as a juvenile and as an adult, mostly for property offences. He has been subject to three probation orders and six community service orders. Importantly for present purposes, he was convicted in October 2006 of unlawful carnal knowledge of a girl under 16 years of age in March 2006. For that offence, he was ordered to perform 100 hours community service. He committed the present offence after that offence occurred but before he was sentenced for it. It is somewhat encouraging that WZ does not seem to have re-offended in the last two years.

[178] WZ left school at grade 8. According to the pre-sentence reports prepared by the Probation and Parole Service, he is illiterate. His first language is Wik-Mungkan. English is his second language. He is able to communicate in English but he appears to have a limited understanding of it. He was difficult to interview. Since leaving school, he has never been employed. Part of the reason that he has been unable to gain employment is said to be that he suffers from a skin disease, a severe form of chronic scabies, symptoms of which include thick white skin on his hands, bottom and feet. His mother reported that he was teased by others in the community because of this. He spends a lot of time on his own "doing nothing". According to the psychological report of Dr Madsen, he suffers from a hearing impairment caused by a chronic middle ear infection and from a learning disability. It seems that he also suffers from some mild intellectual impairment although his cognitive functioning was not formally tested.

[179] WZ does not abuse alcohol or drugs. His father died many years ago. He resides with his mother and three of his six siblings and has a close connection to his family. He is reliant on them for basic needs.

[180] WZ has expressed some remorse for his offending; but he has also said that he thought that the complainant had made her own decision and that she wanted to have sex with him. He said that he "did not think he did the right thing": he did appreciate that what he did was wrong. The psychological report says he "has limited insight into his offending behaviour". At least in part, that is because of contextual factors highlighted in Dr Madsen's report that apply in Aurukun where socio-economic deprivation and

isolation have resulted in prevalent violence and interpersonal exploitation. This, Dr Madsen states, "creates the context for the normalisation" of unlawful behaviour such as the present offending against a 10 year old girl. To that extent, it must be acknowledged that the threat of recidivism is a significant concern. If WZ is to participate in a sex offenders program, Dr Madsen recommends he should have a culturally sensitive intellectual evaluation which may assist in developing a viable intervention strategy for him.

[181] According to the pre-sentence reports, WZ has previously responded poorly to community based supervision, and is considered unsuitable for a period of supervision in the community at this time.

[182] The Solicitor-General, who appeared with Ms Wilson on behalf of the Attorney-General, submitted that a head sentence of eight years imprisonment would strike a proper balance, reflecting the gravity of the offence, his criminal history and lack of remorse, while recognising the respondent's personal disadvantages.

[183] An appropriate sentence upon WZ must reflect the real personal disadvantages which we have discussed above. It must also recognise that it was an aggravating circumstance that WZ's offending occurred in company.

[184] For an offender of WZ's age and criminal history who acted in company, a sentence of the order of seven years imprisonment would ordinarily be appropriate for the present offence of rape, even taking into account the important mitigating feature of his plea of guilty and the absence of exacerbating factors such as coercion, threats, actual violence, breach of trust or proven serious detrimental consequences for the victim.

[185] In taking into account his personal circumstances in order to arrive at a just sentence, it is necessary to observe that he perhaps suffers less from the ravages of an unsettled and unstructured childhood than most of his co-offenders. On the other hand, we note Dr Madsen's reservations about the accuracy of his account of his upbringing. We also note his mild intellectual impairment, his hearing impairment and severe chronic scabies. These factors mean that he is not well socialised and is immature, a feature reflected in his keeping company with juveniles without being a leader of them. His apparent limited empathy for the complainant and general lack of appreciation of the gravity of his crime might be explicable to some extent by his lack of proper socialisation or mild intellectual impairment; but, on the other hand, they give cause for concern as to the likelihood of re-offending, especially bearing in mind his criminal history. In consequence, the sentence to be imposed upon him must reflect an element of personal deterrence as well as general deterrence in the interests of protecting the community. His co-operation with the authorities, the fact that he has apparently not re-offended for the past two years and that whilst his family has its problems, it is supportive of him, are factors demonstrating some prospect of rehabilitation. These matters and his intellectual disability are further reasons supporting sentencing WZ at the low end of the range.

[186] In our view, the most lenient sentence which could be imposed for an offence of the gravity of that in question upon an adult who acted in company and has a record of similar offending is a sentence of imprisonment of six years. The mitigating features in WZ's case, and especially his early plea of guilty, should be further recognised by a relatively early parole eligibility date.

[187] We have concluded that WZ should be sentenced to six years imprisonment with a parole eligibility date fixed at 13 June 2010. There should be a declaration that he has spent 55 days in custody, while on remand in respect of this offence, from 19 September to 5 November 2006 and 16 November to 22 November 2006, and that this time be taken as time served under the sentence now imposed.

[188] It should be explained that although the Court may fix a parole eligibility date, in these cases under s 160D(3) of the *Penalties and Sentences Act*, the determination whether and when a prisoner will be released falls to be made by the Parole Board[106] at the appropriate time. The "parole eligibility date" fixed by the Court effectively marks the earliest point at which the prisoner may ordinarily apply for parole.[107]

6.2 KU

[189] The Solicitor-General on behalf of the Attorney-General submitted that, on the information before the sentencing judge, a sentence of eight years imprisonment is appropriate for KU.

[190] KU was 18 years of age at the time of each of the two offences for which he is to be sentenced. He is now 20 years old. He has a relatively minor history of street offences and offences of dishonesty in relation to property. Relevantly for present purposes, he has no history of sexual offences or offences of personal violence. According to the most recent pre-sentence report prepared by the Probation and Parole Service, he has, however, been the subject of two probation orders and five community service orders. He has not previously spent time in custody and does not seem to have re-offended since being sentenced for these offences. This is a somewhat encouraging factor suggestive of rehabilitation. His maternal grandmother, who attended for his interview with Dr Madsen, reported that since being convicted of these offences he has made a great effort to avoid trouble. She states that he now stays home in the evenings rather than wandering the streets and regularly attempts to help family members.

[191] KU has apparently not suffered as much personal disadvantage as many of his co-offenders: he grew up with his mother but with a stable relationship with his father and so did not lack a male role model which is said to explain the poor socialisation of most of his co-offenders. He was raised in a household which was free of alcohol and drug abuse. We note, however, Dr Madsen's reservations about the accuracy of KU's account of his upbringing and that KU's mother died in 2005 when he was 16 or 17, the year before the present offending. KU's great-grandmother deposed in an affidavit filed on his behalf in these proceedings dated 18 April 2008 that if KU "was sent to jail it would be a bad thing, I am frightened he might hurt himself. [KU] is a good boy he is always home with his father. When I was sick he helped me and cooked for me."

[192] KU does not feel sorry for the complainant, taking the view that "she was asking for it" in the sense that she wanted to have sex. He stated that he is not sure whether his behaviour with the complainant was wrong because everyone seems to have sex with young girls. The psychological report of Dr Madsen recognises KU's "limited insight into the factors associated with his offending". This is confirmed by the affidavit filed on KU's behalf, dated 18 April 2008, in which KU deposed:

> "Because of this trouble with [the complainant] I have brought a lot of shame to my family. I have also brought a lot of shame to myself.

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106 *Corrective Services Act* 2006 (Qld), s 192.

107 *Corrective Services Act*, s 180.

> I realise that I have done a bad thing to [the complainant] and I feel bad about it. However, having sex with young girls here in Aurukun happens a lot and almost seems normal."

[193] KU's recent statement in the context of this offence against a 10 year old girl continues to demonstrate his limited insight into the seriousness of his offending. At least it can be said that since KU committed these offences, he has learnt "that it is not OK for adults to be having sex with young girls".

[194] According to both pre-sentence reports, KU:

> "has previously had a mixed response to community based supervision and due to his apparent lack of remorse and reluctance to accept responsibility for his actions it appears that he continues to be unsuitable for a further community based order at this time."

The reports show that he has worked under the CDEP, and is interested in continuing employment.

[195] The offending for which KU must be sentenced involves two quite separate offences of rape of the 10 year old complainant. On each occasion, he was in company; on the first with multiple offenders and on the second with WY. A sentence of the order of seven years imprisonment is appropriate to the seriousness of KU's two offences, even taking into account his plea of guilty. It is necessary, however, to take into account some additional mitigating features. There are, of course, the contextual features relevant to his personal background and the circumstances in which the offence occurred. He was only 18 years old at the time. He had no previous convictions for sexual offences or offences involving personal violence and has not re-offended for some years. Another significant mitigating feature, in addition to his early plea of guilty, is that he further co-operated with the authorities by making admissions to police about his involvement in both offences. He is presently in part-time employment and hopes to work in the CHALCO mine when it opens in Aurukun in 2010. He has the support of his family.

[196] Notwithstanding KU was seven years younger than WZ, there is in the end very little distinction between them. KU committed two offences of rape, each while in company; he is not entirely remorseful and has limited insight into the offending. Unlike WZ, he admitted his offending to police. Whilst WZ has spent 55 days in pre-sentence custody, KU has not spent time in custody. KU on the whole seems to have slightly more promising rehabilitation prospects than WZ. On the other hand, WZ committed only one rape (in company), and while he committed the offence of having unlawful carnal knowledge of a girl under 16 in March 2006, before the present offence, he was not sentenced for that offence until after the present offence. It is of some relevance to WZ's sentencing that he suffers from mild intellectual impairment as well as other medical conditions. Weighing all of these considerations, there is in the end no sufficient reason to treat KU differently from WZ.

[197] We have concluded that, in respect of each offence, KU should be sentenced to concurrent terms of six years imprisonment for each of the offences of rape to which he pleaded guilty, with a parole eligibility date fixed at 13 June 2010.

6.3 WY

[198] The Solicitor-General on behalf of the Attorney-General submitted that, on the information before the sentencing judge, a sentence of seven to eight years imprisonment is appropriate for WY.

[199] WY was 17 years old at the time he committed the two offences of rape. He is now 19 years old. In addition to pleading guilty at an early stage he co-operated with the police by admitting his role in the offences relatively early. He has a criminal history involving property offences both as a child and as an adult. He has been subject to community service orders and a probation order. It is said in the pre-sentence reports prepared by the Probation and Parole Service placed before this Court that his response to those orders has been "of a very poor standard".

[200] WY left school at 16 years of age after completing grade 10. He has been employed in the CDEP scheme, but is currently without a job. The psychological report of Dr Madsen refers to a "poor work history". Like WZ and KU, WY is a Wik speaker who uses English as a second language. The author of the pre-sentence reports considered that WY's capacity to understand English was limited. He is unable to read or write and signs his name using only his first name.

[201] WY's parents separated when he was younger. He now lives with his mother and her partner. His offending does not seem to be entirely explicable by the absence of a male role model while growing up.

[202] WY's understanding at the time he had intercourse with the complainant was that she had previously had sex with other males in the community. It is said in the pre-sentence reports that WY stated that "having sex with a girl that's only 10 years is normal". This attitude, which is not explicable by the absence of an appropriate male role model, is a matter for concern so far as the prospects of re-offending is concerned. The pre-sentence reports also say he did not show remorse but that now he is aware of the consequences of his actions he may not behave in that way again. The psychological report refers to "limited insight into his offending behaviour".

[203] According to the pre-sentence reports, WY is "presently unsuitable for community based supervision" because of his poor response to previous community based orders. His present rehabilitative prospects are not immediately promising.

[204] The offending for which WY must be sentenced consists of two offences of rape. He was in company on each occasion. A sentence of up to seven years imprisonment would be appropriate to the seriousness of his offending, taking into account his plea of guilty but without other mitigating features. We must take into account his youth, the absence of previous convictions for sexual offences or offences involving personal violence, his co-operation with police in admitting his offences as well as the "double jeopardy" factor, and the contextual issues[108] which pertained to him.

[205] In terms of securing parity between the treatment to be accorded WY, and the other adult respondents WZ and KU, it is the circumstance that WY was 17 years of age at the time of the offences and his co-operation with the authorities which may have warranted some greater leniency in his case than in the case of WZ. But WY committed two rapes in company, and WZ has spent 55 days in pre-sentence custody whereas WY has spent no time in pre-sentence custody. In the end, we conclude that

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[108] See these reasons at [111] and [146], above.

WY should be sentenced in the same terms as WZ and KU: six years imprisonment with a parole eligibility date set at 13 June 2010.

7. Re-sentencing the juvenile offenders

[206] We have elsewhere set out the general sentencing principles applicable to juvenile offenders. In *R v PZ; ex parte A-G (Qld)*,[109] it was said that:

> "The Act provides that a detention order should only be made against a child as a last resort (*Juvenile Justice Act* 1992 (Qld), s 208). It does not follow that a period of detention is never an appropriate sentence for a juvenile, particularly when a serious offence such as rape is involved. The maximum penalty for an adult found guilty of rape is life imprisonment (*Criminal Code* 1899 (Qld), s 349(1)). The Act provides that a juvenile found guilty of an offence for which the punishment is life imprisonment may be detained for up to 10 years (*Juvenile Justice Act* 1992 (Qld), s 176(3)(a). A sentence up to and including life imprisonment may still be imposed if the offence involved violence and may properly be regarded as being particularly heinous: *Juvenile Justice Act* 1992 (Qld), s 176(3)(b)).
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> In *R v C* ([1996] QCA 014; CA No 436 of 1995, 13 February 1996), Fitzgerald P and Mackenzie J said:
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> > 'It was pointed out that the policy of the Juvenile Justice Act is that, if some other course is open, a juvenile should not be detained in custody, and then only for the shortest possible period. Even so, rape is ordinarily a crime of violence which commonly has serious consequences for the victim, in this case a teenage girl, and the sentencing judge was correct in concluding that a period of actual detention was called for.'
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> In *R v E; Ex parte Attorney-General (Qld)* ([2002] QCA 417 at [19]; (2002) 134 A Crim R 486 at 490), Williams JA, with whom Helman J agreed, said:
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> > 'There are a number of cases where juveniles have received sentences in the range of three to five years detention for a single episode of rape without any gratuitous violence being involved. It is sufficient to refer to the recent case of *R v A* [2001] QCA 542. There, a 16 year old was initially sentenced for the offence of raping his grandmother to 12 months' detention with an immediate release order requiring participation in a rehabilitative program. No conviction was recorded. This court on appeal recorded a conviction and ordered the offender to serve four years detention to be released after serving 50% of that term.'"

[207] More recent decisions of this Court in *R v MAC*,[110] *R v S*[111] and *R v JAJ*[112] confirm that a sentence of up to three to five years detention may be appropriate in the case of juvenile offenders who commit rape and plead guilty to the offence.

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109 [2005] QCA 459 at [26] – [29] (citations footnoted in original).

110 [2004] QCA 317.

111 [2003] QCA 107.

112 [2003] QCA 554.

[208] That range was appropriate in cases such as *PZ* and the other cases referred to in it. All those cases involved offending which was considerably more serious than the present. In this case the offending did not involve violence, threatened violence or breach of trust. In respect of all the juvenile respondents other than BBL, there was no hint of coercion or pressure placed on the victim by the offenders; she was not actually overborne. It was not suggested at sentence that the victim was physically hurt during the commission of the offences and nor was it submitted that there were any detrimental consequences to her from it. Of course, the commission of these offences on a 10 year old girl must have had a significant detrimental impact on her. But that fact, and the extent to which it can be related to the present offending, was not established by evidence either at the original sentence or in these appeals.

[209] It must be kept in mind that there are a number of cases at first instance, which were not the subject of an Attorney-General's appeal, where non-custodial sentences have been imposed on juveniles for the offence of rape. In *R v DJL*,[113] DJL pleaded guilty to one count of unlawful carnal knowledge of a 14 or 15 year old girl and to raping her 11 year old younger sister by digital penetration. He was 16 years old at the time of the offence and 17 at sentence. He was sentenced on the basis that the 11 year old was a willing participant. The prosecution, as in the present case, urged the judge to deal with DJL by way of a probation order with a special requirement that he attend counselling. It seems he had a deficit of intellectual capacity and/or functioning. He had some minor criminal history but not for sexual offences. He was placed on two years probation without a conviction recorded.

[210] In *R v MSB*,[114] MSB was convicted after a trial of one count of rape and two counts of indecent treatment of a child under 12. He was 15 years old at the time. His victims were eight and nine years old. He was a baby-sitter to one of them. The child victims were neighbours. The count of rape appears to have been based on his making the victim perform oral sex on MSB. One count of indecent treatment concerned MSB performing oral sex on the child. The other count of indecent treatment involved making the other child watch the act. MSB was sentenced on the rape to 12 months detention suspended immediately with a three month conditional release order and on the remaining counts to two years probation with a special condition that he undergo various programs and receive treatment.

[211] In *R v TAS*,[115] TAS was found guilty after a trial before a Childrens Court judge of one count of rape (penile penetration of the vagina), another count of rape (penile penetration of the victim's mouth) and one count of attempted rape (attempted penile penetration of the anus). The complainant was 10 years old. TAS was 13 years old at the time of the offences. The judge noted that although the complainant was very young the offender was only three years older. TAS had demonstrated no remorse and continued to deny committing the offences. The judge recorded convictions and placed TAS on a three month conditional release order in respect of the first count of rape and three years probation in respect of each of the remaining counts.

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113 Unreported, Britton SC DCJ, Childrens Court, Qld, Indictment No CC17 of 2006, 5 December 2006 (anonymised by this Court).

114 Unreported, O'Brien DCJ, Childrens Court, Qld, Indictment No 33 of 2005, 3 November 2006 (anonymised by this Court).

115 Unreported, White DCJ, Childrens Court, Qld, Indictment No 28 of 2005, 27 January 2006 (anonymised by this Court).

[212] The sentences imposed in these cases demonstrate that the sentencing range here extended from lengthy probation orders to significant periods of detention. They do not support a sentence as low as 12 months probation with no conviction recorded as was imposed on the juveniles in this case.

[213] There are some common features in respect of all the juvenile respondents that warrant leniency. All pleaded guilty at an early stage. All, in varying degrees, suffered from a disadvantaged background. The contextual features noted earlier in these reasons were relevant to their personal circumstances in one way or another and to the circumstances surrounding each respondent's offending. All but KZ co-operated with the police in their investigation by admitting their conduct.

[214] This offence of rape of a 10 year old by youths aged between 13 and 15 is so serious because of the age of the girl compared to the age of the offenders that a conviction should be recorded. This is especially so as all the offenders had previous convictions for other offences, although not for sexual offences. The recording of a conviction for the offence of rape is the irreducible minimum level of denunciation required by an offence of this gravity, and notwithstanding the resulting application of the *Child Protection (Offender Reporting) Act* 2004 (Qld). Convictions must be recorded in respect of all the offences committed by the juvenile offenders.

[215] We note that the Solicitor-General informed the Court that none of the juveniles is currently the subject of proceedings for breach of the probation orders imposed on each of them at first instance.

[216] We turn now to the circumstances personal to each juvenile respondent, and to the sentence which should be imposed in each case.

7.1 YC

[217] The Solicitor-General on behalf of the Attorney-General submitted that, on the information before the sentencing judge, a sentence of three years detention is appropriate for YC.

[218] YC was 15 years of age at the date of his offence. He is now 17 years old but all parties agree that this Court should sentence him as a juvenile: see *Juvenile Justice Act*, Pt 6, Div 11, especially s 132, s 134 and s 141. He has a lengthy criminal history consisting mainly of property offences. His only history for offences of personal violence is a conviction for assault of a police officer under the *Police Powers and Responsibilities Act* 2000 (Qld). He has no history of sexual offences. He has continued to commit property offences since committing the rape offence but, encouragingly, has not re-offended since originally sentenced for the rape offence in October 2007.

[219] At the time of the rape of the complainant, YC was subject to three community service orders and one conditional release order all imposed in respect of offences relating to property. He has previously been subject to two probation orders, six community service orders and one conditional release order. The more recent pre-sentence report prepared by the Department of Communities notes that:

> "… lack of appropriate boundaries and supervision coupled with limited sexual education have contributed to [YC's] involvement in the commission of the offence before the Court.

> However, these factors should be considered within the context of the endemic social issues confronting some contemporary Aboriginal communities such as Aurukun. These include alcohol and substance abuse, child protection issues and the breakdown of the family unit, high incidences of criminal activity leading to over representation in the criminal justice system and a range of other social issues."

[220] That report also notes that through YC's probation order for this rape offence, he has participated in a victim awareness program exploring the effects of crime on his community, family and himself. Whilst on bail for the present offence, he was subject to a 7.00 pm to 7.00 am curfew. The report notes:

> "[YC] and his co-offenders have also experienced a level of community ostracism as a result of the media coverage of the offences and the associated shame that their behaviour has brought on the Aurukun community. [YC] has indicated that due to perceived threats of retribution, he no longer wanders the streets at night, and he consequently spends more time at home."

[221] Since his sentence over seven months ago, YC has been subject to a probation order. He is currently a carer for his sick grandfather and this has limited his ability to pursue his aim of full-time work. He has expressed a willingness to participate in a special sexual offender treatment program, such as that offered by the GYFS, if it were ordered by the Court. It can be inferred from the more recent pre-sentence report that YC would be a suitable candidate for community based orders including probation. Probation "would provide an opportunity for [YC] to build on his strengths and abilities including personal, educational and vocational skills." The report also notes that, were he sentenced to a period of detention, he:

> "would be exposed to a cohort of offending peers in detention, which may serve to exacerbate his offending behaviour … [and a] period of Detention [sic] may impact on [YC's] personal development as he would be removed from his family, community and traditional way of life."

[222] In YC's case, there are significant exculpatory circumstances which must be taken into account in relation to his sentence. The circumstances in which YC's offence was committed are set out above. He was not acting in concert with any other male. It is true, of course, that he should have refused the complainant's advances, but it is argued that he lacked the moral frame of reference which should have guided him and he was only 15 years old. It is tolerably clear that he knew what he did was wrong, but it is in his favour that he told officers of the Department of Communities that he was ashamed and angry with himself for what he had done. He has often been seen to separate himself from his peers to avoid perceived negative behaviour. He co-operated with the authorities in admitting his offending and pleaded guilty at an early stage.

[223] At the time of the offence of present concern, YC was residing with his grandparents. He has had limited contact with his mother, and his father is unable to care for him because of his father's substance abuse. He completed year 10 at school but with sporadic attendance.

[224] YC's grandparents have in the past been unable to impose any meaningful social discipline on him in consequence of which he has been allowed large amounts of unstructured time to associate with his peer group which is a negative influence. He is,

however, fortunate that his grandparents are highly supportive of him despite his sometimes shabby treatment of them. His grandmother deposed in an affidavit recently filed on YC's behalf that YC is involved in family life and is a great help in caring for his sick grandfather. He supervises the use of and cleans his grandfather's dialysis machine, cleans his grandfather's room and changes his grandfather's sheets. The psychological report of the GYFS notes that:

> "[YC] has a functional home and grandparents willing to support and supervise him, even if their ability to provide direction is somewhat limited. Developmentally [YC] now appears to have progressed from the peer culture of sexual engagement present in early adolescence and is seeking more emotionally mature relationships. … There is also an indication of some pro social beliefs in that [YC] expressed recognition that the victim was young and that the behaviour was 'wrong'."

[225] That report also considers:

> "that [the GYFS' suggested] treatment plan … will not be effective in the absence of broader community level interventions targeting a range of general social concerns including poverty, limited employment and recreational opportunities, substance abuse and community violence. Current government sponsored interventions are providing a wealth of resources in communities and this presents a unique opportunity to contextualise individual interventions within broader systemic change and the promotion of a safe community."

[226] There is some reason to think that YC would benefit by an order which would leave him in the Aurukun community. His grandparents report he has severed his links with his peer group and is now abiding by his grandparents' rules. He has formed a significant stable relationship with a young woman. It is said that he treats her well. The psychological report of the GYFS suggests that he is not at as high a risk of sexual re-offending as his juvenile co-offenders or at least not as high as other youths in Aurukun.

[227] The circumstances of his rape of the complainant were such as to make his offending less serious than that of the adult respondents. At 15, he was closer in age to her than his adult co-offenders and his offence was not committed in company. As is noted in the psychological report prepared by the GYFS:

> "[YC's] sexual offending behaviour has occurred at the developmental stage of adolescence, a period where biological demands for diversity of sexual expression and social demands for conformity are often in great conflict. At this stage sexual impulses are relatively new and often compelling, while social conformity may be at its weakest point as stable social and sexual identities are not yet fully established."

[228] There is reason to think that, notwithstanding the limited benefit which non-custodial orders have achieved in the past in terms of his rehabilitation, he is now able to progress beyond the peer group dominated malaise in which he came to be sentenced for this offence.

[229] Under s 176(1)(a) of the *Juvenile Justice Act*, an order may be made for probation for up to three years. YC is currently subject to a probation order for this offence and to

one other probation order. Because of the respondent's positive performance in the course of his probation, and the possibility of further improvement under a continuation of the intense supervision afforded by probation, we consider overall that a lengthy period of probation is a better sentencing option for YC and for his community than a period of detention.

[230] Accordingly, we consider that the probation order currently in place in respect of this offence should be set aside and, in its place, he should be sentenced to three years probation, that being the maximum period provided for in the legislation.

[231] It should be a condition of his probation that he attend the GYFS or any other program as directed by the Department of Communities, comply with all reasonable requirements of the program and maintain a rate of progress that is satisfactory to the treatment program. The other conditions are those mandated by s 193(1)(a) and (b) of the *Juvenile Justice Act*, which will be referred to in the Court's orders as the "usual conditions". A conviction should be recorded.

7.2 KY

[232] The Solicitor-General on behalf of the Attorney-General submitted that, on the information before the sentencing judge, a sentence of two to three years detention is appropriate for KY.

[233] This respondent was 14, nearly 15 years of age, when he raped the complainant. He is now 16 years old, and turning 17 in July this year. He raped the complainant on two separate occasions. He was not acting in company with other males on these occasions. According to the GYFS psychological report, he asserted the complainant importuned him for sex. The second report prepared by the Department of Communities records that he feels ashamed and has developed "some insight into his offending". He co-operated with the police in admitting his offending and pleaded guilty at an early stage.

[234] At the time of this offending, KY was subject to two probation orders made in March and May 2006 for offences in relation to property. He has previously been subject to three probation orders, four community service orders, and one detention order. It is encouraging that he does not seem to have re-offended since being sentenced for the present offences. It seems that, from the pre-sentence reports, he is responding positively to his probation order for the rape offences. The criminal history records no prior sexual offences but the GYFS report records a conviction for a previous sexual offence in 2005 committed with PAG and BBL on a 12 year old girl.

[235] KY attended school only until grade 8. He is not now attending school and he is unemployed. He was raised by his aunt and great-grandparents after his parents separated when he was very young. His mother has been unable to care for him and his siblings because of her chronic alcohol abuse. According to the GYFS psychological report, at the time of his offences against the complainant, he was temporarily residing with his grandmother.[116] He frequently absented himself from her house at night without her permission. He has suffered from poor socialisation due, in part, to the absence of an appropriate role model. The GYFS report stated that he subsequently returned to live with his great-grandparents where he has received more supervision.

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116 The more recent pre-sentence report states that he was then residing with his great-grandmother.

[236] The psychological report from GYFS reports that his behaviour has subsequently changed. Since the offending in question, he spends more time with his great-grandparents, assisting about the house, and respecting a self-imposed 7.00 pm curfew.

[237] Most importantly, he is said to have distanced himself from his anti social peer group. He has not been in any subsequent trouble. He is focused on obtaining employment, and has fathered a child. He and the mother were promised to each other according to traditional cultural practice when they were children. He is said to be taking the responsibility of fatherhood seriously. It is fair to say that these matters suggest a reduced risk of further sexual offending. These considerations support KZ being afforded a further opportunity for non-custodial rehabilitation.

[238] If KY were to remain in the community upon his sentence, he would continue to reside with his great-grandparents. According to the more recent pre-sentence report:

> "[KY] and his co-offenders have also experienced some level of community ostracism as a result of the media coverage and the associated shame that it has brought on the Aurukun community. [KY's] grandmother indicated that the media coverage of the events has endangered their lives due to the volatility of such issues in the community.
>
> It appears that the offences have been a catalyst for a range of positive changes in [KY's] life. [KY] has indicated a desire to cease his offending behaviour, and has identified strategies that would assist him to achieve this goal such as seeking employment.
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> …
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> If [KY] remains in the community upon sentence, he plans to remain in Aurukun. He is currently residing with his great grandmother and great grandfather … and his uncle … . [KY] has indicated he wants to make positive changes to his life and is willing to participate in programs offered by the Department to assist him …"

[239] It can be inferred from the report that KY is an appropriate candidate for community based orders such as probation which "would provide an opportunity for [KY] to build on his strengths and abilities as well as personal, educational and vocational skills that he has developed." He has indicated a willingness to comply with such an order. The author considered that a period of detention may further foster relationships with offending peers and that KY has demonstrated through previous supervised orders that he is able to utilise community based support and assistance.

[240] Further, like YC, he was not in company when he offended and he admitted his wrong-doing to police. By contrast with YC, KY committed two rapes not one, but he was only 14 years old. The prospect of rehabilitation arising from the recent changes in his life, and especially his apparently genuine willingness to distance himself from his peer group of offenders, suggests that, like YC, he should be given the benefit of a long term of probation.

[241] In the upshot, we consider that, like YC, KY's current term of probation should be set aside, and he should be sentenced to probation for three years. For the reasons given earlier, convictions should be recorded.

[242] It should be a condition of his probation that he attend the GYFS or any other program as directed by the Department of Communities, comply with all reasonable requirements of the program and maintain a rate of progress that is satisfactory to the treatment program.

7.3 KZ

[243] The Solicitor-General on behalf of the Attorney-General submitted that, on the information before the sentencing judge, a sentence of two years detention is appropriate for KZ.

[244] KZ was 14 years old at the time he raped the complainant in company. He was therefore closer in age to the victim than most of his co-offenders. He is now 16 years old. He did not co-operate with the police in that he denied the offence although he later pleaded guilty at an early stage.

[245] At the time of the offence, he was subject to a probation order and a community service order made on 13 December 2005 for offences relating to property. Before he was sentenced on 6 November 2007, he was remanded in custody for 41 days, largely as a result of his breaches of the conditions of his bail. He has previously been subject to four probation orders, three community service orders, and one detention order for street offences and offences relating to property.

[246] KZ has not previously been dealt with for sexual offences. He has been convicted of assaults. He is also reported to have a history of violent behaviour both towards his siblings and his then pregnant girlfriend (now the mother of his child) but these matters do not appear on the criminal history placed before this Court.

[247] KZ does not attend school and is unemployed. He has significant problems with literacy and numeracy and struggles with basic reading and writing.

[248] He has endured a deeply deprived childhood. He is the oldest of six children. He was raised by his mother who is a violent alcoholic and a gambler. His siblings are subject to statutory child protection orders because of his violent behaviour and reside in the Cairns area. He has suffered neglect and has been physically and emotionally abused by his mother and her partners. His father was killed in a plane crash during KZ's early childhood. The man he came to know as his stepfather committed suicide when KZ was eight years old. He has witnessed domestic violence between his mother and her subsequent partners.

[249] KZ is said to have a close connection to his peers within the Aurukun community who were a negative influence on him in this offending. He was in their company when he raped the complainant and when he committed other offences. It is said in the GYFS psychological report that he shares a particularly close attachment to a peer group many of whose members have spent "periods detained in custody". His peer group attachment appears to be an attempt to compensate for the absence of any father figure in his life. It is said that he maintained this attachment until his recent incarceration on remand in respect of other charges.

[250] It must be acknowledged that KZ has served over seven months probation for this offence. It seems that KZ has not been convicted in respect of any other offences since being placed on probation for the present offence.

[251] KZ's more recent pre-sentence report dated 12 March 2008 emphasises that his family background was characterised by poor parenting, abuse and neglect. The report states:

> "In terms of positive consequences this offence appears to have been a catalyst to assist [KZ] to make more positive decisions in his life. In particular, [KZ] has identified strategies such as disassociating with negative peers, re-engaging in education and employment as well as participating in community and cultural activities as a strategy to prevent future re-offending by remaining gainfully occupied in family and community roles."

[252] In discussing sentencing options, the report emphasises that KZ was 14 at the time of the offence which was committed 21 months ago and that he has completed some months of a probation order. If he remains in the community he plans to continue to reside with his mother, girlfriend and baby at Aurukun.[117] KZ is motivated to maintain his monogamous relationship and to care for his baby son although the Department of Child Safety has ongoing concerns about the baby's welfare. The report continues:

> "Since this offence [KZ] has been able to identify ways to cease his offending including pursuing education which will enhance his prospects of employment with the mining company (CHALCO) based in Aurukun. [KZ] also indicated that he would like to pursue participating in community life including playing football and hunting with family and friends as other ways which would constructively occupy his time and hence divert him from further [offending]. [KZ] has also indicated that he would participate in counselling to address domestic violence issues as well as to develop positive parenting skills. He has also agreed to be linked in with a positive male role model in the community who may also be able to assist him to develop knowledge and skills in regards to sexual behaviour and Aboriginal lore.
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> …
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> … A Probation Order would provide an opportunity for [KZ] to build on his strengths and abilities including personal, educational and vocational skills that he has developed."

[253] The report, in considering a detention order, referred the Court to the following: KZ was 16 years old; he had spent 41 days remanded in custody; detention may serve to further foster relationships with offending peers; he has demonstrated through previous supervised orders that he is able to utilise support and assistance where required; and the impact on his personal development of being removed from his family including his son, community and traditional way of life.

[254] The GYFS psychological report dated 18 April 2008 was less optimistic. It noted that:

> "In summary, individual factors, in combination with ecosystemic and situational influences, best explain [KZ's] sexual offending behaviour. Key individual factors include parental loss, childhood abuse, witnessed violence, dysregulation, and general antisocial

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[117] See, however, [252] below.

attitudes. Key contextual factors include limited supervision, direct and indirect peer influences, and access and opportunity.

No evidence emerged during this assessment of any specific planning by [KZ] for this offence to occur, suggesting the behaviour was situational and opportunistic rather than predatory in nature. Moreover, no evidence emerged during this assessment to suggest the presence of any underlying sexually deviant interests. Of concern however, in [KZ's] case, is his propensity towards violence, including violence towards women and vulnerable people. He currently lacks the skills to manage his violence and engages cognitive distortions supportive of such coercive, threatening and harmful behaviour."

[255] Later the GYFS report identified that:

"… [KZ] presents with a number of empirically supported factors known to increase the risk of sexual recidivism; as well as non-sexual (violent) behaviour. [KZ] continues to associate with a negative peer group that includes a subculture in which sexual contact between individuals under the legal age of consent has become accepted practice. Situational factors may increase his risk of recidivism. In addition, few protective factors were able to be identified in [KZ's] current circumstances. However, his mother and partner could potentially assist in motivating [KZ] to engage with intervention services and address his behaviour.

Conclusions/Recommendations

[KZ] is a 16 year old youth who lives with his mother … in Aurukun. [He] has an extensive history of non-sexual offences and violent behaviour, though the offence currently before the court is his first charged sexual offence. … A number of risk factors have been identified [as] contribut[ing] to sexual recidivism or violent offending. [His] propensity for violence is of particular concern. He also presents as a high risk of further non-sexual offences. …

There are several factors which, if successfully managed, may reduce [KZ's] risk of future sexual, violent or non-sexual property offending. [KZ] would be suitable to engage in offence-specific treatment and is likely to benefit from such intervention. Specific recommendations and treatment elements to manage [his] risk of recidivism include:

Individual Treatment Elements

A. Developing strategies and skills for behavioural restraint eg. building skills in behavioural and emotional self-regulation, anger management, problem solving skills training, perspective taking, consequential thinking and assertive communication

B. Offence specific interventions, including challenging cognitive distortions specifically associated with this behaviour, victim awareness, education about appropriate sexual behaviour, and safety planning to more effectively assist … self-management strategies to cope effectively within high risk situations

C. Strategies aimed to increase [KZ's] engagement in prosocial behaviour, including building a prosocial peer group, building stronger connections to other prosocial community structures and activities, and building healthy relationship skills.

Individual treatment elements could be provided by GYFS, in collaboration with local partners, if this is ordered by the court. [KZ's] intervention is likely to be of a longer duration than many of his juvenile co-offenders. This intervention can be offered by GYFS irrespective of location.

There is also a range of contextual factors that assist in understanding [KZ's] sexually abusive behaviour. Interventions in the absence of contextual change are likely to have limited efficacy. Case specific systemic interventions therefore will form a critical part of the overall intervention plan and should include:

Systemic Interventions
A. [KZ] to engage in structured activities that promote prosocial behaviour (ideally employment)
B. Facilitate increased supervision within the home and community environment
C. Opportunities to be provided to [KZ] to engage in cultural activities and to develop a positive identity within the family and community
D. Build connections to positive adult male role models
E. Development of family safety plans in conjunction with [his mother], [his partner] and the Department of Child Safety
F. Strong messages about appropriate behaviour, sexuality education and the promotion of healthy relationships to be available on a community level, ensuring more youth in Aurukun also have improved access to this information.

[KZ's] mother will require support and guidance to address [KZ's] behaviour within the home and facilitate increased supervision. [His mother's] support and encouragement of [KZ] will be critical for enhancing his engagement and progress with treatment. It is acknowledged that intervention with this family will need to involve collaboration with the Department of Child Safety. The involvement of the Department of Child Safety is currently a source of concern and stress for both [KZ] and his mother. It is hoped however, that pressure for behavioural change from this Department may provide sufficient external motivation for [KZ] to address his risky behaviour."

[256] KZ recently filed an affidavit in this Court in which he stated:

"I have been in Cleveland [Detention Centre] a little while now. Everything is going okay. But none of my family has visited me here in Townsville. I have to call my Mum twice a week.

I have seen my baby. I held it in Cairns. My baby … is one (1) month old.

> I am doing school here. I am doing grade 10 studies as well as horticulture. When all of this trouble is over, I would like to go back to Aurukun and work there as a town cleaner.
>
> Also in Cleveland, I am playing rugby league and going to football training. I also do indigenous painting here."

[257] KZ has now fathered a child to a woman of his own age with whom he has had a one year relationship. Because of his violent behaviour towards her when she was pregnant, he has been prevented from having contact with her or his baby son since the child's birth by the intervention of the Department of Child Safety. According to the GYFS psychological report, KZ's relationship with the mother of his child is characterized by anger and physical conflict, including assaults by him upon her. That is so, despite his previous participation in an anger management program. He appears, however, to have genuine feelings for his partner to whom, in his words, he is "staying true". That report identified a number of risk factors "which may contribute to sexual recidivism or violent offending". KZ's propensity for violence is said to be "of particular concern".

[258] We are most concerned about KZ's propensity for violent behaviour and his persistent attachment to a peer group which is apt to encourage recidivism. We are also conscious that a period of detention can only be imposed as a last resort and for the shortest appropriate period[118] and that KZ must not receive a more severe sentence because of his lack of family support and opportunities.[119] He must be sentenced only for his present offending. No violence was involved in his commission of the present offence. The more recent pre-sentence report and the GYFS psychological report realistically refer to the challenges KZ and those who would supervise him in the community will have in effecting his rehabilitation. These reports offer some faint hope for the future. But they also emphasise his violence and risk of recidivism because of his membership of a negative peer group. On balance, these mitigating circumstances do not warrant the imposition of a non-custodial sentence.

[259] We are finally persuaded that this Court's duty of securing the protection of the community requires a detention order in this case. KZ, unlike YC and KY, should not be given the opportunity of a three year probation order. In his case, a detention order is the only realistic penalty.

[260] We would order that the respondent be sentenced to three years detention, to be released after serving 50 per cent of that period. The order for release after serving 50 per cent of the term is made in the context of s 227 of the *Juvenile Justice Act*, which relevantly provides as follows:

> "(1) Unless a court makes an order under subsection (2), a child sentenced to serve a period of detention must be released from detention after serving 70% of the period of detention.
>
> (2) A court may order a child to be released from detention after serving 50% or more, and less than 70%, of a period of detention if it considers that there are special circumstances,

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118 *Juvenile Justice Act*, s 150(2)(e), Sch 1, Charter of Juvenile Justice Principles, principle 17.

119 *Juvenile Justice Act*, s 150(2)(d).

> for example to ensure parity of sentence with that imposed on a person involved in the same or related offence."

The "special circumstances" in KZ's case relate particularly to the "pressures and disadvantages" referred to earlier in this judgment and also his early plea of guilty.

[261] The period of 41 days pre-sentence custody should be declared to be time already served under this sentence. For the reasons given earlier, a conviction should be recorded.

7.4 PAG

[262] The Solicitor-General on behalf of the Attorney-General submitted that, on the information before the sentencing judge, a sentence of three years detention is appropriate for PAG.

[263] PAG was 14 years old when he raped the complainant in company. He is now 16 years old. The complainant was his cousin. When he pleaded guilty to this offence, he also pleaded guilty to an unrelated offence of unlawful carnal knowledge which pre-dated the present offence and is not the subject of this appeal. The GYFS psychological report notes that this offence concerned a 12 year old female who agreed to have sex with PAG in 2005. He was then about 13. The offence became known when the victim presented with a sexually transmitted infection which triggered a statutorily required investigation. PAG was initially interviewed by police as a potential witness but was subsequently charged. At the time of his original offence, he was subject to a probation order imposed in February 2006 for offences relating to property. He was placed on a further probation order and a community service order for property and traffic offences at about the time he committed the rape offence. He has been dealt with subsequently for more property offences, some committed before the rape and some after. He is currently subject only to the probation order the subject of this appeal. The criminal history records no prior sexual offences but the GYFS report records a conviction for a previous sexual offence in 2005 committed with KY and BBL on a 12 year old girl.

[264] PAG was raised by his grandparents who were recognised Aurukun elders. His father is in prison for murder, and his mother is an alcoholic who has little to do with her family. His grandfather died two years ago, a few months before the present offending, leaving his grandmother as the sole carer for him and his younger brother. His deceased grandfather was his only significant male role model. According to the more recent pre-sentence report prepared by the Department of Communities, PAG has experienced "significant grief, loss and identity issues as a result of parental estrangement". His grandfather's death has caused him added grief and he has lacked a male role model to guide him as he entered adolescence. His grandfather had begun to educate him about the male aspects of traditional Wik life but he was not fully initiated before his grandfather's death. These issues have predisposed him to a heightened likelihood of engaging in negative behaviour during early adolescence. PAG admitted that he knew that what he did to the complainant was "a crime".

[265] PAG's grandmother deposed in an affidavit recently filed in this Court on his behalf that PAG was "a helpful boy" who "has had no real father figure in his life." He "helps looking after the younger kids". She supports him because he is her first grandson and she needs his help and support. She considers that he understands what

he did was “bad” and he has told her that it was “Really bad what I done and I feel really sad for that girl.”

[266] The pre-sentence report states that he was closely connected to his peer group and that he "lacks the required skills or motivation to deal with negative peer influence, particularly in relation to offending behaviour". Family dysfunction, lack of a positive male role model and the absence of appropriate sex education have also contributed to his offending behaviour. The report records that he has demonstrated "some empathy towards his victim", "feels bad for having had sex" with her and wishes to apologise. He also understands that he has brought shame on his family and to the whole Aurukun community. He understands that this and other offences have not only impacted on his life but also on others who care for him. He has spent eight days in custody on remand for this offence. He was subject whilst on bail for this offence for about 12 months to a curfew from 8.00 pm to 7.00 am. His grandmother imposed further restrictions on him. She gave him a severe verbal reprimand, made him go to bed without food, made him assist with household chores and placed him under an additional curfew whereby he had to return home immediately after school. She advised that he accepted her punishment without protest and complied with her requirements. PAG and his co-offenders have experienced a level of community ostracism and his grandmother spoke of the shame brought on the family such that she did not wish to face the Aurukun community.

[267] In discussing the sentencing options, the pre-sentence report emphasises PAG's age now and at the time of the offence which was committed 21 months ago, that he has been subject to a probation order for some months, that he has begun to take responsibility for the offence and has agreed to participate in all options available to the Court. If he remains in Aurukun he will reside with his grandmother and other family members and continue with his schooling. He has developed an awareness of risk factors for his offending and has identified longer term goals including continuing his education with a view to obtaining an apprenticeship as a mechanic with the mining company, CHALCO, to be based in Aurukun. He indicated a willingness to comply with a probation order which would allow him to participate in various programs including the GYFS program. In discussing the sentencing option of detention, the report noted PAG's age, his time in custody, that a period of detention may serve to further foster relationships with offending peers and that he has previously demonstrated that he is able to utilise support and assistance under supervised orders where required, the impact on his personal development of being removed from his family, community and traditional way of life and that he is currently attending school.

[268] The psychological report from the GYFS, dated 18 April 2008, says that he has “maintained a relatively consistent attendance at school over recent months ... [he] is reported to have distanced himself from his antisocial peer group ... [he] has apparently stayed out of trouble, has not come to the attention of police for more than 12 months, and is compliant with his current Youth Justice Orders”. Furthermore, he has adopted a leadership role at school by encouraging others to attend. He has been praised by the school principal for his positive attitude. There is no suggestion that PAG has sexually deviant interests. He has matured and developed pro-social beliefs in understanding that his conduct was wrong. These circumstances give some cause for optimism as to his rehabilitation, which may be fostered by subjecting him to the maximum of three years probation.

[269] If PAG were sentenced to detention, he would continue to receive educational opportunity, and his life would be more structured and disciplined; but he would certainly be exposed to a negative peer group. It seems that this may not now occur if he were to remain in the community with the significant support and programs available through a lengthy, structured probation order. Despite the very serious aspects of the offence, detention is not the only appropriate course.[120]

[270] Accordingly, we consider that the probation order currently in place should be set aside. For the reasons given earlier, a conviction should be recorded. We would sentence him to three years probation on the same conditions as are applicable to YC and KY.

7.5 BBL

[271] The Solicitor-General on behalf of the Attorney-General submitted that, on the information before the sentencing judge, a sentence of two to three years detention is appropriate for BBL.

[272] BBL turned 14 years of age around about the time he raped the complainant. He was therefore closer to her in age than most of his co-offenders. For some of that time, he was subject to a six month conditional release order made on 23 May 2006 for numerous offences in relation to property. On 21 February 2006, he had been given nine months probation for property related offences. He committed further property offences after the rape but has apparently not committed any further offences for about 12 months. He has no prior history of sexual offences.[121]

[273] It must be noted here that, uniquely among the respondents, BBL told police that the complainant objected to having sex with him. He did not want to have sex with her but another male (who was not charged) forced him to have sex with the complainant. He knew that she did not want to have sex with him, and yet he persisted. That circumstance of aggravation is a matter of concern. He knew that what he did was wrong: he said that he would have been angry if someone had done to a member of his family what he did to the complainant. He has stated that in future he would ask a female how old she was before considering sex. Of further concern in relation to BBL is the circumstance that his criminal history includes an offence of setting man-traps. The sentencing judge was, however, informed by a representative of the Department of Communities that, fortunately, no-one was hurt as a result of that dangerous and foolish episode referred to earlier in these reasons.

[274] BBL assisted the police in frankly admitting his offending (including the complainant's unwillingness) and he pleaded guilty at an early stage.

[275] BBL resides with his mother. Her regular consumption of alcohol has limited her ability to care for him while he was growing up. Regrettably, his father, said to be the first Aurukun man to work in the Council office, died when BBL was two years old. He has grown up without a significant male role model. He has received limited education in relation to appropriate behavioural boundaries.

[276] It appears that his association with his peer group within the Aurukun community including his co-offenders has been a major contributing factor in his offending

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120 *Juvenile Justice Act*, s 150(2)(e), Sch 1, Charter of Juvenile Justice Principles, principle 17.

121 The criminal history records no prior sexual offences but the GYFS report records a conviction for a previous sexual offence in 2005 committed with PAG and KY on a 12 year old girl.

behaviour. He told police that he felt forced to have sex with the complainant by a co-offender. BBL's mother attempted to remove him from the influences of his peer group by sending him to school in Weipa, but he returned to Aurukun because of family connectedness.

[277] BBL is presently attending school in Aurukun. He is of Wik descent and English is his second language. He has also obtained employment. The more recent pre-sentence report prepared by the Department of Communities considers that limited parental support and supervision, lack of appropriate sexual education and male role models and the negative influence of peer groups have contributed to his offending behaviour. He has expressed a willingness to comply with all conditions and requirements of a probation order and understands the consequences of non-compliance. In considering the question of a detention order, the report noted BBL's age, that a period of detention may foster relationships with offending peers, that he has demonstrated through previous supervised orders that he is able to utilise community based support and assistance and that a period of detention may disrupt his education.

[278] The GYFS psychological report notes that BBL has not previously been afforded the opportunity of specialist intervention to address his behaviour. His risk of future sexual or non-sexual offending may be reduced by him engaging in sexual offence-specific treatment. He is suitable to participate in such treatment and is likely to benefit from it. He has matured since the offence. He is currently in a peer-age relationship which may assist him in separating from the undesirable peer group. His personal risk of sexually re-offending has decreased as a result.

[279] Importantly, his performance over the past months while on probation has been encouraging. The more recent pre-sentence report records that he has had limited contact with his co-offenders since the rape of the complainant. He now feels remorse for his offending against the complainant. He is willing to participate in a sexual offending treatment program. If he remains in the community he will live with his mother and continue his schooling.

[280] Having regard to the positive steps undertaken by BBL towards rehabilitation since this offence occurred more than two years ago, and notwithstanding the circumstances of aggravation of his offending, we consider that probation should be continued, both in his interests and in the interests of the community. It is the aggregation of the circumstances covered by the preceding paragraph which, in the end, persuades us that the last resort sentencing option of detention is not warranted, even though the seriousness of his offence against the complainant was aggravated by her objections to having sex with him.

[281] Accordingly, we consider that his current probation order should be set aside. For the reasons given earlier, a conviction should be recorded. He should be sentenced to probation for three years on the same conditions as YC, KY and PAG.

7.6 AAC

[282] The Solicitor-General on behalf of the Attorney-General submitted that, on the information before the sentencing judge, a sentence of 12 months detention is appropriate for AAC.

[283] AAC was 13 years old when he raped the complainant. He was the youngest of all the respondents. He is now 15 years old and will be 16 in July. At the time he raped the complainant, he was subject to two probation orders for property offences, offences of

dishonesty and assault. He was also subject to a community service order for one count of serious assault. The probation and community service orders had been made in February 2006. He has no prior history of sexual offences.

[284] The most recent pre-sentence report prepared by the Department of Communities show that AAC has previously been the subject of five other probation orders, three other community service orders and two detention orders. The psychological report from GYFS refers also to four reprimands.

[285] AAC has a poor record of school attendance and has low literacy and numeracy levels. He is currently neither attending school nor is he in employment. He has a record of drug and substance abuse. His upbringing has been characterised by a lack of adult supervision. He seeks peer acceptance and continually demonstrates poor decision-making. Since 2001, he has resided with his grandmother. His uncle is now prepared to assist AAC as a positive male role model.

[286] AAC has been exposed to domestic and extra-domestic violence from an early age. He has been sexually abused from the age of eight. When he was nine he engaged in sexual behaviour with the present victim. As a result, they were both treated for syphilis.

[287] The lack of appropriate male role models has led to a lack of respect for women and has contributed to his involvement in the offence of present concern. Of great concern is the circumstance that long term chronic substance abuse has resulted in his having limited cognitive capacity to control his behaviour.

[288] It is said by officers of the Department of Communities that he has demonstrated some remorse for his offence. It is also said, however, that he continues to be strongly influenced by his contact with a negative peer group. It is said that his offending behaviour might be exacerbated by an order for detention. On the other hand, continuing exposure to "a cohort of offending peers" is just as, or more, likely to occur if this Court were to make an order for a community based form of punishment.

[289] The more recent pre-sentence report is dated 12 March 2008. It records that AAC has indicated a willingness to comply with a probation order including one making attendance at and compliance with programs. In discussing the sentencing option of a detention order, it notes that this would result in AAC being exposed to a cohort of offending peers which may exacerbate his offending behaviour and it would further erode his relationship with his family and community.

[290] The most recent of the reports in respect of AAC is the GYFS psychological report dated 18 April 2008. It noted the following. AAC was verbally aggressive and threatening towards his grandmother with whom he was residing. After the interview, he again verbally abused her. She indicated that she was worried about her physical safety if she returned home. AAC was difficult to engage in interview and had difficulty controlling his emotions and behaviours so that the interview was terminated prematurely. This may have been because AAC was confused ~~and~~ or frustrated about having to participate in another interview so soon after having been interviewed for the pre-sentence report the previous week. The report also considered that AAC may have experienced increased shame associated with media reports of his offence. His grandmother was distressed when discussing AAC's substance abuse but expressed her commitment to parenting and supporting him and requested help to guide and assist him in this respect. He has mostly been raised by his grandmother. The report

concludes that factors which are likely to perpetuate AAC's sexual offending behaviour include "access and opportunity, ongoing dysregulation, antisocial attitudes, continued confusion regarding sexual norms and boundaries, difficulties in interpersonal relationships, and sustained association with an antisocial peer group that condones underage sexual behaviour." The factors which, if successfully managed, may reduce this risk are that AAC is suitable to engage in sexual offence-specific treatment and is likely to benefit from such intervention, including:

"**Individual Treatment Elements**

A. Developing strategies and skills for behavioural restraint eg. building skills in behavioural and emotional self-regulation, problem solving skills training and consequential thinking
B. Sexual offence specific interventions including challenging cognitive distortions specifically associated with this behaviour, victim awareness, education about appropriate sexual behaviour, and safety planning to more effectively assist [AAC] with self-management strategies to cope effectively within high risk situations
C. Strategies aimed to increase [AAC's] engagement in prosocial behaviour including building a pro-social peer group, building stronger connections to other pro-social community structures and activities, and building healthy relationship skills.

Individual treatment elements could be provided by GYFS, in collaboration with local partners, if this is ordered by the court. [AAC's] treatment intervention is likely to be of a longer duration than his juvenile co-offenders. This intervention can be offered by GYFS irrespective of location.

There is also a range of contextual factors that assist in understanding [AAC's] sexually abusive behaviour. Interventions in the absence of contextual change may have limited efficacy. Case specific systemic interventions therefore will form a critical part of the overall intervention plan and should include:

Systemic Interventions

A. [AAC] to engage in structured activities that promote prosocial behaviour
B. Strengthen relationships between [AAC] and his grandmother and facilitate increased supervision within the home
C. Opportunities to be provided to [AAC] to engage in cultural activities and to develop a positive identity within the family and community
D. [AAC] to build connections to positive male role models
E. Strong messages about appropriate behaviour, sexuality education and the promotion of healthy relationships to be available on a community level, ensuring more youth in Aurukun also have improved access to this information.

> [AAC's] grandmother will require significant support and guidance to address [AAC's] behaviour within the home and facilitate increased supervision. The support and encouragement of [his grandmother] will be critical for enhancing [AAC's] engagement with his treatment process.
>
> Any prospective intervention will need to take into account cultural considerations, including the involvement of local Indigenous workers in intervention planning and delivery. This will assist in minimising potential cultural and language barriers and ensure treatment is offered locally to [AAC]. To achieve this, GYFS would identify an Indigenous person or agency working within the Aurukun community, to assist in treatment provision, in conjunction with GYFS staff. GYFS would provide supervision and support to these collaborative partners, in addition to having some direct involvement in the provision of intervention to address the above individual and systemic goals. Collaboration with local practitioners and community members has the potential to build the capacity of the local community to address broader sexual abuse issues at a community level.
>
> In addition to the above, it is recommended that [AAC] receive interventions from other service providers external to GYFS. These should include:
>
> **External Interventions**
>
> A. Engagement with an experienced mental health professional to assess and provide treatment for his victimisation experiences and trauma symptomatology.
> B. Referral to a neuropsychologist for assessment of cognitive impairment relating to extensive inhalant use.
>
> Finally, it is noted that the treatment plan outlined above is less likely to be effective in the absence of broader community level interventions targeting a range of general social concerns including poverty, limited employment and recreational opportunities, substance abuse and community violence. Current government sponsored interventions are providing a wealth of resources in communities and this presents a unique opportunity to contextualise individual interventions within broader systemic change and the promotion of a safe community."

[291] AAC's grandmother deposed in an affidavit recently filed on his behalf that AAC had twice tried to hang himself in Aurukun; tried to kill himself when he was at Cleveland Detention Centre; and that she was worried that he would hurt himself if he were sent away to detention. She supports all her children and grandchildren including AAC. She confirmed many of the dreadful details of AAC's background. She stated that he was behaving himself and helping her around the house. She hoped that he would not be sent away to Cleveland but realised she had "to leave it to the Courts".

[292] Because of the enormity and variety of problems faced by AAC, and the contextual problems relating to the Aurukun community in which he lives, the program for his

treatment suggested in the GYFS psychological report is ambitious. In contrast to YC, KY, PAG and BBL, AAC's chronic substance abuse and his present attitudes suggest that his rehabilitative prospects are not presently promising. There are factors in his favour. The reports that have been tendered on his behalf do however hold out some hope. AAC assisted the police in admitting his commission of the present offence. He was the youngest of all the co-offenders and therefore the closest in age to the victim. He did not commit the offence in company and nor has there been any suggestion such as in BBL's case, that the complainant was a reluctant participant in the offence. Parity issues between the juvenile co-offenders are also relevant. The contextual factors pertaining to AAC personally are perhaps the most compelling of all the respondents in explaining how AAC, a 13 year old boy, came to commit this serious offence. They are not, however, an excuse for his conduct. Rape of a 10 year old girl is such a serious offence that, even in the particular circumstances of AAC's case, a non-custodial sentence can only be imposed where it is clear that this will be in the best interests of his rehabilitation and the community will be adequately protected. That, sadly, is not so in AAC's case.

[293] We are finally persuaded that, as in KZ's case, there is no realistic alternative to a detention order. For the reasons given earlier, a conviction should be recorded. Balancing all the competing considerations, we consider that he should be sentenced to two years detention. His circumstances are such as to warrant his release after serving 50 per cent of that term.[122] There should be a declaration that he has served one day in custody on remand for this offence to be taken as time served under this order for detention.

[294] Having regard to AAC's chronic substance abuse, it is important to recognise that if he were ordered to serve a period of detention, he would be afforded the opportunity to address his problems with substance abuse. He would also have access to therapeutic programs to address his offending behaviour and would be provided with educational and vocational opportunities which he is unlikely to have if he continues to live within the Aurukun community.

[295] AAC must be denied access to alcohol and drugs for his own prospects of rehabilitation and in order to protect the community. In detention, he will have structure in his life and educational and vocational opportunities which are lacking at Aurukun. We have come to the conclusion that a period in detention for two years is the only course which has any prospect of achieving these objectives. There are special circumstances under s 227 *Juvenile Justice Act* warranting his release after 50 per cent. These are his particularly young age, the "pressures and disadvantages" pertaining to him as referred to earlier in this judgment, his co-operation with the police and his early plea of guilty.

8. Summary

[296] The Court has concluded that the sentencing of the respondents in these cases was attended by a number of errors. These errors were so serious as to produce a clear miscarriage of justice. The errors, and the resulting miscarriage of justice, were so serious, and the circumstances in which they occurred so extraordinary, as to warrant allowing the Attorney-General's appeals, even though the sentences which were originally imposed were essentially in accordance with the submissions put to the learned sentencing judge by the prosecution. The prosecution must bear substantial

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122 *Juvenile Justice Act*, s 227.

responsibility for what occurred, but the errors which attended the sentencing of the respondents cannot be accounted for by the submissions of the prosecution. The imposition of a proper sentence was ultimately the responsibility of the judge.

[297] The sentences imposed upon the adult respondents disregarded the approach established by decisions of this Court as to the sentencing of adults who sexually abuse children. Each respondent's individual circumstances were not given proper attention, even to the extent that the criminal responsibility of the adult offenders was equated to that of the child offenders. And the sentences originally imposed involved an abnegation of the duty of the court to protect innocent or vulnerable members of the community from crime.

[298] In re-sentencing each of the respondents, this Court has fixed a sentence within the binding statutory framework applicable to adults and juveniles respectively. In each case the sentence is intended to reflect the gravity of the offending of each respondent while giving necessary recognition to each respondent's plea of guilty, and the circumstances of disadvantage relevantly suffered by him.

[299] In the case of each of the adult offenders, the Court's approach has been to impose the most lenient sentence which may be imposed consistently with the gravity of the rape of a 10 year old girl, committed by an adult acting in company with other men. The gravity of the offence is such that a sentence of imprisonment is required in each case in order to make it clear that the community regards the offences as unacceptable, and to provide a measure of protection to vulnerable members of the community.

[300] In the case of each of the juvenile offenders, the Court's approach has been to seek to balance the statutory requirement to protect the community with the statutory requirements that a child with no apparent family support should not receive a more severe sentence because of that, and that a custodial sentence should only be imposed "as a last resort and for the least time that is justified in the circumstances",[123] bearing in mind that the rape of a 10 year old child should usually result in a custodial sentence in the absence of significant exculpatory circumstances.

[301] In the case of the juvenile respondents referred to by the designations YC, KY, PAG and BBL, we consider that, because the rehabilitation of offenders serves to protect the community, the Court should act upon the evidence of their efforts to move away from the negative peer group relationships. The influence of these peer groups is the most serious manifestation of the many disadvantages which have beset their young lives. We consider that their efforts in the appreciable period which has elapsed since their offending in mid-2006 warrant a sentence of the longest period of probation available under the law. This would recognise their attempts to rehabilitate themselves, and provide them with the further support which each of them needs to pursue his rehabilitation. These orders are made, both in the interests of each of them, and in the interests of the community.

[302] The offence committed by each of the juvenile respondents was so serious that, having regard as well to their criminal histories, a conviction must be recorded.

[303] In relation to each of the juvenile respondents designated KZ and AAC, the Court has concluded that a sentence of detention is necessary, both to promote the rehabilitation of each of those offenders and to protect the community. It is evident that KZ and

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123 *Juvenile Justice Act*, Sch 1, Charter of Juvenile Justice Principles, principle 17.

AAC have been unable to distance themselves from negative peer group influences. Because of AAC's extreme youth, the period of detention to which he is sentenced is two years, as opposed to three years in the case of KZ. They should each be released after serving 50 per cent of those periods because of their pleas of guilty, the particular "pressures and disadvantages" referred to earlier in this judgment, and, in AAC's case, his very young age at the time of his offending and his co-operation with the police.

9. Orders

[304] The Court makes the following orders:

In CA No. 350 of 2007, *R v WZ*:

1. Appeal allowed;
2. Set aside the sentence imposed in the District Court on 24 October 2007;
3. Order that the respondent be imprisoned for six years and fix a parole eligibility date of 13 June 2010;
4. There will be a declaration that 55 days pre-sentence custody (from 19 September to 5 November 2006 and 16 November to 22 November 2006) be treated as time served under this sentence;
5. Order that a warrant issue for the arrest of the respondent to lie in the registry for seven days.

In CA No. 343 of 2007, *R v KU*:

1. Appeal allowed;
2. Set aside the sentences imposed in the District Court on 24 October 2007;
3. On each count order that the respondent be imprisoned for concurrent terms of six years and fix a parole eligibility date in each case of 13 June 2010;
4. Order that a warrant issue for the arrest of the respondent to lie in the registry for seven days.

In CA No. 345 of 2007, *R v WY*:

1. Appeal allowed;
2. Set aside the sentences imposed in the District Court on 24 October 2007;
3. On each count order that the respondent be imprisoned for concurrent terms of six years and fix a parole eligibility date in each case of 13 June 2010;
4. Order that a warrant issue for the arrest of the respondent to lie in the registry for seven days.

In CA No. 351 of 2007, *R v YC*:

1. Appeal allowed;
2. Set aside the sentence imposed in the District Court on 24 October 2007;
3. Order that a conviction be recorded;
4. Order that the respondent be sentenced to three years probation on the usual conditions, with a further condition that the respondent attend the Griffith Youth Forensic Service or any other program as directed by the Department of Communities, comply with all reasonable

requirements of the program and maintain a rate of progress which is satisfactory to the treatment program;

5. Direct that the respondent's legal representative explain to the respondent the purpose and effect of this order in accordance with s 158 of the *Juvenile Justice Act* 1992 (Qld) and the consequences of non-compliance.

In CA No. 347 of 2007, *R v KY*:

1. Appeal allowed;
2. Set aside the sentences imposed in the District Court on 24 October 2007;
3. Order on each count that convictions be recorded;
4. Order on each count that the respondent be sentenced to three years probation on the usual conditions, with a further condition that the respondent attend the Griffith Youth Forensic Service or any other program as directed by the Department of Communities, comply with all reasonable requirements of the program and maintain a rate of progress which is satisfactory to the treatment program;
5. Direct that the respondent's legal representative explain to the respondent the purpose and effect of this order in accordance with s 158 of the *Juvenile Justice Act* 1992 (Qld) and the consequences of non-compliance.

In CA No. 348 of 2007, *R v KZ*:

1. Appeal allowed;
2. Set aside the sentence imposed in the District Court on 6 November 2007;
3. Order that a conviction be recorded;
4. Order that the respondent be sentenced to detention for three years to be released after serving 50 per cent of that term;
5. There will be a declaration that 41 days pre-sentence detention (from 1 to 3 July 2006, 19 to 20 September 2006, 5 October to 10 November 2006, 7 to 8 December 2006 and 19 to 20 March 2007) be treated as time served under this sentence;
6. Order that a warrant issue for the arrest of the respondent to lie in the registry for seven days;
7. Direct that the respondent's legal representative explain to the respondent the purpose and effect of this order in accordance with s 158 of the *Juvenile Justice Act* 1992 (Qld).

In CA No. 346 of 2007, *R v PAG*:

1. Appeal allowed;
2. Set aside the sentence imposed in the District Court on 24 October 2007;
3. Order that a conviction be recorded;
4. Order that the respondent be sentenced to three years probation on the usual conditions, together with a condition that the respondent attend the Griffith Youth Forensic Service or any other program as directed by the Department of Communities, comply with all reasonable requirements of the program and maintain a rate of progress which is satisfactory to the treatment program;

5. Direct that the respondent's legal representative explain to the respondent the purpose and effect of this order in accordance with s 158 of the *Juvenile Justice Act* 1992 (Qld) and the consequences of non-compliance.

In CA No. 349 of 2007, *R v BBL*:

1. Appeal allowed;
2. Set aside the sentence imposed in the District Court on 6 November 2007;
3. Order that a conviction be recorded;
4. Order that the respondent be sentenced to probation for three years, on the usual conditions, together with a condition that the respondent attend the Griffith Youth Forensic Service or any other program as directed by the Department of Communities, comply with all reasonable requirements of the program and maintain a rate of progress which is satisfactory to the treatment program;
5. Direct that the respondent's legal representative explain to the respondent the purpose and effect of this order in accordance with s 158 of the *Juvenile Justice Act* 1992 (Qld) and the consequences of non-compliance.

In CA No. 344 of 2007, *R v AAC*:

1. Appeal allowed;
2. Set aside the sentence imposed in the District Court on 24 October 2007;
3. Order that a conviction be recorded;
4. Order that the respondent be sentenced to two years detention to be released after serving 50 per cent of that term;
5. There will be a declaration that one day pre-sentence detention (from 8 to 9 October 2007) be treated as time served under this sentence;
6. Order that a warrant issue for the arrest of the respondent to lie in the registry for seven days;
7. Direct that the respondent's legal representative explain to the respondent the purpose and effect of this order in accordance with s 158 of the *Juvenile Justice Act* 1992 (Qld).