May 2022

Final Report

The '80 per cent Rule': The Serious Violent Offences Scheme in the *Penalties and Sentences Act 1992* (Qld)

Queensland Sentencing Advisory Council

Warning to readers

This report contains subject matter that may be distressing to readers. Material describing serious violent offences, including case examples drawn from sentencing remarks and subject-matter expert interviews, and descriptions of the impact these offences can have on victims are included in this report. If you need to talk to someone, support is available:

DV Connect: 1800 811 811

Lifeline Australia: 13 11 14

Mensline: 1800 600 636

Queensland Sexual Assault Helpline: 1800 010 120

Victim Assist Queensland: 1300 546 587 (business hours) or email: VictimAssist@justice.qld.gov.au

The '80 per cent Rule': The Serious Violent Offences Scheme in the *Penalties and Sentences Act 1992* (Qld): Final Report

This Final Report is available for download from the Council's website: www.sentencingcouncil.qld.gov.au.

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Review artwork

The artwork in the cover design is a visual representation of words contained in transcripts of subject-matter expert interviews conducted by the Council for this reference. Words that are larger appeared more frequently in those transcripts. This word cloud was automatically generated with design elements added.

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The Queensland Sentencing Advisory Council

The Queensland Sentencing Advisory Council is established by section 198 of the *Penalties and Sentences Act 1992* (Qld). The Council provides independent research and advice, seeks public views and promotes community understanding of sentencing matters. The Council's functions, detailed in section 199 of the Act, include to:

- inform the community about sentencing through research and education;
- engage with Queenslanders to understand their views on sentencing; and
- advise the Attorney-General on matters relating to sentencing, at the Attorney-General's request.

Further information

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Queensland Sentencing Advisory Council
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12 May 2022

The Hon Shannon Fentiman MP
Attorney-General and Minister for Justice, Minister for Women and
Minister for the Prevention of Domestic and Family Violence
GPO Box 149
BRISBANE QLD 4001

Dear Attorney-General

On 9 April 2021, you referred Terms of Reference to the Queensland Sentencing Advisory Council asking it to review the operation and efficacy of the serious violent offences scheme in Part 9A of the *Penalties and Sentences Act 1992* (Qld).

I am pleased to provide you with the Council's final report on this reference, *The '80 per cent Rule': The Serious Violent Offences Scheme in the Penalties and Sentences Act 1992 (Qld): Final Report*.

Yours sincerely

John Robertson
Chair

Enc.

Queensland Sentencing Advisory Council

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Statement on conflicts of interest: Any conflicts arising during Council reviews are managed in accordance with the Council's *Conflicts of Interest Policy*. More information is available on the Council's website.

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Preface

The serious violent offences (SVO) scheme Terms of Reference from the Attorney-General proved to be both challenging and rewarding. We are grateful to the Attorney-General for referring this review.

The number of offenders who are subject to the SVO scheme fortunately represents only a very small proportion of those who are sentenced in Queensland. Yet the offences committed by these offenders cause enormous harm to victims and the wider community and often have a profound and enduring impact on people's lives.

The Council was asked to consider the operation and efficacy of the SVO scheme. This included how the scheme is currently applied, its impact on court sentencing practices, and whether it creates any inconsistencies or constrains the sentencing process.

This project was not just a straightforward review of a technical area of sentencing law — instead, it raised many fundamental questions about how the criminal justice system can best respond to this form of serious offending, including how the purposes of punishment, denunciation and community protection can best be met, what works in reducing the risks of reoffending; what role parole plays, and how competing interests and views can best be balanced. We came to fully appreciate the complexity of this review the deeper we delved into these issues.

The Council consulted extensively, through our usual submissions process, as well as holding key stakeholder meetings and roundtables. We are grateful to all individuals and organisations who made submissions and helped the Council understand the application, impact, and wider significance of the SVO scheme. A diversity of views was expressed, ranging from support for the repeal of the SVO scheme to expanding its mandatory application. The Council considered all views carefully in the development of its recommendations.

One of the more challenging aspects of the review was to consider the scheme's impact on victim satisfaction, given the very serious consequence to victims and victims' families that often follows from this type of offending. To better understand this aspect, we consulted with victims, the organisations that support them and advocate on their behalf, and those with a role in providing information to victims about court processes.

The Council is enormously grateful to victims who took the time to share their personal experiences to help us better understand their views on sentencing and how current criminal justice system responses to serious forms of offending might be improved. We were moved by their stories and want to sincerely thank every person who participated in these consultation sessions. It takes courage to talk about and revisit a traumatic experience of loss and grief.

The Council also conducted extensive subject-matter expert interviews to understand the impact of the SVO scheme on sentencing practices. Those who participated in these interviews included members of the judiciary from the District and Supreme Courts, legal practitioners, public prosecutors, members of the Parole Board Queensland, representatives from victim support and advocacy organisations and others, including legal and transitional support services who work with prisoners. The Council extends its sincere appreciation to all those who participated for sharing their invaluable insights, as well as to those who provided the necessary permissions for this work to proceed.

The Council wishes to express its gratitude to members of our Aboriginal and Torres Strait Islander Advisory Panel for providing advice on the impact of the recommendations for reform on Aboriginal and Torres Strait Islander defendants, and on potential effects on the serious issue of over-representation.

We also acknowledge the valuable contribution of members of the Council's Consultative Forum for openly sharing their views and providing us with a platform for confidential discussion and the exchange of ideas. Your support of the Council's work is greatly appreciated.

Through consultation, data and case law analysis and consideration of the research evidence, the Council learnt that the SVO scheme and schemes like it fulfil an important function in the sentencing process. They formally recognise the harm caused by serious forms of offending by requiring a significant proportion of the sentence to be served in custody prior to parole eligibility. When an SVO declaration is made, we were told by victims and victim support organisations that it greatly contributes to victims' satisfaction with the sentencing outcome, thereby contributing to victim and public confidence in sentencing.

However, we also learnt that the SVO scheme — as it is currently operating — is not fully meeting its intended objectives and is in need of reform. We found strong evidence that the scheme is constraining the sentencing process and is too restrictive on judicial discretion. The scheme was referred to, by those working with it on a regular basis, as arbitrary and blunt, as distorting sentencing practices, adding unnecessary complexity to sentencing, and as severely curtailing judges' discretion.

From a victim's perspective, we heard concerns about the scheme's impact in reducing head sentences to below 10 years, and the very different outcomes that could result in the minimum period to be served prior to parole eligibility depending on whether a declaration was made. When the conclusion reached was that an offence was

not 'seriously violent enough' to justify a declaration being made, this was met with feelings of disbelief, anger and frustration that the seriousness of the offending had not been properly recognised.

The Council was particularly concerned by the relatively short period of time some offenders subject to a declaration spend supervised on parole. The Council was also very concerned about the number of offenders who do not apply for parole and are subject to release at the end of their sentence with no supervision at all, which does not adequately support the important sentencing purpose of community protection.

This is a difficult topic to grapple with. It may seem counterintuitive that a better outcome may be achieved if the most serious offenders spend less, rather than more time in prison. However, the evidence on the importance of parole for community safety is clear. It is in the interest of community safety for serious offenders who have spent a significant amount of time in prison to be supervised in the community upon their release and to serve a longer, rather than shorter period under supervision.

The Council's final recommendations were not easy to reach. However, we are confident that our careful and systematic consideration of data, information and existing evidence guided us towards recommendations that will greatly improve the SVO scheme if adopted.

Balancing all the evidence and relevant considerations, the Council reached the view that the current SVO scheme should be reformed and recommends that a presumptive scheme be adopted. That is (in simple terms), amendments to the present law that will require a judge to presume, when sentencing for an offence subject to the scheme, that a declaration will be made, unless it is in the interests of justice in the particular case not to do so.

In our view, this form of scheme, which will apply to sentences of greater than 5 years (or 10 years or more for serious drug offences) best balances the need to properly recognise the seriousness of these offences, while at the same time providing courts with some flexibility to respond to the individual circumstances of each case.

Under the reforms recommended, parole eligibility will no longer be fixed at 80 per cent, but rather will be able to be set within a set range of 50 to 80 per cent, while also allowing a court to depart where this is in the interests of justice. This flexibility will ensure the reformed scheme does not erode a sentencing court's ability to deliver individualised justice, given the Council's view that a 'one-size-fits-all' approach does not serve the community well. The recommended presumptive scheme will strike the right balance by ensuring sentencing outcomes reflect the seriousness of these offences and declarations are only made in appropriate cases.

Other recommendations include the creation of a separate and more targeted schedule of offences to apply for the purposes of the reformed scheme, and renaming the scheme the 'serious offences scheme' to reflect the fact that all offences included within the scheme have potential to cause serious harm, but not all are inherently violent, such as serious drug offences.

We hope that our recommendations will contribute to creating a better criminal justice response to serious offending — a topic far more complex and wide-ranging than we were able to address in this review.

We express our continuing gratitude to Council members who generously give their time and expertise to advise on the reference. We would like to particularly thank Phil McCarthy, Helen Watkins and Warren Strange for forming the Project Board and providing outstanding leadership over the duration of this review.

We also want to particularly thank all members of the Council's Secretariat for working tirelessly on this review. Each and every one of you supports our work with your dedication and professionalism. In truth, the extensive work that underpins this report is primarily yours. We thank you for your expertise, intellectual rigour, resilience and good humour.

John Robertson
Chair
Queensland Sentencing Advisory Council
May 2022

Dan Rogers
Project Sponsor and Council Member
Queensland Sentencing Advisory Council
May 2022

Acknowledgments

The Council's inquiries are informed by the knowledge and expertise of its members, research and policy analysis undertaken by staff, and the contributions by key criminal justice agencies, other stakeholders and community members.

The Council would like to acknowledge the contributions of all of those who made submissions, attended meetings to discuss issues relating to the review and provided information and data to inform the preparation of the Final Report. While not exhaustive, those who have contributed to the review include representatives of: the Aboriginal and Torres Strait Islander Legal Service (Qld) Ltd, Aged and Disability Advocacy Australia, the Australian Lawyers Alliance, the Bar Association of Queensland, Bravehearts, Centre Against Sexual Violence, DVConnect, Fighters Against Child Abuse Australia, Full Stop Australia, Gold Coast Centre Against Sexual Violence, knowmore, Legal Aid Queensland, the Office of the Commonwealth Director of Public Prosecutions, the Office of the Director of Public Prosecutions, the Parole Board Queensland, Queensland Corrective Services, the Queensland Homicide Victims' Support Group, the Queensland Law Society, the Queensland Network of Alcohol and Other Drug Agencies, the Queensland Police Service, the Queensland Sexual Assault Network, the Royal Australian and New Zealand College of Psychiatrists, Sisters Inside, and other local and interstate criminal justice agencies, academic researchers and victims and survivors of crime organisations.

The Council also thanks Court Services Queensland, members of the Supreme, District and Magistrates courts and the Heads of Jurisdiction for their support and input into our work on these Terms of Reference.

An important source of information about how the serious violent offences ('SVO') scheme impacts on sentencing practices was the Council's expert interview project. The Council is immensely grateful to all who participated in these interviews and who gave so generously of their time and expertise, as well as to those who provided the necessary approvals without which this work would not have been possible. Participants included members of the judiciary, public prosecutors, defence practitioners, representatives of victim and survivor support and advocacy organisations and legal support organisations working with offenders and prisoners. The information provided in these interviews is referenced throughout this report and has been invaluable to the Council in developing its advice and recommendations.

The Council was also asked to report on the SVO scheme's impact on victim satisfaction. To respond to this aspect of the reference, the Council consulted with victims and survivors and their families. The Council has been deeply moved by their stories and sincerely appreciates their input into this review. The important contributions and reflections of those who took part in these consultation sessions helped the Council understand the importance of sentencing outcomes and the application of the SVO scheme to victims, and how this can affect their perceptions of the criminal justice system.

The Council's Aboriginal and Torres Strait Islander Advisory Panel continues to play a critical role in the Council's work by advising the Council on the potential impacts of any reforms on Aboriginal and Torres Strait Islander peoples. The Council acknowledges the input and advice provided by the Panel towards the latter stages of the reference on these impacts. The Council was very fortunate to have the input of the Panel on this project, and thanks the members of the Panel for their continued engagement and expert advice.

In addition to hosting individual meetings, the Council convened two roundtables with key legal stakeholders on 9 November 2021 and 22 February 2022 to discuss the development of options and issues relevant to this review. The Council wishes to acknowledge the assistance provided by those who attended these roundtables in sharing their expertise and views on potential options for reform.

The Council sought advice from key contacts in Australia and internationally, from departments of justice and Attorneys-General, prosecution services, legal aid commissions and sentencing councils. Their assistance was sought in responding to a series of questions regarding the existence of mandatory and presumptive non-parole period schemes in their respective jurisdictions and relevant case law. The Council was greatly assisted by information provided by the Criminal Law Policy Section, Department of Justice Canada; NSW Law Reform Commission and Sentencing Council Secretariat; the NSW Department of Communities and Justice; New Zealand Crown Law; the South Australian Attorney-General's Department including contributions from the Office of the Director of Public Prosecutions in South Australia; Legal Services Commission of South Australia; the Victorian Sentencing Advisory Council; Law Institute of Victoria; Legal Aid Western Australia; and the Office of the Director of Public Prosecutions for Western Australia.

It is the Council's practice to establish a Project Board for every review. The Council acknowledges the significant contributions of Project Board members, Dan Rogers (Project Sponsor), Philip McCarthy QC (Senior User), Warren Strange (Senior User) and Helen Watkins (Senior User). We thank Board members for generously giving their time throughout all stages of the review.

Executive Summary

Introduction

This report presents the Queensland Sentencing Advisory Council's findings and recommendations on its review into the operation and efficacy of the serious violent offences ('SVO') scheme under Part 9A of the *Penalties and Sentences Act 1992* (Qld) ('PSA').

The review of the SVO scheme was referred to the Council in April 2021 by the Attorney-General and Minister for Justice, Minister for Women and Minister for the Prevention of Domestic and Family Violence, the Honourable Shannon Fentiman MP.

In asking the Council to undertake this review, the Attorney-General referred to:

- the importance of judicial discretion in the sentencing process;
- sentencing orders being properly administered to ensure the facilitation of a fair and just sentencing regime that protects the community's safety;
- the purpose of parole in allowing an offender to serve an appropriate portion of their period of imprisonment in the community to support their reintegration and minimise the likelihood of reoffending; and
- the significance of supporting and promoting public confidence in the criminal justice system to the overall administration of justice.

The '80 per cent rule'

The SVO scheme came into operation on 1 July 1997, through two additions to the PSA: Part 9A (the scheme itself) and Schedule 1 (the list of offences it can apply to).[1]

The SVO scheme requires a person declared convicted of the relevant listed offences[2] to serve 80 per cent of their sentence (or 15 years, whichever is less) in prison before being eligible for release on parole.[3] The making of a declaration is mandatory for sentences of imprisonment of 10 years or more, and discretionary for sentences of imprisonment greater than 5 years and less than 10 years. The SVO scheme, as it applies to sentences of 10 years or more, is a form of mandatory sentencing.

The scheme applies to certain listed offences if they are sentenced in the District or Supreme Courts. Listed offences in the scheme fall into four broad categories: non-sexual violence offences, sexual violence offences, serious drug offences and other offences.

The court also has discretion to declare a conviction for a non-scheduled offence attracting a sentence of any length, or for a scheduled offence resulting in a sentence of less than 5 years' imprisonment, a serious violent offence if it involved the use, or attempted use, of serious violence or resulted in serious harm to another person, provided the offence is dealt with on indictment.

The SVO declaration attaches to the offence rather than the offender. However, the circumstances of the offender can be relevant to the decision made by the court whether to make a declaration in circumstances where this is discretionary.

The fixing of parole eligibility at 80 per cent is very different to the usual rules applying to the setting of a parole release or parole eligibility date in Queensland. Ordinarily, courts have discretion to decide the date an offender must be released on parole (if the person is eligible for court ordered parole) or is able to apply for release on parole. If no parole eligibility is set, a person generally is eligible for parole after serving half of their sentence.[4]

For offenders with a parole eligibility date, release on parole is not automatic. The decision whether to release the offender from custody to parole is made by the independent Parole Board Queensland ('Parole Board').

The Council's approach to this review

The Council conducted extensive research and consulted widely with legal and non-legal stakeholders, including victim and survivor support and advocacy organisations.

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1 *Penalties and Sentences (Serious Violent Offences) Amendment Act 1997* (Qld) ss 10, 17.
2 Or of counselling, procuring, attempting or conspiring to commit such an offence.
3 *Corrective Services Act 2006* (Qld) s 182 ('CSA').
4 Ibid s 184(2). There are some exceptions to this. See s 184 further.

The Council undertook the review over five key stages. The initial stages included the publication of an information sheet on the SVO scheme, a call for preliminary feedback to help inform the Council's approach, and the initiation of a subject-matter expert interview project to better understand the operation of the scheme and how it impacts on court sentencing practices and pre-sentence processes.

Over August to October 2021, the Council released four Background Papers, together with a literature review produced by the University of Melbourne.[5] The background papers considered various areas of the SVO scheme's operation, including the scheme's history, minimum and standard non-parole period schemes operating in other jurisdictions, key court decisions and how the scheme is being applied based on data provided by Court Services Queensland and Queensland Corrective Services.

In November 2021, the Council released a detailed issues paper: *The '80 per cent rule': The Serious Violent Offences Scheme in the Penalties and Sentences Act 1992 (Qld): Issues Paper.* The Council invited written submissions to 34 questions posed in the Issues Paper. The Council received 20 submissions in response. Submissions are available on the Council's website, with the exception of confidential submissions.

Over June to October 2021, the Council conducted 71 interviews with a range of experts, including: members of the judiciary; public prosecutors; legal practitioners; members of the Parole Board; victims and survivor support and advocacy organisations; and other stakeholders, including organisations providing legal advice and transitional support to prisoners.

The Council also held a series of consultation sessions with victims and survivors of serious violent offences and their families and sought input from its Aboriginal and Torres Strait Islander Advisory Panel.

The publication of this report: *The '80 per cent rule': Serious Violent offences scheme in the Penalties and Sentences Act 1992: Final Report* presents the Council's findings and recommendations.

The case for reform

The review identified a number of issues with the operation and application of the SVO scheme. The Council found that the practical application and operation of the scheme is not consistent with its original intended purposes and is in need of reform.

The SVO scheme's application may be impacting on its operation and efficacy

The Council found that the scheme is applied differently across different offence categories to which the scheme can apply (sexual violence offences, non-sexual violence offences, serious drug offences and other offences).

Declarations were overwhelmingly made for 9 offences (of the 60 listed offences), with the majority of eligible Schedule 1 offences not receiving a declaration over the data period. The majority of declarations made were mandatory (72.8% over the 9-year data period). Discretionary declarations were most commonly made for non-sexual violence offences (78.2%).

The Council found that discretionary SVO declarations were less commonly made for sexual violence offences. This is suggestive of a complex broader systemic issue that sexual violence offences may be treated differently to offences involving non-sexual violence by legal practitioners and the courts.

Discretionary declarations were also rarely made for serious drug offences, with many expert interview participants expressing a view that for these offences, a serious violent offence declaration was not an appropriate designation as these offences are not inherently violent.

The Council's data analysis, information provided in submissions, and views expressed by participants in expert interviews made clear that the SVO scheme is applied inconsistently across included offence categories, impacting on its operation and efficacy.

The SVO scheme delivers on its objectives only in part and to a limited extent

When the scheme was introduced by the then Government in 1997, the scheme was primarily justified on the basis of punishment, denunciation and community protection.

The Council found that, when a declaration is made, the scheme results in offenders being detained in custody for longer. To this extent, it could be viewed as contributing to achieving the sentencing purposes of punishment and denunciation, as well as short-term community protection. However, the ability of the scheme to deliver on its intended purposes is likely compromised by the setting of the fixed non-parole period under the scheme at 80 per cent and its mandatory application to sentences of 10 years or more.

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5 Andrew Day, Katherine McLachlan and Stuart Ross, *The Effectiveness of Minimum Non-Parole Period Schemes for Serious Violent, Sexual and Drug Offenders and Evidence-Based Approaches to Community Protection, Deterrence and Rehabilitation* (Summary Report, University of Melbourne, August 2021) ('*University of Melbourne Literature Review*').

The Council found the application of the scheme can result in what would otherwise have been an appropriate head sentence needing to be adjusted down to ensure a sentence that is just in all the circumstances. This is because an offender's plea of guilty and other mitigating factors cannot be taken into account by setting an earlier parole eligibility date.

The Council did not find evidence that the scheme supports long-term community protection. The scheme results in offenders subject to a declaration spending far less time than they otherwise might in the community under supervision — if released to parole at all.[6] There is clear evidence that spending time supervised on parole reduces an offender's risk of re-offending — and this is particularly the case for higher-risk offenders who also are likely to benefit from longer periods of supervision on parole.[7]

The Council found that the SVO scheme delivers on its objectives only in part and to a limited extent and does not operate in a way that supports the objective of long-term community protection.

The SVO scheme creates unnecessary complexity and unintended consequences

The Council identified several ways in which the scheme constrains sentencing practices for serious violent offences, including by creating unnecessary complexity, unintended consequences and anomalies in the sentencing process.

The Council found that the mandatory operation of the scheme may be contributing to inconsistent sentencing outcomes — in particular between offences attracting a 10-year sentence and those falling just below this threshold. When sentencing co-offenders, the split mandatory/discretionary nature of the scheme can make it more difficult to apply the principle of parity.

The Council found that the scheme has a 'distorting effect'[8] on sentencing. This is because it restricts courts in recognising an offender's plea of guilty and other relevant mitigating factors through the setting of an earlier parole eligibility date, thereby exerting downward pressure on head sentences to ensure the imposition of a sentence that is 'just in all the circumstances'.

The scheme was also widely criticised during this review as adding an unnecessary layer of complexity to sentencing, including when dealing with multiple offences committed over different time periods or involving different complainants where only some of the offences may be subject to the SVO scheme.[9]

The Council found that the arbitrary nature of the 10-year mark at which the making of a declaration becomes mandatory and the high level at which the non-parole period is set under the scheme creates unnecessary complexity and leads to unintended consequences.

The SVO scheme contributes to victim and survivor dissatisfaction when a declaration is not made

The SVO scheme requires the offender to spend a substantial proportion of their sentence in custody prior to being eligible for release on parole.

Victims and survivors reported experiencing a great sense of relief when an SVO declaration was made. It meant that they knew the offender would have to serve at least 80 per cent of their sentence in custody. Stakeholders and participants in consultation sessions said that the deferral of parole eligibility provided victims and survivors with reassurance that the seriousness of the offending and the harm caused to them or their family members had been appropriately recognised. This contributed to their feelings of personal safety, knowing that the person would have to serve a long period in custody.

However, the scheme can give rise to significant victim and survivor dissatisfaction in circumstances where, despite the seriousness of the offence, a declaration is not made — either because the prosecution did not actively advocate for this, or the court determined that it was not appropriate to make a declaration. It can lead to victims and survivors feeling a sense of anger and frustration that an offence, which clearly involved serious violence and caused serious harm, is not recognised as such.

The discretionary operation of the scheme below 10 years was viewed as concerning on the basis that it resulted in very few declarations being made. There were concerns that the grounds upon which a discretionary declaration should be made were unclear and to the extent they existed, inconsistently applied.

The Council found that the scheme impacts on victim and survivor satisfaction with the sentencing outcome when a declaration is not made. This can contribute to re-traumatisation if the offence was not recognised as 'seriously violent enough' and subsequent feelings of alienation from the criminal justice process.

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6 For more information, see Part B, Chapter 9.

7 See, for example, Evarn J. Ooi and Joanna Wang, 'The Effect of Parole Supervision on Recidivism' (*Crime and Justice Bulletin*, No. 245, February 2022, NSW Bureau of Crime Statistics and Research) ('*The Effect of Parole Supervision on Recidivism*'); and *University of Melbourne Literature Review* (n 5) 13.

8 *R v Sprott; Ex parte A-G* (Qld) [2019] QCA 116, [41] (Sofronoff P, Gotterson JA and Henry J agreeing) ('*Sprott*').

9 *R v Dutton* [2005] QCA 17 cf *R v Lee* [2021] QCA 233.

The SVO scheme may limit rights protected under the *Human Rights Act 2019*

The Council was asked to consider the compatibility of the current scheme to the rights contained within the *Human Rights Act 2019* ('HRA'). The Council was primarily concerned with compatibility issues that might arise from the SVO scheme's mandatory operation.

The Council views the mandatory component of the SVO scheme as giving rise to human rights concerns as it constrains sentencing and can lead to inconsistencies between sentences that attract an SVO declaration and those that do not.

It thereby interferes with the court's capacity to maintain parity and consistency. As courts are restricted in their ability to recognise relevant mitigating factors in setting the non-parole period — such as a plea of guilty or cooperation with law enforcement — it limits the ability of a court to consider individual circumstances when setting the head sentence.

The Council acknowledges that the scheme's compatibility with rights of victims and survivors of crime needs to be considered, in particular the rights to be protected from torture and cruel, inhuman or degrading punishment, the right to life, and the right to security of person. In the Council's assessment of human rights, it balanced the rights of both victims and offenders.

The Council is of the view that the SVO scheme may limit rights protected under the Human Rights Act and that there are less restrictive and reasonably available ways to achieve the purposes of the SVO scheme.

The Council's recommendations to reform the SVO scheme

On the basis of the issues identified above, the Council recommends retaining a scheme for serious offences and reforming the existing scheme to allow it to better meet its purposes of punishment, denunciation and community protection.

Retention of minimum non-parole period scheme for serious offences

A minimum non-parole period scheme should be retained in Queensland for offenders convicted on indictment of serious offences. The SVO scheme's retention in a modified form is supported over its repeal, in recognition that there is an existing category of high-harm offences. These offences warrant a significant proportion of the sentence being required to be spent in custody for the purposes of punishment, denunciation and community protection to recognise the seriousness of these offences and promote victim and community confidence.

Presumptive model instead of mandatory/discretionary SVO scheme

The current split model should be replaced by a presumptive scheme. On sentencing an offender to imprisonment for a listed offence once the required sentencing threshold is met, a sentencing court should be required to make a declaration, unless the recommended grounds for departure are met. In the Council's view, this approach best balances competing interests and objectives compared to other options considered by the Council.

Presumptive model to apply to sentences of greater than 5 years for certain serious offences

The new presumptive scheme should apply to sentences of greater than 5 years for offences listed in a separate new stand-alone 'serious offences' schedule — with the exception of serious drug offences, to which a 10-year threshold should continue to apply. Setting the threshold at greater than 5 years will remove the current artificial distinction between a sentence of 10 years or more, and one falling just under this level, and also capture those sentences for which immediate imprisonment is the only sentencing option available to a court.

Departure from the scheme permitted if it is 'in the interests of justice'

Departure from the scheme should be permitted where a court is satisfied that this is 'in the interests of justice'. The Council recommends statutory guidance should be introduced to guide this decision to promote understanding of the types of factors a court is required to take into account when making this assessment, while preserving the current legislative sentencing guidance provided under section 9 and other sections of the PSA. The Council recommends this list of factors also be used to assist the court in determining where to fix the parole eligibility date where a declaration is made.

Range to set non-parole period between 50 and 80 per cent if declaration is made

On a declaration being made, a sentencing judge should be permitted to set parole eligibility within a range of 50 to 80 per cent of the head sentence (or 15 years, whichever is less). This will provide courts with greater flexibility to deliver individualised justice than is possible under the current model, while still providing a degree of certainty for victims and survivors and the broader community that offenders who commit serious offences will be required to serve a significant proportion of their sentence in custody.

Rename the scheme to the 'serious offences scheme'

The scheme should be renamed the 'serious offences scheme'. While not all offences included in the scheme are inherently violent, all are serious given they cause, or carry a significant risk of causing, a high level of harm to individuals.

Create a separate and more targeted schedule of offences for reformed scheme

Some offences, such as certain child exploitation material offences, and choking, strangulation or suffocation in a domestic setting, should be added to the new schedule, while a number of existing offences to which the current scheme can apply should be removed. This will better target the scheme at offences that involve serious violence and can cause serious harm.

Review of reforms after 5 years

To ensure the scheme operates as intended, the Council recommends it be reviewed after operating for a period of 5 years, or when another appropriate period of time has passed.

The Council's recommendations are set out in full in Chapter 18.

Benefits of the presumptive scheme

The Council supports a presumptive scheme for the following reasons:

- it will address many of the problems and issues identified by victims and survivors and by the legal profession with the current SVO scheme, especially those arising from its mandatory operation;
- it will recognise that all offences under the scheme are 'serious' and require judges to consider the appropriateness of departing from a declaration for all offences captured under the scheme sentenced to greater than 5 years' imprisonment, thereby avoiding current arbitrary distinctions made between sentences at or above 10 years, and those falling just below this level;
- it will promote community and victim confidence that sentencing outcomes reflect the seriousness of these offences by requiring all offenders convicted of serious offences to serve a significant proportion of their sentence in custody (unless a court determines that it is in the interests of justice that a shorter non-parole period be set);
- it will increase the discretion of the court to set an appropriate parole eligibility date, particularly for sentences of 10 years or more, giving judges the ability to determine whether the community is better protected by the offender serving a longer period of supervision in the community or a longer period of imprisonment based on the individual circumstances of the offence and the offender;
- it thereby better enables courts to deliver individualised justice; and
- it will likely lead to more declarations being made for sentences of over 5 and under 10 years, potentially improving victim satisfaction with sentencing outcomes.

Overview of chapters of this report

Chapter 1 discusses the background to this review, the Council's approach, the project scope and relevant information and data sources. It also discusses terminology used in this report.

PART A – The SVO scheme: History, current law and practice, and alternative approaches

Chapter 2 explores the history of the SVO scheme in Queensland, including when and why it was introduced, the purposes of the scheme and how the scheme impacts on parole eligibility.

The chapter discusses the purposes of parole and the non-parole period. While there is no legislated 'usual' ratio of the minimum time a court must order to be served in Queensland, the chapter discusses the common practice in Queensland to set parole eligibility at one-third of the head sentence if the offender pleads guilty and there are other mitigating features.[10] It also notes the statutory non-parole period that applies (50%) if no parole eligibility date is set.

The chapter explores how the approach under the SVO scheme and its '80 per cent rule' is different to the usual approach to setting parole eligibility dates in Queensland.

Chapter 3 considers the application of sentencing guidelines and principles set out in the PSA and applied under the common law.

10 *R v Crouch & Carlisle* [2016] QCA 81, [29].

It discusses the application of these general principles and key Court of Appeal cases that have guided the application of the SVO scheme. The chapter notes the Court of Appeal's recognition that an 'integrated sentencing approach' is appropriate and that there is no need for 'special factors justifying the exercise of a distinct discretion' to make an SVO declaration.[11]

It also considers what factors support a declaration being made (or not made) in circumstances where the making of a declaration is discretionary.

Chapter 4 examines the way offenders who commit serious offences are managed by Queensland Corrective Services ('QCS') when in custody and on parole. The chapter includes an overview of programs and interventions available in prison and on parole.

Chapter 5 provides a high level overview of approaches to the sentencing of serious violent offences in other jurisdictions, both in Australia and in select international jurisdictions (Canada, England and Wales and New Zealand).

A review of these jurisdictions shows the range of approaches taken to the setting of non-parole periods and outlines differences in the types of minimum and standard non-parole period and sentencing schemes reviewed. These schemes are explored in detail in the Council's paper, *Minimum Non-Parole Period Schemes for Serious Violent Offences in Australia and Select International Jurisdictions* (Background Paper 2).

PART B – Application of the SVO scheme

Chapter 6 examines the application of the SVO scheme, the types of offences that commonly attract an SVO declaration, and mandatory and discretionary declarations made under the scheme based on sentencing data.

The vast majority of cases sentenced for a Schedule 1 offence (for the most serious offence ('MSO') sentenced) were not subject to the SVO scheme.[12] In fact, less than 1 per cent of all cases involving a Schedule 1 offence sentenced across all court levels, and just under 16 per cent of eligible offences[13] (15.8%) resulted in an SVO declaration being made. For eligible offences sentenced to 5 years or more, but less than 10 years, declarations were made in 4.8 per cent of cases.

Over the period 2011–12 to 2019–20, 437 SVO declarations were made (based on a count of the most serious offence (MSO) sentenced). Almost half of all declarations made were for non-sexual violence offences (46.5%), over one-third were for sexual violence offences (37.5%) and 14.9 per cent were for serious drug offences. Discretionary SVO declarations were most commonly made for non-sexual violence offences.

In contrast, discretionary SVO declarations were rarely made for sexual violence offences or serious drug offences. For example, in only 18 cases of sexual violence was a discretionary declaration made (representing 11% of all discretionary declarations). Similarly, for serious drug offences, the majority of declarations were made on a mandatory basis, with only 5 discretionary declarations made (7.7% of discretionary declarations).

The most common offence to attract an SVO declaration (mandatory or discretionary) was maintaining a sexual relationship with a child (n=91), followed by rape (n=71) and drug trafficking (n=65). The remaining offences mostly comprised a variety of non-sexual violence offences — including acts intended to cause grievous bodily harm and other malicious acts, manslaughter, and attempted murder, amongst others.

Chapter 7 further characterises the offences commonly sentenced under the scheme and provides information on socio-demographic characteristics of offenders.

The Council's analysis shows offenders declared convicted of a serious violent offence were predominantly men (96.3%). Aboriginal and Torres Strait Islander peoples were over-represented across most Schedule 1 offences, including all SVO offence categories except trafficking in dangerous drugs. One in five SVO declarations were made for an offence committed by an Aboriginal and Torres Strait Islander person (20.1%).

The chapter further provides information on associated offences, the proportion of SVO and non-SVO cases that were sentenced as a domestic violence offence, differences in plea rates for SVO and non-SVO cases and information on offenders' prior history of being sentenced to imprisonment.

Chapter 8 provides information on sentencing outcomes and appeals based on sentencing data.

The chapter explores patterns of sentence distribution for common SVO declared offences, finding that the offence of trafficking in dangerous drugs appears to have an increased number of cases sentenced at the 9-year mark, relative to sentences of 8 and 10 years. The distribution for manslaughter, in comparison, showed a clear central tendency at 9 years and a relatively steep decline either side of the mode.

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11 *R v Eveleigh* [2003] 1 Qd R 398, 413 [53] (Fryberg J).

12 This is because the offence was not dealt with on indictment, did not receive a sentence long enough to fall under the scheme (based on the criteria under ss 161(1), 161B(1) and 161b(2) of the PSA), or because although eligible for a declaration under the scheme, a declaration was not made. See section 1.7.1 for how the MSO is determined.

13 For the definition of an 'eligible offence' for the purposes of this analysis, see discussion in Chapter 6.

The chapter reports the Council's finding that in almost half of all cases with an SVO declaration, an appeal was lodged. The SVO declaration was removed in 6.8 per cent of these appeals. The chapter finds that cases involving a mandatory SVO declaration were more likely to be appealed (48.1%) than cases where a discretionary declaration was made (37.8%).

Chapter 9 examines parole outcomes based on data provided by Queensland Corrective Services for the period from July 1997 to June 2020.

Nearly two-thirds of offenders convicted of a declared offence who applied for parole had their application for parole granted and were released to supervision in the community (63.0%). Close to one-quarter of offenders with an SVO declaration had their parole application refused (23.4%), with the remaining applications not having an outcome recorded.[14] There were 135 prisoners who were eligible for parole but did not apply for parole (17.9%).

In comparison, over three quarters of offenders (80.8%) sentenced for a Schedule 1 offence who did not receive an SVO declaration had their parole application granted, with less than 10 per cent of parole applications refused (9.0%).

Offenders sentenced for a sexual violence offence with an SVO declaration were the least likely to be granted parole (35.1% for maintaining and 38.1% for rape). On average, offenders sentenced for rape with an SVO declaration spent the longest time in custody beyond their parole eligibility date.

Offenders sentenced for a drug trafficking offence with an SVO declaration, were the most likely to be granted parole (75.9%) and, on average, were released almost immediately after reaching their parole eligibility date.

The chapter also examines parole eligibility dates for non-declared Schedule 1 offences, finding that they cluster around the one-third and half-way mark. This finding is consistent with the common practice in Queensland of setting parole eligibility at one-third to reflect a plea of guilty and the legislative requirement that offenders serve half of their sentence prior to being eligible for parole if no parole eligibility date is set.[15]

PART C – Impact and efficacy of the SVO scheme

Chapter 10 considers the impacts of the SVO scheme on head sentences for Schedule 1 offences and the setting of parole eligibility dates post-commencement of the scheme.

Based on analysis of sentencing remarks, stakeholder feedback and qualitative expert interviews, the Council found evidence that the SVO scheme is having a 'distorting effect'[16] on head sentences by reducing the sentence that might otherwise have been imposed. This is because it is a common practice for courts to sentence offenders towards the lower end of the established sentencing range for an offence where a declaration is made. A reduction in the head sentence may be viewed as necessary to take into account the consequences of a declaration being made as well as an offender's guilty plea and other mitigating factors (which ordinarily might be reflected by setting an earlier parole eligibility date).[17]

The Council further found evidence that the existence of the SVO scheme may increase the likelihood of parole eligibility being deferred when a declaration is not made, in circumstances where the making of a declaration is narrowly avoided.

In this sense, the SVO scheme is constraining the sentencing process for cases subject to the scheme as well as non-declared cases in which an SVO declaration was a possibility.

Chapter 11 examines the extent to which the SVO scheme is meeting its intended objectives of punishment, denunciation and community safety.

The making of a declaration increases the minimum time an offender must spend in custody, thereby promoting the purposes of punishment, denunciation and community protection. However, the Council found that the scheme achieves these purposes only in part and to a limited extent.

In particular, the fixed 80 per cent non-parole period does not support long-term community protection because it shortens the period an offender is subject to be supervised in the community, and may act as a disincentive for offenders to apply for parole. The reduction in head sentences resulting from the scheme further means that offenders are under sentence for a shorter period of time.

This is contrary to evidence that suggests that offenders who commit serious offences require more, rather than less time, under supervision to reduce the risks of reoffending.

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14 This may be because the parole application was still pending review, the application may have been withdrawn, cancelled, deferred, or otherwise not received a final outcome.

15 CSA (n 3) s 184(2). There are legislated exceptions to this. See s 184 further.

16 See *Sprott* (n 8) [41] (Sofronoff P).

17 This approach was explained in *R v McDougall and Collas* [2007] 2 Qd R 87, [19].

Taking the various impacts of the scheme on sentencing practices and outcomes into account, the Council found that the scheme is not fully meeting its purposes of punishment, denunciation and longer-term community protection.

Chapter 12 explains how the scheme creates inconsistencies or constrains the sentencing process, drawing on findings from consultation, submissions received, and views expressed in expert interviews.

The mandatory operation of the scheme for sentences of 10 years and above constrains courts' ability to tailor a sentence to the individual circumstances of the offence and offender, potentially resulting in very different non-parole periods. This means that sentencing outcomes can vary greatly depending on whether a sentence is set at or above 10 years, or just below.

Stakeholders also raised concerns that the SVO scheme increases the complexity of sentencing for offences subject to it — including when a court is sentencing offenders for multiple offences, only some of which are listed in Schedule 1.

The limited guidance provided as to the circumstances in which a discretionary declaration should be made may also give rise to inconsistencies in the scheme's application. However, it also supports the exercise of courts' sentencing discretion.

Chapter 13 examines the SVO scheme's impact on victim and survivor satisfaction with the sentencing process based on expert interviews with victim support and advocacy organisations and prosecutors, submissions received and consultation forums with victims and survivors.

The scheme provides victims, survivors and their families with greater certainty that the offender will spend a long period in custody when a declaration is made. This is viewed as important by victims and survivors in recognition of the seriousness of the offending and harm caused by the offending, as well as for the purpose of their own protection and the protection of the broader community.

The Council found victim and survivor satisfaction appeared to be enhanced when a declaration was made. However, where a declaration was not asked for by the prosecution or made by the sentencing judge, victims and survivors found it difficult to understand why the offending was not considered to be 'seriously violent enough' to be recognised in this way, which led to feelings of anger, hurt and frustration.

While victims and survivors and victim advocacy and support organisations were supportive of some form of scheme being retained, equally it was clear they were dissatisfied with how the scheme is being interpreted and applied in practice.

Concerns expressed included the scheme's apparent effect in reducing head sentences, especially where head sentences are being reduced to under 10 years, the small number of cases receiving a discretionary declaration and the need for clear criteria to guide the making of discretionary declarations.

Victim and survivor stakeholders also wanted reassurances that offenders who commit serious violent offences have access to evidence-based rehabilitation programs and psychological support, both while in prison and in the community. If offenders are released on parole, they supported close and intensive supervision to reduce the risks of reoffending.

Chapter 14 considers the potential impact of the scheme on pleas, plea negotiations and rates of appeal. The Council found it difficult to determine whether the SVO scheme was impacting rates of guilty pleas, but found that the SVO scheme might be contributing to more appeals against sentence, especially in cases that received a mandatory declaration.

Other impacts identified by stakeholders included the scheme's potential to impact on community satisfaction and public confidence and costs to the system associated with the deferral of parole eligibility to 80 per cent.

PART D – Reforms to the SVO scheme

Chapter 15 sets out the fundamental principles which shaped the Council's approach to this review and its advice and recommendations. These are:

- Principle 1: Reforms to sentencing and parole laws should be evidence-based with a view to promoting public confidence.
- Principle 2: Sentencing decisions should accord with the purposes of sentencing as outlined in section 9(1) of the *Penalties and Sentences Act 1992* (Qld).
- Principle 3: Sentencing outcomes arising from the operation of the SVO scheme should reflect the seriousness of these offences, including their impact on victims, while not resulting in unjust outcomes.
- Principle 4: Parole serves an important purpose in helping prisoners successfully and safely reintegrate into the community and in minimising the likelihood of a person reoffending, thereby promoting community safety.
- Principle 5: Sentencing inconsistencies, anomalies and complexities should be minimised.

- Principle 6: Any reforms should take into account likely impacts on the over-representation of Aboriginal and Torres Strait Islander peoples in the criminal justice system.
- Principle 7: The circumstances of each offender and offence are varied. Judicial discretion in the sentencing process is fundamentally important.
- Principle 8: Sentencing orders should be administered in a way that satisfies the intended purposes of the sentence. Services delivered under them, including programs and treatment, should be adequately funded and available across Queensland both in custody and in the community.
- Principle 9: Sentencing decisions for serious violent offences should be informed by the best available evidence of a person's risk of reoffending.
- Principle 10: Any reforms should aim to be compatible with the rights protected and promoted under the *Human Rights Act 2019* (Qld) or be reasonably and demonstrably justifiable as to limitations.

Chapter 16 outlines the Council's case for reforming the SVO scheme.

In summary these are:

- The SVO scheme's application may be impacting its operation and efficacy.
- The SVO scheme delivers on its objectives only in part and to a limited extent.
- The SVO scheme creates unnecessary complexity and unintended consequences.
- The SVO scheme contributes to victim dissatisfaction when a declaration is not made.
- The SVO scheme may limit rights protected under the *Human Rights Act 2019* (Qld).

Chapter 17 sets out the different options and alternative models considered by the Council, and why it recommends the introduction of a presumptive scheme. It also includes a brief assessment of human rights implications for each option considered by the Council.

The Council considered the following options:

- Option 1: Leave the scheme unchanged;
- Option 2: Modify the scheme to be presumptive in some cases, and discretionary in others;
- Option 3: Abolish the scheme entirely — with or without other reforms as to how parole eligibility dates are fixed;
- Option 4: Reform the scheme to be wholly mandatory; or
- Option 5: Reform the scheme to be wholly discretionary; or
- Option 6: Reform the scheme to be wholly presumptive (**the recommended option**).

The Council ultimately found that:

- a minimum non-parole period scheme should be retained for offenders convicted of serious offences due to the high harm these offences cause, warranting a significant proportion of the sentence being served in custody to reflect the seriousness of these offences; and
- a presumptive scheme balances competing interests and objectives best, compared to the other options considered by the Council.

Chapter 18 sets out the Council's recommended reforms to the SVO scheme in detail.

Rename the scheme the 'serious offences scheme'

The Council's view is that the scheme's name communicates what type of offending the scheme is targeted at in the interests of promoting community understanding and guiding courts and legal practitioners on its proper application. Stakeholders were supportive of a name change and made a number of suggestions explored in the chapter.

The Council recommends that the scheme should be renamed the 'serious offences scheme' to avoid the scheme's current narrow focus on whether an offence has involved the use of 'serious violence'.[18] The removal of the term 'violent' recognises that not all offences included in the scheme are inherently violent; such as serious drug offences, but all are serious given they cause, or carry a significant risk of causing, a high level of harm.

Do not legislate the objectives of the scheme

The Council concluded that it is unnecessary, and potentially unhelpful, to set out the scheme's objectives in a legislative way. The Council's view is that the extrinsic materials supporting the introduction of the proposed reforms should make clear the intention of the scheme to ensure the minimum period to be served in custody reflects the seriousness of these offences with reference to the sentencing purposes of punishment, denunciation, deterrence

[18] The Council found that the focus on 'serious violence', in practice, has resulted in only a very small proportion of convictions for sexual violence offences being declared serious violent offences where the court had discretion to do so. This is discussed in detail in section 12.9.5 of this report.

and community protection. The general principles and factors which a court must have regard to in sentencing, including those listed in section 9 of the PSA, would continue to apply under the new scheme.

Adopt a threshold of greater than 5 years for the scheme's presumptive application, but retain the 10-year threshold for serious drug offences

The 10-year threshold for mandatory declarations under the current scheme was widely criticised during consultations and in submissions as being arbitrary and having the potential to result in very different minimum non-parole periods to be served, depending on whether a sentence is set at 10 years or above, or just below. On this basis, victims and survivors and victim support agencies were particularly critical of the range for discretionary declarations of 5 years to less than 10 years.

The Council concluded that a new sentencing threshold of over 5 years should be applied. The Council's view is that a sentence of greater than 5 years for offences that will be captured under the new scheme is a more accurate measure of offence seriousness. Setting the scheme to apply presumptively to sentences of greater than 5 years for SVO schedule offences captures those sentences where immediate imprisonment is the only sentencing option available to a court and avoids creating a displacement effect to partially suspended sentences.

As serious drug offences are in a very different category to the other offences proposed to be included in the reformed scheme and are not inherently violent, the Council determined that the current 10-year threshold should be retained. This will limit the application of the scheme to cases in which significant quantities of drugs were trafficked on a commercial basis, and involving the most serious instances of aggravated supply and production.

The Council also recommends changes to how the specified years of imprisonment will be calculated for the purposes of the new presumptive scheme.

A new parole eligibility date range of 50–80 per cent

The fixed nature of parole eligibility under the current SVO scheme has been widely criticised due to its arbitrariness and the limited time it leaves for offenders to be supervised on parole. This is contrary to evidence that suggests offenders serving long sentences need a longer rather than shorter period of supervision to reduce their risks of reoffending.

The Council therefore recommends that once a declaration is made, a court should have discretion to set the parole eligibility date within a specified range of between 50 to 80 per cent. It considers this approach may have a number of benefits, including:

- reducing the need for courts to depart from making a declaration in order to achieve a just sentence, meaning that more declarations will be made;
- potentially lessening the impact of the fixed nature of the non-parole period in reducing head sentences as courts are better able to take those considerations into account by setting the parole eligibility within the range;
- better enabling courts to deliver individualised justice and take the individual circumstances of the offence and offender into account;
- improving courts' ability to allow for the principle of parity to be applied when sentencing co-offenders; and
- potentially reducing problems that sometimes arise in applying the scheme in conjunction with other mandatory sentencing provisions, such as under section 156A of the PSA.

Departure permitted where this is 'in the interests of justice'

While the Council recommends the reformed scheme should be applied presumptively, it supports courts being provided with a discretion to depart taking into account that the circumstances in which offences are committed are infinitely varied, as are factors personal to the offender.

The test the Council recommends is whether the court is satisfied that departure from the scheme would be 'in the interests of justice'. This concept is well known to the legal system and reflects the importance of achieving a just sentence in all the circumstances — which has been recognised by the Queensland Court of Appeal as 'the paramount objective of sentencing'.[19]

Why statutory guidance is required

There is currently limited statutory guidance in Part 9A of the PSA regarding when an SVO declaration should be made in circumstances where the decision is discretionary.

The Council recommends legislating a broad non-exhaustive list of statutory criteria in support of the operation of the new presumptive model on the basis that this will preserve judicial discretion, while increasing transparency and promoting a better understanding by victims and the broader community of the basis on which a decision not to make a declaration might be made or parole eligibility set towards the lower end of the new 50–80 per cent

19 *R v Randall* [2019] QCA 25, [37].

range. At the same time, casting these considerations in broad terms, as recommended by the Council, will preserve existing guidance contained in section 9, other sections of the PSA and under existing case law.

The factors recommended by the Council to be legislated focus on:

- the nature and seriousness of the offence, including any harm done to a victim and the circumstances in which the offence was committed;
- the culpability of the offender;
- the offender's prospects of rehabilitation;
- any cooperation with the investigation or prosecution;
- whether the offender pleaded guilty and the circumstances;
- the risk of serious harm to members of the community and the need to protect members of the community from that risk; and
- any other relevant circumstance.

The Council also recommends that the requirement for a court in sentencing an offender for an offence that involves the use or attempted use of violence against a child under 12 years, or causing the death of a child under 12 years, treating the age of the child as an aggravating factor, should be retained. This recognises the particular vulnerability and defencelessness of children.

Information available to courts to inform decision-making

There was general support by all stakeholders, including those representing the views of victims, survivors and their families, for suitable programs and interventions being made available to offenders in custody and in the community. A number commented on the importance of addressing factors associated with offenders' risk of reoffending given the scheme's primary objective of community protection, and potential for this to inform the sentencing process.

The Council acknowledges that the availability of programs will change over time and views about risk assessments, program and intervention availability should only ever be one of many factors for a court to consider.

The Council recommends that Queensland Corrective Services should consider how the information made available to legal practitioners and sentencing courts about available programs and other forms of interventions and support might be enhanced to better inform sentencing decisions.

A new schedule of offences

The Council applied specific criteria in determining which offences should be retained under the reformed scheme. These were whether the offence:

- had a significant maximum penalty;
- was triable only on indictment;
- involved the use or threatened use of violence;
- could result in or create conditions in which serious harm of a sexual or non-sexual nature could be caused to another person;
- was committed against a vulnerable victim;
- involved a special risk of serious consequence to the victim and/or the community.

The development of criteria is intended to increase certainty and confidence in the reformed scheme's application and was informed by the research on approaches in other jurisdictions and different objective measures of offence seriousness.

The Council recommends 44 offences be included in the new schedule, with some notable changes including:

- the inclusion of certain child exploitation material offences;
- the inclusion of the offences of choking, suffocation or strangulation in a domestic setting; aiding suicide; and female genital mutilation;
- the narrowing of the scheme's application to cases of aggravated sexual assault and dangerous operation of a vehicle causing death or grievous bodily harm;
- the removal of a number of less serious offences which do not have violence as an element or which commonly only involve a very low level of violence;
- the removal of repealed offences.

Repeal of discretionary power to make a declaration

The power to make a declaration for offences not listed in the Schedule has been very rarely used — and in the few cases it has been applied, was used almost exclusively for Schedule 1 offences where the sentence fell below 5 years (only one non-Schedule 1 offence received an SVO during the 9-year data period).[20]

Rather than retaining this provision, the Council considers it is preferable to rely on courts' existing power to postpone parole eligibility under the general provisions that apply to parole given it is rarely used. The Council therefore recommends the repeal of this power.

Transitional provisions

There is a general presumption under Queensland law that legislation will operate prospectively.[21]

While the new reformed scheme may place some offenders at a disadvantage through its presumptive application to sentences of greater than 5 years but less than 10 years, other offenders benefit from the presumptive (rather than mandatory) application and the recommended parole eligibility range of 50 to 80 per cent. Similarly, changes to the list of included offences may benefit some offenders, while disadvantaging others.

The Council recommends that the approach taken should ensure an offender is not placed at a disadvantage following the introduction of the proposed reforms.

Chapter 19 identifies broadly any potential financial and practical implications associated with the Council's recommendations, analyses the compatibility of the scheme with the *Human Rights Act 2019* (Qld) and advises on the impacts of the recommendations on the over-representation of Aboriginal and Torres Strait Islander peoples.

The Council's view is that its recommendations are either compatible with rights, or to the extent any aspects of the reformed scheme might be viewed as limiting any rights, such limitations are reasonable and demonstrably justified. The Council considered the right to liberty and security, the right to a fair hearing and the right to recognition and equality before the law to be the most central to its recommendations. A detailed analysis is contained in Appendix 14 of the report.

The Council shares stakeholder concerns about the potential for a presumptive test to place Aboriginal and Torres Strait Islander defendants, and other individuals who are marginalised or experiencing disadvantage, at a disadvantage. In particular, these groups may be less able to afford high-quality legal representation or pay for specialist reports in support of displacing the presumption that a declaration should be made. Therefore, the Council recommends that further consultation should occur prior to the commencement of the reforms regarding legal support and funding needs and the adequacy of existing funding.

Chapter 20 addresses a number of other issues identified by the Council in the course of this review related to the operation of the criminal justice system. This includes the recognition of victims' rights and information and support needs, post-sentence orders for offenders convicted of non-sexual violence offences, and the provision of mental health support services to offenders.

20 The non-Schedule 1 offence sentence related to a 7-year sentence imposed for an offence charged under s 419(4) of the Criminal Code (Qld) — Burglary with intent to commit an indictable offence where an indictable offence is committed (in this case, grievous bodily harm) — which is not an offence listed in Schedule 1: see *R v Smith* [2018] QCA 136. Some declarations made for Schedule 1 offences appear to have been made on the erroneous basis that a sentence for a Schedule 1 offence imposed cumulatively on an earlier-imposed sentence for a Schedule 1 offence, once the sentence exceeds 10 years, must be declared to be a serious violent offence.

21 Queensland Government, Department of the Premier and Cabinet, *Legislation Handbook* (2019) 28 '6.5 — General presumption that legislation will be prospective'.

List of Recommendations

1. Based on the Council's findings, the serious violent offences scheme under Part 9A of the *Penalties and Sentences Act 1992* (Qld) should be retained and reformed.

2. A wholly presumptive model should replace the current split mandatory/discretionary SVO scheme.

3. The scheme should be renamed the 'serious offences scheme'. The term 'violent' should no longer be used in recognition that not all offences included in the scheme are inherently violent, but all are serious given they cause, or carry a significant risk of causing, a high level of harm.

4. The purposes of the new serious offences scheme should not be legislated. Instead:

a. the general principles and factors to which a court must have regard in sentencing, including those set out in section 9 of the *Penalties and Sentences Act 1992* (Qld), should continue to be applied; and

b. the extrinsic materials supporting the introduction of the proposed reforms should make clear the intention of the scheme to ensure the minimum period to be served in custody reflects the seriousness of these offences with reference to the sentencing purposes of punishment, denunciation, deterrence and community protection.

5. The current distinction between sentences of 10 years or more, and those falling under 10 years for the purposes of the making of a serious offence declaration should be removed. The new scheme instead should apply in a presumptive way to sentences of imprisonment of greater than 5 years on conviction of an offender for a listed offence — with the exception of serious drug offences, to which a 10-year threshold should apply (see Recommendation 8)

6. Section 161C of the *Penalties and Sentences Act 1992* (Qld) should be repealed or amended to provide that:

For the purposes of calculating the specified years of imprisonment for the new scheme for an offence:

a. against a provision mentioned in schedule 1 (current schedule) or the new schedule (under the new scheme); or

b. of counselling or procuring the commission of, or attempting or conspiring to commit, an offence against a provision mentioned in schedule 1 or the new schedule;

an offender is sentenced to the specified years of imprisonment only if the offender is sentenced to a term of imprisonment of the specified years for that offence.

Note: *See Recommendation 24 regarding proposed transitional provisions.*

7. A court should be required to declare an offender convicted of a serious offence on imposing a sentence of imprisonment of greater than 5 years for a single charge for a listed offence, other than for a serious drug offence — to which a 10-year threshold should apply.

8. For serious drug offences, a court should be required to declare an offender convicted of a serious offence on imposing a sentence of imprisonment of 10 years or greater for a single charge for a listed drug offence.

9. On making a serious offence declaration, a court should be required to fix a parole eligibility date within a specified range of 50 to 80 per cent of the head sentence, provided that the non-parole period fixed does not exceed 15 years.

10. A court should be permitted to decline to make a declaration where the court is satisfied this is 'in the interests of justice'.

11. Section 161B(5) of the *Penalties and Sentences Act 1992* (Qld) should be retained under the new scheme with any necessary changes to reflect the new form of declaration. This section provides that in deciding whether to make a discretionary declaration under sections 161B(3) or (4) of the Act, if an offender is convicted on indictment of an offence —

a. that involved the use, counselling or procuring the use, or conspiring or attempting to use, violence against a child under 12 years; or

b. that caused the death of a child under 12 years;

the sentencing court must treat the age of the child as an aggravating factor in deciding whether to declare the offender to be convicted of a serious violent offence.

12.1. Additional statutory guidance should be provided to courts to guide whether a declaration should be made and, on a court determining it appropriate to make such a declaration, where the parole eligibility date should be fixed.

12.2. The guidance provided to courts should be cast in broad terms in the form of a non-exhaustive list of matters to be considered, including:

a. the nature and seriousness of the offence, including any harm done to a victim, and circumstances in which the offence was committed, including any aggravating factors;

b. the culpability of the offender;

c. whether the offender has good prospects of rehabilitation, whether by reason of the offender's age or otherwise;

d. the nature and extent of any cooperation with the investigation or prosecution of that or any other offence and the circumstances surrounding, and likely consequences of such cooperation;

e. if the offender pleaded guilty to the charge of the offence or offences — that fact and the circumstances of the plea;

f. the risk of serious harm to members of the community and the need to protect members of the community from that risk;

g. any other relevant circumstance.

13. Queensland Corrective Services should consider how the information made available to legal practitioners and sentencing courts about available programs and other forms of interventions and support might be enhanced to better inform sentencing decisions, including:

a. the suite of programs and other interventions currently available to offenders both in custody and in the community and what types of issues and needs these are targeted at;

b. what programs and interventions are typically offered to offenders with specific risk and needs profiles that might be similar to those targeted under the new scheme, including the availability of culturally safe programs and interventions for Aboriginal and Torres Strait Islander offenders.

14. A new, stand-alone schedule of offences to which the new scheme applies should be introduced. This schedule should be separate to that which exists and is applied for the purposes of section 156A of the *Penalties and Sentences Act 1992* (Qld) (Cumulative sentences of imprisonment must be made in particular circumstances).

15. The following offences listed in Schedule 1 should be included in the new schedule that applies for the purposes of the reformed scheme:

- Indecent treatment of children under 16 (Criminal Code, s 210)
- Owner etc. permitting abuse of children on premises (Criminal Code, s 213)
- Carnal knowledge with or of children under 16 (Criminal Code, s 215)

- Abuse of persons with an impairment of the mind (Criminal Code, s 216)
- Procuring young person etc. for carnal knowledge (Criminal Code, s 217(1))
- Procuring sexual acts by coercion etc (Criminal Code s 218(1))
- Taking child for immoral purposes (Criminal Code, s 219(1))
- Incest (Criminal Code, s 222)
- Maintaining a sexual relationship with a child (Criminal Code, s 229B)
- Procuring engagement in prostitution of a person who is not an adult or who is a person with an impairment of the mind (Criminal Code, s 229G(2))
- Manslaughter (Criminal Code, ss 303(1) and 310)
- Attempted murder (Criminal Code, s 306)
- Conspiring to murder (Criminal Code, s 309)
- Killing unborn child (Criminal Code, s 313)
- Disabling in order to commit indictable offences (Criminal Code, s 315)
- Stupefying in order to commit indictable offence (Criminal Code, s 316)
- Acts intended to cause GBH and other malicious acts (Criminal Code, s 317)
- Grievous bodily harm (Criminal Code, s 320)
- Torture (Criminal Code, s 320A)
- Administering poison with intent to harm, if the poison or noxious thing endangers the life of, or does grievous bodily harm to, the person to whom it is administered or by whom it is taken (Criminal Code, s 322(a))
- Wounding (Criminal Code, s 323)
- Dangerous operation of a vehicle in circumstances of aggravation under s 328A(4) (causing death or grievous bodily harm, including while adversely intoxicated or excessively speeding or taking part in an unlawful race, or if the offender leaves the scene of the incident knowing or ought to have reasonably known the other person has been killed or injured) (Criminal Code, s 328A(4))
- Rape (Criminal Code, s 349)
- Attempt to commit rape (Criminal Code, s 350)
- Assault with intent to commit rape (Criminal Code, s 351)
- Sexual assault, with a circumstance of aggravation (Criminal Code, (ss 352(2) and 352(3))
- Kidnapping (Criminal Code, s 354(1))
- Kidnapping for ransom (Criminal Code, s 354A)
- Robbery (Criminal Code, ss 409 and 411)
- Attempted robbery (Criminal Code s 412)
- Burglary, with circumstance of aggravation (Criminal Code, ss 419(3)(b)(i) and s 419(3)(b)(ii))
- Trafficking in dangerous drugs (*Drugs Misuse Act 1986* (Qld), s 5)
- Supplying dangerous drugs (*Drugs Misuse Ac 1986* (Qld), s 6)
- Producing dangerous drugs (*Drugs Misuse Act 1986* (Qld), s 8).

16. The following offences listed in Schedule 1 should not be included in the new schedule that applies for the purposes of the reformed scheme:

- Riot (Criminal Code, s 61)
- Threatening violence (Criminal Code, s 75)
- Escape by persons in lawful custody (Criminal Code, s 142)
- Misconduct with regard to corpses (Criminal Code, s 236(2))
- Carrying or sending dangerous goods in vehicle (Criminal Code, s 317A (1))
- Obstructing rescue or escape from unsafe premises (Criminal Code, s 318)
- Endangering the safety of person in a vehicle with intent (Criminal Code, s 319)
- Attempting to injure by explosive or noxious substances (Criminal Code, s 321)
- Bomb hoaxes (Criminal Code, s 321A)
- Failure to supply necessaries (Criminal Code, s 324)
- Endangering life of children by exposure (Criminal Code, s 326)
- Dangerous operation of a vehicle (except if charged under s 328A(4)) (Criminal Code, s 328A)
- Assaults occasioning bodily harm (Criminal Code, s 339)
- Serious assaults (Criminal Code, s 340)
- Sexual assaults (except if charged under ss 352(2) and 352(3)) (Criminal Code, s 352(1))
- Cruelty to children under 16 years (Criminal Code, s 364)

- Taking control of aircraft (Criminal Code, s 417A)
- Unlawful assembly, riot and mutiny (*Corrective Services Act 2006*, s 122 and repealed equivalent (*Corrective Services Act 2000*, s 92(2))
- Other offences (*Corrective Services Act 2006*, s 124(a) and repealed equivalent (*Corrective Services Act 2000*, s 94(a)).
- (Repealed) Unlawful anal intercourse (Criminal Code, s 208)
- (Repealed) Unlawful sodomy (Criminal Code, ss 208(1)-(2))
- (Repealed) Conspiracy to defile (Criminal Code, s 221)
- (Repealed) Incest by man (Criminal Code, s 222)
- (Repealed) Incest by adult female (Criminal Code, s 223)
- (Repealed) Preventing escape from wreck (Criminal Code, s 318).

17. The following offences not currently listed in Schedule 1 should be included in the new schedule that applies for the purposes of the reformed scheme:

- Involving child in making child exploitation material (Criminal Code, s 228A)
- Making child exploitation material (Criminal Code, s 228B)
- Distributing child exploitation material (Criminal Code, s 229C)
- Possessing child exploitation material (Criminal Code, s 228D)
- Knowingly participating in the provision of prostitution with a circumstance of aggravation (where the person involved in the provision of prostitution is not an adult or is a person with an impairment of the mind) (Criminal Code, s 229H(2)
- Aiding suicide (Criminal Code, s 311)
- Choking, suffocation or strangulation in a domestic setting (Criminal Code, s 315A)
- Female genital mutilation (Criminal Code, s 323A)
- Child-stealing (Criminal Code, s 363)
- Abduction of a child under 16 (Criminal Code, s 363A).

18. The scheme should also apply to offences of counselling or procuring the commission of, or attempting or conspiring to commit, an offence against a provision mentioned in the new schedule — consistent with the operation of the current SVO scheme.

19. Section 161B(4) of the *Penalties and Sentences Act 1992* (Qld), which permits a court to make a declaration for offences not listed in Schedule 1, or a Schedule 1 offence for a sentence of less than 5 years, provided certain criteria apply, should be repealed.

20. The new scheme should apply to offenders sentenced for an offence included in the new schedule but not listed in Schedule 1 only if the act or omission constituting the offence occurred on or after the commencement of the new provisions.

21. If a court sentences an offender post-commencement of the new scheme for an offence listed in Schedule 1 that is not included in the new schedule, the offender should not be subject to either the existing SVO scheme or the new scheme regardless of whether the offence or conviction happened before or after the commencement of the new scheme. Instead, the offender should be sentenced in accordance with general provisions applying to parole.

22. If a court is sentencing an offender post-commencement of the new scheme for an offence listed in both the new schedule and the currently applying Schedule 1, the following should apply:

a. If the act or omission constituting the offence occurred on or after the commencement of the new scheme, the new scheme should apply;

b. If the act or omission constituting the offence occurred prior to the commencement of the new scheme, but post commencement of the existing SVO scheme, the court should decide whether the person is to be sentenced under the current SVO scheme or under the new scheme. The court should be required to ensure that the offender is not placed at a disadvantage as to where the parole eligibility date is fixed, consistent with the principle against retrospective punishment.

23. The repeal of section 161B(4) of the *Penalties and Sentences Act 1992* (Qld) should come into effect from the date of commencement and apply whether the offence or conviction for the offence or offences happened before or after its repeal.

24. The repeal of, or amendments to, section 161C of the *Penalties and Sentences Act 1992* (Qld) should come into effect from the date of commencement and apply whether the offence or conviction for the offence or offences happened before or after its repeal and whether a person is sentenced under the current scheme (if still in operation) or under the new scheme.

25. As part of any implementation strategy developed by the Department of Justice and Attorney-General for the new serious offences scheme, further consultation should be undertaken to assess the legal support needs of disadvantaged defendants and identify any additional legal funding or support required to minimise potential unintended impacts of the reformed scheme. This consultation should include legal stakeholders providing direct representation for Aboriginal and Torres Strait Islander defendants and other defendants who are marginalised or are experiencing disadvantage. The consultation process should include consideration of the adequacy of existing funding both in support of defendants' legal representation and to fund the preparation of any required specialist reports.

26. The Attorney-General should request that the Council, or another suitable entity, undertake a review of the operation and efficacy of the new scheme after the scheme has been in operation for a period of 5 years or another appropriate period deemed suitable. This review should consider and report on matters including:

a. the proportion of eligible cases that attract a declaration;

b. the offences that most commonly result in a declaration being made;

c. the distribution of sentences of imprisonment and parole eligibility dates for both declared and non-declared offences; and

d. what types of factors are referred to by a court when deciding to make or not make a declaration.

This review should include an analysis of how the scheme is impacting on Aboriginal and Torres Strait Islander peoples and other marginalised or disadvantaged groups. It should also involve consultation with victims and survivors, relevant support and advocacy groups and legal stakeholders.

Chapter 1

Introduction

1.1 Background

On 9 April 2021, the Queensland Sentencing Advisory Council ('Council') received Terms of Reference issued by the Attorney-General and Minister for Justice, Minister for Women and Minister for the Prevention of Domestic and Family Violence, the Honourable Shannon Fentiman MP, asking the Council to review the operation and efficacy of the serious violent offences ('SVO') scheme in Part 9A of the *Penalties and Sentences Act 1992* (Qld) ('PSA').

In March 2022, in response to a request made by the Council, the Attorney-General granted an extension, postponing the Council's reporting date from 11 April 2022 to 13 May 2022.

1.2 Terms of Reference

In accordance with the Terms of Reference, the Council has been asked to:

- assess how the SVO scheme is being applied (including where the making of an SVO declaration is discretionary) and whether the scheme is meeting its objectives;
- assess how the SVO provisions are impacting on court sentencing practices;
- identify any trends or anomalies that occur in application of the SVO scheme that create inconsistency or constrain the sentencing process;
- examine whether the SVO scheme is impacting victims' satisfaction with the sentencing process and if so, in what way;
- advise on any reforms to ensure sentencing outcomes reflect the seriousness of these offences and if retained, the making of an SVO application only in appropriate cases.

In undertaking the review, the Council also is to:

- examine the approach to similar sentencing provisions involving minimum non-parole periods for serious criminal offences in other Australian and international jurisdictions;
- have regard to any relevant research, reports or publications regarding the SVO scheme;
- consult with the community and other key (legal and non-legal) stakeholders, including but not limited to the judiciary, legal profession, victims of crime groups, child protection and domestic, family and sexual violence advocacy groups, or any relevant government department and agencies;
- identify broadly, if possible, any potential financial and practical implications associated with any recommendations;

- advise whether the legislative provisions that the Queensland Sentencing Advisory Council reviews, and any recommendations, are compatible with rights protected under the *Human Rights Act 2019*; and
- advise on the impact of any recommendation on the over-representation of Aboriginal and Torres Strait Islander peoples in the criminal justice system.

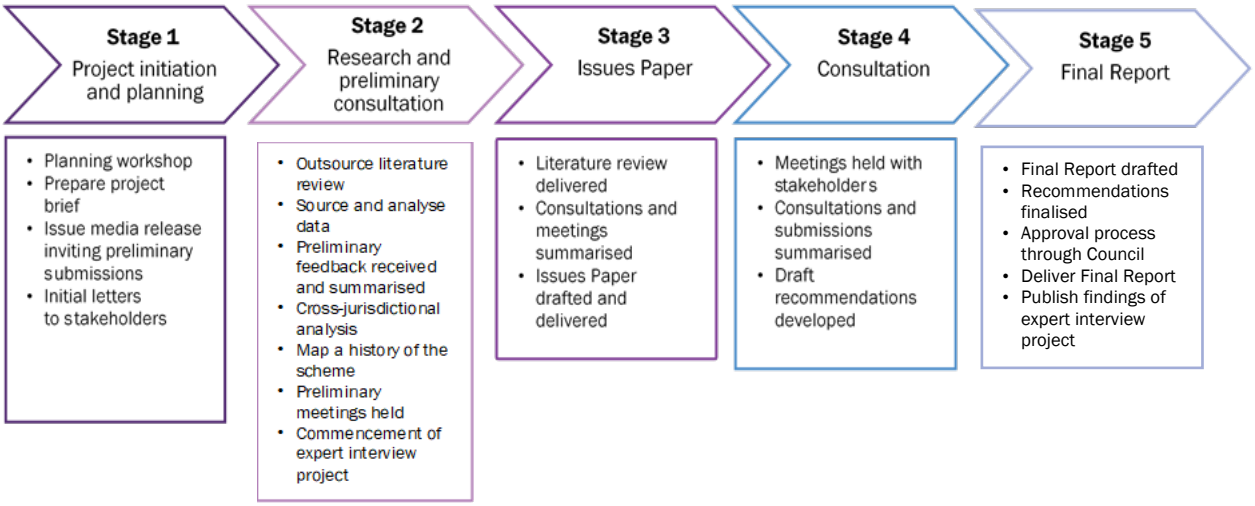
The Terms of Reference are set out in full in Appendix 1.

1.3 The Council's approach to the review

As with all Terms of Reference projects at the Council, work is governed by a project management policy that was established early in the life of the Council. The Council's practice is to nominate several of its members to sit on a separate Project Board that meets throughout the life of a project and governs all decisions relating to the progress of the project. The Project Board for these Terms of Reference has met monthly and is responsible for ensuring a high-quality response to the Terms of Reference. As with all its Terms of Reference projects, the Council has adopted a staged approach to the review.

Key stages of the project are shown in Figure 1.

Figure 1: The Council's approach to the Terms of Reference



Summary of Key Stages

Stage 1 The Council initiated the project and prepared project plans. The Council released an information sheet on the SVO scheme published on its website, invited preliminary feedback on issues to be explored, met with key stakeholders and agencies, and established a research framework to guide the review. The Council also initiated a separate expert interview project during the initial stages of the review to better understand the operation of the SVO scheme and how it impacts on court sentencing practices, pre-sentence processes, including plea negotiations and the management of offenders convicted of an SVO.

Stage 2 The University of Melbourne was commissioned to undertake a literature review. The Council analysed relevant data provided by Court Services Queensland and Queensland Corrective Services ('QCS'), and undertook background research on the history of the scheme as well as similar schemes in other jurisdictions.

Stage 3 The Council published the outcomes of its initial research and analysis in four background papers. These are available on the Council's website. Key findings from these papers are reported in this final report. The Council also published a detailed Issues Paper: *The '80 per cent rule': The Serious Violent Offences Scheme in the Penalties and Sentences Act 1992*. The Issues Paper posed 34 questions for stakeholders to consider. The Council also held several consultation meetings with key stakeholders. A list of stakeholder consultations can be found in Appendix 2.

Stage 4 The Council received 18 public submissions from key stakeholders, which have been published on the website, and two confidential submissions. The Council also conducted consultation sessions with victims and survivors of serious violent crime and their families to understand the impact of the SVO scheme on victim satisfaction. In this stage, the Council also sought further input from its Aboriginal and Torres Strait Islander Advisory

Panel regarding the impact of the current SVO scheme, and any recommended reforms, on Aboriginal and Torres Strait Islander offenders. A list of those submissions and victim and survivor consultations can be found in Appendix 2.

Stage 5 This report is published, presenting the final advice and recommendations from the project.

1.4 The Council's approach to consultation

As set out earlier, the Council undertook its usual consultation activities for this Terms of Reference review. This included seeking preliminary feedback on the SVO scheme and producing an Issues Paper inviting submissions from stakeholders and interested parties. A total of 20 submissions were received in response.

The Council also held individual meetings with stakeholders, including with members of its Consultative Forum — a roundtable comprising senior representatives from across the criminal justice system.

In addition to the Issues Paper, four detailed background papers were produced to help stakeholders and interested parties respond to the Issues Paper. Each Background Paper responded to a specific theme or issue and these papers are available on the Council's website:

1. Background Paper 1: *History of the Serious Violent Offences Scheme*.
2. Background Paper 2: *Minimum Non-Parole Schemes for Serious Violent Offences in Australia and Select International Jurisdictions*.
3. Background Paper 3: *Analysis of Queensland Court of Appeal Decisions and Select Sentencing Remarks.*
4. Background Paper 4: *Analysis of Sentencing and Parole Outcomes: The Who, What and How Long of Serious Violent Offences.*

Consultation forums with victims and survivors of serious violent offences and their families

To obtain the views of victims of offences sentenced under the SVO scheme, the Council conducted consultation forums. Due to the impact of the COVID-19 pandemic, these consultation sessions were held online over January and February 2022. The Council partnered with the Queensland Homicide Victims' Support Group to conduct these consultation sessions and held two forums with members from both South-East Queensland as well as regional areas.

Other consultation sessions to be run in partnership with other victim and survivor support agencies were scheduled, but had to be cancelled due to the COVID-19 wave in Queensland. Following discussions with partner organisations, the Council did not proceed with these sessions in an online format due to the difficulty in ensuring a trauma-informed approach. The Council appreciates the contributions of these organisations in other ways, including through submissions and participation in the expert interview project.

The consultation process was co-designed with the partner organisation. The aim of the consultation was to explore participants' understanding and views of the scheme, as well as to ascertain the importance of different elements of the scheme to participants. The consultation sessions addressed the following issues:

- knowledge of the SVO scheme and information provided to victims and survivors and their families throughout the criminal justice process;
- views of the scheme and impact on the satisfaction with the sentencing process and outcome;
- importance of different elements of the sentence, including overall head sentence and non-parole period;
- perception of parole for offenders declared convicted of a serious violent offence; and
- impact on victims when a discretionary SVO declaration is not made.

Participation in the Council's consultation process was voluntary and confidential. Potential participants were provided with an information sheet and consent form (see Appendix 3). The partner organisation provided psychological support to participants before, during and after the sessions as required.

1.5 Literature review

The Council commissioned the University of Melbourne to undertake a literature review to provide insights into perceptions of seriousness, risk and harm, the effectiveness of mandatory or minimum non-parole period schemes and evidence-based approaches to achieving community protection, deterrence, and rehabilitation. The review draws on over 10 years of available research to review the effectiveness of the SVO and similar schemes. A Summary Report and Technical Report can be found on the Council's website. See Appendix 4 for an overview of the literature review findings.

1.6 Scope of the project

Early in the project, the Council considered whether there were any matters that would be excluded from the analysis undertaken for the project.

This review focused on the operation and efficacy of the SVO scheme. This review and its data analysis expressly excludes some sentencing orders that can be made for offenders convicted of offences listed in Schedule 1 of the PSA — the schedule in the Act that lists offences that can, or must be declared convictions of a serious violent offence where a term of imprisonment is imposed depending on the length of the sentence.[1] These are life sentences, indefinite sentences,[2] mandatory sentences for repeat serious child sex offences,[3] and the operation of the serious organised crime circumstance of aggravation.[4]

The Council agreed that the sentencing of children (people aged under 18 years of age)[5] was excluded from this review, as the SVO scheme does not apply to children sentenced under the *Youth Justice Act 1992* (Qld).

Decisions made by the Mental Health Court concerning offenders charged with Schedule 1 offences did not form part of this review as they are not sentencing decisions. These decisions include a finding that a person is of unsound mind at the time of the offence, which means they are not criminally responsible for their actions.

The *Dangerous Prisoners (Sexual Offenders) Act 2003* (Qld) ('DPSOA') was also excluded from the review as this operates as a civil post-sentence scheme. Although some offences listed in Schedule 1 of the PSA may result in an order being made under the DPSOA (meaning the person is subject to detention or supervision at the end of their sentence), the PSA expressly prohibits a court from having regard to the potential for an offender to become subject to an order as a result of a dangerous prisoner application when imposing a sentence.[6] The Council included limited analysis examining the intersection between the SVO scheme and the DPSOA in Part B. The Council discusses post-sentence orders for offenders convicted of non-sexual violent offences, in Chapter 20 of the report.

The Terms of Reference ask the Council to examine whether the SVO scheme is impacting on victims' satisfaction with the sentencing process and if so, in what way. It was not possible for the Council to undertake empirical research to address this question in detail due to limited time to complete the reference and ethical considerations. The Council instead addressed this aspect of the Terms of Reference through consideration of submissions from victim and survivor support and advocacy organisations and consultation with victims, survivors, and their families — see section 1.4 for further detail. Victim and survivor support services also participated in the Council's subject-matter expert interview project — see section 1.7.3.

As required under the Terms of Reference, the review includes consideration of similar sentencing provisions involving minimum non-parole periods for serious criminal offences in other Australian and international jurisdictions. However, a direct comparison between Queensland sentencing outcomes and other jurisdictions was not undertaken as legislative and penalty frameworks and sentencing approaches are unique to each jurisdiction.

1.7 Methodology and data sources

1.7.1 Quantitative research

Courts database

The Council used sentencing data from the Courts Database to obtain information about whether a person was sentenced for a declared SVO. The Courts Database, which is maintained by the Queensland Government Statistician's Office ('QGSO'), contains information collected from an administrative information system used by court staff.

Information about whether a person was sentenced for a declared SVO improved considerably from July 2011 onwards. Consequently, most data reported in this paper covers the period from 2011–12 to 2019–20.

The courts data is presented in relation to the most serious offence ('MSO') for which an offender was sentenced on a particular day. The determination of which sentence is the 'most serious' was ascertained using predetermined

1 For information on the operation of the SVO scheme, see Chapter 2.
2 *Penalties and Sentences Act 1992* (Qld) Part 10 ('PSA').
3 Ibid pt 9B.
4 Ibid pt 9D.
5 *Acts Interpretation Act 1954* (Qld) sch 1, definition of 'child'. This applies for the purposes of the *Youth Justice Act 1992* (Qld).
6 PSA (n 2) s 9(9)(b).

data flags developed by QGSO. Cases in which the MSO was a life sentence were excluded from this analysis. Life sentences are not subject to the SVO scheme as separate statutory provisions apply governing relevant minimum non-parole periods.

The Technical Paper for Research Publications, available on the Council's website, provides more information about the counting rules, methodology and terminology in relation to court data used in this paper.

QCS data

The Council obtained data from QCS about prisoners who served a sentence of imprisonment for a declared SVO at any time during the operation of the SVO scheme. This resulted in a unit record dataset of all prisoners who were declared convicted of a serious violent offence from July 1997 to June 2020.

Cases sentenced between 2011–12 and 2019–20 were matched with the courts' dataset and cross-validated for consistency between the datasets. This resulted in a dataset of 437 cases with an SVO declaration over the 9-year period. This dataset forms the basis for most of the data analysis contained in this paper (apart from Chapter 9, parole and actual time served in custody, which is based on QCS data).

The QCS dataset provided additional data about prisoners sentenced for an offence declared to be an SVO. This includes information about parole applications, the length of time a prisoner served in custody before being released on parole, and other information about parole.

Time served in custody before release on parole was calculated from when an offender's sentence was deemed to have started for declared SVOs, including any time declared served on remand, until the first exit from custody (after having served all of the sentence, or having been released on parole). Prisoners who were subject to cumulative penalties were excluded from the parole analysis, as it was not possible to untangle the effects of the operation of the SVO scheme with other sentences.

Analysis of QCS data was limited to the 'most serious' sentence served by a prisoner. The determination of which sentence was the 'most serious' was calculated by the Council based on the charge which attracted the longest sentence of imprisonment.

1.7.2 Data and methodological limitations

While the Council made every effort to obtain as much information about the application of the scheme as possible, there are several data limitations impacting the Council's analysis. These include:

- **Offence classifications**: Offence information maintained by QCS is not recorded against definitions set out in legislation. This means that QCS information does not directly correspond to courts data on offences. The offence categories assigned by QCS are broader than legislative definitions. See Table A4 in Appendix 5 for a list of legislative offences and how these correspond to QCS offence categories:
  - Some QCS offence categories, such as *deal or traffic in illicit drugs* are broader than the legislative offence of *trafficking in dangerous drugs* and may include prisoners sentenced for the offence of *supply a dangerous drug*.
  - Other offences, such as *acts intended to cause grievous bodily harm and other malicious acts* (s 317), are coded under the broader QCS category of *acts intended to cause grievous bodily harm*, together with offences such as *grievous bodily harm* (s 320) and *wounding* (s 323) making these offences indistinguishable for the purposes of analysis.
- **Information on victims**: Reliable information on victims of offences that were declared to be SVOs was not available in the datasets collected by Court Services Queensland.
- **Information about drugs**: The data sources did not include information about the type or amount of drugs seized.
- **Limited data**: The SVO scheme was introduced in 1997. Criminal justice data collected prior to this date is incomplete and recorded under different counting rules and methodologies compared to data collected in recent years. As such, the Council was limited to descriptive analysis about sentencing outcomes following the introduction of the SVO scheme. As a result, it was not possible for the Council to determine the impact of the SVO scheme on sentencing practices based on the quantitative data analysis conducted.
- **Preliminary feedback**: Preliminary feedback received from stakeholders addressed the importance of understanding the impact of the scheme on vulnerable and marginalised communities, including people with mental health issues, and people with disability. Due to data limitations, this analysis was not possible.

1.7.3 Qualitative research

Subject-matter expert (SME) interviews

To gain an understanding of the application of the scheme and its impact on sentencing practices, the Council conducted an extensive subject-matter expert ('SME') interview project. The purpose of these interviews was to learn about the practical application of the SVO scheme and gather the views of professionals regularly interacting with it. The benefits of this project included gaining a deeper understanding of key issues and problems, gathering information about the practical operation of the scheme, and exploring a wide diversity of stakeholder views.

Selection of participants for SME interviews

The Council conducted 71 interviews over June to October 2021 with a range of experts, including members of the judiciary, public prosecutors, legal representatives, members of the Parole Board, victims and survivor support and advocacy organisations and other stakeholders, including organisations which provide legal and transitional support to prisoners. Figure 2 provides an overview of the interviews conducted in the expert interview project. Participants were based in South East Queensland, as well as Far North Queensland. Participants were recruited either through nominations or direct contact. While the Council fully acknowledges that the expert interview project did not capture all relevant stakeholders, the approach adopted provided access to a wide range of experiences and perspectives.

The interviews were confidential, with participants only identified as a member of their broader occupational group. Information drawn from these expert interviews has been further deidentified in this report to further protect the identity of participants.

Figure 2: Number of interviews in Subject-Matter Expert Interview project

Participant group	Number of interviews
Supreme Court Judges	12
District Court Judges	9
Public Prosecutors	10
Legal Practitioners (private)	6
Legal Practitioners (Legal Aid)	9
Queensland Parole Board (members and staff)	5
Victim and survivor support and advocacy organisations	11
Queensland Corrective Services (staff)	5
Other	4

Note: Some organisations had multiple participants in attendance at their interview.

Data collection and analysis

Interviews were conducted either in person or online by Secretariat staff. A semi-structured interview guide was used to conduct the interviews (these can be found in Appendix 6). The interviews explored topics including experiences of the scheme, examples of relevant cases and key considerations, the impact of the scheme on sentencing practices and judicial discretion, the scope of the scheme, as well as the impact of the scheme on victims and survivors of serious violent offences.

The majority of interviews were audio-recorded and transcribed. Transcripts were analysed using the qualitative data analysis software NVivo and grouped in broad themes and sub-categories. An approach of deductive coding was applied, with issues identified that did not fit into predetermined codes coded separately for further review. A coding tree can be found in Appendix 7.

1.8 Terminology in this report

The Council acknowledges that the language used to describe offences under Schedule 1 is important. For data analysis purposes and to simplify the presentation of the data, the different types of offences listed in Schedule 1 were grouped into four categories — non-sexual violence offences, sexual violence offences, drug offences and other offences.[7]

7 Queensland Sentencing Advisory Council, *Analysis of Sentencing and Parole Outcomes: The Who, What and How Long of Serious Violent Offences* (Background Paper 4, October 2021). See Table A1 in Appendix 5 for a full list of sch 1 offences and the Council's categorisation for analysis.

The Council acknowledges that not all offences in Schedule 1 can be assigned to a single offence category. The Council refers to interpersonal offences as sexual violence and non-sexual violence to distinguish between these types of offences for data purposes only. The Council regards sexual offences as inherently violent and is aware of a broader and systemic problem regarding the classification of these offences.[8] This issue as it impacts on this review is discussed further in section 16.2.2 of this report.

The Council acknowledges that many individuals who have experienced a crime, including specific crime types such as family violence and sexual assault, prefer the term 'victim survivor' or 'survivor' rather than the term 'victim' while some people do not identify with any of these terms. For this reason, the Council generally uses 'victims and survivors' in this report to recognise individual preferences. This term is used to refer generally to people who have suffered harm because a crime was committed against them or because they are a family member or dependant of a person who has died or suffered harm because a crime was committed against that person.

1.9 Structure of this report

The chapters in this report are structured as follows:

PART A – The SVO scheme: History, current law and practice, and alternative approaches

Chapter 2 The context of the SVO scheme

Chapter 3 Current legislative and caselaw framework

Chapter 4 Post-sentence management of offenders

Chapter 5 Approach to sentencing serious violent offences in other jurisdictions

PART B – Application of the SVO scheme

Chapter 6 By the numbers — the application of the SVO scheme

Chapter 7 Characterising the scheme: offences and offenders

Chapter 8 Sentencing outcomes and appeals

Chapter 9 Parole and actual time served in custody

PART C – Impact and efficacy of the SVO scheme

Chapter 10 Impact of the scheme on court sentencing practices

Chapter 11 Ability of the current scheme to meet its intended objectives

Chapter 12 Potential of the SVO scheme to create inconsistency of constrain the sentencing process

Chapter 13 Victim satisfaction with the sentencing process

Chapter 14 Other impacts of the SVO scheme

PART D – Reforms to the SVO scheme

Chapter 15 Fundamental principles

Chapter 16 The case for reform

Chapter 17 Options and alternative models considered by the Council

Chapter 18 Recommended reforms to the SVO scheme

Chapter 19 Implications and impacts of proposed reforms

Chapter 20 Other issues

8 See Victorian Sentencing Advisory Council, *Sentencing of Offenders: Sexual Penetration of a Child under 12* (Report, June 2016) 2–3.

PART A

The SVO scheme: History, current law and practice, and alternative approaches

Chapter 2

The context of the SVO scheme

Chapter 3

Current legislative and caselaw framework

Chapter 4

Post-sentence management of offenders

Chapter 5

Approach to sentencing serious violent offences in other jurisdictions

Chapter 2

The context of the SVO scheme

2.1 Introduction

In Chapter 2, we explore the history of the serious violent offences ('SVO') scheme in Queensland, including when and why it was introduced, the purposes of the scheme and how the scheme impacts on parole eligibility.

2.2 The serious violent offences scheme

The SVO scheme requires a person declared convicted of certain listed offences[1] to serve 80 per cent of their sentence (or 15 years, whichever is less) in prison before being eligible for release on parole.[2] The making of a declaration is mandatory for sentences of imprisonment of 10 years or more, and discretionary for sentences of imprisonment between 5 and less than 10 years. The SVO scheme, as it applies to sentences of 10 years or more, is a form of mandatory sentencing.

This is different to the ordinary rules applying to the setting of a parole release or parole eligibility date. Ordinarily, courts have discretion to decide the date an offender must be released on parole (if the person is eligible for court ordered parole) or is eligible for release on parole.

For offenders with a parole eligibility date, release on parole is not automatic. The decision whether to release the offender from custody to parole is made by the independent Parole Board Queensland ('Parole Board') – see section 4.2.2.

The SVO declaration attaches to the offence. However, as will be discussed later in this report (see section 3.3), the circumstances of the offender can be relevant to whether to make a declaration or not.

2.3 The operation of parole

Parole is 'a form of conditional release of offenders sentenced to a term of imprisonment, which allows an offender to serve the whole or part of their sentence in the community, subject to conditions'.[3] Parole aims to improve public safety by reintegrating the person into the community and minimising the likelihood of reoffending.

The sole purpose of parole is:

1 Or of counselling, procuring, attempting or conspiring to commit such an offence.
2 *Corrective Services Act 2006* (Qld) s 182 ('CSA').
3 Arie Freiberg et al, 'Parole, Politics and Penal Policy' (2018) 18(1) *QUT Law Review* 191, 191.

> to reintegrate a prisoner into the community before the end of a prison sentence *to decrease the chance that the prisoner will ever reoffend*. Its only rationale is to keep the community safe from crime. If it were safer, in terms of likely reoffending, for prisoners to serve the whole sentence in prison, then there would be no parole.[4]

Prisoners who are not granted parole and are released from prison at the end of their sentence will not be subject to supervision,[5] nor the support the parole system can provide.[6]

A person on parole must comply with conditions and can be returned to prison at any time during the remainder of their sentence, in accordance with the Parole Board's statutory powers (which have a primary focus on community safety). If a person fails to comply with the conditions of their parole order, the Parole Board may amend, suspend or cancel parole (see section 4.2.2).[7]

2.3.1 Types of parole in Queensland

Queensland has a 'mixed system where orders for release on parole are either made by the court at the time of sentence or by the Parole Board sometime during the sentence period'.[8] This means that when a court decides to sentence an offender to imprisonment with parole, there are two different approaches to setting a parole eligibility date that may apply:[9]

1. **Court ordered parole** – where a court sentences an offender to a term of imprisonment of 3 years or less (excluding sexual offences and declared SVOs) the court must set a parole release date at the time of sentence.[10] The offender must be released on that date subject to certain powers of intervention held by the Parole Board. The court may fix any day of the offender's sentence as their parole release date, including the day of sentence or the last day of the sentence.[11] A person cannot be sentenced to court ordered parole and declared convicted of an SVO.
2. **Board ordered parole** – where a court chooses to set the date the person becomes eligible for release on parole, the Parole Board decides whether the person should be released when that person makes an application. The actual date of their release is at the discretion of the Parole Board and can vary greatly depending on the circumstances of the case and of the offender. In some cases, offenders serve their full head sentence in custody. This is the only type of parole available for sentences of more than 3 years[12] or if the person is sentenced for a serious violent offence or sexual offence.[13]

Board ordered parole is the type of parole order that is relevant to the SVO scheme and is examined in this review.

2.3.2 What is the non-parole period?

The non-parole period is the period during which an offender sentenced to imprisonment must remain in custody before being eligible for release or released into the community on parole.[14] The maximum term of imprisonment to be served is called the 'head sentence' (comprising the non-parole and parole periods).

The relationship between the head sentence and the non-parole period is illustrated in Figure 3. In Queensland, the non-parole period is the period before a prisoner reaches their parole eligibility date (Board ordered parole) or fixed parole release date (Court ordered parole).

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4 Walter Sofronoff, Queensland Parole System Review: Final Report (Report, 2016) 1 [3] (emphasis in original) ('*Queensland Parole System Review: Final Report*').

5 An exception to this is the *Dangerous Prisoners (Sexual Offenders) Act 2003* (Qld) ('DPSOA') which provides a system for preventative detention and supervision of a certain class of offender beyond the expiry of their full time sentences. The 'particular class of prisoner' are those detained in custody serving a period of imprisonment for a 'serious sexual offence': DPSOA s 5. The court will determine whether the prisoner should be ordered to remain in custody (continuing detention order) or be released into the community under extended supervision (supervision order): DPSOA s 13(5).

6 Parole Board Queensland, *Parole Manual* (2019) 11.

7 CSA (n 2) s 205.

8 *Queensland Parole System Review: Final Report* (n 4) 71 [315].

9 The relevant provisions regarding parole are in the *Penalties and Sentences Act 1992* (Qld) Part 9, Division 3 ('PSA').

10 Ibid s 160B.

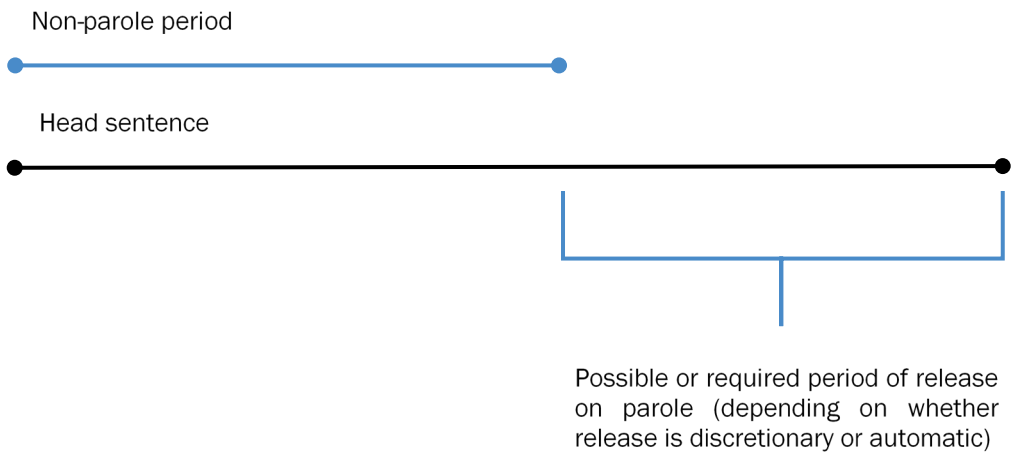
11 Ibid s 160G.

12 Ibid s 160C.

13 Ibid s 160D.

14 Australian Law Reform Commission, *Same Crime, Same Time: Sentencing of Federal Offenders* (Report No. 103, 2006) 281 [9.2].

Figure 3: Head sentence and the non-parole period in sentencing



2.3.3 Commentary on the purpose of the non-parole period

The High Court has described the non-parole period as the 'minimum period of imprisonment to be served because the sentencing judge considers that the crime committed calls for such detention'.[15] This was reinforced by a later judgment of *Muldrock v The Queen*,[16] which stated 'the non-parole period is imposed because justice requires that the offender serve that period in custody'.[17] The non-parole period may be regarded as serving 'the interests of the community in the same way that the head sentence can, by providing for some element of community protection as well as personal and general deterrence'.[18]

Both the 'circumstances of the offence' and the 'justice' of the case are relevant considerations to a sentencing judge's decision about parole.[19] Critically, 'the non-parole period must necessarily bear a relationship to the sentence of imprisonment which is imposed'.[20] To determine the minimum period of actual incarceration in full time custody, a sentencing judge should have 'regard to all the elements of punishment including rehabilitation, the objective seriousness of the crime and the offender's subjective circumstances'.[21] With respect to any rehabilitative purpose the High Court has said 'that does not mean that the sentencing judge, in fixing the minimum term, approaches the task on the footing that he or she is solely or primarily concerned with the prisoner's prospects of rehabilitation'. [22]

Importantly, 'the fixing of a non-parole period serves the interests of the community rather than those of the offender, even though a minimum term confers a benefit on the offender'.[23]

2.3.4 The development of an apparent 'usual' non-parole period in Queensland

In Queensland, there is a statutory 50 per cent ratio between the minimum time to be served before an offender is eligible to be released on parole and the head sentence. This only applies when a court does not fix a parole eligibility date. However, there are some exceptions, such as the SVO scheme (see section 2.4) and legislative minimum non-parole periods that apply to life sentences in Queensland.

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15 *Power v The Queen* (1974) 131 CLR 623, 628 (Barwick CJ, Menzies, Stephen and Mason JJ).
16 (2011) 244 CLR 120.
17 Ibid 140 [57].
18 Arie Frieberg, *Fox and Frieberg's Sentencing: State and Federal Law in Victoria* (Thomson Reuters, 3rd ed, 2014) 857 with reference to *R v Lane* (1995) 80 A Crim R 208.
19 *Inge v The Queen* [1999] 199 CLR 295, 316 [58] citing *Deakin v The Queen* (1984) 58 ALJR 367.
20 Ibid 316 [59].
21 Judicial Commission of New South Wales, *Sentencing Bench Book* (June, 2021) [7-500] citing *Power v The Queen* (1974) 131 CLR 623, 628–9, applied in *Deakin v The Queen* (1984) 11 A Crim R 88; *R v Simpson* (2001) 53 NSWLR 704, 717 [59]; *R v Ogochukwu* [2004] NSWCCA 473, [33]; *R v Cramp* [2004] NSWCCA 264, [34]; *Caristo v The Queen* [2011] NSWCCA 7, [27]; *R v MA* (2004) 145 A Crim R 434, 440–1 [34]; *Hili v The Queen* (2010) 242 CLR 520, 533 [40].
22 *Bugmy v The Queen* (1990) 169 CLR 525, 530–1 [17] (Mason and McHugh JJ).
23 *R v Ibbetson* [2020] QCA 214, [38] citing *De Hollander v The Queen* [2012] WASCA 127, [80].

Judicial discretion in setting sentences of imprisonment with parole requires flexibility. In 2019, the Court of Appeal observed:

> Because of the many different kinds of offences, the infinite kinds of circumstances surrounding the commission of offences and the limitless kinds of offenders, both the discretion as to length of imprisonment and as to the fixing of a parole date cannot possibly be circumscribed by judge-made rules so as to preclude consideration of whatever relevant factors might arise in a particular case. It may be common to impose a head sentence by having regard mostly to the circumstances surrounding the commission of the offence and to fix the actual period of custody by reference to an offender's personal circumstances. But there is no rule of law that requires that to be done in every case. In the absence of a statute that prescribes the way in which an offender should be punished, sentencing judges have always regarded all of the elements of a sentence to be flexible. They will continue to do so in order to arrive at a just sentence in all the circumstances.[24]

Sections 160C(5) and 160D(3) of the *Penalties and Sentences Act 1992* (Qld) ('PSA') give courts the discretion to set a parole eligibility date for sentences of imprisonment that are longer than 3 years, or of any length if the person is being sentenced for a sexual offence.[25] Where a judge declines to set a parole eligibility date, section 184(2) of the *Corrective Services Act 2006* (Qld) ('CSA') provides that the person will become eligible for parole after serving 50 per cent of their sentence (although there are some legislated exceptions). Setting parole eligibility at 50 per cent of the head sentence is commonly applied to offenders who have been convicted after a trial.

In Queensland, it is regarded as a 'rule of thumb'[26] to set parole eligibility date at the one-third mark of the head sentence if the offender pleads guilty and there are other mitigating features (such as a lack of prior criminal history or a commitment by the offender to their rehabilitation).[27] The Court of Appeal has found the discretion to set an appropriate parole eligibility date is 'relevantly unfettered'[28] and that 'there can be no mathematical approach to setting such a date'.[29] However, the Court has also said that postponing an offender's parole eligibility date beyond the statutory 50 per cent mark must be supported by a 'good reason'.[30]

In the 2022 decision of *R v HCI*,[31] the applicant was appealing his sentence of 4 years and 6 months (with a non-parole period of 16 months) for nine counts of serious child sexual offences, on the basis of it being manifestly excessive in part due to the non-parole period. As part of their argument, the applicant's counsel asserted to 'the proper sentence being one third actual time in custody'.[32] In response to that, Fraser JA said:

> Those sub-paragraphs [in the applicant's submission] assume it is appropriate to adopt an arithmetical approach to sentencing and that the common sentence practice of fixing parole eligibility after one-third of the

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24 *R v Randall* [2019] QCA 25, [38] ('*Randall*'). See also *R v Fischer* [2020] QCA 66, 4–5.

25 The exceptions to this are: (a) where an offender is sentenced to a period of imprisonment that is more than 3 years if the offender has a current parole eligibility date — in which case the court must fix the date the offender is eligible for parole (PSA (n 9) s 161C(2)); and (b) where an offender is sentenced to a period of imprisonment that includes a term of imprisonment for a serious violent offence or sexual offence in circumstances where the offender has a current parole eligibility date or release date — in which case the court must fix the date the offender is eligible for parole): PSA (n 9) s 161D(2).

26 *Randall* (n 24) [2019] QCA 25 [43].

27 *R v Crouch & Carlisle* [2016] QCA 81, [29] (McMurdo P, Gotterson JA agreeing at [34] and Burns J agreeing at [35]). The President also said that judges should continue to 'exercise the sentencing discretion judicially' and that 'whether a sentence warrants mitigation reflected in a parole eligibility, a parole release date or a suspension set after one third of the sentence, or at some other time, will always turn on the particular circumstances of the individual case': at [29]. See also *R v Tran; Ex Parte Attorney-General* (Qld) [2018] QCA 22, where it was stated that 'usually, pleas of guilty generally only attract parole eligibility dates at around the one-third mark of a head sentence in circumstances where the plea of guilty is early and accompanied by genuine remorse. There are also often other factors relevant to the exercise of such discretion, including the youth of the offender and successful steps towards rehabilitation': at [42]. Absent a mandatory sentence, it is common for an offender who enters an early guilty plea, accompanied by genuine remorse, to have a parole eligibility date or release date, or suspension of their sentence, set after serving one-third of the head sentence in custody: See also *R v Rooney & Gehringer* [2016] QCA 48, [16]–[17] (Fraser JA, Gotterson JA agreeing at [22] and McMeekin J agreeing at [23]) and *R v McDougall and Collas* [2007] 2 Qd R 87, 97 [20]. More recent judgments stress that 'as a matter of principle, the just and appropriate sentence including the proportion which the period to be served in prison bears to the whole term, is to be fixed with reference to all of the circumstances of the particular case, rather than by the application of some rule of thumb in a way that would unduly confine a sentencing judge's discretion': *R v Dinh* [2019] QCA 231, 5 (Fraser JA, McMurdo JA agreeing at 6 and Henry J agreeing at 6). Further, 'the discretion to fix a parole eligibility date is unfettered and the significance of a guilty plea for the exercise of that discretion will vary from case to case. Consequently, there can be no mathematical approach to fixing such a date': *Randall* (n 24) [43].

28 *R v Amato* [2013] QCA 158, [20] (Fraser JA, Holmes JA agreeing at [1] and Mullins J agreeing at [25]) ('*Amato*') citing *R v Kitson* [2008] QCA 86, [16].

29 *R v Hitchcock* [2019] QCA 60, [18] (Sofronoff P, Fraser JA agreeing at [21] and Philippides JJA agreeing at [22]) referring with approval to comments made by Fraser JA in *Amato* (n 28) at [20] citing *R v Ruha, Ruha and Harris; ex parte DPP (Cth)* [2011] 2 Qd R 456, 471 [47] as authority.

30 *Randall* (n 24) [37].

31 [2022] QCA 2.

32 Ibid [34].

> term of imprisonment should be departed from only in exceptional circumstances. Neither assumption accords with sentencing principles.[33]

In the same judgment, the Court also commented on setting the parole eligibility date in circumstances where the sentence had been set below 10 years, 'thereby avoiding the effect of a serious violent offence declaration'.[34] Fraser JA remarked that 'in such circumstances, it is not uncommon for parole eligibility to be fixed well after one-third of the term has been served'.[35] This is discussed further in section 10.4.

To the extent that a parole-eligibility practice has developed, it is clear Queensland courts have a broad discretion to set a parole eligibility date anywhere in relation to the head sentence. However, most often parole eligibility dates are set between 50 per cent and 33 per cent and lower. Indeed, for Schedule 1 offences sentenced to 5 years or more but less than 10 years imprisonment and not declared to be an SVO, the Council found that the majority had a parole eligibility date at 50 per cent and lower, and more commonly at one-third or lower – see section 9.3.

2.4 The SVO scheme and parole eligibility

The SVO scheme requires an offender to serve 80 per cent of their term of imprisonment in custody or 15 years in prison (whichever is less) before being eligible for parole. This applies regardless of whether the SVO is mandatory (imprisonment of 10 years and longer) or discretionary (imprisonment of 5 years to less than 10 years, or less than 5 years if certain criteria are met). The '80 per cent rule' in the SVO scheme is a marked departure from standard parole laws. Figures 4 and 5 illustrate the different ratios of non-parole period to head sentences in Queensland.

Figure 4: A 9-year head sentence of imprisonment with different ratios of non-parole periods

Figure 4 shows a 9-year head sentence and the common non-parole periods that may be set by the court. If the court sets the parole eligibility date at the one-third mark (or 33%), the offender would be eligible for parole at 3 years, and if parole is granted by the Parole Board, would be under supervision in the community for 6 years. If the offender's parole eligibility date is set (or declined to be set by the court as the case may be) at the halfway mark, the offender would be eligible for release after serving 4.5 years and may be subject to up to 4.5 years of supervision. However, if the court makes a discretionary SVO declaration, the offender would only become eligible for parole after serving 80 per cent of their head sentence, or 7.2 years, and at most, be under supervision for 1.8 years (22 months).

The ratio between the head sentence and non-parole period for sentences subject to the SVO scheme is shown in Figure 5. For sentence ranging from 5 to 20 years, the purple bar is the mandatory component to be served in custody and the blue bar shows the maximum period the person may be on parole. Depending on when the person

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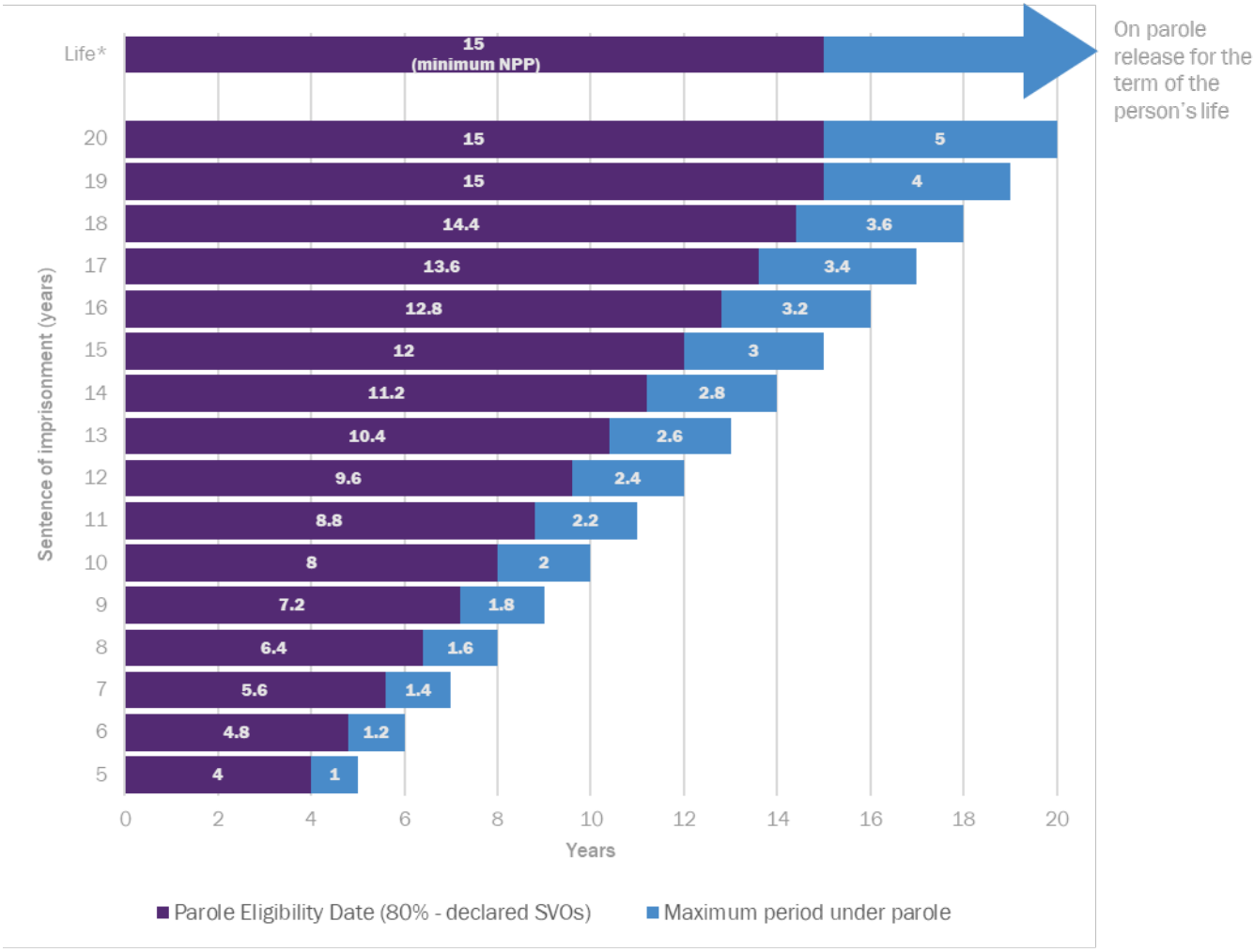
33 Ibid [35] (Fraser JA, Bond JA agreeing at [49] and Daubney J agreeing at [50]). Bond JA reiterated in *R v Sumner* [2022] QCA 8 that while the 'conventional approach in Queensland [is] that a timely plea of guilty is often reflected by setting parole at the one-third point' this is not a mandated approach and does not mean an early guilty plea alone warrants one-third as a starting point, with other mitigating features further reducing the eligibility date: at 6.

34 Ibid [37]. The applicant had been sentenced to two sentences of imprisonment for child sexual offences 'which preceded the subject sentence were considered by the sentencing judge to be relevant to the determination of the subject sentence, by reference to the totality principle': at [10]. The sentencing judge considered had the applicant been sentenced for the subject offending when sentenced earlier he would likely have received a sentence of 8 to 9 years. The judge determined that a notional total term of imprisonment of 8.5 years under the two preceding sentences and the subject sentence with a 16-month non-parole period was appropriate (noting he'd already served 2 years and 8 months on remand).

35 Ibid.

applies for parole and the decision of the Parole Board, a person may serve more than 80 per cent of their sentence before being released on parole, or even their full sentence in some cases.

Figure 5: Ratio between head sentence and parole eligibility date for sentences subject to SVO scheme



* Excludes murder and repeat serious sex offences

2.5 The 'usual' non-parole periods in other Australian jurisdictions

In Background Paper 2, the Council found that Queensland generally sets lower parole eligibility dates, relative to the head sentence, than other Australian jurisdictions (in the absence of special parole provisions).

For Commonwealth offences, and in the Australian Capital Territory (ACT), South Australia (SA) and Victoria, in general there is no set statutory ratio between the non-parole period and the head sentence. However, under SA,[36] Victorian[37] and ACT[38] common law, the ratio is usually between 50 and 75 per cent of the head sentence. SA and Victoria have statutory schemes which set minimum non-parole periods.[39] However, unlike Queensland's SVO

36 The South Australian Court of Criminal Appeal has noted that non-parole periods have tended to range between '50% and 75% of the head sentence': *R v Devries* [2018] SASCFC 101, [19] (Hinton J) citing *R v Palmer* [2016] SASCFC 34, [4] (Kourakis CJ).

37 Generally Victorian sentencing courts impose non-parole periods that are between 60% and 75% of the head sentence: Judicial College of Victoria, *Victorian Sentencing Manual* (4th ed, July 2021) 158 [8.3.2] ('*Victorian Sentencing Manual*').

38 The 'usual [percentage] range of 50-75%' has been noted in a number of Court of Appeal decisions: see *Zdravkovic v The Queen* [2016] ACTCA 53, [74] citing *Barrett v The Queen* [2016] ACTCA 38, [52]: *Taylor v The Queen* [2014] ACTCA 9 at [20] (Murrell CJ, Refshauge and Penfold JJ agreeing generally as to reasons).

39 In South Australia these are the serious repeat offenders scheme and the mandatory minimum non-parole period for serious offences against the person. In Victoria the standard sentences scheme has mandatory non-parole periods and the statutory minimum sentences scheme applies a statutory defined term minimum non-parole period to certain offences. See section 5.3 of this report, for more detail about these schemes.

scheme, those schemes allow judicial officers some discretion to depart.[40] Commonwealth offences which fall within the category of being a terrorism or espionage offence are subject to a 'three-quarter rule' where the non-parole period that must be set is at least three quarters of the head sentence.[41]

In other states and territories, sentencing and parole legislation provides guidance about the required minimum, or recommended proportion between the non-parole period and the head sentence. This ranges from 50 per cent in the Northern Territory,[42] Tasmania[43] and Western Australia,[44] to 75 per cent in New South Wales.[45] In Western Australia, for sentences of more than 4 years, a person is eligible for parole after serving all but two years of the term of imprisonment imposed in custody.[46]

For more detail on each jurisdiction's ratios between non-parole periods and head sentences see Chapter 5. A table setting out the legislative provisions in relation to the statutory ratios between non-parole periods and head sentences is in Appendix 8.

2.6 Why the SVO scheme was introduced

The SVO scheme in Part 9A of the PSA was introduced in the *Penalties and Sentences (Serious Violent Offences) Amendment Act 1997* (Qld) ('*SVO Amendment Act*'). The Bill was introduced on 19 March 1997 and gained assent on 3 April 1997. It was created as a result of a National Liberal Coalition election commitment[47] in the lead up to the 1995 State election. Once established, the SVO scheme has remained largely unchanged as the parole system was overhauled around it.

The SVO scheme is part of the PSA. The scheme came into operation on 1 July 1997, through two additions to the PSA: Part 9A (the scheme itself) and Schedule 1 (the list of offences it can apply to). When the scheme was introduced, the then Attorney-General explained that the approach was based on:

> a reasonable community expectation that the sentence imposed will reflect the true facts and serious nature of the violence and harm in any given case and that condign punishment is awarded to those who are genuinely meritorious of it.[48]

Once an offender is declared convicted of an SVO, the 80 per cent rule engages — whether the offender has pleaded guilty or not, and regardless of any mitigating features of the case.

2.6.1 The SVO scheme was part of wider reform to the Criminal Code

The introduction of the SVO scheme took place alongside extensive reform to the Criminal Code,[49] achieved through the *Criminal Law Amendment Act 1997* (Qld) ('CLAA'). The Criminal Law Amendment Bill was introduced on 4 December 1996 and gained assent on 3 April 1997. The two Bills were part of the same 'policy platform'[50] and members of Parliament at times spoke to the subject matter of one Bill when debating the other (including on the same day).

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40 For example, in SA, a court may set a shorter non-parole period where there are 'exceptional circumstances' under the mandatory minimum non-parole period for serious offences against the person scheme. Section 48(3) of the *Sentencing Act 2017* (SA) sets out a non-exhaustive list of exceptional circumstances which may allow a court to depart from the scheme. In Victoria, the statutory minimum sentences scheme allows a court to depart where there are 'special reasons' — *Sentencing Act 1991* (Vic) s 10A. While under the standard sentences scheme a court may depart from the legislated non-parole period where it is in the 'interests of justice to do so': *Sentencing Act 1991* (Vic) s 11A(4).

41 *Crimes Act 1914* (Cth) s 19AG(1).

42 Applies to sentences of 12 months or longer: *Sentencing Act 1995* (NT) ss 53 and 54. The non-parole period increases to 70% for certain sexual and violent offences: *Sentencing Act 1995* (NT) ss 55 and 55A.

43 *Sentencing Act 1997* (Tas) s 17(3).

44 In this case limited to sentences of 4 years or less: *Sentencing Act 1995* (WA) s 93.

45 *Crimes (Sentencing Procedure) Act 1999* (NSW) s 44, unless there are special circumstances for the balance of the sentence to be more. A court can also decline to set a non-parole period: s 45.

46 *Sentencing Act 1995* (WA) s 93.

47 Queensland National Liberal Coalition, *Policy on Serious Violent Offences (1995)* — reproduced in Karen Sampford, *The Penalties and Sentences (Serious Violent Offences) Amendment Bill 1997* (Legislation Bulletin No. 4/97, Queensland Parliamentary Service, March 1997) Appendix A.

48 Queensland, *Parliamentary Debates*, Legislative Assembly, 19 March 1997, 597 (Denver Beanland, Attorney-General and Minister for Justice).

49 By 1997 the Criminal Code had been subject to two reviews (which did not cover sentencing legislation to any great extent). These reviews bookended a failed replacement Code. The chronology was a 1992 review (the O'Regan Review), the failed 1995 replacement Code and the 'Connolly working group' (Connolly Review) of 1996. For more detail on these please refer to Queensland Sentencing Advisory Council, *History of the Serious Violent Offences Scheme* (Background Paper 1, 2021).

50 Queensland, *Parliamentary Debates*, Legislative Assembly, 19 March 1997, 'Criminal Law Amendment Bill', 619 (Luke Woolmer, Member for Springwood).

A Government member told Parliament that 'law and order issues are close to the heart of every Queenslander'[51] and the CLAA was:

> part of a comprehensive and multifaceted approach that will deliver to the people of Queensland the appropriate level of protection and change that they have called for strongly for such a long time.[52]

This was 'a three-pronged legislative approach that is designed to approach the law and order problems from a legal perspective'.[53] The three prongs were:

1. 'a greatly amended Criminal Code that sent a very deliberate signal to all of our population that this Government will not accept the previous standards'.[54]
2. 'changes to the *Juvenile Justice Act* to finally provide some teeth for the police and the judiciary in dealing with young offenders'.[55]
3. '[an] increase [to] the minimum parole term for serious and violent offenders to 80%'.[56]

Another Government member told Parliament that in the context of the 80 per cent amendment and the system of remissions then in place:

> The Government's commitment to this task is reflected in its decision to build more gaols and expand existing facilities. I commend the Minister for Corrective Services for his desire to follow the wishes of ordinary Queenslanders on this matter. The community is tired of reading day in and day out of the early release of prisoners. By formalising the requirement that the worst prisoners stay where they belong—behind bars—the Government is further demonstrating its desire to listen and act accordingly.[57]

2.7 When the SVO scheme applies

The SVO scheme can apply to certain listed offences if they are sentenced in the District or Supreme Courts ('on indictment'). The offences include:

- non-sexual violence offences (such as manslaughter, grievous bodily harm, torture, robbery, serious assault and assault occasioning bodily harm);
- sexual violence offences (such as rape, maintaining a sexual relationship with a child, incest and indecent treatment of children under 16);
- drug offences (trafficking and aggravated supply of dangerous drugs, aggravated production of Schedule 1 dangerous drugs); and
- offences of counselling or procuring the commission of, or attempting or conspiring to commit, an offence against a provision mentioned in Schedule 1.

Being convicted of a listed offence does not mean the sentence is one imposed under the SVO scheme. There are two ways the SVO scheme can then apply:

- **Automatically:** An offender sentenced to 10 years or more for a listed offence or offences (or of counselling or procuring the commission of, or attempting or conspiring to commit, a listed offence) is automatically convicted of a serious violent offence. The legislation makes this mandatory. Judges are required to declare the conviction to be a conviction of an SVO as part of the sentence. Even if a judge does not, the legislation still deems the offender to have been convicted of an SVO.
- **By judicial discretion:** Judges can choose to make an SVO declaration when the sentence of imprisonment is either:
  - 5 years or more but less than 10 years for a listed offence; or
  - of any length and for any offence (it does not have to be listed in Schedule 1) - provided that it:
    - involved the use, counselling or procuring the use of serious violence against another person (or conspiring or attempting to use it); or
    - resulted in serious harm to another person.

The SVO declaration attaches to the offence. However, as will be discussed later in this report (see section 3.3), the circumstances of the offender can be relevant to whether to make a declaration or not.

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51 Ibid 618.
52 Ibid.
53 Ibid 619.
54 Ibid 618.
55 Ibid.
56 Ibid 619.
57 Ibid 629 (Graham Healy, Member for Toowoomba North).

2.8 Purpose and objectives of the SVO scheme

The purposes of sentencing are considered in greater detail in Chapter 3, with this section examining the objectives of the SVO scheme in achieving sentencing purposes.

2.8.1 Community protection, punishment and denunciation

When the SVO scheme was introduced, its stated purpose was that it would ensure sentencing would reflect the 'true facts and serious nature of the violence and harm in any given case and that condign punishment is awarded to those who are genuinely meritorious of it'.[58] Courts were expected to make protection of the community the primary sentencing consideration and to reflect 'community denunciation of this type of crime'.[59]

In his second reading speech, then Attorney-General and Minister for Justice Denver Beanland declared that 'in determining the appropriate length of a custodial sentence for a serious violent offender, a court will take into account the protection of the community as a primary sentencing consideration'.[60]

The then Attorney-General described the SVO scheme as:

> introducing, within the existing legislative framework, a separate regime for the punishment of criminals convicted of serious violent offences, giving effect to a number of Government election promises. Serious violent offenders will serve at least 80% of their term of imprisonment before becoming eligible to apply for parole or for any form of leave of absence or home detention [which then applied].[61]

Community safety was focused on the offender being incarcerated for at least 80 per cent of their sentence, and then, if found eligible for parole, being in the community under supervision for the remaining 20 per cent. The SVO scheme was the result of this election promise:

> to introduce into the penalties and sentences legislation a section dealing with serious violent offences that reflects our concern for community safety as well as community outrage with this form of crime. This bill delivers that promise. The provisions of the new Part in the Penalties and Sentences Act 1992 will expressly reflect the Government's concern with community safety in relation to serious violent offences, as well as community denunciation of this type of crime.[62]

The election promise also indicated that:

> there will be no remissions. Criminals will not be eligible for work release, day release or other release programs until they have served at least 80% of their sentence. Punishment will fit the crime.[63]

The primary objectives of the SVO scheme are therefore to keep the Queensland community safe, while also ensuring sentences imposed for these offences reflect their seriousness.

2.8.2 Deterrence and rehabilitation

When the scheme was being debated in Parliament in 1997, some Opposition members questioned the usefulness of tougher sentences as an effective deterrent. For instance:

> multitudes of studies have demonstrated that the chief deterrent is not the length of the sentence or, indeed, the circumstances of gaol or the nature of the punishment that somebody will receive in gaol. ... the chief deterrent has always been found to be the certainty of apprehension. .... To attempt to use a Penalties and Sentences Bill for the purposes of deterrence is not the most effective way to do that. One should use the police force for that purpose. One should use community policing, neighbourhood watches and all kinds of crime prevention programs to deter ... Of course, there are some crimes of passion where people do not think ahead. However, a crime which involves preparation is carried out on the basis of the criminal's estimate of his or her likelihood of being caught. That is what we should turn our attention to.[64]

The sentencing purpose of rehabilitation was not considered relevant to the scheme when it was created. However, during debate on the Bill, some Opposition members pointed to the value of supervision on parole in the community, and that by applying an 80 per cent non parole period, it would reduce the time under supervision.

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58 Ibid 597 (Denver Beanland, Attorney-General and Minister for Justice).
59 Ibid 595.
60 Ibid.
61 Ibid.
62 Ibid.
63 Ibid 598 (Denver Beanland, Attorney-General and Minister for Justice).
64 Queensland, *Parliamentary Debates*, Legislative Assembly, 26 March 1997, 907 (Dean Wells, Shadow Minister for Emergency Services, Public Service Matters and Federal/State Relations). See also Queensland, *Parliamentary Debates*, Legislative Assembly, 19 March 1997, 647 (Jonathan H. Sullivan, Member for Caboolture).

> Usually, if it is a well-resourced parole system, that person who is on parole is on a string. That person is regularly in contact with his or her parole officer. A well-resourced parole system is a very, very much cheaper option for the community as a whole and it is also beneficial to that prisoner.
>
> … People need to have time out of prison on parole, on a string under the guidance of a parole officer, so that they can be helped to fit back into society and hopefully not become that one person out of three who commits another crime straightaway.[65]

2.9 Why a schedule was used as an eligibility device

There are offences in Schedule 1 that do not have violence of any kind as an element. The justification provided by the then Attorney-General for the inclusion of such as offences at the time the scheme was introduced was the 'serious degree of violence or harm [that] can be inflicted although actual violence is not an element of the offence':

> The Government went to the people at the last election and made a promise that: "serious violent offences will include rape, child molestation, armed robbery, serious assault, violent attacks in the home and attempted murder. Because of the enormous damage done in the community by drug trafficking, those convicted of this offence will be treated similarly".
>
> This Bill delivers that promise. The expression "serious violent offence" will extend to any of the indictable offences listed in the new Schedule.
>
> Because this Government is concerned to see that Queenslanders feel secure in their homes and on the streets, this Bill addresses both inherently violent crimes and all other crimes in which serious violence is used or contemplated or which results in serious harm.
>
> A solely Schedule based approach, though it can list most violence related offences, may fail to catch some offences in which a serious degree of violence or harm can be inflicted although actual violence is not an element of the offence.
>
> A conspiracy to murder is as serious a "violent" crime as any other, as is an attempted abduction which renders the victim afraid to go anywhere alone.
>
> Therefore attempts and conspiracies to use violence are included in the definition of a serious violent offence, as are the counselling or procuring of such offences.[66]

2.10 Scope of the scheme

Offences have been added to and removed from the schedule over time. In 1997, the scheme included 46 provisions and in its current form, Schedule 1[67] captures 60 offences. These include:

- 47 offence provisions under the Criminal Code;
- 6 repealed Code provisions;
- 2 provisions under the *Corrective Services Act 2006* (Qld) ('CSA');[68]
- 2 equivalent provisions under the repealed *Corrective Services Act 2000* (Qld); and
- 3 offences under the *Drugs Misuse Act 1986* (Qld).[69]

The Council's review of the scheme's history did not reveal any criteria for deciding which offences would be part of the SVO scheme, nor have criteria been created since.

When the scheme was being debated in Parliament in 1997, objections were raised regarding the inclusion of section 421(2) (Entering or being in premises and committing indictable offences) on the basis that it is not a violent offence. However, despite those objections, the offence was included in the original schedule.[70] At the time, Opposition members otherwise supported the scheme, including the inclusion of the three drug offences.

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65 Ibid 905 (Demetrios (Jim) Fouras, Member for Ashgrove). See also Jonathan H. Sullivan, Member for Caboolture at 892 and Queensland, *Parliamentary Debates*, Legislative Assembly, 18 March 1997, 542 (Raymond (Ray) Hollis, Member for Redcliffe).

66 Queensland, *Parliamentary Debates*, Legislative Assembly, 19 March 1997, 596 (Denver Beanland, Attorney-General and Minister for Justice).

67 PSA (n 9) sch 1.

68 These are CSA s 122(2) 'take part in a riot or mutiny' and s 124(a) 'prepare to escape from lawful custody'.

69 These offences are unchanged from those originally listed, but with changes over time to the types and classification of drugs captured under the *Drugs Misuse Act 1986* (Qld) and the *Drugs Misuse Regulation 1987* (Qld), and in the case of the offence of trafficking in dangerous drugs, the period of its application.

70 Queensland, *Parliamentary Debates*, Legislative Assembly, 26 March 1997, 931–934 (Matthew Foley, Shadow Attorney-General and Shadow Minister for Justice and the Arts). This offence was later removed from the schedule by section 84 of the *Justice and Other Legislation Amendment Act 2004* (Qld) under a Labor Government.

Generally, the SVO provisions have remained largely unchanged since their introduction. However, some offence provisions have been added to and removed from the Schedule over time. An example of a recent addition to the scheme was the insertion of section 324 of the Criminal Code (Failure to supply necessaries) on 7 May 2019 by the *Criminal Code and Other Legislation Amendment Act 2019* (Qld).[71] Its inclusion, which took place in conjunction with an increase in the maximum penalty that applies to this offence from 3 years to 7 years' imprisonment, was justified on the basis that it:

> Reflects the seriousness of this offence and is consistent with the current inclusion of other offences such as endangering life of children by exposure (section 326 of the Criminal Code) and cruelty to children under 16 (section 364 of the Criminal Code).[72]

The offence of cruelty to children under 16 was itself added to Schedule 1 in 2004, alongside the offences of:

- taking a child for immoral purposes (Criminal Code, s 219);
- conspiring to murder (Criminal Code, s 309); and
- taking control of aircraft (Criminal Code, s 417A).[73]

The Council's data analysis on the application of the scheme and the Schedule 1 offences which received an SVO over the 9-year data period is presented in Part B of this report.

2.10.1 Dual purpose of Schedule 1

Schedule 1 has a dual purpose and is not solely applied for the purposes of the SVO scheme. It is also the basis for requiring courts to order a prison sentence imposed for a Schedule 1 offence to be served cumulatively with any other term of imprisonment the person is liable to serve where certain criteria are met. These include where the new offence was committed while the person was:

- a prisoner serving a prison sentence; or
- released on parole; or
- at large after escaping from lawful custody under a sentence of imprisonment; or
- on a leave of absence granted under the *Corrective Services Act 2000* (Qld) or the CSA.[74]

This means that without splitting these dual purposes, any changes to Schedule 1 offences would also affect the application of section 156A of the PSA.

2.11 Consultation on the *SVO Amendment Act*

The SVO scheme was created alongside large-scale reform of the Criminal Code, as noted in section 2.6.1 of this report. The CLAA's Explanatory Notes revealed that extensive consultation was undertaken for the CLAA:

> The proposed amendments represent the outcome of an extensive consultative strategy commencing with Cabinet's establishment of the Advisory Working Group in April 1996. That Advisory Working Group, which consisted of Mr Peter Connolly QC, a former Justice of the Supreme Court of Queensland, and two barristers in practice at the private bar, both possessing extensive experience in prosecution and defence criminal law work, produced a comprehensive set of proposed amendments for the Attorney-General in July 1996. These proposals were then released for public consultation, which period lasted until mid-September 1996. Since that time and until the introduction of the legislation, the submissions received from individuals and organisations, which totalled approximately 125, were assessed and examined in-depth. The material contained in those submissions was influential in determining the final outcome of the legislation. In the final stages of the consultative period, further discussions were held with members of the judiciary in order to incorporate refinements to advance drafts which they suggested.[75]

In contrast, the Explanatory Notes for the *SVO Amendment Act* noted only that '[t]here has been extensive consultation and cooperation with the Honourable the Minister for Police and Corrective Services'.[76]

The lack of consultation attracted strong criticism by the shadow Attorney-General, with apparently 'no consultation with victims of crime, with the legal profession, with Aboriginal and Islander groups,[77] with domestic violence groups

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71 *Criminal Code and Other Legislation Amendment Act 2019* (Qld) s 10.
72 Explanatory Notes, Criminal Code and Other Legislation Amendment Bill 2019 (Qld) 5.
73 *Justice and Other Legislation Amendment Act 2004* (Qld) s 84.
74 PSA (n 9) s 156A.
75 Explanatory Notes, Criminal Law Amendment Bill 1996 (Qld) 3.
76 Explanatory Notes, Penalties and Sentences (Serious Violent Offences) Amendment Bill 1997 (Qld) 4.
77 'The lack of consultation with Aboriginal and Islander people and the lack of relation of these measures to the royal commission into Aboriginal deaths in custody is truly worrying': Queensland, *Parliamentary Debates*, Legislative Assembly, 26 March 1997, 883 (Matthew Foley, Shadow Attorney-General and Shadow Minister for Justice and the Arts).

or groups concerned with the rehabilitation of offenders' despite the 'significant changes' being made 'to the principles governing the penalties and sentences applicable under Queensland's criminal law'.[78]

The shadow Attorney-General's amendment 'to refer this Bill to the all-party Legal, Constitutional and Administrative Review Committee with a direction that the committee undertake public consultation on the Bill and report to the House by the next sitting day' about a month later, was defeated.[79]

The shadow Attorney-General also argued that community consultation would ensure that 'the net is cast in the appropriate way and not simply cast in a way which picks up circumstances that would not normally of themselves fall under the category of "serious violent offence"'.[80]

The Opposition Leader considered it a 'very basic tenet' that certain stakeholders be consulted:

> such as the Law Society, the Bar Association and the judiciary itself. After all, this Bill deals with penalties and sentences and it deals with the behaviour of the judiciary. I would have thought that the Chief Justice, for example, should have been involved in detailed discussion … a very detailed consultation should have involved the whole community, the various victims of crime associations—and many people are involved in victims of crime associations—some of the larger offender groups and Aboriginal groups.[81]

The Attorney-General responded that 'the Explanatory Notes only mention the consultation that occurred in recent times'.[82] In particular:

- This issue had more public consultation than any other 'prior to the last election' and 'this legislation became a very clear election commitment for this Government … which we gave clearly and in some detail'.
- 'Well advertised' Public Law and Order Task Force meetings, which 'were not campaign meetings … were held around the State for 18 months to two years prior to the election' and 'everyone had an opportunity to attend'. The Attorney-General, the Minister for Police and Corrective Services, and three other members attended.
- 'We are allowing appropriate time for people to consider the Bill … there has been a great deal of public comment … Wherever one travels in the State, people say that they want tougher provisions in respect of serious violent offenders'.
- 'The Scrutiny of Legislation Committee did not indicate that it shared the [Opposition's] concerns'.[83]

Mrs Cunningham, who held the balance of power, said a number of post-election meetings had been held in her electorate addressing 'crime issues in our region'. The message conveyed reflected the legislation's sentiment: 'they want serious offenders dealt with toughly. They want truth in sentencing – and I guess that is a catchphrase. They want people who commit serious crimes to do the time'. While the Bill itself 'may not have been specifically circulated for comment', she thought 'it embodies many of the issues raised with individual elected members and also their parties … the community has telegraphed its concern'.[84]

Another Opposition member argued that expert opinion was lacking, and Parliamentary debate and general community will have had:

> nothing to do with consultation … people who attended the meetings … were those who were demanding loudly that we should hang offenders or castrate them or whatever else. The people who had a different point of view did not attend … The Government has heard one side of the argument and one side only.
>
> … There should be consultation [not just] with the Police and Corrective Services Minister on whether there is enough accommodation in gaol, but consultation with people in the community who can put an expert point of view on the various issues: what effect this will have; whether or not it will increase the severity of some crimes against people … whether or not the penalty is appropriate to the crime.[85]

2.11.1 Scrutiny of Legislation Committee analysis

In 1997, the Scrutiny of Legislation Committee noted that the SVO Amendment Bill was the fulfilment of Government election policies. It concluded that the question of whether the legislation had had sufficient regard to the rights and liberties of offenders, was a question for Parliament to consider. The Committee noted that it:

> does not examine policy unless, as in this case, it directly intersects with the Committee's terms of reference. The fundamental legislative principles require that legislation should have sufficient regard to the rights and

78 Ibid 878 (Matthew Foley, Shadow Attorney-General and Shadow Minister for Justice and the Arts).
79 Ibid. The next sitting day was 29 April 1997. The vote is at 889.
80 Ibid 881 (Matthew Foley, Shadow Attorney-General and Shadow Minister for Justice and the Arts).
81 Ibid 884 (Peter Beattie, Leader of the Opposition).
82 Ibid 908 (Denver Beanland, Attorney-General and Minister for Justice).
83 Ibid 886 (Denver Beanland, Attorney-General and Minister for Justice).
84 Ibid 886 (Elizabeth (Liz) Cunningham, Member for Gladstone).
85 Ibid 887 (Len Ardill, Member for Archerfield).

> liberties of individuals. There is no doubt that a bill dealing with matters like sentencing principles and periods of imprisonment will affect the liberties of certain offenders.[86]

It referred to the 'justified rationale of the criminal law' being 'the application of sanctions that restrict the rights and liberties of those who engage in socially harmful or disruptive behaviour'.[87] However, it was further noted that:

> Despite the justification for the use of such sanctions on deterrence, punishment or the reduction of the opportunity to re-offend, offenders remain citizens in our society with rights and liberties. Their liberties that should not be curtailed more than is necessary for the effective functioning of the criminal justice system.[88]
>
> As law makers, it is therefore arguable that parliamentarians should always carefully consider proposals for the increase of penalties under the criminal law. They should ensure that such increases are proportionate and necessary for the effective operation of the criminal justice system.[89]

Although the Committee recognised the SVO scheme would have a significant impact on offenders, no evidence base was provided to justify the scheme's significant increase in penalties. Evidence was not provided to explain how the scheme would lead to greater community protection, rather, it appears the scheme is based on a perception of community safety. Had such evidence been demonstrated, it may have justified the increased penalty outcomes on offenders on those grounds.

86 Scrutiny of Legislation Committee, Parliament of Queensland, *Alert Digest* (Issue No. 3 of 1997, 25 March 1997) 1 [1.4].
87 Ibid 1 [1.5].
88 Ibid.
89 Ibid 1–2 [1.6].

Chapter 3

Current legislative and caselaw framework

3.1 Introduction

In this chapter we examine the current legislative and caselaw framework in Queensland relating to the serious violent offences ('SVO') scheme.

The Council's recommendations for reform to the SVO scheme, which may impact on the application of these purposes, guidelines and caselaw is set out in Chapter 18 this report.

3.2 *Penalties and Sentences Act 1992* (Qld) — purposes, guidelines and factors

The *Penalties and Sentences Act 1992* (Qld) ('PSA') is the key piece of legislation that guides sentencing for offences in Queensland. The Act has its own purposes as a piece of legislation and also lists sentencing guidelines and factors that courts must consider.

3.2.1 The purposes of the PSA

Relevant to this review, the purposes of the PSA listed in section 3 of the Act include:

a. collecting into a single Act general powers of courts to sentence offenders; and

b. providing for a sufficient range of sentences for the appropriate punishment and rehabilitation of offenders, and, in appropriate circumstances, ensuring that protection of the Queensland community is a paramount consideration; and

c. promoting consistency of approach in the sentencing of offenders; and

d. providing fair procedures:

   (i) for imposing sentences; and

   (ii) for dealing with offenders who contravene the conditions of their sentence; and

e. providing sentencing principles that are to be applied by courts; and

f. promoting public understanding of sentencing practices and procedures.

Consistency in sentencing in this context refers to the application of a consistent *approach* (i.e. using the same purposes and principles) for sentencing similar offenders for similar offences, rather than applying the same sentence.[90]

3.2.2 Sentencing guidelines

Section 9(1) of the PSA sets out sentencing guidelines, limited to the following five (including combinations of them):

a. to punish the offender to an extent or in a way that is just in all the circumstances; or

b. to provide conditions in the court's order that the court considers will help the offender to be rehabilitated; or

c. to deter the offender or other persons from committing the same or a similar offence; or

d. to make it clear that the community, acting through the court, denounces the sort of conduct in which the offender was involved; or

e. to protect the Queensland community from the offender.

The PSA does not suggest that one purpose should be more, or less, important than any other purpose; in practice, their relative weight must be assessed taking into account the individual circumstances involved. The purposes overlap and cannot be considered in isolation. They are guideposts to the appropriate sentence — sometimes pointing in different directions.[91]

The concept of '**just punishment**' reflects the principle of proportionality — a fundamental principle of sentencing in Australia. Sentencing courts must ensure the sentence imposed 'should never exceed that which can be justified as appropriate or proportionate to the gravity of the crime considered in the light of its *objective* circumstances'.[92]

While a sentence must not be 'extended beyond what is appropriate to the crime merely to protect society', the propensity of an offender to commit future acts of violence, and the need to **protect the community** is a legitimate sentencing consideration.[93]

Deterrence has a forward-looking, crime prevention focus and aims to discourage the offender and other potential offenders from committing the same or a similar offence.[94]

Denunciation in a sentencing context is concerned with communicating 'society's condemnation of the particular offender's conduct'.[95] The sentence imposed represents 'a symbolic, collective statement that the offender's conduct should be punished for encroaching on our society's basic code of values as enshrined within our substantive criminal law'.[96]

As discussed in Chapter 2, the primary objective of the SVO scheme was to meet the sentencing purposes of community protection, punishment and denunciation.

3.2.3 General sentencing factors in section 9 of the PSA

General and specific sentencing factors to which a court must have regard in sentencing (as they apply to the facts of each case) are set out in sections 9(2)–(11) of the PSA. Section 9 applies to any sentence for potentially any offence, including Magistrates Courts sentences that represent the overwhelming majority of sentences imposed in Queensland.

Imprisonment must generally only be imposed as a last resort and a sentence allowing an offender to stay in the community is preferable (section 9(2)(a) of the PSA). However, these two principles do not apply to offences involving the use of (or counselling or procuring the use of, or attempting or conspiring to use) violence against another person, or offences that resulted in physical harm to another person (section 9(2A) of the PSA).[97] Section 9(2)(a) also does not apply when 'sentencing an offender for any offence of a sexual nature committed in relation to a child

90 Sarah Krasnostein and Arie Freiberg, 'Pursuing Consistency in an Individualistic Sentencing Framework: If You Know Where You're Going, How Do You Know When You've Got There?' (2013) 76(1) *Law and Contemporary Problems* 265, 270–71.
91 *Veen v The Queen (No. 2)* (1988) 164 CLR 465, 476 (Mason CJ, Brennan, Dawson and Toohey JJ).
92 *Hoare v The Queen* (1989) 167 CLR 348, 354 (Mason CJ, Deane, Dawson, Toohey and McHugh JJ) (emphasis in original).
93 *Veen v The Queen (No. 2)* (1988) 164 CLR 465, 473, 475 (Mason CJ, Brennan, Dawson and Toohey JJ).
94 Arie Freiberg, *Fox and Freiberg's Sentencing: State and Federal Law in Victoria* (Law Book Co, 3rd ed, 2014) 250–51.
95 *Ryan v The Queen* (2001) 206 CLR 267, 302 [118] (Kirby J).
96 Ibid citing *R v M (CA)* [1996] 1 SCR 500, 558 (Lamer CJ).
97 *Penalties and Sentences Act 1992* (Qld) ss 9(2)(a) and 9(2A).

under 16 years'.[98] Unless exceptional circumstances[99] exist, the court must sentence these offenders to a term of actual imprisonment.[100]

Sections 9(2A) and (3) were introduced in 1997 alongside the SVO scheme.[101] The relevant terms within these sections are not further defined. The Council has previously noted that 'section 9(2A) applies to any offence involving violence or physical harm, thereby reaching beyond the very serious offences to which the SVO scheme applies'.[102]

The Court of Appeal has stated that:

> The evident purpose of the enactment of these provisions in 1997 was to reflect the Parliament's intention that the community expected that crimes of violence were to be punished more severely by the courts than they had been until then.[103]

Similarly, Parliament passed laws relating to child sexual offenders for the same purpose in 2002. Section 9(4) and the corresponding factors in section 9(6) applying to the sentencing of child sexual offences were introduced in the *Sexual Offences (Protection of Children) Amendment Act 2003* (Qld). The Explanatory Notes state that 'the reforms to the sentencing of child sex offenders are designed to ensure that child sex offences are recognised as offences equating in seriousness to offences of violence'.[104]

There is also a list of general factors in section 9(2), which apply to all cases, including offences of non-sexual violence and sexual violence – see Table 1.

Table 1: Sentencing factors in section 9 of the PSA

Section 9(2): General factors applying to all cases	Section 9(3) applying to cases of violence and/or physical harm	Section 9(6) applying to sexual offences against children under 16 years
The maximum penalty and any minimum penalty for the offence	The risk of physical harm to any members of the community if a custodial sentence were not imposed	The effect of the offence on the child
The nature of the offence and how serious the offence was, including: – any physical, mental or emotional harm done to a victim, including harm mentioned in a victim impact statement; and – the effect of the offence on any child under 16 years who may have been directly exposed to, or a witness to the offence	The need to protect any members of the community from that risk	The age of the child
The extent to which the offender is to blame for the offence (culpability)	The personal circumstances of any victim of the offence	The nature of the offence, including, for example, any physical harm or the threat of physical harm to the child or another
Any damage, injury or loss caused by the offender	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	The need to protect the child, or other children, from the risk of the offender reoffending
The offender's character, age and intellectual capacity	The nature or extent of the violence used, or intended to be used, in the commission of the offence	Any relationship between the offender and the child
The presence of any aggravating or mitigating factor concerning the offender	Any disregard by the offender for the interests of public safety	The need to deter similar behaviour by other offenders to protect children
The prevalence of the offence	The past record of the offender, including any attempted rehabilitation and the number of previous offences of any type committed	The prospects of rehabilitation including the availability of any medical or psychiatric treatment to cause the offender to behave in a way acceptable to the community

Table continued over page.

98 Ibid s 9(4)(b).
99 When deciding whether exceptional circumstances exist, the court may consider the closeness in age between the offender and the child: ibid s 9(5).
100 Ibid s 9(4)(c).
101 *Penalties and Sentences (Serious Violent Offences) Amendment Act 1997* (Qld) s 6. Note: these sections were numbered differently when introduced.
102 Queensland Sentencing Advisory Council, *Penalties for Assaults on Public Officers* (Final Report, 31 August 2020) 229-30 [10.2.4].
103 *R v O'Sullivan and Lee; Ex parte A-G (Qld)* (2019) 3 QR 196, 224 [75] (Sofronoff P, Gotterson JA, Lyons SJA).
104 Explanatory Notes, Sexual Offences (Protection of Children) Amendment Bill 2002 (Qld) 2.

Section 9(2): General factors applying to all cases	Section 9(3) applying to cases of violence and/or physical harm	Section 9(6) applying to sexual offences against children under 16 years
How much assistance the offender gave to law enforcement agencies in the investigation of the offence or other offences	The antecedents, age and character of the offender	The offender's antecedents, age and character[105]
Time spent in custody by the offender for the offence before being sentenced	Any remorse or lack of remorse of the offender	Any remorse or lack of remorse of the offender
Other sentences imposed on the offender that have an impact on the sentence being imposed (and vice versa)	Any medical, psychiatric, prison or other relevant report in relation to the offender	Any medical, psychiatric, prison or other relevant report relating to the offender
Submissions made by a representative of the community justice group in the offender's community, if the offender is an Aboriginal or Torres Strait Islander	Anything else about the safety of members of the community that the sentencing court considers relevant	Anything else about the safety of children under 16 the sentencing court considers relevant
Any other relevant circumstance		

3.2.4 Aggravating and mitigating factors

Aggravating factors are details about the offence, the victim, and/or the offender that tend to increase the person's culpability and the sentence received. Mitigating factors are details about the offender and the offence that tend to reduce the severity of the sentence. Both can impact on the sentence imposed, depending on their relevance and the weight placed on them by the court.

The Court of Appeal has noted that the expression 'aggravating factors' is useful because:

> it signifies the tendency of such factors to promote a more severe punishment. However, sometimes such factors really reflect the relevance, in the sentencing process, of the interests of the community and the interests of those who have been directly affected by the offence.[106]

Previous convictions must be treated as an aggravating factor if the court considers they can reasonably be treated as such. This is determined by considering the nature of the previous conviction, its relevance to the current offence, and the time that has elapsed since the conviction.[107]

The fact an offence is a domestic violence offence must be treated as an aggravating factor, unless the court considers it is not reasonable to do so because of the exceptional circumstances of the case.[108] This aggravating factor ensures that sentences reflect a specific type of aggravating criminal behaviour – that is domestic and family violence – in every case in which this behaviour appears, irrespective of what offence is charged.

Aggravating circumstances operate differently to aggravating factors. Aggravating circumstances are grafted into specific subsections of Schedule 1 offence provisions such as serious assault and assaults occasioning bodily harm and provide for higher maximum penalties — where those aggravating circumstances are established.

Generally, the circumstances of the offence and relevant aggravating factors determine the setting of the head sentence. This means the more serious the offence is, the higher the offender's level of culpability. If any aggravating factors are relevant, the longer a head sentence is likely to be.

At sentencing, the judge must balance the setting of the head sentence with an appropriate parole eligibility date based on factors personal to the offender. The sentencing judge is required 'to balance the various interests of the community against the disadvantages of release on parole and to impose a head sentence which is proportionate to the gravity of the offence'.[109] The High Court has considered the role of the sentencing judge in relation to recommendations for parole and non-parole periods and in *R v Shrestha*[110] stated:

> The fact that considerations of mitigation and rehabilitation would ordinarily found a decision that a prisoner be released on parole does not mean that they are the only considerations which are relevant to the question (for the sentencing judge) whether a convicted person should be eligible for release on parole at some future time or to the subsequent question (for the parole authority) whether the prisoner should be actually released. All of the considerations which are relevant to the sentencing process, including antecedents, criminality, punishment and deterrence, are relevant both at the stage when a sentencing judge is considering whether it is appropriate

105 The court must not have regard to the offender's good character if that assisted the offender in committing the offence: PSA (n 9) s 6A.
106 *R v Patrick (a pseudonym); ex parte A-G* (2020) 3 QR 578, 587 [28] (Sofronoff P, Fraser JA agreeing at [63] and Boddice J agreeing at [64]).
107 PSA (n 9) s 10.
108 PSA (n 9) s 9(10A)
109 John Robertson, *Queensland Sentencing Manual* (Lawbook Co, 19 November 2008) [15.210].
110 (1991) 173 CLR 48.

> or inappropriate that the convicted person be eligible for parole at a future time and at the subsequent stage when the parole authority is considering whether prisoner should be released on parole at or after that time.[111]

The Queensland Court of Appeal in *R v Randall*[112] stated there is no rule of law that requires a court to fix the head sentence by mostly having regard to the circumstances surrounding the offence and to fix the non-parole period by reference to the offender's personal circumstances. The Court acknowledged that approach to be common, but:

> in the absence of a statute that prescribes the way in which an offender should be punished, sentencing judges have always regarded all of the elements of a sentence to be flexible. They will continue to do so in order to arrive at a just sentence in all the circumstances.[113]

However, when the SVO scheme is enlivened 'a just sentence in all of the circumstances' is challenging for sentencing judges to achieve. The SVO scheme is a form of mandatory sentencing requiring offenders to serve an 80 per cent non-parole period. Due to this constraint, the Court of Appeal has determined that in order to make a just sentence, it may be appropriate to 'impose a sentence toward the lower end of the applicable range'.[114] This will allow a sentencing judge to take into account the relevant mitigating factors while also recognising the seriousness of the offence through the making of an SVO declaration.

This issue and Court of Appeal caselaw is discussed in greater detail in the next section below and in section 3.3.

3.2.5 Guilty plea as a mitigating factor

A Queensland sentencing court must take the offender's guilty plea into account and may reduce the sentence it would have otherwise imposed had the offender not pleaded guilty (taking into account the timing of the plea).[115] The courts have indicated the more serious the offence, the less significance a plea of guilty will carry in terms of the ultimate sentence imposed. However, even where the offence is quite serious, some reduction in the sentence is warranted in the event of a guilty plea.[116]

As discussed in Chapter 2, section 2.3.4, when there is a guilty plea and other mitigating features, such as a lack of prior criminal history or a commitment by the offender to their rehabilitation, the court commonly will set a parole eligibility date earlier than the statutory half-way mark, and often at, or around, the one-third mark.

There are three reasons why a guilty plea is generally accepted as justifying a lower sentence than would otherwise be imposed:

1. The plea can be a manifestation of remorse or contrition. The Court of Appeal has cautioned that 'on sentencing, an offender's remorse should not be left to inference. If it exists, it should be proved with clarity'.[117]
2. The plea has a utilitarian value to the criminal justice system. It saves public time and money.
3. In particular cases — especially sexual assault cases, crimes involving children and, often, elderly victims — there is particular value in avoiding the need to call witnesses, especially victims, to give evidence.[118]

In the absence of remorse by the offender for their actions, the focus moves to the willingness of the offender to facilitate the course of justice.[119]

As to the utilitarian value of a plea, courts have recognised that the public interest is served by an accused person who accepts guilt and pleads guilty to an offence charged,[120] even if there is a high likelihood of conviction had the

111 Ibid, 67-9 (Deane, Dawson and Toohey JJ).
112 *Randall* (n 24).
113 Ibid [38].
114 *R v Bojovic* [2000] 2 Qd R 183, 191–2 [34] (de Jersey CJ, Thomas JA, and Demack J) ('*Bojovic*').
115 PSA (n 9) s 13.
116 See, for example, *R v Bates; R v Baker* [2002] QCA 174, 11–12 [58], [60] (Williams JA) where the Court of Appeal allowed an appeal by an offender who received a life sentence on this basis substituting a determinate sentence of 18 years' imprisonment finding that the failure of the sentencing judge to take the guilty plea into account in mitigation represented an error in the exercise of the sentencing discretion; and *R v Duong* [2002] QCA 151 where the Court of Appeal accepted the offenders must receive some benefit for their guilty pleas notwithstanding their lateness: at 9 [38]; and that it involved 'an horrendous crime calling for severe punishment': at 10 [45]. In that instance, sentences of 12 years' imprisonment on two offenders, and 9 years' imprisonment on the others with a serious violent offence declaration were not disturbed on appeal.
117 *Randall* (n 24) 5 [27].
118 *R v Thomson* (2000) 49 NSWLR 383, 386 [3]. This principle has been cited with approval by the Queensland Court of Appeal. See, for example, *R v Bates; R v Baker* [2002] QCA 174, 14 [76] (Atkinson J).
119 *Cameron v The Queen* (2002) 209 CLR 339, 343 [11], [13]–[14] (Gaudron, Gummow and Callinan JJ); and *R v McQuire & Porter* (2000) 110 A Crim R 348, 358 (de Jersey CJ), 362 and 366 (Byrne J).
120 *R v Harman* [1989] 1 Qd R 414, 421; *Cameron v The Queen* (2002) 209 CLR 339, 360–1 [66]–[68] (Kirby J).

case proceeded to trial.[121] This is because, unless there is some incentive for a defendant to plead guilty, there is always a risk they will proceed to trial in the absence of an incentive not to.[122]

While the degree of leniency may vary according to the degree of conviction certainty (as it appears to the sentencing judge), a guilty plea must be considered as a factor.[123]

The person's motive for pleading guilty is not a basis for not taking the plea into account.[124]

Sentencing discount for guilty plea

In Queensland, the extent to which a guilty plea may reduce a sentence that would otherwise have been imposed depends in part on how early or late the plea was entered.[125] It is also necessary to consider the circumstances of the case. For example, if a person only pleads guilty to an offence after other charges to which he or she was not prepared to plead guilty are withdrawn, it cannot automatically be assumed the person has not pleaded guilty at the earliest opportunity.[126]

There is a range of approaches to statutory provisions relating to the discount allowed for a guilty plea in Australia and internationally. For example, some Australian jurisdictions have a legislatively prescribed reduction for guilty pleas. New South Wales and South Australia legislation sets out a sliding scale of discounts based on fixed points within the pre-trial process.[127] Comparatively, Queensland, the Northern Territory, the Australian Capital Territory and New Zealand do not.[128] These jurisdictions have a statutory requirement to take into account a guilty plea (and its timing), but discretion is left to the court in relation to the extent of the discount provided. This approach places 'the emphasis on the utilitarian value of the plea … [meaning the] timing of the plea [is] the key factor relevant to the reduction received'.[129] In Victoria, there is no legislative statement determining the amount of discount, however caselaw provides guidance as to the appropriate discount for an early plea.[130] In Western Australia, when a term of imprisonment is imposed, there is a statutory requirement for a maximum discount of 25 per cent and the legislation provides that the sentence discount must be stated.[131]

Guilty pleas and the SVO scheme

When a person is sentenced to 10 years or more and subject to a mandatory SVO declaration, the sentencing court cannot adjust the parole eligibility date to recognise mitigating factors such as a guilty plea or cooperation with law enforcement. In this sense, the SVO scheme constrains judges' ability to take all circumstances of the case into account and balance them appropriately, leaving the length of the head sentence as the only adjustable component of the sentence.

This means that a just sentence outcome may warrant sentencing an offender to less than 10 years where there are mitigating factors that cannot be taken into account by setting an earlier parole eligibility date. The Court of Appeal confirmed this approach in *R v Ali*.[132] In that case, Burns J concluded that the only way to arrive at a sentence that is just in all of the circumstances for a sentence of 10 years or more with mitigating circumstances is to reduce the head sentence.[133]

In the case of discretionary SVO declarations, similar considerations to mandatory declarations apply. These considerations ensure a sentence is just in the circumstances, given delayed parole eligibility, and considers an offender's guilty plea. This will usually mean the head sentence is moderated to take into account the guilty plea (and any other mitigating factors). In *R v Lawler*[134] the Court of Appeal affirmed the sentencing judge's approach to

121 *R v Bulger* [1990] 2 Qd R 559, 564 (Byrne J).
122 Ibid.
123 *R v Ellis* (1986) 6 NSWLR 603, 604 (Street CJ).
124 *R v Morton* [1986] VR 863, 867 cited in *R v Bates; R v Baker* [2002] QCA 174, [83] (Atkinson J).
125 *R v Bates* [2002] QCA 174, 15 [79] (Atkinson J).
126 *Atholwood v The Queen* (1999) 109 A Crim R 465, 468 (Ipp J) cited in *R v Bates* [2002] QCA 174, 15 [80].
127 New South Wales: *Crimes (Sentencing Procedure) Act* 1999 (NSW) Division 1A; South Australia: *Sentencing Act 2017* (SA) s 40(3) — in 2020 following a review the maximum discount for a guilty plea in the case of a serious indictable offence is now 25% — a reduction from the previous maximum discount of 40% — with reductions also made to discounts that can be applied to pleas entered at a later stage.
128 PSA (n 9) s 13; *Sentencing Act 1995* (NT) s 5(2)(j); *Crimes (Sentencing) Act 2005* (ACT) ss 35(3) and 37(2); *Sentencing Act 2002* (NZ) s 9(2)(b).
129 Tasmanian Sentencing Advisory Council, *Statutory Sentencing Reductions for Pleas of Guilty* (Final Report No. 10, October 2018) 10.
130 *Sentencing Act 1991* (Vic) s 6AAA: The court is required to state the sentence and non-parole period, if any, that it would have imposed but for the plea of guilty.
131 *Sentencing Act 1995* (WA) ss 9AA(4) and (5).
132 [2018] QCA 212.
133 Ibid [28] (Burns J, Fraser and Gotterson JJA agreeing).
134 [2020] QCA 166.

'reduce the sentence to reflect all of the mitigating circumstances' and to impose 'a sentence at the lower end of the range and then make the declaration' was correct.[135]

In *R v Benjamin,*[136] North J said:

> The declaration of conviction of a serious violent offence also has the consequence that such discounting of the sentence as is appropriate to take into account the time plea of guilty can only be implemented by moderation of the head sentence. There can be no formula as to how significant the discounting of the head sentence ought be. It will inevitably be influenced by the individual circumstances of each case. While the guilty plea here appears to have been borne of a realisation of the strength of the prosecution case, there ought be some amelioration of the sentence given the beneficial consequences of a timely plea of guilty for the administration of justice, the community and most importantly, the victim.[137]

3.2.6 Cooperation with law enforcement and admissions

Another mitigating factor which is highly relevant in sentencing is an offender's cooperation with law enforcement and in particular, the making of substantial admissions to criminal conduct that would not have been known to the authorities.

Judges are required to take into account at sentencing 'how much assistance the offender gave to law enforcement agencies in the investigation of the offence or other offences'.[138] The nature of the discount where there has been cooperation with law enforcement will vary with the circumstances.

The High Court and the Queensland Court of Appeal have both agreed that where a person makes significant disclosures that implicate themselves and without those admissions there would be little to no evidence of the offence, recognition must be given by the court.[139] This is because the revelation of crimes that would have been difficult to prove is in the public interest. This interest can take several aspects, for example it may involve assisting police 'to clear up crimes which would not otherwise have been brought to justice',[140] and like a guilty plea, can relieve the community the costs of a trial and victims being required to give evidence.[141] In a case involving significant child sexual offences, Kirby J said:

> It involved the public confession by the [offender] of his wrongdoing to a large number of pupils whose trust he had abused. It obliged the authorities to inform those victims of the [offender's] acknowledgement of his sexual offences, that he had confessed to them, that such offences were accepted by the legal system as having occurred, and that the law recognised that the victims were wholly innocent. The victims were also made aware that the [offender] would be punished for what he had done.[142]

The discount for such cooperation may also serve to encourage others to do so.

There are also statutory schemes for cooperating with law enforcement in the PSA. One is premised on future cooperation and the other on past cooperation as mitigating factors. Section 13A requires a commitment from the offender to future cooperation with law enforcement and provides for a sentencing discount. This future cooperation may involve giving evidence in a co-accused's trial or providing further information to police about other criminal activity. During a section 13A sentence hearing only parts of the sentence are delivered in open court. At a certain point the court will close to only relevant court staff, the lawyers and the person being sentenced. During this portion of the hearing the court will state anything out loud relevant to the reduction in sentence (including that it is being reduced under section 13A) and set an 'indicative' sentence that would have been imposed had the offender not agreed to cooperate.[143] If the offender fails to cooperate as promised, the court must resentence the person 'having regard to' the indicative sentence.[144]

The second scheme under section 13B does not have the second 'indicative' sentence aspect because the cooperation has already occurred. In such cases, law enforcement provides the court with an affidavit stating the nature, extent and usefulness of the cooperation provided. As in a 13A sentence, anything said out loud that is relevant to the reduction of the sentence must occur in closed court. The penalty imposed must be stated in open court.

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135 Ibid [62] (Wilson J, Holmes CJ agreeing at [1] and Morrison JA agreeing at [2]).
136 (2012) 224 A Crim R 40.
137 Ibid 57 [82] (citations omitted).
138 PSA (n 9) s 9(2)(i).
139 *AB v The Queen* (1999) 198 CLR 111, 155 [113]; *Ryan v The Queen* (2001) 206 CLR 267; *R v Holmes* [2008] QCA 259; *R v Saunders* [2016] QCA 221.
140 *AB v The Queen* (1999) 198 CLR 111, 148–9 [99] (Kirby J).
141 Ibid 160–1 [131] (Hayne J).
142 Ibid 148–9 [99] (Kirby J).
143 PSA (n 9) s 13A(7).
144 PSA (n 9) s 188(4)(a).

3.2.7 Sentencing principles in case law

Sentencing principles established by case law are applied alongside the legislative factors and are equally important. They are referred to as the 'common law' and courts have a duty to follow them. The principles are often discussed in judgments issued by the Queensland Court of Appeal.

These sentencing principles apply to all cases in the Queensland courts, as well as to those subject to the SVO scheme. How the SVO scheme may impact on these principles is examined briefly and sentencing principles specific to the SVO scheme are discussed in section 3.3 of this chapter.

Proportionality

A sentence must always be proportionate to the objective seriousness of the offending.[145] Proportionality, in the form adopted by Australian courts, sets the outer limits (both upper and lower) of punishment.[146]

> It is only within the outer limit of what represents proportionate punishment for the actual crime that the interplay of other relevant favourable and unfavourable factors … will point to what is the appropriate sentence in all the circumstances of the particular case.[147]

In determining whether a sentence is proportionate, courts consider factors such as the maximum penalty for the offence and the circumstances of the offence, including the degree of harm caused and the offender's culpability.[148]

Applied to the SVO scheme, it means that the sentence, taking into account the making of an SVO declaration, must be proportionate given the seriousness of the offence — meaning in the context of sentencing for a Schedule 1 offence, the impact of making a declaration on the overall severity of the sentence must be considered. But where that exercise of the power to make a declaration is mandatory, adjustments may be made to the head sentence only within 'the range'. This is discussed further in section 3.3.

Parity

The parity principle guards against unjustifiable disparity between sentences for offenders guilty of the same criminal conduct or common criminal enterprise. Ideally, people who are parties to the same offence should receive the same sentence but matters that create differences must be taken into account. These include each offender's 'age, background, previous criminal history and general character … and the part which he or she played in the commission of the offence'.[149] Parity aims to ensure any sentence imposed does not give rise to an 'unjustifiable disparity' in contravention of the 'equal justice norm'.[150]

The parity principle requires comparison not only of the head sentence, but also the period of actual custody.[151] However, in some circumstances, the SVO scheme operates inconsistently with this principle. This typically arises when the making of an SVO declaration is automatic for one offender, but not for another (due to the sentence falling below 10 years), meaning rough equivalency or consistency between sentences for co-offenders cannot be achieved.

In the primary appeal judgment, *R v Crossley*,[152] the Court of Appeal observed that the principle of parity requires comparison not only of the head sentence but also the period of actual custody, although the principle is qualified by the statute.[153] This case is 'authority for the conclusion that, once an SVO declaration is appropriately made in one case but not made in the other, the principle of parity that would ordinarily apply has little scope for operation'.[154]

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145 *Markarian v The Queen* (2005) 228 CLR 357, 385 [69] (McHugh J); *Veen v The Queen (No 2)* (1988) 164 CLR 465, 473–4 (Mason CJ, Brennan, Dawson, Toohey JJ). PSA (n 9) s 9(11) expressly applies this principle to previous convictions.

146 Arie Freiberg, *Fox and Freiberg's Sentencing: State and Federal Law in Victoria* (Lawbook Co, 3rd ed, 2014) 237.

147 *Veen v The Queen (No 2)* (1988) 164 CLR 465, 491 (Deane J).

148 Australia, Royal Commission into Institutional Responses to Child Sexual Abuse, *Criminal Justice Report* (2017) 280.

149 *Lowe v The Queen* (1984) 154 CLR 606, 609 (Gibbs CJ), affirmed in *Postiglione v The Queen* (1997) 189 CLR 295, 303 (Dawson and Gaudron JJ), 325 (Gummow J).

150 *Green v The Queen; Quinn v The Queen* (2011) 244 CLR 462, 475 [32] (French CJ, Crennan and Kiefel JJ).

151 *R v Crossley* (1999) 106 A Crim R 80, 86–7 [25]–[27] (Pincus JA, McPherson JA agreeing at 88 [34], McMurdo P not deciding) applying *Postiglione v The Queen* (1997) 189 CLR 295, 302 (Dawson and Gaudron JJ).

152 Ibid.

153 Ibid 86–7 [25]–[27] (Pincus JA, McPherson JA agreeing at 88 [34], McMurdo P not deciding), applying *Postiglione v The Queen* (1997) 189 CLR 295, 302 (Dawson and Gaudron JJ).

154 *R v Mikaele* [2008] QCA 261, [36] (MacKenzie AJA, Keane JA agreeing at [1] and Douglas J agreeing at [50]).

In the 2018 decision of *R v Dang,*[155] the Court noted that if the legislature intended for parity (as a fundamental principle) to be substantially compromised or excluded, it should be expected that this intention would have been 'clearly expressed' in the legislation[156] (and it was not).[157]

The Court of Appeal has agreed that a just sentence for one offender should not be harshened 'to achieve a perceived parity or comity'.[158] In the 2021 case, *R v ABF; R v MDK,*[159] the Court of Appeal observed that the sentencing judge had 'fixed the female appellant's sentence as a proportion of the male appellant's sentence' in an endeavour 'to apply the parity principle' resulting in the female appellant's sentence being manifestly excessive.[160] While the female's offending warranted 'condign punishment … both general and specific deterrence and denunciation',[161] Mullins JA noted that:

> the appellants were co-offenders, there should be some relativity in the sentences imposed on them for the same offences, but the respective sentences also had to take into account the differences in the offending conduct committed by each of them for which they are being sentenced at the same time. The male appellant's conduct … was more egregious that the female appellant's involvement in the same offences.[162]

The Court reduced the female appellant's sentence from 11 years and 3 months to 10 years with an SVO declaration. The male appellant's sentence of 16 years and 8 months was not altered.

Totality

The court must consider the totality of all criminal behaviour when dealing with multiple offences at once (for instance, a number of assaults on different people in one incident) or when sentencing for an offence and the person is already serving another sentence. It must impose a sentence that 'adequately and fairly represents the totality of criminality involved in all of the offences to which that total period is attributable'.[163] It can achieve this by making the sentences concurrent, so they run together, instead of making the sentences cumulative (i.e. to be served one after the other).[164]

> The totality principle applies whether the penalty takes the form of a fine or a term of imprisonment or, indeed, whatever might be the form of punishment. It will apply whether the resulting accumulation of punishments is relatively light, such as a series of fines or several cumulative short terms of imprisonment, or whether it is severe. The principle is very much concerned with the concept of proportionality that pervades so many facets of the system of law. In some of its applications it reflects the prohibition against double punishment which is a risk when several offences committed at the same time contain elements that are all proved by the same fact.[165]

This principle is specifically reflected in two of the sentencing factors listed in section 9(2) of the PSA. A sentencing court must have regard to:

(k) sentences imposed on, and served by, the offender in another State or a Territory for an offence committed at, or about the same time, as the offence with which the court is dealing; and

(l) sentences already imposed on the offender that have not been served.

Where an offender has been sentenced, and then is convicted of a second set of offences and sentenced by another judge, the Court of Appeal has said:

> The second judge's task is not to re-open the first sentence to re-sentence for offences that already have been imposed in the light of facts not known to the first sentencing court. The second judge's task is to sentence for offences that are before that judge. In doing so, the judge must ensure that the aggregate sentence reflects the total criminality of the offender's conduct. This does not mean that the first sentence is re-opened and adjusted.[166]

Queensland and Australian caselaw is not settled about 'the necessity, permissibility or utility of attempting to determine what the overall sentence would have been had the offender been sentenced at the one time for all

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155 [2018] QCA 331.
156 Ibid [38] (McMurdo JA).
157 See Explanatory Notes, Penalties and Sentences (Serious Violent Offences) Amendment Bill 1997 (Qld).
158 *R v Maksoud* [2016] QCA 115, [61] (McMurdo P and Bond J agreeing).
159 [2021] QCA 240.
160 Ibid [85].
161 Ibid [86].
162 Ibid.
163 *R v Beattie; Ex parte A-G (Qld)* (2014) 244 A Crim R 177, 181 [19] (McMurdo J) cited in *R v DBQ* (2018) 274 A Crim R 19, 25 [27] (Philippides JA, Boddice J agreeing at [43] and Bond J agreeing at [44]).
164 *Mill v The Queen* (1988) 166 CLR 59, 63 (Wilson, Deane, Dawson, Toohey, Gaudron JJ). See also *R v Hill* [2017] 81 MVR 172, [34]–[36] (Applegarth J, Sofronoff P agreeing at [1] and Atkinson J agreeing at [2]) and *Nguyen v The Queen* (2016) 256 CLR 656, 677 [64] (Gageler, Nettle and Gordon JJ).
165 *R v Symss* (2020) 3 QR 336, 343 [22] (Sofronoff P, Morrison JA agreeing at [43] and McMurdo JA agreeing at [44]) ('*Symss*').
166 *R v CCT* [2021] QCA 278, [218] (Applegarth J, Sofronoff P agreeing at [1]and McMurdo JA agreeing at [2]).

offences'.[167] The High Court in *Mill v The Queen*[168] confirmed that where offences are committed within a short space of time but in different jurisdictions, a court should consider what an effective head sentence would be if all the offences had been committed 'in one jurisdiction and had been sentenced at one time'.[169]

Sentencing a person for multiple offences in cases in which only some of those convictions are eligible or serious enough to warrant an SVO declaration is complex. The Court of Appeal has provided guidance on how to deal with multiple offences (and therefore totality) when the scheme is engaged. This caselaw is discussed in section 3.3.

'Crushing' sentences

There are circumstances under which cumulative terms of imprisonment are justified, but their total combined effect can be described as 'crushing'. Examples include:

> when an offender is sentenced to a long term of imprisonment but then commits a further serious offence while imprisoned, or while at liberty after escaping, or, sometimes, while on bail awaiting trial for a set of offences for which he is later found guilty. If sentences in such cases were not made cumulative then the offender would effectively get a discount by a misapplication of the totality principle.[170]
>
> Also, sometimes the need to vindicate the rights of different victims while giving effect to the totality principle results in making sentences cumulative in whole or in part.[171]

In such cases, harshness in the overall sentence (if it in fact arises in the particular case) is alleviated by the notion that a sentence should never be a 'crushing sentence'.[172] Such a sentence has been described as one so harsh as to 'provoke a feeling of helplessness in the [offender] if and when he is released or as connoting the destruction of any reasonable expectation of useful life after release'.[173] While some mandatory sentences (life imprisonment for murder, for example) must be imposed regardless of their significant impact, where there is discretion, a court can reduce a sentence on the basis that it is crushing:

> Such mercy is not a reflection upon the applicant's subjective characteristics or his deserts. It reflects the attitude of our community[174] that, in general, and in the absence of particular circumstances, even a justly severe punishment [and factors that aggravate the severity of the offence, particularly denunciation][175] ought not remove the last vestige of a prisoner's hope for some kind of chance of life at the end of the punishment.[176]

This principle can be relevant in cases where an SVO declaration is enlivened and there are multiple offences being dealt with. A recent example is the 2020 case of *R v RBD.*[177] The Court of Appeal dismissed an appeal in which the applicant argued his 12-year head sentence (which comprised three 'sets of offending'[178] with SVO declarations on all of the Schedule 1 offences) was manifestly excessive. The applicant had been sentenced to:

- 2 years' imprisonment for sexual assault (with an SVO declaration) and a 2-year concurrent sentence for a choking, suffocation or strangulation in a domestic setting;
- 8 years' imprisonment each for a rape and a burglary offence with a circumstance of aggravation (both with SVO declarations) and lesser concurrent terms of imprisonment for other offences on that date; and
- 2 years' imprisonment for a dangerous operation of a motor vehicle (with an SVO declaration).[179]

Practically, this meant the applicant would be eligible for release on parole after serving 9.6 years of the 12-year sentence.[180] The sentencing judge discounted the sentences for individual offences, including discounting for pleas

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167 Ibid [222] (Applegarth J, Sofronoff P and McMurdo JA agreeing). Some authorities suggest the second judge should also 'seek to determine what the overall sentence would have been had the offender been sentenced at the one time for all offences': at [219].

168 (1988) 166 CLR 59.

169 Ibid 66.

170 *Symss* (n 165) [25] citing *R v Makary* [2019] 2 Qd R 528.

171 Ibid citing *Richards v The Queen* [2006] 46 MVR 165.

172 Ibid 345 [32].

173 *R v Beck* [2005] VSCA 11, [19] (Nettle JA), cited in *Symss* (n 165) 344 [27].

174 'Shared values of the community which do not countenance either cruelty in punishment or a total abandonment of hope, even for the worst kind of offender': ibid at 345–6.

175 Ibid 345.

176 Ibid 347.

177 [2020] QCA 136.

178 This was done on the basis of the applicant's conduct as a course into stages marked by intervention by the authorities following which the applicant deliberately chose to press on with further offences.

179 All of the offences were domestic violence offences.

180 'Under section 161C(2)(b) of the Act, if the term of imprisonment to which the offender is sentenced for the offence is part of a period of imprisonment of 10 years or more imposed on convictions on which the offender is being sentenced consisting of convictions of offences mentioned in schedule 1, the offender is sentenced to 10 or more years imprisonment for the relevant offence': *R v RBD* [2020] QCA 136 [22].

of guilty, to fashion a cumulative sentence that was not 'too crushing'.[181] The Court of Appeal found no error, stating it was 'a heavy sentence but it was imposed for extremely serious offending'.[182]

The De Simoni Principle

A sentencing judge can generally consider all of an offender's conduct, including conduct that would make the offence more, or less, serious. However, a judge cannot take into account circumstances of aggravation that would have warranted a conviction for a more serious offence.[183]

The acts, omissions and matters constituting the offence (and accompanying circumstances) for sentencing purposes are determined by applying common sense and fairness. Offending that might technically constitute a separate offence is not necessarily excluded from consideration for that reason.[184] However, factors cannot be taken into account if they would establish:

- a separate offence that consisted of, or included, conduct that did not form part of the offence for which the person was convicted;[185]
- a more serious offence; or
- a circumstance of aggravation.[186]

In such a case, the act, omission, matter, or circumstance cannot be considered for any purpose either to increase the penalty or deny leniency. A person convicted of an isolated offence is entitled to be punished for that isolated offence. In restating these principles, the Queensland Court of Appeal has recognised it would be wrong to punish the person on the basis that their isolated offence formed part of a pattern of conduct for which the person has not been charged or convicted.[187]

In *R v Armitage, Armitage, and Dean,*[188] the Court of Appeal considered the De Simoni Principle in relation to one applicant with an SVO declared sentence. All the applicants had been convicted of being party[189] to manslaughter and interfering with a corpse and each was sentenced to a lengthy term of imprisonment (10, 8 and 10 years respectfully) with an SVO declaration.[190]

On appeal, one applicant raised the De Simoni Principle, arguing that as Mr Armitage had not been convicted of torture, it would be an error to sentence him on the basis of the torture allegations in relation to Mr Barker's death. It was argued that the only violence he was guilty of was associated with the unlawful killing and 'the degree of that violence is unknown, and it cannot be inferred that it was so serious as to warrant a serious violent offence declaration'.[191] However, based on principles established by the High Court and Court of Appeal, the Court of Appeal concluded that:

> it may be accepted that the particulars of torture may constitute a relevant circumstance of the manslaughter by reason of the fact that those acts and omissions inform how manslaughter was a probable consequence of the prosecution of the common purpose.[192]

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181 Ibid [31].

182 Ibid [42] (Jackson J).

183 *The Queen v De Simoni* (1981) 147 CLR 383, 389 (Gibbs CJ). See also *Nguyen v The Queen* (2016) 256 CLR 656, 667 [29] (Bell and Keane JJ), 676 [60] (Gageler, Nettle and Gordon JJ) and *R v D* [1996] 1 Qd R 363, 403. A circumstance of aggravation means 'any circumstance by reason whereof an offender is liable to a greater punishment than that to which the offender would be liable if the offence were committed without the existence of that circumstance': Criminal Code (Qld) s 1.

184 *R v D* [1996] 1 Qd R 363, 403.

185 *R v Boney; Ex parte A-G (Qld)* [1986] 1 Qd R 190. McPherson J observed that 'as the defendant had been neither charged nor convicted of rape, he could not be punished for it': at 208.

186 *R v D* [1996] 1 Qd R 363, 403. Note *R v Cooney* [2019] QCA 166, 6–7 [27]–[35] (Henry J, Gotterson JA agreeing at [1] and Bradley J agreeing at [72]), where a defence De Simoni argument in a serious assault case failed — the manner in which the offender's blood ended up on a police officer's cut hand was inadvertent physical proximity rather than a direct application as required by the section ('applies'). This meant that the court could consider emotional harm caused to the officer as a result of the blood, because the Crown had not foregone the opportunity to charge a circumstance of aggravation.

187 Ibid 403–4.

188 [2021] QCA 185 ('*Armitage, Armitage, and Dean*').

189 The person who helps, as a 'party' or as part of a joint criminal enterprise, can be found guilty of the same offence or a lesser one (Offences committed in prosecution of common purpose): Criminal Code s 8.

190 All three applicants were originally convicted of murder, torture and interfering with a corpse and successfully appealed those convictions. Ultimately for each applicant the torture charge was discontinued, however the court did identify several acts relied on by the Crown: 'acts of assaulting Mr Barker, keeping him in an esky in summer, depriving him of sustenance and/or depriving him of his liberty': *Armitage, Armitage, and Dean* (n 188) at [14].

191 Ibid [53].

192 Ibid [64] citing *R v De Simoni* (1981) 147 CLR 383; *Nguyen v The Queen* (2016) 256 CLR 656, *R v Boney; Ex parte A-G (Qld)* [1986] 1 Qd R 190, *R v D* [1996] 1 Qd R 363.

It was unnecessary for the Court to make specific factual findings as to the violence inflicted on the deceased victim. The Court of Appeal resentenced all three applicants to higher sentences (11 years and 6 months, 9 years and 6 months and 11 years and 6 months) along with making SVO declarations.

3.3 Key Court of Appeal cases and sentencing principles for the SVO scheme

The Council provides comprehensive analysis of key Court of Appeal judgments in sentencing principles in relation to the SVO scheme in Background Paper 3. This section provides a brief overview of only a few of these decisions and principles.

3.3.1 *R v Eveleigh* ('*Eveleigh*')

The case of *Eveleigh*[193] provided a consolidated form of guidance to courts on the application of the SVO scheme. Critically, the Court of Appeal affirmed the earlier decision of *R v Bojovic,*[194] which found that power to make a discretionary SVO declaration was 'simply another option that has been placed in the court's armoury'[195] and that exercising that discretion requires consideration of all circumstances.

This judgment also considered the differing views of the Court of Appeal as to whether the making of a declaration was a two-stage process or an integrated one. In the 2000 judgment of *R v Collins,*[196] McMurdo P and McPherson JA favoured a two-step approach: 'first, the identification of an appropriate head sentence and second, the exercise of the discretion'.[197] The Court of Appeal unequivocally rejected this approach in *Bojovic*, arguing that the making of an SVO declaration was an integrated process.[198] In *Eveleigh,* the Court agreed that an integrated sentencing approach was appropriate.

In dismissing the application for leave to appeal, Fryberg J observed that the position of the law as it related to SVO declarations was as follows:

1) The exercise of the sentencing discretion is an integrated process involving a consideration of all of the circumstances of the case.
2) The 1997 amendments provided judges with additional sentencing tools to use in the course of this process.
3) Those tools must be used as part of the overall sentencing process, not applied in the course of a separate step taken after the balance of the sentence is determined.
4) In considering what head sentence to impose, a judge should take into account the consequences of any exercise of the powers conferred by those amendments.
5) However, on the authorities as they presently stand, where that exercise of power is mandatory, adjustments may be made to the head sentence only within 'the range'.
6) The judge should also take into account all relevant sentencing principles, including relevant considerations set out in s. 9 of the *Penalties and Sentences Act 1992*, in formulating all aspects of the sentence, not solely in relation to the head sentence; but subject of course to the explicit terms of s 9.
7) Where the making of a declaration is discretionary, the considerations which potentially may be taken into account in the exercise of the discretion are the same as those which may be taken into account in relation to other aspects of sentencing.

   Where the making of a declaration is discretionary:

   (i) seriousness of and violence in the course of the offence are not essential conditions for the making of a declaration;

   (ii) seriousness of and violence (actual or threatened) in the course of the offence are relevant factors in deciding whether a declaration is appropriate;

   (iii) seriousness of and violence (actual or threatened) in the course of the offence do not require the making of a declaration.

   (iv) Where the making of a declaration is discretionary, the discretion is unfettered. In particular, it is not necessary that the circumstances of the case should take it beyond the 'norm' for cases of its type.

193 [2003] 1 Qd R 398 ('*Eveleigh*').
194 *Bojovic* (n 114).
195 Ibid 191 [33].
196 [2000] 1 Qd R 45 ('*Collins*').
197 *Eveleigh* (n 193) 410 [44] (Fryberg J).
198 Ibid 41 [52] (Fryberg J).

(v) All aspects of a sentence must have a legitimate purpose.

(vi) The sentencing judge should state the reasons for the sentence, both in terms of the nature of the components of the sentence and their severity. If the reasons are implicit in the remarks of the judge, the sentencing discretion will not be held to have miscarried.[199]

Importantly, the Court confirmed that there is no need for 'special factors justifying the exercise of a distinct discretion' to make an SVO declaration[200] — provided that the making of the declaration is warranted by the circumstances of the case and supported by proper reasons. However, the making of an SVO declaration is an integrated sentence and the 'sentencing judge is not free to disregard the consequences of making a declaration'.[201] Determining if a sentence is just requires a judge to take into account the impact of the overall outcome.

Fryberg J was particularly critical of the view expressed in the earlier Court of Appeal judgment, *R v DeSalvo* ('*DeSalvo*') [202] that 'there must be something about the circumstances of the offence in question which takes it beyond the norm'.[203] His Honour rejected the applicant's argument that his offending had not been 'beyond the norm', and concluded that:

> A declaration is justified not by the fact that the circumstances take the offence beyond the norm, but by the fact that the circumstances of the offence and of the offender warrant the declaration as part of the proper sentence.[204]

This position, however, was not carried forward by the Court of Appeal in subsequent judgments — see section 3.3.2.

3.3.2 *R v McDougall and Collas ('McDougall and Collas')*

The Court provided further guidance on the application of the SVO scheme in the case of *R v McDougall and Collas* ('*McDougall and Collas*').[205] This case summarised the principles to be applied by a sentencing court when determining whether an SVO declaration should be made, as well as the broader integrated approach to be adopted.

Firstly, like in *Eveleigh,* the Court noted the earlier contradictory positions on how to approach the scheme, that is whether decisions should be approached in a two-stage process or through an integrated process. The position of the High Court in *Markarian v The Queen*[206] was recognised: 'the sentencing process is an integrated process directed to the determination of a just sentence'.[207] The Court of Appeal concluded that, 'the exercise of the discretion conferred by s 161B(3) of the *Penalties and Sentences Act* thus falls to be exercised as part of, and not separately from, the conclusion of the process of arriving at a just sentence'.[208] This position was reaffirmed in the later decision of *R v Free; Ex parte Attorney-General (Qld)* ('*Free*').[209]

Secondly, *McDougall and Collas* set out considerations for setting a parole eligibility date:

> The considerations which may lead a sentencing judge to conclude that there is good reason to make a recommendation apt to bring forward the offender's eligibility for parole will usually be concerned with the offender's personal circumstances which provide an encouraging view of the offender's prospects of rehabilitation, as well as due recognition of the offender's co-operation with the administration of justice.
>
> The considerations which may lead a sentencing judge to conclude that there is good reason to postpone the date of eligibility for parole will usually be concerned with circumstances which aggravate the offence in a way which suggests that the protection of the public or adequate punishment requires a longer period in actual custody before eligibility for parole than would otherwise be required by the [*Penalties and Sentences Act 1992*] having regard to the term of imprisonment imposed. In that way, the exercise of the discretion will usually reflect an appreciation by the sentencing judge that the offence is a more than usually serious, or violent, example of the offence in question and, so, outside 'the norm' for that type of offence.[210]

McDougall and Collas also provided guidance on making a discretionary SVO declaration. The Court of Appeal referred to *DeSalvo* as authority for the principle that consideration must be given as to whether the offence has features that warrant the delaying of parole eligibility to 80 per cent.[211] In *DeSalvo,* the Court of Appeal considered

199 Ibid 430-1 [111] (Fryberg J) (emphasis added).
200 Ibid 413 [53] (Fryberg J).
201 Ibid.
202 (2002) 127 A Crim R 229 ('*De Salvo*').
203 *Eveleigh* (n 193), 430 [109] (Fryberg J).
204 Ibid.
205 [2007] 2 Qd R 87 ('*McDougall and Collas*').
206 (2005) 228 CLR 357.
207 *McDougall and Collas* (n 205) 97 [20] (Jerrard JA, Keane JA, Holmes JA).
208 Ibid 95 [16]–[17] (Jerrard JA, Keane JA, Holmes JA) (emphasis in original).
209 (2020) 4 QR 80 ('*Free*').
210 *McDougall and Collas* (n 205) 97 [20]–[21] (citations omitted).
211 Ibid 96 [19], citing *DeSalvo* (n 202).

that there must be features that take it 'beyond the norm'.[212] The Court used less emphatic language in its observations in *McDougall and Collas* in suggesting:

> the exercise of the discretion will **usually** reflect an appreciation by the sentencing judge that the offence is a more than usually serious, or violent, example of the offence in question and, so, outside 'the norm' for that type of offence.[213]

The Court of Appeal listed these considerations as relevant to deciding whether to exercise the discretion to make an SVO declaration:

- It is where the making of a declaration is discretionary that a difference in views has arisen about whether declarations are available as a sentencing tool, when the circumstances are not beyond the norm for that offence. The following observations may assist sentencing courts:
- the discretionary powers granted by s 161B(3) and (4) are to be exercised judicially and so with regard to the consequences of making a declaration;
- a critical matter is whether the offence has features warranting a sentence requiring the offender to serve 80 per cent of the head sentence before being able to apply for parole. By definition, some of the offences in the Schedule to the Act will not necessarily – but may – involve violence as a feature, such as trafficking in dangerous drugs or maintaining a sexual relationship with a child;
- the discrete discretion granted by s 161B(3) [and] (4) requires the existence of factors which warrant its exercise, but the overall amount of imprisonment to be imposed should be arrived at having regard to the making of any declaration, or not doing so;
- the considerations which may be taken into account in the exercise of the discretion are the same as those which may be taken into account in relation to other aspects of sentencing;
- the law strongly favours transparency and accessible reasoning, and accordingly sentencing courts should give reasons for making a declaration, and only after giving the defendant an opportunity to be heard on the point;
- for the reasons to show that the declaration is fully warranted in the circumstances it will usually be necessary that declarations be reserved for the more serious offences that, by their nature, warrant them;
- without that last feature, it may be difficult for the reasons to show that the declaration was warranted;
- where a discretionary declaration is made, the critical question will be whether the sentence with that declaration is manifestly excessive in the circumstances; accordingly, the just sentence which is the result of a balancing exercise may well require that the sentence imposed for that declared serious violent offence be toward the lower end of the otherwise available range of sentences;
- where the circumstances of the offence do not take it out of the 'norm' for that type, and where the sentencing judge does not identify matters otherwise justifying the exercise of the discretion, it is likely that the overall result will be a sentence which is manifestly excessive, and in which the sentencing discretion has miscarried; probably because of an incorrect exercise of the declaration discretion.[214]

Lastly, *McDougall and Collas* also provided guidance on making mandatory declarations for sentences over 10 years or more. In those circumstances, the following considerations apply:

- that sentencing is a practical exercise which has regard to the needs of punishment, rehabilitation, deterrence, community vindication, and community protection;
- that courts cannot ignore the serious aggravating effect upon a sentence, of an order of 10 years rather than, say, nine years. The inevitable declaration if the sentence is 10 years or more is relevant in the consideration of what sentence is 'just in all the circumstances', in order to fulfil the purpose of sentencing which is prescribed s. 9(1) of the Act;
- but that courts should not attempt to subvert the intention of pt 9A of the Act by reducing what would otherwise be regarded as an appropriate sentence;
- with the result, as described by Fryberg J in *R v Eveleigh* [2003] 1 Qd R 398, that while a court should take into account the consequences of any exercise of the powers conferred by the pt 9A, adjustments may only be made to a head sentence which are otherwise within the 'range' of appropriate penalties for that offence; and
- the court should also take into account the relevant sentencing principles set out in s 9 of the Act.[215]

Affirming the Court of Appeal's position in the earlier case of *Eveleigh,*[216] the Court noted that where a sentence of less than 10 years would be outside the 'range' of appropriate penalties, a sentence should not be reduced to less

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212 *De Salvo* (n 202) 232 [15]–[16] (emphasis added).
213 *McDougall and Collas* (n 205), 97 [20]–[21] (emphasis added).
214 Ibid 96–7 [19] (Jerrard JA, Keane JA, Holmes JA).
215 Ibid 95–6 [18].
216 *Eveleigh* (n 193).

than 10 years. However, the fact that a sentence of 10 years or more attracts a mandatory minimum non-parole period cannot be ignored in the integrated sentencing process.[217]

3.3.3 *R v Free; Ex parte Attorney-General (Qld)* ('Free')

R v Free; Ex parte Attorney-General (Qld) ('Free')[218] is a significant and recent Court of Appeal case, which both affirmed and departed from earlier Court of Appeal decisions.

The Court of Appeal endorsed comments in McMurdo P's judgment in *Collins* that:

> The intention to protect the community from future violent offending seems to have been the paramount consideration of the legislature in enacting the 1997 Act.[219]

The Court of Appeal further stated:

> The clear intention of the legislature in enacting the 1997 Act was that judges should exercise the s 161B(3) discretion in appropriate circumstances. Section 3 demonstrates that protection of the community was an important consideration for the legislature, as was punishment and rehabilitation. Sections 9(3), 9(4)(a) and 9(4)(b) reinforce the view that the legislature was primarily concerned to protect the community from offenders who pose an on-going risk to the community. The Attorney-General's second reading speech of the 1997 Act is also consistent with this approach.[220]

The Court of Appeal also unanimously established new principles to be applied when determining if it is appropriate to make a declaration in circumstances where the decision is discretionary. As noted earlier, the Court affirmed that community protection was paramount in a case such as this,[221] observing that community protection is not achieved only by incarceration but also by supervision on parole.[222] Further, the Court commented that allowing the possibility of parole at a point earlier than 80 per cent of the sentence:

> has two potential benefits: first, to provide the prisoner a basis for hope and, in turn, an incentive for rehabilitation; and, in appropriate cases, to enable a longer period of conditional supervision, outside of the custodial environment, which may provide greater community protection in the long term.[223]

In the context of the circumstances that applied in this case, the Court determined that an 8-year sentence with no SVO declaration, but no recommendation for parole eligibility, was appropriate. In reaching this conclusion, the Court referred to:

- the fact that it was not yet known how Mr Free would respond to treatment programs while in custody;
- the importance of his 'extensive cooperation'; and
- the need for his early plea of guilty to be 'recognised in a tangible way in the sentence imposed'.[224]

The Court also unanimously moved away from what it regarded as being an overly narrow interpretation of the 'test' to be applied when determining whether to make a discretionary declaration — that is focusing on whether the offending was 'outside the norm' for that type of offending. The Court said sentencing judges should instead be:

> considering more broadly whether there are circumstances…which aggravate the offence in a way which suggests the protection of the public or adequate punishment required a longer period in actual custody before eligibility for parole than would otherwise be required.[225]

The Court acknowledged that analysing whether there are factors outside of 'the norm' for the type of offence was 'a short-hand expression frequently invoked as a means of conveying "the test" to be applied',[226] but that 'such focus is too narrow'.[227] The Court went on to state:

> We also observe that, for a sentencing judge, it can be uncomfortable, to say the least, to be describing a 'norm' for an appalling offence – the present case is an obvious example; but there are many others. There is nothing

217 Ibid 95–6 [18].
218 *Free* (n 209).
219 *Collins* (n 196) 51 [20].
220 Ibid 52 [29].
221 Mr Free pleaded guilty to the offences of taking a child under 12 years for an immoral purpose, deprivation of liberty and indecent treatment of a child under 12. He was sentenced to 8 years imprisonment, and on appeal his parole eligibility date was changed from one-third of the sentence to no recommendation for parole (i.e. parole eligibility after serving 50%). An SVO declaration was not made by either court.
222 *Free* (n 209) 108 [91].
223 Ibid citing *Bugmy v The Queen* (1990) 169 CLR 525, 536 and *Collins* (n 196) 52 [31](McMurdo P).
224 *Free* (n 209) 108 [91]–[92].
225 Ibid 98 [49].
226 Ibid 98 [50].
227 Ibid.

> normal or normative about this offending. It is shocking, and to speak of a 'norm' is justifiably jarring, for victims of the offending, and also for the broader community, let alone for the sentencing judge.[228]

Finally, the Court also agreed that it was an error for the sentencing judge to move:

> directly from the conclusion about the serious violent [offence], to a conclusion that parole eligibility after the 'conventional' one-third was appropriate, without considering the overall effect of that conclusion, and whether there were factors (including punishment, denunciation, deterrence and community protection) favouring a later release date.[229]

In 2022, the Court of Appeal affirmed that the 'approach [in *Free*] should be taken in determining whether to make a serious violent offence declaration'.[230] Morrison JA also stated that:

> His Honour's (the sentencing judge) approach was in accordance with what this Court said in *R v Free* was one of the available approaches, namely to sentence towards the top of the bounds of appropriate discretion and not reduce the parole eligibility date, rather than sentence towards the bottom and impose a serious violent offence declaration.[231]

3.3.4 The relevance of an offender's prior criminal history in making an SVO declaration

Since the SVO scheme was introduced, a number of Court of Appeal cases have considered the relevance of an offender's criminal history to the decision to exercise the court's discretion to make a declaration. The view of the Court on this issue has changed over time.

In 2002, McPherson JA noted that 'an offender's previous record of offending always operates as a factor … to increase the penalty imposed' and that 'an offender's criminal history may tend to show the offence for which the sentence is being imposed in a serious light, so that a need is perceived to protect the community'.[232] However, McPherson JA and Williams JA both questioned whether prior convictions could be considered because the scheme is about the offence, not the offender.[233]

McPherson JA made similar remarks in the 2005 case of *R v Orchard,*[234] stating that 'the offender's prior record of violent convictions, if relevant, should not be allowed decisive weight in deciding to make such a declaration'.[235]

In the 2016 case of *R v Woods*,[236] the appellant had an extensive criminal history which featured many similar offences of burglary with violence, including an earlier offence of attempted robbery for which he had been sentenced to 7 years' imprisonment. Fraser JA distinguished an exercise of the discretion where prior criminal history was a decisive factor, from an exercise of the discretion where an offender's history was one of several circumstances which justified the declaration.[237] His Honour determined that Mr Wood's prior convictions for violence were, amongst other factors, circumstances which supported making an SVO declaration.[238]

In a 2021 decision, the Court of Appeal agreed that 'an offender's criminal history may be relevant to the exercise of discretion [in] whether or not' to make an SVO declaration.[239] In *R v Kampf*[240] the applicant submitted that his SVO declaration should be removed on the basis that his history was 'arguably not relevant', referring to the observations made by McPherson JA in *DeSalvo*[241] and *Orchard*,[242] as well as the decision in *Woods*.[243] In refusing leave to appeal the sentence, the Court stated that in cases where 'an offence that involved the use of violence or that resulted in physical harm to another person, the Court is required to have regard primarily to the factors in

228 Ibid 98–9 [51].
229 Ibid 99 [55].
230 *R v Lewis; Ex parte A-G (Qld)* [2022] QCA 14, [73] (Morrison JA, Sofronoff P agreeing at [1] and Flanagan J agreeing at [77]).
231 Ibid [75] (Morrison JA).
232 *DeSalvo* (n 202) [10] (McPherson JA), citing *R v Keating* [2002] QCA 19.
233 Ibid (McPherson JA, Williams JA agreeing at [15], Byrne J dissenting at [21]), McPherson and Williams JJA citing *R v Keating* [2002] QCA 19.
234 [2005] QCA 141 ('*Orchard*').
235 Ibid [7].
236 [2016] QCA 310 ('*Woods*').
237 Ibid [28].
238 Ibid [29]. Other factors which supported making a declaration were: the use of a knife in a reckless way without regard for the consequences and the wanton and gratuitous use of violence.
239 *R v Kampf* [2021] QCA 47 [59] ('*Kampf*').
240 Ibid.
241 *DeSalvo* (n 202).
242 *Orchard* (n 234).
243 *Woods* (n 236).

s 9(3)'[244] of the PSA when determining the sentence. Section 9(3) includes factors relating to the offender, such as their past record (see Table 1 in section 3.2.3 for more detail). The Court noted that:

> The previous convictions of an offender must be treated as an aggravating factor if the sentencing court considers that they can reasonably be treated as such, having regard to the nature of the previous conviction and its relevance to the present offence and the time that has elapsed since the conviction.[245]

The Court of Appeal determined the principle to be followed was, 'the task of sentencing involves taking into account all relevant factors and arriving at a single result'.[246] This includes assessing whether an offender's criminal history is relevant to making a discretionary SVO declaration or not.

3.3.5 Sentencing at the lower end of the range if an SVO declaration is made

Courts may sentence at the lower end of the range in cases where an SVO declaration is made as part of the integrated approach to sentencing (refer to *Eveleigh* in section 3.3.1 for more detail). The Court of Appeal has affirmed courts may determine that the offender should be sentenced towards the lower end of the applicable sentencing range and/or the head sentence should be reduced on the basis that parole eligibility is to be delayed from the making of an SVO declaration.[247]

The Court of Appeal found in *Bojovic* that what might be a just sentence depends on whether or not an SVO declaration is made. The Court observed that in the case of a discretionary SVO declaration:

> the courts have the power to maintain reasonable consistency between sentences, although they will of course heed the additional emphasis that has now been placed on protecting the community from violent offenders. As an example, if according to ordinary principles a violent offence seems to call for a sentence of between six and eight years, and it is one where the discretion to make a violent offender declaration arises, such that it might but not must be made, the sentencing judge has the discretion in the event that a declaration is to be made, to impose a sentence towards the lower end of the applicable range. Conversely if the judge is to give the offender the benefit of declining to make such a declaration, it might be appropriate to consider imposing a sentence towards the higher end of the range. If this were not done, it is difficult to see how the sentencing judge could properly discharge his or her duty under s. 9 of the Act. A just sentence is the result of a balancing exercise that produces an acceptable combination of the purposes mentioned in s. 9(1)(a) to 9(e) of the Act.[248]

However, the Court of Appeal has clarified that while sentencing an offender towards the lower end of the sentencing range where the making of a declaration was mandatory operated as a 'general rule', there was no requirement of courts to do so. In *R v Cowie,*[249] the Court found that while this general rule existed, it 'would be contrary to the apparent purpose of'[250] the SVO scheme to oblige a sentencing judge to sentence at the lower end of the range and generally lessen sentences as a result.

One of the reasons that sentences tend to be reduced when the SVO scheme comes into play is the inability to take into account factors in mitigation by setting an earlier parole eligibility date. As discussed in section 3.2.5 a guilty plea is the most common mitigating factor. When the SVO scheme is enlivened, the only way a judge may reach a just sentence when sentencing an offender with several mitigating features personal to them[251] is to reduce the head sentence. This is the case for both mandatory[252] and discretionary[253] SVO declarations.

The Court of Appeal affirmed this position in the 2021 case of *R v Leslie (a pseudonym)*,[254] noting the sentencing judge had found that 'a sentence of 10 and a half years was not outside the range before then reducing that to nine years to take into account the mitigating circumstances'[255] (a guilty plea and experiencing domestic violence from her co-offender). The Court noted that:

> Consistently with this Court's judgment in *R v Carlisle*,[256] the mitigating circumstances were used to reduce the head sentence in recognition of the fact that if the sentence was 10 years or over, a serious violent offence

244 *Kampf* (n 239) [57].
245 Ibid.
246 Ibid [59].
247 *Bojovic* (n 114); *R v Ali* [2018] QCA 212.
248 Ibid 191–192 [34] (de Jersey CJ, Thomas JA, and Demack J).
249 [2005] 2 Qd R 533.
250 Ibid 538 [19].
251 Such as a guilty plea, no criminal history, a mental health disorder, good rehabilitation prospects and remorse, to name a few.
252 *R v Ali* [2018] QCA 212.
253 *R v Lawler* [2020] QCA 166.
254 [2021] QCA 85 ('*Leslie*'). She pleaded guilty to 6 counts of rape and 3 counts of indecent treatment of a child under 16 who is a lineal descendent. The co-accused was her husband and the two complainants were their biological daughters.
255 Ibid [15]. The sentencing judge set the non-parole period at 4 years (approximately 44% of the head sentence).
256 [2017] QCA 258.

> declaration was mandatory and therefore, mitigating circumstances could not be reflected in a recognition for early parole.[257]

The Court went on to note that, correctly, the reduction was mainly due to the 'horrific' nature of the offending and concluded that 'a sentence attracting a serious violent offence declaration or one attracting an order delaying eligibility for parole, may have been difficult to upset on appeal'.[258]

3.3.6 The need to avoid a 'double benefit'

When sentencing under the SVO scheme, courts generally are not to give a 'double benefit' of reducing both the head sentence and the parole eligibility date. A court should not give an offender a discount on both the head sentence and parole eligibility date for factors such as a plea of guilty and non-declarable pre-sentence custody if this may result in the automatic application of the scheme being avoided. Although, some mitigating circumstances may warrant this.[259]

In general, where the automatic application of the scheme (due to the sentence length) has been narrowly avoided, the Court of Appeal discourages the giving of a 'double benefit' to an offender:

> To impose a lower non-parole period would distort the sentence and effectively convey a double benefit by not only reducing the non-parole period by the period of pre-sentence custody, but also avoiding the impact of the requirement to serve 80 per cent.[260]

However, there may be exceptions where a 'double benefit' is warranted. In *R v Tran; Ex parte Attorney-General,*[261] the Court of Appeal provided a list of some discretionary factors which may warrant reducing both the head sentence to below 10 years and the non-parole period from the statutory half-way mark. Those factors may include a guilty plea, genuine remorse, the youth of the offender, and successful steps towards rehabilitation.[262]

In the recent case of *R v KAX*,[263] the Court of Appeal reduced the applicant's original sentence of 10 years and 8 months (with a mandatory SVO declaration) to 9 years and 8 months (with no SVO declaration and parole eligibility set at 50%) on the basis of personal mitigating factors that had not been recognised at sentence.[264] The applicant sought a further reduction to his parole eligibility date on the basis of the impacts of COVID-19, however the Court of Appeal said that 'any further mitigation for the COVID-19 pandemic restrictions [were] of no significance in the circumstances'.[265]

3.3.7 Approaches to sentencing multiple offences

When sentencing an offender who has committed a series of offences constituting one or more episodes of offending, the Court of Appeal has identified two common approaches.

A judge can:

1. impose a global head sentence on the most serious offence to reflect the seriousness of the offending; or
2. order two or more cumulative sentences.[266]

The first option is the most common approach for 'imposing sentences for a number of distinct, unrelated offences'.[267] This approach allows a judge to fix a sentence for the most serious offence, which is higher than it would be alone, but also take into account the overall criminality involved in the other offences. It is referred to as the 'global sentence'. This approach is complicated, however, in circumstances where the head sentence for an SVO declared offence is increased on the basis of other offending for which a declaration is not (or cannot be) made.[268] In those circumstances, it is necessary for the sentencing judge to moderate the sentence to recognise the impact of the SVO scheme.[269]

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257 *Leslie* (n 254) [15].
258 Ibid [17] (citations omitted).
259 *R v Tran; Ex parte A-G (Qld)* [2018] QCA 22; *R v Cumner* [2020] QCA 54.
260 *R v Cumner* [2020] QCA 54, [68] (Morrison JA).
261 [2018] QCA 22.
262 Ibid [41]–[42] (Philippides and McMurdo JJA, and Boddice J).
263 [2020] QCA 218.
264 Recognition was given to the circumstances of sexual assaults experienced by the applicant as a juvenile when in detention which have led to psychiatric conditions and contributed to his long-term drug addiction.
265 *R v KAX* (2020) 285 A Crim R 81, 92–3 [43]
266 *R v Derks* [2011] QCA 295 [26] (McMurdo P, White JA and Fryberg J agreeing) ('*Derks*').
267 *R v Nagy* [2004] 1 Qd R 63, 72 [39] (Williams JA).
268 *Derks* (n 266) [44] (Fryberg J).
269 *R v Baker* [2021] QCA 150, [17]–[24]. Cf *R v Hasanovic* [2010] QCA 337 in which the Court determined 'the sentencing judge was not required to reduce the total period of imprisonment under the sentences for the SVOs to reflect that for the

Where only some of the offences being sentenced would attract an SVO declaration, the Court of Appeal has found a global sentence should not be imposed unless the fact those convictions are not declarable or have not been declared is taken into account in reducing the overall sentence.[270]

In relation to the second approach to impose two or more cumulative sentences, the Court of Appeal has noted that such an approach is vulnerable to 'inadvertent error' due to 'unintended consequences on parole eligibility and release dates'.[271] In the 2020 case of *R v RBD*[272] (refer to section 3.2.7 for more detail), the Court of Appeal agreed with the sentencing judge's approach to cumulative sentences for three 'sets' of offending, with SVO declarations on all of the Schedule 1 offences. The applicant was sentenced to a total effective sentence of 12 years, with a parole eligibility date of 9.6 years.

3.4 How courts make discretionary SVO declarations

3.4.1 Statutory guidance

The PSA does not provide guidance on factors that should be considered by a judge when exercising the discretion to make an SVO declaration. The only guidance the PSA provides for discretionary declarations is that the person being sentenced:

- must be convicted on indictment for:
  - an offence or offences in Schedule 1; and/or
  - of counselling or procuring the commission of, or attempting or conspiring to commit, an offence or offences against a provision in Schedule 1; and
- must be sentenced to 5 years or more, but less than 10 years.[273]

The PSA does not require courts to provide reasons for declining to exercise the discretion to make a discretionary declaration, although it is common practice to do so.

This lack of guidance has been commented on by the Court of Appeal. In *R v Collins*, McMurdo P wrote:

> The Act gives no specific guidance as to what factors should be considered by a sentence judge exercising the discretion pursuant to s 161B(3) of the Act … In the absence of guidance from the Act one would expect that normally no such declaration would be made unless there were reasons to justify the making of a declaration.[274]

In the same judgment, McPherson JA noted that:

> The provisions of Part 9A provide no specific guidance about the way in which the discretion under s 161B(3) is to be exercised in making a declaration of a serious violent offence. That being so, the general principles or considerations ordinarily governing the sentencing of offenders fall to be applied so far as they are relevant and applicable to a matter like this.[275]

Part 9A provides more guidance in relation to the making of discretionary declarations under section 161B(4) of the Act. A court may order a discretionary declaration for a non-Schedule 1 offence, or for a Schedule 1 offence sentenced on indictment to less than 5 years' imprisonment, that 'involved the use, counselling or procuring the use, or conspiring or attempting to use, serious violence against another person' or 'that resulted in serious harm to another person'.[276] The PSA defines 'serious harm' as 'any detrimental effect of a serious nature on a person's emotional, physical or psychological wellbeing, whether temporary or permanent'.[277]

Serious violence is not defined in the PSA, however as discussed earlier in section 3.2.3 when sentencing offences involving violence, courts are required to consider 'the nature or extent of the violence used, or intended to be used, in the commission of the offence'.[278] Similarly, when sentencing for sexual offences against children, courts are required to consider 'the nature of offence, including for example, any physical harm or threat of physical harm to the child or another'.[279]

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offences that were not SVOs the applicant would otherwise have been entitled to parole eligibility at an earlier date than the 80 per cent point': at [41].

270 *Derks* (n 266); *R v Baker* [2021] QCA 150.
271 Ibid [26] (McMurdo P).
272 [2020] QCA 136.
273 PSA (n 9) s 161B(3).
274 *Collins* (n 196) 48 [14] (McMurdo P).
275 Ibid 56 [46] (McPherson JA).
276 PSA (n 9) s 161B(4).
277 Ibid s 4.
278 Ibid s 9(3)(e).
279 Ibid s 9(6)(c).

When the SVO scheme was introduced in 1997, the then Attorney-General stated in his second reading speech that 'the new Part 9A will provide that in considering the question of the protection of the community, a court must have regard to'[280] a list of 11 factors. While Part 9A does not specifically state this, the 11 factors are now reflected in section 9(3).[281] One of these factors is ' the nature or extent of the violence used, or intended to be used, in the commission of the offence'.[282]

Violence against, or causing the death of, a child under 12 years: s 161B(5)

There has been no review of the SVO scheme since its creation and very limited amendments to Part 9A of the PSA. The most significant amendment to Part 9A to provide additional guidance was the insertion of section 161B(5) in 2010. This amendment requires courts to treat the use or attempted use of violence against a child under 12 (or that caused the death of a child under 12) as an aggravating factor 'in deciding whether to declare the offender to be convicted of a serious violent offence'.[283] The primary objective of this change was 'to strengthen the penalties imposed upon … offenders who commit violence upon a young child and/or who cause the death of a young child'[284] and to 'ensure that genuine regard is had to the special vulnerability of these young victims'.[285]

The Explanatory Notes identified the reasons for this change:

> **Violence to young children**
>
> The community rightly has a keen interest in the penalties imposed upon offenders who commit violence upon a young child and/or who cause the death of a young child. These cases generate a strong emotive response. The intention is to ensure that sufficient weight is placed upon the age of the victim and genuine recognition made of their special vulnerability. The disproportionate position of an adult to that of a young child and the comparative level of force needed to cause significant harm to a young child as distinct from another adult, must be recognised by the court in deciding whether to declare the offender to be convicted of a serious violent offence.[286]

The Notes outlined how the objectives of the amendment would be achieved:

> The amendment will strengthen, when appropriate, the penalties imposed upon offenders convicted of an offence of violence against a young child or an offence that caused the death of a young child, without fettering judicial discretion in deciding whether to declare the offender to be convicted of a serious violent offence. Maintaining judicial discretion in this process is essential given that there will be cases where the community, despite the tragic consequences of the conduct, would not expect such a severe sanction.[287]

The reference to a 'child aged under 12 years' was identified as being:

> consistent with the approach adopted in the Criminal Code where certain offending is aggravated by virtue of the victim being under twelve years and where a child under twelve years is legally incapable of giving consent. These provisions acknowledge the special vulnerability of young children and the need to legislatively protect them.[288]

During the course of his second reading speech, the Attorney-General said:

> The second part of this reform bill aims to strengthen the penalties imposed upon repeat offenders, those who commit sexual offences against children, and offenders who are violent to young children or who cause the death of a young child. Two judicial sentencing principles currently applied by the Queensland courts will be inserted into the Penalties and Sentences Act. There is significant utility in adopting existing common law sentencing principles into statute, primarily to place beyond all doubt the intent of the parliament that courts must adopt and apply such principles in all appropriate cases. By enshrining these principles in statute law, the parliament is sending a clear message to the courts and to offenders as to the expectations of the community in this regard while also giving the community greater certainty and confidence as to the principles courts must apply in sentencing offenders.[289]

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280 Queensland, Parliamentary Debates, Legislative Assembly, 19 March 1997, 596 (Denver Beanland, Attorney-General and Minister for Justice). Two further statements on that page repeat the intention that the 11 factors apply to serious violent 'offenders' (a term which does not appear in the PSA, as distinct from serious violent 'offences' as defined).

281 In 1997 this was section 9(4) in Part 2, and it was also introduced by the *Penalties and Sentences (Serious Violent Offences) Amendment Act 1997* (Qld).

282 PSA (n 9) s 9(3)(e).

283 Inserted by *Penalties and Sentences (Sentencing Advisory Council) Amendment Act 2010* (Qld) s 7.

284 Explanatory Notes, Penalties and Sentences (Sentencing Advisory Council) Amendment Bill 2010 (Qld) 2.

285 Queensland, *Parliamentary Debates*, Legislative Assembly, 3 August 2010, 2308–9 (Cameron Dick, Attorney-General and Minister for Industrial Relations).

286 Explanatory Notes, Penalties and Sentences (Sentencing Advisory Council) Amendment Bill 2010 (Qld) 2.

287 Ibid 5.

288 Ibid.

289 Queensland, *Parliamentary Debates*, Legislative Assembly, 3 August 2010, 2308 (Cameron Dick, Attorney-General and Minister for Industrial Relations).

The same Bill also strengthened the penalties for child sexual offenders by requiring a court to impose an actual term of imprisonment for those offences, however neither the Attorney-General nor the Explanatory Notes appear to link the two measures together.[290] A reasonable expectation of section 161B(5) is that more SVOs would be made for child sexual offences. It may be that it was seen to be implicit that section 161B(5) would apply to child sexual offences, or the omission may be a reflection of the broader systemic issue of sexual violence being treated as distinct violent offending. This issue is discussed further in Chapter 16, section 16.2.2.

Beyond this limited guidance, criteria and guidance specific to Part 9A beyond the general purposes and principles of sentencing in Part 2 (Governing principles) of the PSA has otherwise been left to the Court of Appeal to develop common law (see section 3.4.2).

3.4.2 Common law guidance

In the 2000 decision of *R v Collins,*[291] the Court of Appeal affirmed that:

> The clear intention of the legislature in enacting the 1997 Act was that judges should exercise the s 161B(3) discretion in appropriate circumstances. Section 3 demonstrates that protection of the community was an important consideration for the legislature, as was punishment and rehabilitation. Sections 9(3), 9(4)(a) and 9(4)(b) reinforce the view that the legislature was primarily concerned to protect the community from offenders who pose an ongoing risk to the community. The Attorney-General's second reading speech of the 1997 Act is also consistent with this approach.[292]

In *R v BAX,*[293] the Court of Appeal considered whether an SVO declaration could be made for convictions for serious sexual offences, namely maintaining a sexual relationship with a child under 16 years of age. McPherson JA observed:

> Under s 161A of [the *Penalties and Sentences*] Act, an offender is convicted of such an offence if convicted on indictment of an offence against a provision mentioned in the schedule to the Act: s 161A(a)(i)(A). The schedule lists a number of offences that may, and in practice often are, unaccompanied by 'violence' in the ordinary acceptation of that term. In those and other instances, violence in that sense is not an ingredient of or a condition precedent to the making of a declaration under the statutory provisions referred to. Among those offences are that of maintaining a relationship of a sexual nature with a child: s 229B of the Code.[294]

In the same judgment, Jerrard J when referring to the earlier guidance provided in *Eveleigh*[295] said:

> Where the making of a declaration is discretionary, seriousness of and violence in the course of the offence are not essential conditions for the making of a declaration, but are clearly relevant in deciding whether it is appropriate … it is impossible to hold that a declaration cannot be made for the offence of maintaining an unlawful sexual relationship with a child, since that offence is specifically listed in the schedule to the Act … The lack of any grounds specified in Part 9A on which a court could or should exercise the discretion to make that declaration has necessarily resulted in the court attempting to do that, in a manner consistent with the legislation and its apparent purpose, with the results summaries in the judgment of Fryberg J. Significantly, the earlier decisions of this Court support his proposition that a sentencing judge making a discretionary declaration that a conviction is for a serious violent offence may — and I observe, perhaps must — take into account the exercise of that discretion the same considerations as those which may be taken into account in relation to other aspects of sentencing [those appearing in s 9 and s 13].[296]

The sentencing principles set down by the Court of Appeal discussed in section 3.3, as these apply to making of discretionary SVO declarations include:

- there is no need for special factors to justify the exercise of the discretion to make an SVO declaration — provided that the making of the declaration is warranted by the circumstances of the case and supported by proper reasons;[297]
- the making of a discretionary SVO declaration is to be undertaken as part of the 'integrated process of arriving at a just sentence', in which consideration is required of all available sentencing options and all the circumstances;[298]

290 Explanatory Notes, Penalties and Sentences (Sentencing Advisory Council) Amendment Bill 2010 (Qld) 4.
291 *Collins* (n 196).
292 Ibid 51 [29] (McMurdo P).
293 [2005] QCA 365.
294 Ibid [4].
295 *Eveleigh* (n 193).
296 *R v BAX* [2005] QCA 365, [18]. Jerrard J dissented from McPherson JA and Fryberg J and would have allowed the appeal, however he agreed that maintaining a sexual relationship with a child under 16 was eligible for an SVO declaration.
297 *Eveleigh* (n 193).
298 *Free* (n 209).

- in fashioning a sentence that is just in all the circumstances where an SVO declaration is made, the offender should be sentenced towards the lower end of the applicable range and/or the head sentence that would otherwise have been appropriate should be reduced;[299]
- the consequences of making a declaration must be taken into account by the court when assessing whether the overall outcome is a just sentence;[300] and
- judges must consider factors relevant to community protection and adequate punishment when deciding whether to make a declaration, and therefore requiring an offender to serve a longer period in actual custody before parole eligibility.[301]

As discussed in section 3.3.2, in 2006 the Court of Appeal identified a range of considerations in the case of *McDougall and Collas*. The Court determined that the primary basis for making a discretionary declaration was whether the offence took it 'out of the "norm" for that type [of offence], and where the sentencing judge does not identify matters otherwise justifying the exercise of the discretion, it is likely that the overall result will be a sentence which is manifestly excessive, and in which the sentencing discretion has miscarried'.[302]

However, in *Free,* the Court moved away from this position on the basis that focusing on offending beyond or outside 'the norm' was too narrow an approach.[303] The Court of Appeal said when considering whether to make a discretionary declaration, sentencing judges should:

> Consider all relevant circumstances, including in a case such as this [child sexual offences] the matters in ss 9(1), 9(2) and, primarily, s 9(6) [of the] *Penalties and Sentences Act*, to determine whether there are circumstances which aggravate the offence in way which suggests that the protection of the public, or adequate punishment, requires the offender to serve 80 per cent of the head sentence before being able to apply for parole.[304]

Discretionary declarations for offences not on Schedule 1

As discussed previously in this section, unlike sections 161A and 161B(3), which require that the offence is listed in Schedule 1 of the PSA, a discretionary SVO declaration pursuant to section 161B(4) of the PSA can be made for any offence if it features 'serious violence against another person' or 'resulted in serious harm to another person'.

The Council's data analysis over a 9-year period found that declarations are rarely made pursuant to this subsection, with only 7 made — see Part B, Chapter 6 for more information. Further, where this provision was relied on, it was almost exclusively for an offence listed in Schedule 1 sentenced to less than 5 years (the lower limit for the making of a declaration for a Schedule 1 offence specified under s 161B(3) of the Act), rather than an offence not in Schedule 1.[305]

However, the Court of Appeal has provided some guidance in relation to this provision. In *R v Riley,*[306] the applicant had been sentenced to 12 months' imprisonment and a cumulative term of 2 years' imprisonment for two assaults occasioning bodily harm against corrective services officers. The offences were declared to be serious violent offences pursuant to section 161B(4) of the Act. Neither the prosecution nor the applicant's lawyers were invited to make submissions as to whether SVO declarations should be made.

The Court of Appeal made the following observations about section 161B(4):

- 'serious harm', within the meaning of that subsection, requires more significant harm than the harm caused to these two officers;[307] and
- a serious risk that the applicant will cause physical harm to members of the community is not a matter relevant to the existence of the discretion pursuant to this subsection, but if other matters such as resultant serious harm or the use of serious violence raise the existence of the discretion then it is a factor relevant to the decision as to whether to exercise that discretion.[308]

The application and appeal were allowed and the previous orders and declarations set aside. The applicant was re-sentenced to 9 months' imprisonment on each offence, which were to be served cumulatively.

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299 *Bojovic* (n 114); *R v Ali* [2018] QCA 212.
300 *Eveleigh* (n 193).
301 *Free* (n 209) 98 [49].
302 *McDougall and Collas* (n 205) 96–7 [19] (Jerrard JA, Keane JA, Holmes JA).
303 *Free* (n 209) 99 [50].
304 Ibid 99 [53].
305 Only one offence sentenced under s 161B(4) was for a non-Schedule 1 offence — see Table 16, Part B.
306 [1999] QCA 128.
307 Ibid 7 (Fryberg J, de Jersey CJ and Davies JA agreeing at 11).
308 Ibid.

Violence against, or causing the death of, a child under 12: s 161B(5)

Despite its introduction in 2010, there has been limited discussion of section 161B(5) of the PSA by the Court of Appeal. The 2019 case of *R v O'Sullivan and Lee; Ex parte Attorney-General (Qld)*[309] is the authority for the proposition that these legislative changes require courts to give greater weight to the aggravating effect where the offender inflicts violence on a child in a domestic setting, therefore increasing the range of appropriate sentences.

In reference to section 161B(5) and other legislative amendments,[310] the Court stated:

> This sequence of legislative changes since 1997 puts it beyond question that the legislature has made a judgment about the community's attitude towards violent offences committed against children in domestic settings. The amendments constitute legislative instructions to judges to give greater weight than previously given to the aggravating effect upon a sentence that an offence was one that involved infliction of violence on a child and that the offender committed the offence within the home environment.[311]

3.4.3 Factors commonly present in the making of a discretionary declaration

The Council analysed sentencing remarks for cases where an SVO declaration was considered sentenced between 1 January 2019 and 28 February 2021 in the higher courts. The analysis examined many aspects of the SVO scheme, including the courts' decision-making process in relation to discretionary declarations.

Some of the reasons judicial officers made or declined to make a discretionary declaration are those contained in Table 2 (this is a non-exhaustive list and in no particular order).

Table 2: Reasons for making or declining to make a discretionary SVO, higher courts, 1 July 2019 – 28 February 2021

Reasons for making a discretionary SVO declaration	Reasons for not making a discretionary SVO declaration
Protracted, violent attack	One-off, limited nature of violence used
Vulnerable victim	Not 'outside the norm'[312]
Use of a weapon	Offender's youth
Attack was premeditated and/or planned	Attack was opportunistic and unplanned
Nature and extent of the injuries inflicted	Would be disproportionate to offender's overall offending/to avoid a 'crushing' sentence
Serious and relevant criminal history	Limited or no criminal history
Absence of genuine evidence of rehabilitation prospects	Mental health issues
Offending occurred while on parole and/or a suspended sentence	Admissions and cooperation with the investigation
Protection of the public and/or adequate punishment	Need for supervision and to promote rehabilitation in the interests of community safety

More detail can be found in Background Paper 3 regarding the practical application of the SVO scheme by sentencing courts, including the making of discretionary SVO declarations.

In addition to this analysis, the Council asked participants in the subject-matter expert interviews what considerations were relevant to the making a discretionary SVO declaration. Many participants spoke of the difficulty in determining whether an offence should receive an SVO declaration. While many of the offences in Schedule 1

309 (2019) 3 QR 196 ('*O'Sullivan and Lee*').

310 Ibid 222–31 [68]-[90] (Sofronoff P, Gotterson JA, Lyons SJA), referring to the insertion of *Penalties and Sentences Act 1992* (Qld) pt 9A (the SVO scheme); the insertion of the *Penalties and Sentences Act 1992* (Qld) ss 9(3), (4) which created an exemption to the principle that imprisonment is a last resort where the offending involved the use of, or counselling or procuring the use of, or attempting or conspiring to use, violence against another person or that result in physical harm to another person; the amendment of *Penalties and Sentences Act 1992* (Qld) s 9(1)(d) to replace the word 'does not approve of' with 'denounces' in this sentencing principle – 'to make it clear that the community, acting through the court, denounces the sort of conduct in which the offender was involved' (emphasis added); the replacement of the *Domestic and Family Violence Protection Act 1989* (Qld) with the *Domestic and Family Violence Protection Act 2012* (Qld) and various amendments made to that Act in subsequent years; and the insertion of *Penalties and Sentences Act 1992* (Qld) s 9(10A), which requires the Court to treat the fact that the offending was domestic violence offending as an aggravating feature.

311 Ibid 231 [93] (Sofronoff P, Gotterson JA, Lyons SJA).

312 See *DeSalvo* (n 202) [15] (Williams JA); and *McDougall and Collas* (n 205) where until recently the Court of Appeal had stated that courts should identify offending 'beyond the norm' to make a discretionary declaration. Cf *Free* (n 209) where the Court of Appeal has more recently clarified it was erroneous to focus 'on a perceived need to find factors which take the case outside the norm for the type of offence; rather than considering more broadly whether there are circumstances of the case which aggravate the offence in a way which suggests the protection of the public or adequate punishment required a longer period in actual custody before eligibility for parole than would otherwise be required': at 98 [49].

are, by their very nature serious and violent, participants identified the following features as justifying consideration and/or the making of a declaration:

- unusual or gratuitous violence;
- violence led to significant injury;
- whether a weapon was involved and to what extent;
- duration of the violence or offending (e.g. child sexual offending committed over years);
- intention to inflict pain;
- deliberate attempt to humiliate or degrade the victim;
- intention motivating the offence (e.g. revenge);
- nature of the relationship between the victim and the offender;
- age and vulnerability of the victim;
- whether violence accompanied the offence (particularly for sexual violence).

Chapter 4

Post-sentence management of offenders

4.1 Introduction

Chapter 4 examines the way offenders are managed after sentencing by Queensland Corrective Services ('QCS') when in custody and on parole. It provides an overview of how offenders sentenced to Schedule 1 offences are managed in custody, including programs available in prison and on parole.

4.2 Assessment and management of offenders in custody and on parole

4.2.1 How prisoners are managed in custody

The Terms of Reference require the Council to consider 'the importance of sentencing orders of the court being properly administered so that they satisfy the intended purposes of the sentencing order and facilitate a fair and just sentencing regime that protects the community's safety'.

This section explores how QCS undertakes custodial classification, risk and needs assessments, and programs and interventions available to prisoners sentenced to a term of imprisonment for serious drug, sexual violence and non-sexual violence offences, including those declared convicted of an SVO.

In 2016, Mr Walter Sofronoff QC undertook the Queensland Parole System Review ('QPSR') which involved an extensive review of the parole and broader correctional system. The QPSR made 91 recommendations for reform, with 89 recommendations supported or supported in principle.[313] The implementation of those recommendations is ongoing.

Custodial classification

The *Corrective Services Act 2006* ('CSA') prescribes security classifications for all prisoners — maximum, high and low. Table 3 sets what each security classification means.

See Appendix 9 for a list of all high and low security prisons in Queensland.

313 See Queensland Government, *Response to Queensland Parole System Review Recommendations* (2017).

Table 3: Queensland Corrective Services security classifications

Classification Level	Details
Maximum Security Classification	This classification level is assigned when 'assessment against statutory criteria indicate the risks the prisoner poses are so significant the prisoner cannot be effectively managed at a high security classification'. 'Female prisoners should not be classified maximum security'.
High Security Classification	This classification level is assigned to 'those prisoners requiring high levels of supervision and highly structured routines to ensure centre security, appropriate behaviour and to maintain prisoner wellbeing'.
Low Security Classification	This classification level is assigned to 'prisoners requiring limited direct supervision, considered not to be an escape risk and assessed as a minimal risk of causing harm to the community. This may include short-term prisoners and those who are nearing release from lengthy sentences'.

Source: Queensland Corrective Service, Sentencing Management: Classification and Placement, Custodial Operations Practice Directive, (21/12/2021: Public version 7) 4-5.

All prisoners admitted to a corrective services facility for detention must be classified into one of these three categories.[314] The classification level informs a prisoner's level of supervision, placement and management requirements. A prisoner's personal circumstances along with statutory criteria in section 12(2) of the CSA must be taken into account when determining a prisoner's security classification. This includes:

a. the nature of the offence for which the prisoner has been charged or convicted;

b. the risk of the prisoner escaping, or attempting to escape, from custody;

c. the risk of the prisoner committing a further offence and the impact the commission of the further offence is likely to have on the community; and

d. the risk the prisoner poses to himself or herself, or other prisoners, staff members and the security of the correctional services facility.

In addition to the statutory requirements, QCS is also required to consider a range of other factors.[315] Of those, several are particularly relevant to prisoners with an SVO declaration:[316]

- the length of sentence the prisoner has served to date and the proximity to their release dates (i.e. parole and full time discharge);
- any violence perpetrated by a prisoner in custody or in the community, with consideration of the nature of the violence, such as the relationship to the victim (i.e. domestic and family violence or stranger violence), any patterns of violent offending and/or the severity of the violent behaviour;
- access to activities and interventions to achieve planned goals and activities;
- any medical conditions including mental health issues and external medical requirements;
- the prisoner's safety including compatibility issues, associates, protection status and history of sexual assault in a correctional environment;
- the prisoner's association with Groups of Interest[317] including any active or recent intelligence information.

As a first option and where possible, female prisoners are considered for low security classification and placement, however 'female prisoners should not be classified maximum security'.[318] Additional considerations apply for Aboriginal and Torres Strait Islander prisoners, including proximity to family (unless it poses an unacceptable safety risk). Prisoners convicted of a sexual offence in Schedule 1 of the CSA,[319] murder, or sentenced to life imprisonment, are not eligible to be accommodated in a low security facility.[320] A prisoner's progress and classification level are reviewed at regular statutory intervals (see section 13, CSA).

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314 CSA (n 2) s 12: Offenders on remand and not serving a term of imprisonment for another offence, may only be classified to high or maximum: s 12(1A).

315 See 'Placement Considerations' in Queensland Corrective Services, Sentencing Management: Classification and Placement, *Custodial Operations Practice Directive* (14/06/2021: Public version) 8.

316 Queensland Corrective Services, Sentencing Management: Assessment and Planning, *Custodial Operations Practice Directive* (03/06/2021: Public version) 8.

317 Such as prison gangs and outlaw motorcycle gangs.

318 Queensland Corrective Service, Sentencing Management: Classification and Placement, *Custodial Operations Practice Directive* (21/12/2021: Public version 7) 4.

319 All of the sexual offences listed in sch 1 of the *Penalties and Sentences Act 1992* (Qld) are included.

320 Queensland Corrective Service, Sentencing Management: Classification and Placement, *Custodial Operations Practice Directive* (03/06/2021: Public version) 10. Until recently, prisoners with an SVO declaration would also have been excluded from low security classification - see Queensland Sentencing Advisory Council, *History of the Serious Violent Offences Scheme* (Background Paper 1, 2021) for more details.

Risk and needs assessments

QCS screens every sentenced prisoner and offender to determine the level of risk and consequently the level of service[321] that will be provided. The outcome of this screening is determined by two Risk of Reoffending (RoR) tools — (a) the Risk of Reoffending – Prison Version (RoR-PV), and (b) Risk of Reoffending – Probation and Parole Version (RoR-PPV).[322] Both validated tools, the RoR-PV is used with prisoners to assess the risk of general reoffending post-release from prison, while the ROR-PPV calculates the likely risk of general reoffending for those commencing community-based supervision.[323]

Further tailored assessment tools are used post this initial screening tool for particular cohorts to inform the level of offence specific risk and need and the level of service that will be provided.

The RoR tool allocates a score to a person, derived from an actuarial assessment of several, mostly unchangeable, factors (such as age and criminal history).[324] The score provides an indication of the likelihood of a person committing another offence as a proportion of a cohort of offenders with similar characteristics. The score, alongside other factors such as an offender's time in custody or under a community-based order or willingness, ability, or availability of suitable interventions, is an important factor in determining a person's eligibility for rehabilitation programs. The RoR-PPV score ranges from one to 20, and the RoR-PV score ranges from one to 22. The higher the score a person receives, the higher the predicted risk of reoffending, and the higher the service required by QCS. How the RoR score relates to QCS service on parole is discussed at section 4.2.3.

The RoR tool is administered only once at the start of each new episode in the correctional system 'to determine a prisoner's general risk of reoffending and to inform eligibility for QCS intervention programs'.[325] Neither tool is specifically designed to 'assist with making assessments of parole eligibility, pre-sentencing decisions, or to provide assessments of dangerousness'.[326] The QPSR observed tools such as the RoR tool are valuable only for identifying high risk offenders. These tools do not provide guidance on which criminogenic risk factors require addressing at the individual level.[327]

The QPSR recommended risk and needs assessments be replaced with validated assessment tools.[328] QCS is currently implementing the recommendations supported by Government from that review,[329] and the Council understands it is also currently reviewing the RoR tools as part of that work.

After a RoR-PV is completed, prisoners serving terms of imprisonment of more than 12 months undergo a series of internal processes and assessments[330] to ensure the prisoner's needs and risks are progressed and supported where possible. This can include programs, educational needs in the areas of literacy/numeracy, secondary, tertiary and vocational education and training, and 'the needs of specific prisoner groups, including a prisoner's learning style and ability, cognitive impairments, gender, physical disability and cultural diversity'.[331] Professional support will be engaged for prisoners with complex needs.

Specialised risk assessment

QCS also uses specialised risk assessment tools for sexual offenders. Sexual offenders sentenced for an offence listed in Schedule 1 of the CSA must undergo a Specialised Assessment with the STATIC 99-R.[332] This is an actuarial risk assessment tool which:

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321 The level of service guides how frequently an offender is required to determine the intensity and activities undertaken with the offender during supervision. The higher the risk, the more intensive the supervision becomes: Queensland Parole System Review (n 4) 114 [570].

322 Both tools were developed by Griffith University and validated on a sample of prisoners and offenders in Queensland.

323 Walter Sofronoff, *Queensland Parole System Review: Issues Paper* (2016) 17 ('*Queensland Parole System Review: Issues Paper*').

324 *Queensland Parole System Review: Final Report* (n 4) 107 [529].

325 Queensland Corrective Services, Sentencing Management: Assessment and Planning, *Custodial Operations Practice Directive*, (03/06/2021: Public version) 4. This means a new RoR assessment will only be completed if an offender fully disengages from QCS supervision. Should an offender commit new offences while under supervision, a new RoR assessment will not be undertaken.

326 *Queensland Parole System Review: Issues Paper* (n 323) 17.

327 Ibid 109 [555].

328 Recommendations 8, 9 and 10. All were supported by the Queensland Government, *Response to Queensland Parole System Review Recommendations* (2017) 4.

329 Queensland Corrective Services, *Annual Report 2020-21* (Report, 2021) 31.

330 For example, activating warning flags of any current and/or historical factors on the QCS database IOMS, Literacy and Numeracy assessments, Rehabilitation Needs Assessment ('RNA') and in the case of sexual offenders sentenced to an offence listed in sch 1 of the *Corrective Services Act 2006* (Qld) a Specialised Assessment with STATIC 99-R.

331 Queensland Corrective Services, Sentencing Management: Assessment and Planning, *Custodial Operations Practice Directive*, (03/06/2021: Public version) 6.

332 Offenders sentenced for child exploitation material offences including possession, making or production, or procurement of minors for objectional computer games, films or publications are not assessed using this assessment tool.

> positions offenders in terms of their relative risk for sexual recidivism based on commonly available demographic and criminal history information that has been found to correlate with sexual recidivism in adult male sex offenders. The instrument places offenders in risk groups relative to the recidivism rates of the reference population (North American sex offenders).[333]

In addition to the STATIC 99-R, QCS also uses STABLE-2007 and ACUTE-2007. STABLE-2007 is used to identify treatment needs and ACUTE-2007 identifies acute factors indicative of a heightened risk of sexual offending.[334] 'The STATIC 99-R and STABLE-2007 provide QCS with the risk assessment information needed to allocate prisoners to either the High Intensity Sexual Offending Program (HISOP) and the Medium Intensity Sexual Offending Program (MISOP)'.[335]

In terms of specialised risk assessment for non-sexual violent offenders, according to the QPSR, QCS primarily uses the RoR score, the number of violent offences and the available time in custody to determine whether a prisoner should be referred to an intensive violence program.[336] A Violence Risk Scale[337] is used as a pre-program assessment to determine treatment needs.

Changes to the assessment tools are being trialled and evaluated through the End-to-End Case Management trial.

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

In early 2019, QCS initiated End-to-End ('E2E') Case Management as an improved way to manage and support prisoners to achieve behavioural change. The project responds to a number of recommendations in the QPSR and is informed by extensive research undertaken by the Offender Management Renewal Program in 2017 and 2018.[338] The E2E Offender Management Framework for prisoners and parolees provides a single, evidence-based framework for all QCS officers across the state.[339] The framework encompasses five fundamental principles — risk and need, desistance, responsivity, evidence-based and governance. It aims to provide a consistent pathway, beginning at the point of entry to the correctional system and supports:

- progression through the correctional system;
- improving preparedness and readiness for release into the community;
- continuity of service delivery.[340]

Critically, E2E management ensures there is (or will be when fully implemented) front-end assessment when a person enters custody to provide them with a targeted plan for their time under QCS management. This includes while the person is on remand, serving a custodial sentence and on parole.

Key deliverables in the E2E project include:

- establishing Case Management Units in each correctional centre;
- developing a revised parole application process;
- implementing a 'living' whole of journey offender planning tool; and
- Improving processes to transition a person between custody and the community.[341]

A central part of E2E management is the creation of Case Management Units ('CMUs') in correctional centres to facilitate access to programs and services. CMUs are responsible for case co-ordination and being a consistent contact point for prisoners, as well as sharing information internally between QCS and the Parole Board Queensland.[342] They will undertake case management planning functions throughout a prisoner's entire journey through custody and under community supervision. CMUs are multi-disciplinary teams comprising senior case management officers, practice support, intelligence analysts and administrative and management-level staff.[343]

The first CMU was implemented at the Townsville Correctional Complex in December 2020. Findings from a post-implementation review will inform the further rollout of this approach to other correctional centres in Queensland.

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333 *A-G (Qld) v Donaldson* [2021] QSC 339, 13.
334 *Queensland Parole System Review: Final Report* (n 4) 119 [600].
335 Ibid 119 [601].
336 Ibid 119 [599].
337 This is a widely used and validated tool.
338 Queensland Corrective Services, 'End-to-end Case Management improving outcomes for offenders', Blog (13 November 2019).
339 Queensland Corrective Services, *Annual Report 2020-21* (Report, 2021) 31–32.
340 Ibid 32.
341 Queensland Corrective Services, 'End-to-end Case Management improving outcomes for offenders', Blog (13 November 2019).
342 Ibid.
343 Queensland Corrective Services, *Annual Report 2019-20* (Report, 2020) 25.

The second CMU to be established will be at Lotus Glen Correctional Centre, followed by broader rollout of the E2E model to the Community Corrections workforce.[344]

Details provided through expert interviews indicate that under the framework there are four management pathways — low risk remand/short sentence individuals, general offending (includes moderate to high risk individuals), a sexual offender pathway and a violent offender pathway.[345] Each management pathway has different criteria, which prisoners must complete in order to transition through their pathway. SVO-declared offenders would fall within scope of the general, violence or sexual offender pathways.

Programs and interventions

According to its 2020-21 Annual Report, QCS delivers a range of programs and services that:

> target employability, education, family and parenting, violence and domestic violence, substance misuse, psychological wellbeing and sexual offending, with the goal of giving prisoners the best possible chance to stop offending.[346]

Within that suite of programs and interventions, there are several which may be relevant to a prisoner with an SVO declaration. The SVO declaration in itself does not have much meaning for QCS and the declaration does not mandate program participation. Therefore, SVO offenders take part in general sexual violence, violence and substance misuse programs as appropriate.

Many offenders may require more than one type of program to address their offending and risk factors. Further, the types of interventions and programs required to address offending and risk may need to be undertaken in a particular order. For example, prisoners who ought to complete the High Intensity Substance Intervention Program should do so before commencing HISOP, as they cannot be delivered simultaneously.[347]

Similarly, QCS assesses the suitability of a prisoner to participate in group programs. Some prisoners will be unable to complete group programs due to their mental health needs, such as high anxiety in group situations,[348] or be unsuitable due to serious psychological concerns, such as psychopathy. In such cases individual treatment may be required, however access to individual treatment appears to be limited.

Numerous stakeholders shared their concerns with the Council about the quality and availability of programs and interventions for offenders.[349] Stakeholders advised that:

- some programs have limited annual availability and/or are only in some locations across the state;
- there are few programs available for violent offenders, particularly perpetrators of domestic and family violence; and
- programs are not targeted to minority groups such as women, Aboriginal and Torres Strait Islander peoples and other vulnerable groups, or to adequately respond to individual needs.

These issues are explored further in section 16.3.4 of Part D in this report.

344 Queensland Corrective Services, *Annual Report 2020-21* (Report, 2021) 31.
345 Subject-matter expert interview I18.
346 Queensland Corrective Services, *Annual Report 2020-21* (Report, 2021) 41.
347 *Attorney-General for the State of Queensland v Salmon* [2022] QCS 14, [20].
348 Ibid [48] - [49].
349 Submission 12 (Queensland Law Society) 8; Submission 11 (Sisters Inside) 5–6; Submission 14 (Parole Board Queensland) 2–3; Submission 19 (Queensland Homicide Victims' Support Group) 2.

Substance abuse programs

QCS has several programs to address substance misuse, including group-based programs and individual interventions in prison and the community — see

Table 4.

Table 4: QCS substance misuse programs available in 2020–21

Program name	Details
Short Intensity Substance Intervention	A short 6- to 12-hour psycho-education program.
Low Intensity Substance Intervention	A range of 16- to 24-hour psycho-education programs, including motivational interviewing and contingency management approaches to reduce problematic substance use or reduce drug-related harm.
Moderate and High Intensity Substance Interventions	40- to 50-hour and 100-hour programs respectively that are relapse-prevention based and target those with higher levels of need and risk.
Substance Abuse Maintenance Interventions	Follow up programs for those who have previously completed a substance misuse program.
Opioid Substitution Treatment Program	A partnership between QCS and Queensland Health, this program involves 'the legal administration of an opioid to eliminate cravings and withdrawal symptoms associated with drug dependency'.[350] In conjunction with this is the use of long-acting injection buprenorphine in these locations. Available: Townsville, Lotus Glen and all women's correctional centres.
Positive Futures Program	A 32- to 36-hour, culturally sensitive program for eligible male Aboriginal and Torres Strait Islander prisoners and offenders that helps them address aspects of their offending behaviour, including family violence, alcohol and drug abuse, power and control, jealousy, trust and fear, family and community, and parenting. Available in all correctional centres and multiple central and remote Community Corrections locations.

Source: Queensland Corrective Service, *Annual Report 2020-21* (2021) 38 and 43. The Annual Report does not expand on whether these programs are available in all correctional facilities across the state, however according to the Queensland Parole System Review some programs were available in all correctional centres – see Appendix 12 of that report.

350 Queensland Corrective Services, *Annual Report 2020-21* (Report, 2021) 38.

Sexual offending programs

QCS also has programs for sexual offending that aim to reduce sexual offending recidivism — see Table 5. While prisoners are encouraged to participate, participation is voluntary and prisoners must have sufficient time left on their sentence to participate. All sexual offenders are required to complete the preparatory program first, prior to transitioning to the higher intensity programs. There is no differentiation in the QCS sexual offending programs for offenders who committed offences against children or adults.

In 2020-21, there were 378 sexual offender program completions.[351]

Table 5: QCS sexual offender programs in correctional centres and in community locations in 2020–21

Program name	Details
Getting Started: Preparatory Program (GS:PP)	A 24-hour introductory, motivational program designed to assist offenders reduce barriers and responsivity factors known to inhibit further intensive sexual offending programs. The offender must have sufficient time on their sentence to complete the program with their current sexual offence conviction. Available in: Wolston, Townsville, Lotus Glen, Cairns, Brisbane, Central, Ipswich, South Coast.
Medium Intensity Sexual Offending Program (MISOP)	75- to 175-hour program for prisoners and offenders assessed as low to moderate risk of sexual reoffending. The offender must have sufficient time to complete the program with their current sexual offence conviction. Available in: Wolston, Townsville, Cairns, Brisbane, Central, Ipswich, South Coast.
High Intensity Sexual Offending Program (HISOP)	350-hour program for prisoners assessed to be at high risk of sexual reoffending. The offender must have sufficient time on their sentence to complete the program with their current sexual offence conviction. Available in: Wolston.
Inclusion Sexual Offending Program	108-hour program for prisoners with low cognitive and/or low social/emotional abilities, that have been assessed as requiring support to participate in a sexual offending program. The offender must have sufficient time on their sentence to complete the program with their current sexual offence conviction. Available in: Wolston.
Sexual Offending Program for Indigenous Males (SOPIM)	75-to-350-hour program for Aboriginal and Torres Strait Islander male offenders. The offender must have sufficient time on their sentence to complete the program with their current sexual offence conviction. Available in: Lotus Glen.
Sexual Offending Maintenance Program (SOMP)	16- to 24-hour program to build on and strengthen offenders' cognitive, emotional and behavioural skills linked with living an offence-free lifestyle. The offender must have sufficient time on their sentence to complete the program with their current sexual offence conviction, must have completed a previous sexual offending intervention, and can be referred to multiple SOMPs. Available at: Wolston, Townsville, Lotus Glen, Brisbane, Central, Logan/Ipswich, Townsville and Cairns.

Source: Queensland Corrective Service, *Annual Report 2020-21* (2021) 44, with details about the programs taken from the Queensland Parole System Review, Appendix 12.

According to the QCS Business Plan 2021-22, the existing Aboriginal and Torres Strait Islander sexual offender program, SOPIM, will be redeveloped in partnership with the University of the Sunshine Coast, Murridhagun Cultural Centre and stakeholders including community Elders.[352]

351 Ibid 44.

352 Queensland Corrective Services, *Business Plan 2021-22* (Report, 2021) 16. The Murridhagun Cultural Centre is a unit based at the QCS Correctional Services Academy at Wacol. The centre is a 'priority reference point for matters designed to address the needs of Aboriginal and Torres Strait Islander staff, prisoners, offenders and victims': The Honourable Mark Ryan MP, Minister for Police, Fire and Emergency Services and Minister for Corrective Services, 'Corrective Services celebrates NAIDOC Week' (Media Release,4 July 2017).

Violence programs

There are very few programs addressing violent offending offered by QCS — see Table 6. QCS is considering changes to those programs and is in the process of replacing the only general violence program, the Cognitive Self Change Program, with a new moderate intensity violence program. Implementation is currently underway.

A Domestic and Family Violence program trial was conducted in 2019–20 and was evaluated in 2020–21.[353] The outcome of that evaluation is yet to be published, and QCS has advised that the Disrupting Family Violence Program would be rolled out in three locations by the end of the 2021 year.

Table 6: QCS violence offending programs

Program name	Details
Disrupting Family Violence Program	75-hour moderate intensity program targeted at perpetrators of domestic and family violence. Prisoners in program locations can participate if they have sufficient time to complete the program and a history of domestic violence ('DV') offending and/or are subject to a current Domestic and Family Violence Protection Order. This program is not suitable for high risk DV offenders. Available at: Wolston, Woodford and Maryborough.
Men's Domestic Violence Education and Intervention Program	A 48-hour program delivered in the community by an external provider in various Community Corrections locations across Queensland. Participants are referred by the Court.
Positive Futures Program	A 32- to 36-hour, culturally sensitive program to eligible male Aboriginal and Torres Strait Islander prisoners and offenders that helps them address aspects of their offending behaviour, including family violence, alcohol and drug abuse, power and control, jealousy, trust and fear, family and community, and parenting. Available in all correctional centres and multiple central and remote Community Corrections locations.

Source: *Queensland Parole System Review: Final Report*, Appendix 12 with the replacement of the Cognitive Self Change Program with a new moderate intensity violence program as notified in private correspondence received 28 October 2021 from the Office of the Deputy Commissioner QCS to the Director, QSAC.

4.2.2 How the Parole Board decides whether a person should be released on parole

When a prisoner approaches their parole eligibility date, they become eligible to make an application to the Parole Board to be released on parole.[354] A prisoner's parole eligibility date does not create a right or entitlement for a prisoner to be granted parole and released into the community. There is always the potential that a prisoner may serve their full sentence in prison.

Section 242E of the CSA authorises the Minister to make guidelines about policies to assist the Board in performing the functions (the *Ministerial Guidelines to Parole Board Queensland*). The current ministerial guidelines include criteria for the Parole Board to use when deciding applications provided that the overriding consideration for the Board's decision-making process is community safety.[355] The Parole Board must assess community safety both in terms of whether a prisoner poses an unacceptable risk to the community if released on parole, and whether the risk to the community would be greater if the person does not spend a period on parole under supervision before completing the full term of their sentence.[356]

The Parole Board makes decisions based on the evidence it has before it, which can include:

- a prisoner's criminal history and pattern of offending;
- sentencing remarks;
- a Parole Board Assessment Report;[357]
- advice to the Parole Board;
- program completion reports;

353 Queensland Corrective Services, *Annual Report 2019-20* (Report, 2020) 24.
354 A prisoner can apply for parole up to 180 days before their parole eligibility date: CSA (n 2) s 180.
355 Mark Ryan MP, Minister for Police, Fire and Emergency Services and Minister for Corrective Services, *Ministerial Guidelines to Parole Board Queensland* (at 3 July 2017) 2 [1.2]–[1.3].
356 Ibid [1.3].
357 This report provides a summary of the prisoner, including their behaviour management in custody (e.g. incidents, drug tests etc.), participation in programs and education and outcomes of risk and needs assessments.

- Accommodation Risk Assessment;[358]
- submissions from the prisoner and his/her family;
- letters of support from community-based organisations;
- victim submissions;
- medical reports;
- Psychiatric and Psychological Risk Assessments;
- Verdict and Judgment Records; and
- toxicology reports.[359]

The ministerial guidelines set out factors the Parole Board should consider when determining the level of risk a prisoner may pose to the community. One of these factors is whether the prisoner has been convicted of a serious violent offence.[360]

Under section 234 of the CSA, when the Parole Board meets to discuss 'prescribed prisoners', the Board must have the following board members present — the President, Deputy President or professional board member, at least one community board member and at least one permanent board member.[361] A 'prescribed prisoner' includes, among other criteria, prisoners imprisoned for a Schedule 1 offence convicted on indictment,[362] or a serious sexual offence.[363]

As discussed previously in this section, all parole orders include mandatory conditions[364] and breaching these can result in the Parole Board amending, suspending or cancelling parole orders. In addition, the Parole Board can tailor conditions specifically to individual prisoners and set any extra conditions it reasonably considers necessary to ensure the prisoner's good behaviour in the community, to mitigate against escalating risk, or stop them from committing another offence.[365]

Delays in assessing parole applications may shorten the time an offender spends on parole

In 2021 the Parole Board was experiencing significant delays in assessing parole applications due to an increasing backlog caused by high prisoner numbers, the impact of increased parole applications due to COVID-19 and the time required to obtain any supporting materials, including psychiatric reports. In August 2021, the Parole Board issued a statement advising that applications received in June 2021 would be unlikely to be heard until March 2022 — an 8-month delay.[366] However, that did not mean that prisoners would be held at least 8 months longer than their parole eligibility date, as they can apply for parole up to 6 months prior to reaching their parole eligibility date.[367]

These delays led to the Supreme Court receiving numerous applications for judicial reviews, and on 17 December 2021, the Senior Judge Administrator released an updated protocol for applications.[368]

To help address delays, the Queensland Government provided for two additional Parole Board panels (to a total of 5).[369] The Government also recently passed the *Police Powers and Responsibilities and Other Legislation Amendment Act 2021* (Qld) to provide temporary extensions to the time the Parole Board must hear an application

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358 The Accommodation Risk Assessment includes 'Is the offender a declared serious violent offender (current sentence)?' as a criterion to respond to. A 'yes' response to this criterion results in further assessment being required: Parole Board Queensland, *Parole Manual* (2019) 101–103.

359 Ibid 13.

360 CSA (n 2) s 234(7)(b)(i). Section 234(7) identifies a range of other offences the Parole Board must also give regard to such as serious sexual offences, choking, suffocation and strangulation (Criminal Code s 315A) and terrorism offences.

361 This section was amended by the *Police Powers and Responsibilities and Other Legislation Amendment Act 2021* (Qld) s 26(1). Prior to this change when discussing 'prescribed prisoners' the Board was required to sit as 5 members and comprise (at minimum) of the President or Deputy President, a professional board member, a community board member, a public service representative and a policy representative.

362 CSA (n 2) s 234(3)(b)(i) referring to PSA (n 9) s 161A(a)(i).

363 Ibid s 234(7). A prescribed prisoner also includes prisoners convicted of an offence under section 315A of the Criminal Code (choking, suffocation or strangulation in a domestic setting).

364 Ibid s 200. Examples include reporting to Community Corrections as required, complying with urine tests, not committing an offence, notifying Community Corrections of any changes to employment or residential address and attending courses, programs, meetings and counselling as directed by Community Corrections: see Parole Board Queensland, *Parole Manual* (2019) 90-91.

365 Ibid s 200. See Parole Board Queensland, *Parole Manual* (2019): examples include imposing a curfew, electronic monitoring, abstaining from alcohol, undergoing psychological assessment and treatment: at 91.

366 'PBQ Delays' Parole Board Queensland (Release) <https://www.pbq.qld.gov.au/wp-content/uploads/2021/08/PBQ-delays.pdf>.

367 CSA (n 2) s 180.

368 Supreme Court of Queensland, Applications for Judicial Review - Parole Board Queensland, *Protocol* (17 December 2021). This protocol applies from 4 January 2022 until 4 May 2022.

369 Tony Keim, 'Prisoners Inundate Supreme Court to Avoid Parole Hearing Delays', *QLS Proctor* (online, 27 September 2021) <https://www.qlsproctor.com.au/2021/09/prisoners-inundate-supreme-court-to-avoid-parole-hearing-delays/>.

— up from 120 to 180 days — or if a matter is deferred, from 150 to 210 days. When introducing the Bill to Parliament, the Minister for Police and Corrective Services and Minister for Fire and Emergency Services said:

> For a six-month period the independent Parole Board Queensland will have an extra 60 days to decide parole matters. These amendments will provide the board with greater flexibility to manage its responsibilities and the risks that different prisoners pose to the community. This builds on our further investment in the Parole Board by continuing the operation of the fourth temporary operating team and establishing a fifth temporary operating team.[370]

For prisoners with an SVO declaration currently waiting on a parole decision, or soon reaching eligibility, these delays may have shortened the already comparatively short time under supervision in the community if the prisoner was deemed suitable for release on parole.

In its submission to the Council, the Parole Board advised that due to the additional two Board panels and legislative amendments, the delays have 'improved very significantly since August 2021'.[371] The Parole Board said:

> Applications received in the last week of January 2022 are expected to be considered by the Board in April or May 2022, that is, within the current statutory timeframes. The number of undecided applications for parole is decreasing. If Teams 4 and 5 continue to decide parole matters because funding is extended, the Board will comply with the recommenced 120 and 150 day timeframes in the overwhelming majority of cases.[372]

A well-resourced Parole Board is critical for the proper administration of sentences and to give effect to the intent of sentencing judges when setting a non-parole period for serious offences.

4.2.3 Management of prisoners on parole

When a prisoner has been granted parole and released from prison, they will be supported by a range of re-entry services. In 2020-21, QCS delivered almost 41,700 re-entry service contacts to prisoners and offenders. A person transitioning to parole is required to report to Community Corrections shortly after leaving custody.

QCS applies a person-centric approach to supervision, with case management strategies and intervention tailored to the individual in accordance with evidence-based principles. The supervision of offenders is designed to correspond to risk and manage the individual's treatment and intervention requirements. Following the Risk-Need-Responsivity (RNR) principles,[373] Community Corrections undertake front-end assessments (RoR, Immediate Risk Assessment and STATIC-99R for sex offenders) to determine an individual's overall risk level before then applying graduated levels of intervention and supervision. Generally, high risk offenders who require a higher level of service receive more in-depth assessments to inform their management by experienced officers.[374]

An offender's level of service is primarily determined by their RoR score, with some exclusionary factors and professional discretion applied. Offenders convicted of a declared SVO are included in the Intensive Level of Service ('LOS'). The LOS guides how frequently an offender is required to report to their Community Corrections case manager and the frequency of substance testing. Those in Intensive LOS are subject to more frequent reporting and a lower threshold for risk and non-compliance. While the above activities increase monitoring by QCS of the individual, the manner in which an offender's criminogenic needs are identified and responded to, is the same regardless of their SVO status.

In addition to determining the level of service, QCS also undertakes a series of assessments to identify immediate risks of harm and basic needs, goals and rehabilitation activities. The main assessment is the Benchmark Assessment,[375] which forms the basis of case management for parolees. It takes about 2 months to complete, so parolees must have longer than 3 months supervision remaining on their sentence to warrant one. The Benchmark Assessment examines 'risk factors that may destabilise an offender on supervision in the community and forms the basis of case management for offenders with a level of service of "standard" or greater'.[376] There are 14 risk factors considered, including accommodation, substance misuse, employment, criminal history and DFV (both as a perpetrator and as a victim). For offenders in Enhanced and Intensive levels of service with identified medium or high risk factors, additional offender planning is also undertaken.[377] Once assigned to Intensive LOS, an offender

370 Queensland, *Parliamentary Debates*, Legislative Assembly, 15 September 2021, 2767 (Mark Ryan, Minister for Police and Corrective Services and Minister for Fire and Emergency Services).
371 Submission 14 (Parole Board Queensland) 4.
372 Ibid.
373 A widely used model for determining offender treatment and underlies many risk-needs offender assessment instruments. The risk principle is concerned with whom to target, the need principle is concerned with what to target and the responsivity principle identifies factors that could be a barrier to treatment or interfere with learning: *Queensland Parole System Review: Final Report* (n 4) 109 [541]–[542].
374 *Queensland Parole System Review: Issues Paper* (n 323) 17.
375 Developed by QCS for use by Community Corrections, it is not a validated tool: *Queensland Parole System Review: Final Report* (n 4) 115 [576].
376 Ibid 115 [577].
377 Ibid 116 [582].

can progress through different phases of supervision depending on their engagement with case management and intervention. This can include being placed into the Maintenance phase, achievable once they have completed all required interventions or demonstrated a period of stability in their engagement over a period of time. Ultimately the assessment pathway and any presenting dynamic risk determines the planning and case management activities for individuals subject to community supervision.

As noted in section 4.2.1, QCS released the E2E Offender Management Framework, an evidence-based approach to the management of offenders, developed in response to the QPSR recommendations. The implementation of end-to-end case management across QCS is ongoing, and includes 'new offender pathways, validated assessment tools and [a] new engagement plan for use across Community Corrections'.[378]

[378] Queensland Corrective Services, *Business Plan 2021-22* (2021) 16.

Chapter 5

Approach to sentencing serious violent offences in other jurisdictions

5.1 Introduction

Chapter 4 provides a high-level overview of the approach to sentencing serious violent offences in other jurisdictions, both domestically and internationally. For more detail on each scheme discussed, please refer to Background Paper 2.

5.2 Australian non-parole period schemes

5.2.1 General provisions applying to the setting of a parole eligibility or release date

States and territories have adopted different legislative approaches to the setting of non-parole periods. Some jurisdictions identify a minimum statutory ratio of the non-parole period to the head sentence (and the reverse in New South Wales (NSW)), while others leave this to be determined by the court as a matter of discretion.

As discussed in Chapter 2, for Commonwealth offences, and in the Australian Capital Territory (ACT), South Australia (SA) and Victoria, there is no set statutory ratio between the non-parole period and the head sentence. However, under SA,[379] Victorian[380] and ACT[381] common law, the ratio is usually between 50 and 75 per cent of the head sentence, with a number of legislated exceptions further discussed in this chapter.

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

379 The South Australian Court of Criminal Appeal has noted that NPPs have 'tended to range between 50% and 75% of the head sentence': *R v Devries* [2018] SASCFC 101, [19] (Hinton J) citing *R v Palmer* [2016] SASCFC 34, [4] (Kourakis CJ).

380 Generally Victorian sentencing courts impose non-parole periods that are between 60% and 75% of the head sentence: *Victorian Sentencing Manual* (n 37) 158 [8.3.2].

381 The 'usual [percentage] range of 50-75%' has been noted in a number of Court of Appeal decisions: see *Zdravkovic v The Queen* [2016] ACTCA 53, [74] citing *Barrett v The Queen* [2016] ACTCA 38, [52]; *Taylor v The Queen* [2014] ACTCA 9, [20] (Murrell CJ, Refshauge and Penfold JJ agreeing generally as to reasons).

In a number of these jurisdictions, a court is either not permitted to set a non-parole period of less than the statutory ratio specified,[382] or is allowed to depart from this only if special circumstances apply.[383]

5.2.2 Nature of the parole period and eligibility schemes as mandatory vs discretionary

Sentencing and parole schemes across Australia differ as to the level of discretion available to a court in deciding the appropriate sentence and non-parole period (or parole eligibility date). Examples are provided in Table 7.

Table 7: Sentencing frameworks in Australia by scheme type and level of discretion

Lowest level of discretion

Penalty type	Description	Examples
Fixed penalties (no discretion)	Parliament specifies a set penalty for the offence. The court has no discretion and is limited to a 'one size fits all' approach.	**Qld:** Mandatory SVO declaration for sentences of 10 years or more for Schedule 1 offence (parole eligibility after serving 80% of sentence); NPP for unlawful striking causing death where imprisonment imposed.
Mandatory minimum schemes	Parliament specifies a range with a maximum and minimum penalty. Court can set a higher penalty than the minimum, but not a lower one. The court has a narrow discretion about the factors that it can take into account, as long as it imposes a sentence that is within the statutory range.	**Commonwealth:** 'Three-quarters rule' for national security offences. **NT:** 70 % mandatory minimum NPP scheme for prescribed offences. **Tas:** NPP, if fixed, must not be less than 50% of the head sentence. **WA:** Mandatory minimum sentences.
Presumptive minimum schemes	This is similar to a mandatory minimum, in that Parliament specifies a range. This is different to a mandatory minimum in that Parliament allows the court to impose a sentence below that range in defined circumstances.	**NSW:** Balance of sentence not to exceed one-third of the NPP, unless there are special circumstances. **NT:** Level 5 sexual offences, a court must order set minimum penalties, unless there are exceptional circumstances. **Vic:** NPPs for standard sentence offences, statutory minimum sentences.
Structured discretion	Parliament specifies a maximum penalty and provides a set of general guidelines in sentencing legislation. The court can impose any sentence below the statutory maximum, subject to legislation, common law principles and appellate review. The court can take a wide variety of factors into account.	**Qld:** Sentencing violent and sexual offences under section 9 of the PSA, discretionary SVO declarations. **NSW:** Standard NPP scheme. **NT:** For non-level 5 sexual offences the court must record a conviction and impose actual imprisonment or a partially suspended sentence. **Vic:** Standard sentencing scheme.
Broad discretion	The court has broad discretion to take any factors into account, as required or permitted by law, and impose any sentence (but no greater than the maximum penalty for the offence).	**ACT:** Setting of NPP for sentences of 12 months or longer. **Qld:** Setting of parole eligibility date for sentences of more than 3 years (other than where SVO declaration made).

Highest level of discretion

Under some provisions, courts have no discretion and are limited to a 'one size fits all' approach. Under others, courts have broad discretion to decide the sentence and appropriate non-parole period, within the limits of the law, while acting in accordance with relevant legislation and legal principles.

382 For example, see *Sentencing Act 1995* (NT) ss 53 and 54 and *Sentencing Act 1997* (Tas) s 17(3).
383 See *Crimes (Sentencing Procedure) Act 1999* (NSW) s 44.

5.3 Minimum and standard non-parole period schemes

Appendix 10 sets out minimum non-parole schemes that apply across Australia to adult offenders. It does not include mandatory sentencing schemes that apply to the setting of the head sentence, unless these also include a mandatory or presumptive non-parole component. This means that some schemes discussed in this chapter in the interest of providing a comprehensive overview, are not included in this table.

5.3.1 Australian Capital Territory

In the ACT, if a court sentences an offender to a term of imprisonment of 12 months or longer, or two or more terms of imprisonment that total 12 months or longer (other than a life sentence),[384] a court must set a non-parole period (NPP).[385] However, the court may decide not to set an NPP, if it considers that it would be inappropriate to do so, having regard to the nature of the offence or offences and the offender's antecedents.[386] When a court sets a NPP, it must state when the NPP starts and ends.[387]

While there is no legislated ratio between the NPP and head sentence, the ACT Court of Appeal has, on a number of recent occasions, affirmed that for NPPs the 'usual [percentage] range of 50 [to] 75%' applies when sentencing an offender to a term of imprisonment of 12 months or longer.[388]

5.3.2 Commonwealth

General provisions applying to parole

The fixing of minimum periods of imprisonment to be served by a federal offender is governed by Part IB of the *Crimes Act 1914* (Cth) ('*Crimes Act*'), together with common law principles applied by section 80 of the *Judiciary Act 1903* (Cth).[389]

With the exception of the provisions set out in Table 8, there is no fixed ratio or proportion between the head sentence imposed on a federal offender and the period, or minimum period, to be served.[390] A court in some circumstances can order a federal offender sentenced to imprisonment to be released immediately (meaning the person does not have to serve any period (or further period) in custody subject to entering into and complying with a recognizance).[391] In other cases, it may require the person to serve the whole period of the sentence in custody. In most cases the court will order that a period, or minimum period, be served, exercising its discretion.

The setting of non-parole periods is to be approached on an individualised basis, and not by reference to suggestions about established 'norms' about the period or minimum period to be served for an offence under Commonwealth law.[392]

The Commonwealth DPP ('CDDP'), in a sentencing guide developed for practitioners, has identified that while 'sentencing courts must endeavour to ensure reasonable consistency in the sentencing of federal offenders' in practice, there is 'considerable variation, both within and between jurisdictions, in the ratio between the length of the head sentence … and the period fixed as the period, or minimum period to be served':[393]

> Broadly speaking, the ratio in most cases is between one-third and three-quarters. Ratios at the lower end are found more commonly where the head sentence is shorter and a release period is fixed. Where the head sentence is greater than 3 years, and a minimum term is imposed, ratios are typically between 50% and 75%. The ratio tends to be greater (sometimes higher than 80%) for very serious offending, when the head sentence or total effective sentence is particularly long.[394]

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384 *Crimes (Sentencing) Act 2005* (ACT) s 64(2)(f).
385 Ibid s 65.
386 Ibid s 65(4).
387 Ibid s 65(3).
388 *Zdravkovic v The Queen* [2016] ACTCA 53, [74]; *Barrett v The Queen* [2016] ACTCA 38 at [52]; *Taylor v the Queen* [2014] ACTCA 9, [20]: *Henry v The Queen* (2019) 276 A Crim R 519.
389 Commonwealth Director of Public Prosecutions, *Sentencing of Federal Offenders in Australia: A Guide for Practitioners* (4th ed, 2021) 155 [665].
390 Ibid 155 [666].
391 Ibid.
392 *Hili v The Queen* (2010) 242 CLR 520, 528 [25], and 532–4 [36]–[44] (French CJ, Gummow, Hayne, Crennan, Kiefel and Bell JJ).
393 Commonwealth Director of Public Prosecutions, *Sentencing of Federal Offenders in Australia: A Guide for Practitioners* (4th ed, 2021) 157–8 [672].
394 Ibid (citations omitted).

The CDPP cautions that this summary of the position 'is not only very general but no more than descriptive'.[395]

Minimum non-parole period and sentencing schemes under Commonwealth legislation

Commonwealth legislation has three minimum non-parole period and sentencing regimes. A brief overview of these regimes is set out in Table 8.

Table 8: Commonwealth minimum non-parole period and sentencing regimes

Scheme	Offences it applies to	Details
'Three-quarters' rule for national security offences	A 'minimum non-parole period offence' is defined to mean: a terrorism offence (as defined in s 3(1) of the *Crimes Act*); an offence against Division 80 of the Criminal Code (Cth) (treason, urging violence, advocating terrorism, etc.); or an offence against sections 91.1(1) or 91.2(1) of the Criminal Code (Cth) (intentional espionage offences).	Applies when an offender is sentenced to imprisonment[396] for a listed offence. A court is to fix a single NPP of at least three-quarters of the head sentence whenever a person is convicted of a 'minimum non-parole period offence', or of the aggregate term if the person is sentenced for two or more of those offences.[397] The court can depart from the three-quarters rule by setting a shorter NPP, but only if the person being sentenced is aged under 18 years where exceptional circumstances exist.[398] A court is not to reduce the head sentence to compensate for, or offset, the effect of this provision[399] nor can it impose a straight sentence (without fixing an NPP) when it could otherwise have done so under other provisions of the Crimes Act.[400]
Minimum head sentences and non-parole period for people smuggling offences	section 233B (aggravated people smuggling, involving cruel, inhuman or degrading treatment, or conduct giving rise to a danger of death or serious harm to the person); section 233C (aggravated people smuggling, involving a group of at least 5 unlawful non-citizens); or section 234A (offence relating to forged or false documents, or false or misleading statements or documents, relating to a group of 5 or more non-citizens or a member of such a group).	People convicted of listed people-smuggling offences must be sentenced to a mandatory term of imprisonment, a mandatory minimum duration of that term and a mandatory minimum NPP.[401] If a person is convicted of an offence against section 233B, or a repeat offence[402] for a relevant people smuggling offence, the court is required to impose a sentence of at least 8 years,[403] with a non-parole period of at least 5 years[404] — just over 60 per cent of the minimum head sentence. For a person convicted of an offence against either of the other listed sections (other than a repeat offence), the court is required to impose a sentence of at least 5 years[405] with a non-parole period of at least 3 years[406] — 60 per cent of the minimum head sentence.

Table continued over page.

395 Ibid.
396 Section 19AG applies if a person is convicted of one of the listed offences and a court imposes a 'sentence' — defined in s 16 of the *Crimes Act 1914* (Cth) to mean a sentence of imprisonment.
397 *Crimes Act 1914* (Cth) s 19AG(2).
398 Ibid s 19AG(4A).
399 Ibid citing *Lodhi v The Queen* (2007) 179 A Crim R 470, 535–7 [255]–[262] as authority. However, see Williams J in *R v Kruezi* [2020] 6 QR 119 [62] referring to observations of the sentencing judge that the defendant in *Lodhi* was convicted following a trial and therefore 'there was no occasion to lower the head sentence'
400 Sections 19AB(3), 19AC(1) or (2) or 19AD(2)(f): Commonwealth Director of Public Prosecutions (n 393) 173 [740].
401 *Migration Act 1958* (Cth) s 236B. For a detailed discussion of these provisions, see Commonwealth Director of Public Prosecutions, *Sentencing of Federal Offenders in Australia: A Guide for Practitioners* (4th ed, 2021) section 8.2 'People smuggling offences'.
402 A 'repeat offence' refers to a conviction for an offence under sections 233B, 233C or 234A by a person who, on the same or a previous occasion, has been convicted of or found to have committed another such offence, or who has, after 27 September 2001, been convicted or found to have committed an offence under ss 232A or 233A of the Act: *Migration Act 1958* (Cth) s 236B(5).
403 Ibid s 236B(3)(a) and (b).
404 Ibid s 236B(4)(a).
405 Ibid.
406 Ibid s 236B(3)(c).

Scheme	Offences it applies to	Details
		For a person convicted of an offence against either of the other listed sections (other than a repeat offence), the court is required to impose a sentence of at least 5 years[407] with a non-parole period of at least 3 years[408] — 60 per cent of the minimum head sentence. These provisions prevail over those in section 17A of the *Crimes Act* that require a court to consider all other available sentences and to be satisfied before imposing a sentence of imprisonment that no other sentence is appropriate in all the circumstances of the case.[409]
Mandatory minimum sentences for specified Commonwealth child sex offences or child sexual abuse offences	15 high-level Commonwealth child sex offences 35 Commonwealth child sexual abuse offences To qualify for a second or subsequent conviction for a child sexual abuse offence. A child sexual abuse offence is defined to mean: a 'Commonwealth child sex offence' (as further defined); an offence against sections 273.5, 471.16, 471.17, 474.19 or 474.20 of the Criminal Code (as in force at any time before the commencement of Schedule 7 to the *Combatting Child Sexual Exploitation Legislation Amendment Act* 2019); an offence against Part IIIA of the *Crimes Act* (as in force at any time before the commencement of Schedule 1 to the *Crimes Legislation Amendment (Sexual Offences Against Children) Act* 2010); or a 'State or Territory registrable child sex offence' (as further defined).	Mandatory minimum sentences of imprisonment for 15 specified high level Commonwealth child sex offences[410] and specified minimum length sentences for repeat child sexual abuse offences.[411] The mandatory minimum sentence levels for high-level Commonwealth offences depend on the type of offence and maximum penalty — ranging from 5 years' imprisonment (for offences carrying a 20 year maximum penalty) to 7 years' imprisonment (for offences carrying a maximum penalty of 30 years or life).[412] A court may reduce the minimum sentences set by legislation by up to 25 per cent if it considers it appropriate taking into account either a plea of guilty, or cooperation with law enforcement authorities in the investigation of the offence or a Commonwealth child sex offence, or by up to 50 per cent if both circumstances apply.[413] The mandatory minimum sentences do not apply if the person was aged under 18 years at the time of the offence.[414] In contrast to the mandatory sentencing requirements for specified people-smuggling offences, the legislation does not set mandatory minimum NPPs that the person being sentenced is required to serve. Nor must the period to be served represent any set or minimum proportion of the head sentence as applies to certain national security offences. This means the court must fix a NPP or RRO in the same way as for any other offence not subject to mandatory requirements, except that immediate release under a RRO is only available in exceptional circumstances.[415]

407 Ibid.
408 Ibid s 236B(4)(b).
409 Commonwealth Director of Public Prosecutions, *Sentencing of Federal Offenders in Australia: A Guide for Practitioners* (4th ed, 2021) 241 [1057].
410 *Crimes Act 1914* (Cth) s 16AAA. Must be committed on or after 23 June 2020.
411 Ibid s 16AAB. Must be committed on or after 23 June 2020 where offender has previously been convicted (at any time) of a child sexual abuse offence, whether under the law of the Commonwealth or a state or territory. For a detailed discussion of these provisions, see Commonwealth Director of Public Prosecutions, *Sentencing of Federal Offenders in Australia: A Guide for Practitioners* (4th ed, 2021) section 8.3.1.
412 *Crimes Act 1914* (Cth) s 16AAA.
413 Ibid s 16AAC.
414 Ibid s 16AAC(1).
415 Commonwealth Director of Public Prosecutions, *Sentencing of Federal Offenders in Australia: A Guide for Practitioners* (4th ed, 2021) 245 [1075] and *Crimes Act 1914* (Cth) ss 20(1)(b)(ii) and (iii).

5.3.3 New South Wales

General provisions applying to parole

Sentences of imprisonment of six-months or less in NSW are for 'fixed terms'.[416] This means that the offender must spend the whole fixed term of imprisonment in custody and is then released unconditionally at the end of the term.

For terms of imprisonment over six months, the court must 'first set a NPP', and 'the balance of the term of the sentence must not exceed one-third of the non-parole period for the sentence'.[417] This means that the NPP is effectively three-quarters or more of the total sentence length.[418] However, a court has discretion to exceed the statutory one-third requirement if there are 'special circumstances' (and those reasons must be stated in the decision).[419] When sentencing a person for two or more offences, the court may set one NPP for all the offences to which the sentence relates after setting the term of the sentence.[420]

For sentences of 3 years or less, statutory parole orders direct the release of an offender on parole at the end of the NPP.[421] This release is conditional upon the person being eligible for release on parole.[422] For sentences over 3 years, the NPP signifies parole eligibility only.

In 2013, the NSW Law Reform Commission (NSWLRC) made several recommendations in relation to the setting of NPPs, including that the general 'statutory ratio' between the NPP and term of the sentence be changed from three-quarters to two-thirds of the sentence.[423] Those recommendations are yet to be implemented.

Standard non-parole period scheme

NSW has also established a standard non-parole period ('SNPP') scheme that applies to a range of serious offences, including murder.[424]

An SNPP represents the non-parole period for an offence that, 'taking into account only the objective factors affecting the relative seriousness' of the offence, 'is in the middle of the range of seriousness'.[425] The SNPP operates as a 'legislative guidepost' in sentencing, along with the maximum penalty.[426] When sentencing an offence to which an SNPP applies, the court must also consider other legislated and common law sentencing considerations.[427]

The offences to which the scheme applies, and associated SNPPs, are set out in a Table to Part 4, Division 1A of the *Crimes (Sentencing Procedure) Act 1999* (NSW). As originally introduced, the scheme applied to more than 20 categories of serious indictable offences including a range of violent, sexual and drug offences, such as murder, sexual assault, commercial manufacture of drugs and unauthorised possession of a firearm. The number of offences captured under the scheme has since expanded to over 30, and the offence categories 'cover the majority of serious crimes that have a relatively high volume'.[428]

The SNPPs are expressed as a number of years. For example, the SNPP for attempt to murder is 10 years,[429] and 7 years for sexual assault.[430]

The levels at which the SNPPs were originally set 'generally were at least double the median non-parole period between 1994 and 2001, and in some cases, such as sexual offences and supplying a commercial quantity of a

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416 *Crimes (Sentencing Procedure) Act 1999* (NSW) s 46.
417 Ibid ss 44(1) and 44(2).
418 Ibid s 44. The non-parole period is defined as 'the minimum period for which the offender must be kept in detention in relation to the offence': s 44(1).
419 Ibid s 44(2). Analysis of sentencing findings of 'special circumstances' by the Judicial Commission of New South Wales led former Chief Justice Spigelman to query in a 2004 Court of Appeal decision whether many offenders' circumstances really were sufficiently 'special' to justify lowering NPPs: *R v Fidow* [2004] NSWCCA 172, [20] (Spigelman CJ).
420 *Crimes (Sentencing Procedure) Act 1999* (NSW) s 44(2A).
421 *Crimes (Administration of Sentences) Act 1999* (NSW) s 158(1).
422 Ibid s 126.
423 See NSW Law Reform Commission, *Sentencing* (Report No. 139, July 2013) Recommendation 6.2.
424 *Crimes (Sentencing Procedure) Act 1999* (NSW) Division 1A, ss 54A–54D.
425 Ibid s 54A(2).
426 *Muldrock v The Queen* (2011) 244 CLR 120, 132 [27] (French CJ, Gummow, Hayne, Heydon, Crennan, Kiefel and Bell JJ).
427 *Crimes (Sentencing Procedure) Act 1999* (NSW) s 54B(2).
428 NSW Law Reform Commission, *Sentencing* (Report No. 139, July 2013) [1.21].
429 All offences listed in ss 27, 28, 29 and 30 of the *Crimes Act 1900* (NSW). Each offence carries a maximum penalty of 25 years.
430 Ibid s 61I which carries a maximum penalty of 14 years.

prohibited drug, they were nearly triple the existing median periods'.[431] The SNPP is based on the seriousness of the offence, the maximum penalty and sentencing trends for the offence.[432]

The SNPP provisions do not apply where an offender is:

- sentenced to life imprisonment or for any other indeterminate period (and is therefore ineligible for parole);[433]
- sentenced to detention under the *Mental Health and Cognitive Impairment Forensic Provisions Act 2020* (NSW);
- dealt with summarily; or
- under 18 years at the time the offence was committed.[434]

The court must record in the sentencing remarks the reasons for setting a NPP that is longer or shorter than the SNPP and each factor that was taken into account when making this determination.[435] When determining an aggregate sentence of imprisonment, the court must state in writing which offences the SNPP applies to and the NPP that would have been set for each offence to which the aggregate sentencing relates, had each offence received a separate sentence of imprisonment.[436]

Reviews of the SNPP scheme were undertaken by the NSW Sentencing Council and NSW Law Reform Commission in 2012 and 2013. For an overview of those reports please refer to Background Paper 2.

5.3.4 Northern Territory

General provisions applying to parole

In the NT, a court is prohibited from fixing a non-parole period for a sentence of imprisonment of less than 12 months or suspended in whole or in part[437] except if a new offence is committed before the NPP for another offence has ended, in which case the court must set a single NPP for all offences.[438]

For sentences of imprisonment of 12 months or longer, a court must fix an NPP of not less than 50 per cent of the period of imprisonment the offender is to serve under the sentence[439] (provided this is not for a period of less than 8 months[440]); unless the court considers that the nature of the offence, the past history of the offender, or the circumstances of the particular case, make the fixing of such a period inappropriate[441] (in which case the person must serve the whole period of the sentence in custody).

Different parole requirements apply to setting NPPs for murder,[442] and where minimum NPPs and fixed NPPs apply — see Table 9.

Mandatory minimum sentencing and non-parole period provisions

The *Sentencing Act 1995* (NT) contains a number of mandatory sentencing provisions, some of which require a court to impose an actual term of imprisonment, a minimum period of imprisonment of a specified length, or a minimum NPP (being a set proportion of the head sentence) — see Table 9. Most of these mandatory sentencing provisions are directed at sexual offences and violent offences.

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431 NSW Law Reform Commission, *Sentencing* (Report No. 139, July 2013) [1.16].
432 NSW Sentencing Council, *Standard Non-Parole Periods* (Report, December 2013) 3 citing NSW, *Parliamentary Debates*, Legislative Assembly, 23 October 2002, 5817.
433 In NSW the maximum (non-mandatory) penalty for murder is life imprisonment (*Crimes Act 1900* (NSW) s 19A, inserted by the *Crimes (Life Sentences) Amendment Act 1989* (NSW) sch 1(14)) and a life sentence without parole may be imposed where 'the court is satisfied that the level of culpability in the commission of the offence is so extreme that the community interest in retribution, punishment, community protection and deterrence can only be met through the imposition of that sentence': *Crimes (Sentencing Procedure) Act 1999* (NSW) s 61(1).
434 *Crimes (Sentencing Procedure) Act 1999* (NSW) s 54D.
435 Ibid s 54B(3).
436 Ibid s 54B(4).
437 *Sentencing Act 1995* (NT) s 53(1A).
438 Ibid s 57.
439 Ibid ss 53(1) and 54(1).
440 Ibid s 54(2).
441 Ibid s 53(1).
442 Ibid s 53A.

Table 9: Mandatory minimum sentencing and non-parole provision schemes in the Northern Territory

Scheme	Offences it applies to	Details
Mandatory imprisonment for certain violent offences	Examples of Level 5 offences from the Criminal Code (NT) include: • Serious harm — s 181 • Assault of persons providing rescue, medical treatment or other aid — s 155A • Causing harm — s 186 • Choking, strangling or suffocating in a domestic relationship — s 186AA • Some aggravated forms of common assault – s 188(a) but excluding paragraph (k) • Assaults on police or emergency workers — s 189A	Introduced in 2013 by the *Sentencing Amendment (Mandatory Minimum Sentences) Act 2013* (NT). While a minimum NPP is not specified, if the court is required under these provisions to impose a minimum sentence of 12 months' actual imprisonment, the NPP fixed must not be less than 12 months.[443] Must record a conviction and impose either a term of actual imprisonment or a partly suspended sentence when sentencing an offender for a sexual offence.[444] The Act created 5 levels of violent offence based on the type of offence, whether the victim experienced physical harm and whether a weapon was used, with imprisonment requirements varying based on the five levels. **Level 5:** A minimum of 3 months' actual imprisonment if the offender has not previously been convicted of a violent offence,[445] or 12 months' actual custody if the person has previously been convicted of a violent offence.[446] **Level 4:** A 3-month minimum sentence (whether or not the person has previously been convicted of a violent offence).[447] **Level 3:** Where a victim suffers physical harm and the offender has not previously been convicted of a violent offence, a sentence of actual imprisonment, but without the minimum length being specified.[448] If the person has previously been convicted of a violent offence, a minimum sentence of 3 months' actual imprisonment applies.[449] **Level 2:** Impose a term of actual imprisonment.[450] **Level 1:** A term of actual imprisonment in circumstances where the offender has been previously convicted of a violent offence.[451] 'Actual imprisonment' includes a sentence of imprisonment that is partly suspended, or partly suspended on the offender entering into a home detention order,[452] but where a minimum sentence is specified, the court cannot suspend the imprisonment for the specified period required to be imposed.[453] Courts can depart from the scheme in exceptional circumstances. If deciding that the circumstances are 'exceptional', the court must have regard to any victim impact statement or victim report presented, and any other matter it considers relevant. The Act sets out examples of potential exceptional circumstances, for example the offender has taken responsibility for their conduct and has made a genuine effort to change their behaviour, along with examples that do not meet the threshold (e.g. the offender was voluntarily intoxicated by alcohol, drugs or a combination at the time of the offence).

Table continued over page.

443 *Sentencing Act 1995* (NT) s 54(4).
444 Ibid s 78F(1). A 'sexual offence' to which this section applies means an offence specified in sch 3: s 3. A court can also impose a partially suspended sentence.
445 Ibid s 78D.
446 Ibid s 78DA.
447 Ibid s 78DB.
448 Ibid s 78DC.
449 Ibid s 78DD.
450 Ibid s 78DE.
451 Ibid s 78DF.
452 Ibid s 78DG – referring to orders under ss 40 (suspended sentence) and 44 (home detention order).
453 Ibid s 78DH.

Scheme	Offences it applies to	Details
Minimum non-parole periods for certain sexual offences, drug offences and offences against children under 16 years	The offences listed above; specified sexual offences (including sexual intercourse without consent (rape)[454] and listed sexual offences where committed against a child under 16 by a person who was an adult);[455] drug offences (including supply, manufacture and possession of a commercial quantity of a dangerous drug);[456] and offences of violence committed against children aged under 16 (including acts intended to cause serious harm or prevent apprehension, serious harm, harm, endangering the life of a child by exposure and common assault).[457]	In addition to the mandatory sentencing provisions discussed above, a minimum non-parole period of 70 per cent of the head sentence, applies to offenders sentenced to 12 months or more to certain offences. A court also may set a higher NPP than the minimum specified and may also decline to set an NPP if it considers that the fixing of such a period is inappropriate taking into account the nature of the offence, the past history of the offender or the circumstances of the particular case.[458]

The main justification provided by the Country Liberal Party for the introduction of these NPP provisions was that offenders who commit certain types of offences 'should spend longer in prison',[459] including to 'act as a deterrent for would-be offenders'.[460]

The NT Court of Criminal Appeal has considered a number of the aspects of the operation of the 70 per cent mandatory minimum NPP scheme. Points of clarification have included:

- both the 50 per cent minimum NPP in section 54 of the *Sentencing Act 1995* (NT), and the 70 per cent NPP in section 55A of the Act (that applies to certain offences against children under 16 years) apply to offences committed prior to the introduction of these minimum NPPs provided the offender is sentenced after these provisions came into force;[461]
- the 70 per cent minimum non-parole period mandated by sections 55 and 55A applies only to offences against those sections of the Criminal Code listed in sections 55 and 55A and 'not to offences of a similar or even identical kind under previous legislation';[462] and
- where a court is imposing a total effective sentence for two or more offences, some of which are subject to the minimum NPP of 70 per cent and some of which are subject to the minimum NPP of 50 per cent, the requirement to fix a minimum NPP of not less than 70 per cent of the sentence applies only to that part of the sentence that relates to the 'specified offences' under section 55 of the *Sentencing Act*[463] (and, by extension, those offences listed in section 55A as subject to the 70 per cent minimum NPP).

While the Court has avoided commenting on the merits of the scheme itself, it has noted that one of its effects is the 'inevitable interference with courts' capacity to maintain parity and consistency in sentencing' given the mandatory nature of these provisions.[464]

454 Ibid s 55.
455 Ibid s 55A. Sexual offences this applies to under the Criminal Code (NT) are: sexual intercourse or gross indecency involving a child under 15 years (s 127), sexual intercourse or gross indecency by provider of services to mentally ill or handicapped person attempts to procure child under 16 (s 131), sexual relationship with a child (s 131A), indecent dealing with a child under 16 (s 132), incest (s 134) and gross indecency without consent (s 192(4)).
456 Ibid s 55.
457 Ibid s 55A.
458 Ibid ss 55(2), 55A(2) and 53(1).
459 See Northern Territory, *Parliamentary Debates*, Legislative Assembly, 18 May 1995, 3388 (Fred Finch, Attorney-General) with respect to the original form of s 55 that applied to the offence of rape.
460 Northern Territory, *Parliamentary Debates*, Legislative Assembly, 5 June 2001, 7891 (Denis Burke, Attorney-General) discussing extending the section 55 provisions to offenders convicted of child abuse offences.
461 *R v Cumberland* (2019) 42 NTLR 1, 5 [10] (Grant CJ, Kelly, Barr, Hiley JJ and Riley AJ) citing *TRH v The Queen* [2018] NTCCA 14. See also *JL v The Queen* (2019) 42 NTLR 17 28, [34] (Kelly and Barr JJ and Riley AJ).
462 Ibid.
463 *R v Cumberland* (2019) 42 NTLR 1, 16 [49] (Grant CJ, Kelly, Barr, Hiley JJ and Riley AJ).
464 *Norris v The Queen* (2020) 284 A Crim R 72 (Grant CJ, Southwood and Barr JJ) [46] citing *Bojovic* (n 114), [34].

5.3.5 South Australia

General provisions applying to parole

In South Australia (SA), if a person is sentenced to imprisonment for a period of 12 months or more, the court must fix a non-parole period (if the person is not subject to an existing NPP), or if the person is subject to an existing NPP, review this period and extend it 'by such period as the court thinks fit'.[465]

A court may also, by order, decline to fix a non-parole period if the court is of the opinion it would be inappropriate to do so because of:

- the seriousness of the offence or the circumstances surrounding the offence;
- the person's criminal record;
- the person's behaviour during any previous period of release on parole or conditional release; or
- any other circumstance.[466]

While there is no mandatory (or minimum) ratio between the head sentence and NPP, the South Australian Court of Criminal Appeal has noted that NPPs have 'tended to range between 50% and 75% of the head sentence'.[467]

In SA, a court cannot set a parole period for sentences of under 12 months.

Mandatory and presumptive parole provisions

The *Sentencing Act 2017* (SA) ('*Sentencing Act*') includes various mandatory sentencing provisions in respect of serious repeat offenders, offenders convicted of murder or a serious offence against the person, and serious firearm offenders. In addition to these mandatory schemes, there are limitations on when a court may impose a suspended sentence, an intensive correction order or a home detention sentence. Those schemes that involve the application of a minimum NPP are discussed in Table 10.

Table 10: Mandatory and presumptive parole provisions in South Australia

Scheme	Offences it applies to	Details
Mandatory minimum non-parole period for serious offences against the person	A 'serious offence against the person' is defined to mean 'a major indictable offence (other than an offence of murder) resulting in the death of the victim, or the victim suffering total incapacity' — that is, becoming 'permanently physically or mentally incapable of independent function'.[468]	Offenders convicted of a 'serious offence against the person' are subject to a mandatory minimum NPP of four-fifths the length of the head sentence (80%).[469] A court can impose a longer NPP if satisfied this is warranted because of any objective or subjective factors affecting the relative seriousness of the offence.[470] A court can set a shorter NPP only where there are 'exceptional circumstances'.[471]

Table continued over page.

465 *Sentencing Act 2017* (SA) ss 47(5)(a) and 47(1)(a)–(b).
466 Ibid s 47(5)(e).
467 *R v Devries* [2018] SASCFC 101, [19] (Hinton J) citing *R v Palmer* [2016] SASCFC 34, [4] (Kourakis CJ).
468 *Sentencing Act 2017* (SA) s 47(12)(f).
469 Ibid s 47(5)(d).
470 Ibid s 48(2)(a).
471 Ibid s 48(2)(b). There is also a power to prescribe circumstances in which a shorter NPP may be set by regulation. No circumstances are currently prescribed.

Scheme	Offences it applies to	Details
		The Act sets out a non-exhaustive list of exceptional circumstances, including:[472] (a) the offence was committed in circumstances in which the victim's conduct or condition substantially mitigated the offender's conduct; (b) the offence was committed in circumstances of family violence (being circumstances in which the offender, or a member of the offender's family, was a victim of family violence committed by the victim of the offence); (c) if the offender pleaded guilty to the charge of the offence — that fact and the circumstances surrounding the plea; (d) the degree to which the offender has cooperated in the investigation or prosecution of that or any other offence and the circumstances surrounding, and likely consequences of, any such cooperation. The existence of one of more of these circumstances, however, does not require the court to consider fixing a shorter NPP.[473] It is a decision made with reference to the individual circumstances of the case and factors personal to the defendant.[474]
Serious repeat offenders provisions	*Serious offence* means:[475] • A serious firearm offence within the meaning of Division 3;[476] or • A listed offence where the maximum penalty is or includes at least 5 years—examples include Robbery,[477] and Arson,[478] offences against the person (e.g. murder, manslaughter, stalking, assault) *Serious sexual offence* means: • A listed offence including sexual exploitation of a person with a cognitive impairment,[479] and a range of sexual offences where the victim was under 14 years at the time of the offence;[480] • An offence in another State or Territory that would if committed in South Australia be a serious sexual offence.	A presumptive scheme where the court sentencing a person who is a 'serious repeat offender' is not bound to ensure that the sentence it imposes is proportional to the offence.[481] A person is a serious repeat offender if the person (whether as an adult or as a child) has committed and been convicted of (including the offence the person is being sentenced for): • at least 3 'serious offences' committed on separate occasions; or • at least 2 'serious sexual offences' committed on separate occasions.[482] A presumptive scheme where the court sentencing a person who is a 'serious repeat offender' is not bound to ensure that the sentence it imposes is proportional to the offence.[483] The court must ensure that any NPP fixed in relation to the sentence must be at least four-fifths (80%) the length of the sentence. The court may depart from the scheme when satisfied by evidence under oath[484] that the defendant's personal circumstances are so exceptional as to outweigh the paramount consideration of protecting the safety of the community and personal and general deterrence, and that it is, in all the circumstances, not appropriate that they be sentenced as a serious repeat offender.[485] The defendant must satisfy both requirements before the exception to being sentenced as a serious repeat offender operates.[486]

472 Ibid s 48(3).
473 See *R v Barnett* (2009) 198 A Crim R 251.
474 *R v Frencken* (2012) 61 MVR 195 [14]–[20] (Vanstone J, Nyland and David JJ agreeing).
475 *Sentencing Act 2017* (SA) s 52.
476 Ibid s 49. Includes one of a number of offences involving the use, carriage and supply of firearms and other offences under the *Firearms Act 2015* (SA).
477 *Criminal Law Consolidation Act 1935* (SA) s 137.
478 Ibid s 85(1).
479 Ibid ss 51(1) and (2).
480 Ibid ss 48, 48A, 49, 50, 56, 58, 59, 60, 63, 63B, 66, 67, 68 or 72.
481 *Sentencing Act 2017* (SA) s 54(1).
482 Ibid s 53.
483 *Sentencing Act 2017* (SA) s 54(1).
484 The requirement for evidence on oath does not require a defendant to themselves give evidence — see for example *R v Douglass* [2019] SASCFC 67 where the only evidence given on oath was by a forensic psychologist who had assessed the defendant.

5.3.6 Tasmania

General provisions applying to parole

In Tasmania, when sentencing a person to a term of imprisonment, a court *may* set a parole eligibility date or order that an offender is not eligible for parole at all.[487] The parole period specified by the court 'is not to be less than one-half of the sentence'.[488]

However, when a court sentences a person to life imprisonment, the order *must* state that the person is either not eligible for parole[489] or set a parole eligibility date.[490] There is a statutory obligation to provide reasons when making an order refusing or allowing parole eligibility.[491]

Except for life sentences, if the court does not state an eligibility date, then the offender is not eligible for parole.[492] This means that, in contrast to Queensland, when a court does not state a parole eligibility date, there is no default entitlement to parole under the *Corrections Act 1997* (Tas). This amendment was introduced in 2002 via the *Sentencing Amendment Act 2002* (Tas). According to the Second Reading speech for the bill, this amendment was made in order 'to force the courts to impose a non-parole period failing which the offender cannot be paroled'.[493] In the same speech, the former Attorney-General stated that:

> The Government's view is that the sentencing courts are far better placed to determine exactly when a convicted person should be eligible for parole. The court has all the facts of the case before it and has knowledge of the effect it has had on the victim or the family of a deceased victim and the community in general. These are matters which have dissipated because of the passage of time when the Parole Board comes to consider parole.[494]

Minimum sentence of imprisonment for causing serious bodily harm to a police officer

There is only one mandatory sentencing scheme that appears to exist in Tasmania. The *Sentencing Act 1997* (Tas) provides that for the offence of causing serious bodily harm to a police officer, the court must order a person to serve a term of not less than 6 months, unless the court finds there are exceptional circumstances.[495]

Inserted into the Act in 2014,[496] this provision was introduced to give effect to a Government election commitment to legislate for a minimum mandatory sentence of six months imprisonment for assaults on police officers and other emergency service personnel, to ensure sentences where serious harm was caused would 'reflect the gravity of the crime'.[497]

5.3.7 Victoria

General provisions applying to parole

Victoria, like a number of other Australian jurisdictions, does not allow the court to set a parole period for sentences of imprisonment of under 12 months.[498] For sentences of less than one year, an offender must serve the entire sentence in prison.[499]

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485 *Sentencing Act 2017* (SA) s 54(2). For detailed consideration by the South Australian Court of Criminal Appeal of the meaning of 'exceptional circumstances' see *Knight v The Queen* (2021) 138 SASR 56.

486 *Knight v The Queen* (2021) 138 SASR 56, 172 [62]–[63]. See also *R v Karnage* [2019] SASCFC 82. For an example of a case where a declaration was made under s 54(2), see *R v Douglass* [2019] SASCFC 67. The sentencing judge made the declaration for a first-time sentenced defendant who had a significant intellectual disability and this was not set aside on appeal.

487 *Sentencing Act 1997* (Tas) ss 17(2)(b), 17(3), 17(3A).

488 Ibid s 17(3).

489 Ibid s 18(1)(a).

490 Ibid s 18(1)(b).

491 Ibid ss 17(7) and 18(5) and *Young v Wilson* [2015] TASSC 16, [54].

492 Ibid s 17(3A) and *Corrections Act 1997* (Tas) ss 68(1), 69.

493 Tasmania, *Parliamentary Debates*, House of Assembly, 29 May 2002, 66 (Peter Patmore, Attorney-General).

494 Ibid.

495 *Sentencing Act 1997* (Tas) s 16A(1).

496 *Sentencing Amendment (Assaults on Police Officers) Act 2014* (Tas) s 4.

497 Tasmania, *Parliamentary Debates*, Legislative Council, 26 November 2014, 2 (Vanessa Goodwin, Leader of the Government in the Legislative Council).

498 *Sentencing Act 1991* (Vic) s 11(2).

499 Ibid; Victorian Sentencing Advisory Council, *A Quick Guide to Sentencing* (Report, 6th ed, 2021) 22.

For sentences between 12 and 24 months, the court does not have to, but *may* choose to set an NPP.[500] For sentences of more than two years, the court *must* set an NPP, unless it considers that the nature of the offence or the circumstances of the offender make it inappropriate to do so.[501] For sentences between 12 and 24 months, and over two years, the NPP *must* be six months or more.[502] Unless the offence is captured in one of the mandatory sentencing schemes (see Table 11), there is no 'requirement at law which calls for a set ratio between the head sentence and the non-parole period'.[503]

As noted in Chapter 2, section 2.5, generally sentencing courts impose NPPs that are between 60 and 75 per cent of the head sentence.[504] However, 'different standards may apply for both longer and shorter sentences'.[505] The Victorian Court of Appeal has observed that while there is 'no usual non-parole period'[506] and that such an idea is 'problematic' because it 'tends to imply'[507] a two-stage sentencing process, a range still 'informs the sentencing task by providing an important guide to sentencing judges'.[508]

When fixing an NPP that is higher or lower than the common proportional range, a court should give reasons for doing so, but is not required to.[509]

Mandatory sentencing provisions

Victoria has several mandatory sentencing schemes:

- mandatory imprisonment sentences for Category 1 and Category 2 offences;
- statutory minimum sentences;
- mandatory non-parole periods that apply to standard sentences; and
- the serious offenders scheme.

These schemes are set out in Table 11. All are intended to increase sentence lengths and, in particular, the period of time spent in custody by an offender.

Table 11: Mandatory sentencing provisions in Victoria

Scheme	Offences it applies to	Details
Statutory minimum youth justice centre orders: youth offenders aged 18-20 years	For 'causing injury offence' against emergency or custodial workers on duty. However, this exception does not apply to charges of intentionally or recklessly causing serious injury in circumstances of gross violence.[510]	Offenders aged 18 and over but under 21 at time of sentence who are convicted of a relevant offence, the court may impose a minimum term of youth justice centre detention in lieu of a statutory minimum NPP. To do this, the court must find: • a special reason under section 10A of the *Sentencing Act 1991* (Vic) does not exist; and • a pre-sentence report indicates, and the court is of the view, that: there are reasonable prospects for rehabilitation; or the young offender is particularly impressionable, immature or likely to be subjected to undesirable influences in an adult prison.[511]

Table continued over page.

500 *Sentencing Act 1991* (Vic) s 11(2).
501 Ibid s 11(1).
502 Ibid s 11(3).
503 *R v Tran* [2006] VSCA 222, [27] Redlich JA with whom the other members of the court agreed.
504 *Victorian Sentencing Manual* (n 37) 158 [8.3.2].
505 Ibid.
506 *Wallace v The Queen* (2012) 35 VR 520, 523 [16] ('*Wallace*').
507 *Kumova v The Queen* (2012) 37 VR 538, 541 [9]–[10] (Nettle JA, Redlich and Osborn JJA agreeing).
508 Ibid 547–8 [34]–[35] (Redlich and Osborn JJA).
509 'The failure to give reasons does not indicate error but it invites appellate scrutiny': *Victorian Sentencing Manual* (n37) 158 [8.3.2]. The Court of Appeal has requested sentencing judges not use 'phrases such "shorter-than-usual" and "longer-than-usual"' as it is unhelpful and 'is apt to create false or unrealistic expectations'. Instead sentencing judges should state 'that the non-parole period is "shorter than it would otherwise have been" - for example, because of the offender's efforts towards and/or prospects of rehabilitation': *Wallace* (n 506) 523 [16].
510 *Sentencing Act 1991* (Vic) s 10.
511 Ibid s 10AA.

Scheme	Offences it applies to	Details
Mandatory imprisonment for a Category 1 or Category 2 offence	There are 23 Category 1 offences and 19 Category 2 offences.[512] Category 1 offences within the *Crimes Act 1958* (Vic) include: • Murder — s 3 • Rape — s 38 • Intentionally causing serious injury in circumstances of gross violence — s 15A • Aggravated home invasion — s 77B Category 2 offences within the *Crimes Act 1958* (Vic) include: • Manslaughter — ss 4A and 5 • Child homicide — s 5A • Culpable driving causing death — s 318 • Home invasion — s 77A	There are two special categories of offences which require a court to impose a sentence of imprisonment unless an exception is enlivened.[513] Most Category 1 offences must receive a sentence of imprisonment and the court cannot attach a Community Correction Order (CCO).[514] However, for certain Category 1 offences the court may impose a sentence other than a term of imprisonment, if special reasons exist.[515] In the case of Category 2 offences, a court must impose a sentence of imprisonment unless the offender was aged under 18 years at the time the offence was committed, or a special reason exists. In either case, the court is not permitted to impose a sentence of imprisonment in addition to making a CCO.[516] Special reasons are set out in the Act.[517]
Standard sentences scheme	12 offences: • Murder • Homicide by firearm • Culpable driving causing death • Rape • Sexual penetration of a child under the age of 12 • Sexual penetration of a child under the age of 16 • Sexual assault of a child under the age of 16 • Sexual activity in the presence of a child under the age of 16 • Persistent sexual abuse of a child under the age of 16 • Sexual penetration of a lineal descendent under 18 • Sexual penetration of a stepchild under 18 • Trafficking in large commercial quantity of drug of dependence	An offender aged 18 or older who commits a prescribed offence on or after 1 February 2018 is subject to the standard sentencing scheme.[518] The standard sentence is a guidepost for 12 serious offences, applying to the setting of the head sentence, rather than to the setting of the NPP — however there also legislated NPPs for these offences. The standard sentence represents the midpoint of objective seriousness for the offence.[519] That means the middle of the range of seriousness when just considering the offending and no other factors (such as the offender's circumstances, criminal history or plea).[520] The standard sentence is just one factor to be considered by the court, alongside all other relevant sentencing principles and factors. The standard sentence is not more important than other factors, and it does not affect instinctive synthesis.[521] Nor is it 'a mandatory sentence' or a 'starting point from which to add or subtract time'.[522] The court must fix an NPP when sentencing an offender for a standard sentence offence of at least the specified period, unless the court considers that it is in the interests of justice not to do so.[523] These NPPs must be at least: • 30 years, if the relevant term is a term of life imprisonment; • 70 per cent if the relevant term is a term of 20 years or more; or • 60 per cent if the relevant term is a term of less than 20 years.[524] The 'relevant term' is defined for the purposes of this calculation as the sentence imposed for the standard sentence offence, or the total effective sentence imposed in respect of 2 or more sentences, at least one of which is for a standard sentence offence.[525]

Table continued over page.

512 *Sentencing Act 1991* (Vic) s 3 (definitions of 'Category 1 offence' and 'Category 2 offence'). Some Category 1 offences overlap because they account for previous and current versions of the same offence.
513 Ibid ss 5(2G), (2H).
514 Ibid ss 5(2G)-5(2GC).
515 For example, if it is a Category 1 offence against certain prescribed officials (intentionally causing serious injury, recklessly causing serious injury or intentionally or recklessly causing injury against a protected official) and the court finds that special reasons exist for not applying the statutory minimum, it must sentence in accordance with s 5(2GA) of the *Sentencing Act 1991* (Vic). That is, it must impose a mandatory treatment and monitoring order, a Residential Treatment Order or a Court Secure Treatment Order: s 5(2GA)(b).
516 Ibid ss 5(2G) and (2H). This is otherwise permitted under s 44 of the Act.
517 Ibid ss 10A(2), 10A(2A), 10A(2B), 10A(3), 10A(4) and 10A(5).
518 Ibid ss 5A and 5B.
519 Ibid s 5A(1)(b).
520 Ibid ss 5A(1)(b) and (3).
521 *Brown v The Queen* (2019) 59 VR 462, 464–5 [4], 475 [44], 490 [106].
522 *DPP v Hermann* [2019] VSC 694, [104].
523 *Sentencing Act 1991* (Vic) s 11A(4).

Scheme	Offences it applies to	Details
Serious offenders	a 'serious offender' means a: 'serious arson offender' (who is a person convicted of a serious arson offence); 'serious drug offender' (who is a person convicted of a drug offence); or 'serious sexual offender' (who is a person convicted of: • two or more sexual offences; • persistent sexual abuse of a child under 16; • committing the incidents of a sexual offence included in a course of conduct charge (as defined in clause 4A of Schedule 1 of the *Criminal Procedure Act 2009*); or • at least one sexual offence and at least one violent offence arising out of the same course of conduct); or • serious violent offender (who is a person convicted of a serious violent offence).	Allows for a court to order a term of imprisonment that is longer than would otherwise be proportionate, taking into account the seriousness of the offence. To meet the criteria of being a 'serious offender', the person must have been sentenced to a term of imprisonment or detention in a youth justice centre for the relevant offence or offences.[526] This can be in Victoria or another jurisdiction provided the offence was substantially similar. Where the court considers imprisonment is justified, when determining the sentence length, the court: • must regard the protection of the community from the offender as the principal purpose for which the sentence is imposed; and • may, in order to achieve that purpose, sentence the offender to a term that is longer than that which is proportionate to the gravity of the offence considered in light of its objective circumstances.[527] Every term of imprisonment imposed on a serious offender for a relevant offence must be served cumulatively on any uncompleted sentence of imprisonment unless the court orders otherwise.[528] When sentencing a serious offender for a relevant offence, the court must also declare on court records that the offender was sentenced as a serious offender.[529] Where an offender meets the statutory criteria of being a 'serious offender' a prosecutor cannot waive the application to have the person declared to be a serious offender but may decline to seek that a disproportionate sentence be imposed.[530]

5.3.8 Western Australia

General provisions applying to parole

In Western Australia (WA), a court may not make a parole eligibility order if the fixed term is less than 6 months.[531] For sentences of imprisonment (including aggregate terms) of 6 months or more, a court may make a parole eligibility order which means the person is eligible to be considered for parole by the Prisoners Review Board.[532]

The court can decline to make a parole eligibility order if it considers the offender should not be eligible for parole on the basis of at least one of four factors:

1. the offence is serious;
2. the offender has a significant criminal record;
3. the offender, when released from custody under a previous release order, did not comply with that order;
4. any other reason the court considers relevant.[533]

If the court does not make a parole eligibility order, the offender cannot be released on parole.[534] A court must not make a parole eligibility order in respect of a prescribed term (a term imposed for escaping lawful custody).[535]

A person serving a term of imprisonment to which a parole eligibility order applies is subject to a statutory minimum NPP that varies depending on the sentence length. Section 93(1) of the *Sentencing Act 1995* (WA) provides that:

524 Ibid s 11A.
525 Ibid s 11A(5).
526 Ibid s 6B(2).
527 Ibid s 6D.
528 Ibid s 6E.
529 Ibid s 6F.
530 *Nguyen v The Queen* [2013] VSCA 63, [31] (Kaye AJA, Redlich and Whelan JJA agreeing).
531 *Sentencing Act 1995* (WA) s 89(2).
532 Ibid s 89(1).
533 Ibid s 89(4).
534 Unless the sentencing judge (or, on an appeal against sentence by the Court of Appeal) makes a parole eligibility order, the offender can never be released on parole and s 20 of the *Sentencing Administration Act 2003* (WA) is not engaged.
535 *Sentencing Act 1995* (WA) ss 85(1) and 89(3).

- for sentences of 4 years or less, a NPP of 50 per cent applies before the prisoner becomes eligible for parole; and
- for sentences of more than 4 years, a prisoner is eligible for parole when they have served all but 2 years of their term of imprisonment in custody.[536]

Minimum non-parole periods and 'serious offence' declaration

In WA, a minimum NPP scheme applies to all terms of imprisonment, life imprisonment,[537] and to prescribed offences. In addition, some offences subject to the minimum NPP scheme, are also subject to mandatory minimum terms of imprisonment in certain circumstances. Table 12 sets the minimum non-parole period schemes in WA.

Table 12: Minimum non-parole periods and 'serious offence' declaration in WA

Scheme	Offences it applies to	Details
Mandatory minimum terms for prescribed offences	Prescribed offences are the following (if committed by an adult): Grievous bodily harm committed against a police officer or certain other officers such as those working in hospitals, courts or prisons.[538] Serious assault committed against a police officer or certain other officers such as those working in hospitals, courts and prisons.[539] Dangerous driving causing death or grievous bodily harm, and dangerous driving causing bodily harm, where the offence is committed in circumstances of 'escape pursuit of police'.[540]	There are also prescribed offences which are subject to a mandatory NPP. The mandatory NPP period is the greater of either, the minimum term applicable to the offence or the period that would have been required to be served if the offence were not a prescribed offence.[541]

Table continued over page.

536 Some exceptions to this are set out in ss 94A, 94 and 95A: ibid.
537 Ibid s 90(1)(a): mandatory minimum NPP for a sentence of life imprisonment for murder is 10 years and s 96(1): an offender serving a life sentence for an offence other than murder must serve a mandatory NPP of 7 years.
538 *Sentencing Act 1995* (WA) s 85(a) and *Criminal Code* s 297.
539 Ibid s 85(b) and *Criminal Code* s 318(5).
540 Ibid s 85(c) and *Road Traffic Act 1974* (WA) ss 59, 59A, 49AB(1)(c).
541 Ibid s 95A(1).

Scheme	Offences it applies to	Details
Mandatory minimum terms of imprisonment	Numerous offences attract a minimum mandatory sentence including: • repeat home burglaries;[542] • offences committed in the course of conduct that constitutes aggravated home burglary;[543] • reckless driving to evade police and certain 'escape pursuit' dangerous driving offences;[544] • certain assaults on specific public officers;[545] • certain drug offences committed by adults in relation to children;[546] certain breaches of restraining orders or police orders by repeat offenders.[547]	Where an offence attracts a mandatory minimum term of imprisonment, the minimum NPPs set by section 93(1) of the *Sentencing Act 1995* (WA) continue to apply. The court cannot suspend any term of imprisonment and in the case of juvenile offenders, must record a conviction.[548] Mandatory minimum terms of imprisonment vary between offences: • a person convicted of serious assault must be sentenced to at least 6 months[549] or 9 months[550] depending on the circumstances of the case; • an adult convicted of grievous bodily harm must be sentenced to at least 12 months,[551] or when committed in the course of an aggravated home burglary, at least 75 per cent of the maximum penalty of either 10 years or 14 years.[552]
'Serious offence' declaration	An indictable offence that involved the use or attempted use of a firearm, serious violence against another person, or that resulted in serious harm to, or the death of another person. Offences in Schedule 1 of the *High Risk Serious Offenders Act 2020* (WA) or an offence of conspiracy, attempt or incitement to commit such an offence.[553] Offences under Commonwealth law are also captured.[554]	When sentencing a person to imprisonment for a prescribed offence, the court can declare the offence committed by that person to be a 'serious offence' for the purposes of the *High Risk Offenders Act 2020* (WA) and the *Sentencing Administration Act 2003* (WA) Part 5A. The making of a declaration means that the person who committed the offence or offences to which it applies can be subject to a post-sentence supervision order (PSSO) made by the Parole Board. A PSSO cannot be less than 6 months or more than 2 years commencing at the end of the person's sentence.[555] Even if a court has not declared the offence to be a 'serious offence', the Parole Board must consider whether a PSSO should be made if it is otherwise a 'serious offence' within the meaning used in the *High Risk Serious Offenders Act 2020* (WA).[556]

542 *Criminal Code Act 1913* (WA) ss 400, 401A and 401B ('*Criminal Code*').
543 Ibid. Examples include murder (s 279), attempted murder (s 283), manslaughter (s 280), acts intended to cause grievous bodily harm (s 294) and sexual offences (ss 320, 321, 324, 325, 326, 327 and 328).
544 *Road Traffic Act 1974* (WA) ss 59, 60.
545 *Criminal Code* (WA): grievous bodily harm (s 297(8)) and serious assault (s 318(5)).
546 *Misuse of Drugs Act 1981* (WA) ss 34(3), 34(4) and 34(5).
547 *Restraining Orders Act 1997* (WA) s 61A(4).
548 For example, *Criminal Code* (WA) ss 297(5), 297(6).
549 Ibid s 318(4)(b).
550 Ibid s 318(4)(a).
551 Ibid s 297(5)(b).
552 Ibid ss 297(5)(a)(i) or 297(5)(a)(ii).
553 *High Risk Serious Offenders Act 2020* (WA) ss 5(1) and (3).
554 Ibid s 5(5).
555 *Sentence Administration Act 2003* (WA) s 74E.
556 *Sentencing Act 1995* (WA) s 74A (definition of 'serious offence', adopting the definition in s 5 of the *High Risk Serious Offenders Act 2020* (WA)). A PSSO must be made by the Board if it considers the order is necessary for the prevention of harm to the community from further offending by the person. Factors to be considered include any matters raised in a victim's submission, participating in programs in custody and their performance and likelihood of committing a serious offence.

5.4 International non-parole period schemes

5.4.1 Canada

General requirements applying to parole

With the exception of sentences of imprisonment under 6 months,[557] in Canada parole is decided by the Parole Board and is generally available after a third of the head sentence is served or 7 years (whichever is less).[558] In Canada, prisoners can be released based on earned remission, which applies to sentences under 2 years (15 days of remission for each month).[559]

Statutory release applies to prisoners who either do not apply for release on parole, or who have been denied release on full parole.[560] It is automatic and triggered once two-thirds of the head sentence is served (if parole has not already been granted),[561] but can be annulled by executive intervention regarding listed offences grounded in concerns about the person's likelihood of reoffending on release.[562]

'Parole' under the *Corrections and Conditional Release Act* means 'day parole' or 'full parole'.[563] Day parole is an offender's (authorised) temporary release during the sentence, to prepare 'for full parole or statutory release' with conditions requiring 'return to a penitentiary, community-based residential facility, provincial correctional facility or other location each night or at another specified interval'.[564] Full parole is authorised release during the offender's sentence.

An offender is not eligible for full parole until the day on which they have served a period in custody is the lesser of one third of the sentence and 7 years.[565]

For example, if a person is sentenced to 6 years' imprisonment for a federal offence with a commencement date of 1 January 2021, they can apply for day parole 6 months prior to being eligible for full parole (on 1 July 2022) and for full parole after serving one-third of their sentence (2 years) on 1 January 2023.

Eligibility for parole is subject to the particular requirements of the *Criminal Code* — such as for life without eligibility for parole for a specified number of years,[566] and special provisions applying to indeterminate sentences.[567] By section 120(2) of the *Corrections and Conditional Release Act*, an offender serving a life sentence that was not imposed as a minimum punishment, is not eligible for full parole until 7 years are served (subject to the court's power to delay parole[568]). Eligibility for full parole cannot generally be later than 15 years after sentence, or any additional sentence.[569] Again, life sentences are an exception to this.[570]

Special provisions for serious violent, drug and sexual offences

Notwithstanding the general 'one-third/7-year' rule in section 120 of the *Corrections and Conditional Release Act*, courts can order 'that the portion of the sentence that must be served before the offender may be released on full parole is one half of the sentence or 10 years, whichever is less'.[571]

This is only possible for imprisonment of 2 years or more (including a sentence of imprisonment for life imposed otherwise than as a minimum punishment), if the offence is one listed in *Corrections and Conditional Release Act* Schedule I (a long list of Code offences including violent, sexual and weapons offending) and Schedule II (drug offending) which was prosecuted on indictment.

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557 *Corrections and Conditional Release Act*, SC 1992, c 20, s 119(2) (day parole) and 123(3.1) (full parole).
558 Ibid s 120(1).
559 *Prisons and Reformatories Act*, RSC 1985, c P-20, s 6.
560 Correctional Services Canada, 'Types of Release' (Web Page, 11 September 2019) < https://www.csc-scc.gc.ca/parole/002007-0002-en.shtml>.
561 *Corrections and Conditional Release Act*, SC 1992, c 20, s 127(3).
562 Ibid s 130.
563 Ibid s 99.
564 Ibid.
565 Ibid s 120(1).
566 Ibid and *Criminal Code*, RSC 1985, c C-46, s 746.1.
567 *Criminal Code*, RSC 1985, c C-46, s 761.
568 Ibid s 743.6.
569 *Corrections and Conditional Release Act*, SC 1992, c 20, s 120.3.
570 Ibid and *Criminal Code*, RSC 1985, c C-46, s 745.
571 *Criminal Code*, RSC 1985, c C-46, s 743.6(1).

The court must be 'satisfied, having regard to the circumstances of the commission of the offence and the character and circumstances of the offender, that the expression of society's denunciation of the offence or the objective of specific or general deterrence so requires'.[572]

In the absence of such an order being made, general parole release arrangements also apply to offenders convicted of serious violent, drug and sexual offences — although in this case there is provision for their ongoing risk to be reviewed before they reach the end of their sentence.[573]

The statutory release date for offenders sentenced to imprisonment (and who are not granted or who have not applied for parole) is the day on which the person completes two thirds of the sentence. However, before the statutory release date of an offender who is serving a sentence of 2 years or more that includes a sentence imposed for a Schedule I or II offence, the Commissioner must cause the offender's case to be reviewed by the Service, which must refer the case to the Parole Board more than 6 months before the day on which an offender is entitled to be released on statutory release.[574]

The Service must provide the Parole Board with information relevant to a Schedule I case regarding the likelihood of the offender committing an offence causing death or serious harm to another person before the expiration of the offender's sentence.[575] This applies to offenders convicted of offences listed in Schedule 1 where the commission of the offence caused the death of or serious harm to another person, or was a sexual offence involving a child (defined in s 129(9)). 'Serious harm' is defined as 'severe physical injury or severe psychological damage'.[576]

For Schedule II offences, the threshold is reasonable grounds to believe the offender is likely to commit a serious drug offence before the expiration of the sentence.

More generally, the Commissioner must refer a case to the Board if he or she believes on reasonable grounds that an offender is likely, before the expiration of the sentence, to commit an offence causing death or serious harm, a sexual offence involving a child, or a serious drug offence (Schedule II).[577] This must generally occur more than 6 months before the statutory release date.[578]

The Board must conduct a review. The prisoner is not entitled to statutory release. On completion of the review, the Board can order the offender not be released until the expiration of the sentence, if satisfied of the likelihood of reoffending as discussed earlier in this section.[579] The Board must review such a decision within one year, and again within each subsequent year while the order remains in force, or 2 years for a Schedule I offender who caused death or serious harm.[580]

There are non-exhaustive legislated factors, including issues relating to risk and behavioural patterns, which the Commissioner or Board must take into consideration regarding likelihood of reoffending causing death or serious harm, a sexual offence involving a child or a serious drug offence.[581]

Long-term sentences for dangerous offenders

Canada has both a 'dangerous offender' designation and a 'long-term offender' designation. A brief overview of these two designations is set out in Table 13. For more detail on these schemes please refer to Background Paper 2.

572 Ibid.
573 *Corrections and Conditional Release Act*, SC 1992, c 20, s 130.
574 Ibid s 129(1).
575 Ibid s 129(2).
576 Ibid s 99.
577 Ibid s 129(3).
578 Ibid.
579 Ibid s 130.
580 Ibid s 131.
581 Ibid s 132.

Table 13: Dangerous offenders and long-term offenders in Canada

Designation	Offences it applies to	Details
Dangerous offenders	A person convicted of a 'serious personal injury offence' which can be: an indictable offence (other than high treason, treason, or first or second degree murder) involving the use or attempted use of violence against another, or conduct endangering/likely to endanger the life or safety of another, or inflicting/likely to inflict severe psychological damage on another, and for which the sentence may be 10 years' imprisonment or more; or one of a number of listed sexual offences (sexual assault, and with a weapon/threats to a third party or causing bodily harm, and aggravated sexual assault – or attempts to commit these) one of the offences referred to in paragraph 753.1(2)(a) of the Criminal Code	The process for designation of an offender as a 'dangerous offender' relies on an application being made by the Crown prior to sentence.[582] When reasonable grounds are made and the offender is convicted of a relevant offence, the court must remand the offender prior to sentence for a period not exceeding 60 days to the custody of a person who can arrange for an assessment to be completed for use as evidence in the application.[583] After an assessment report is filed, the court can only find a person to be a 'dangerous offender' when a statutory basis of evidence is established.[584] The finding of 'dangerousness' is a finding of fact.[585] The sentencing judge is not prevented from considering evidence relating to the prospects of future treatment when considering a dangerous offender designation.[586] The Crown bears the burden of proof to establish the elements under the provision are met, which must satisfy this to a criminal standard (beyond reasonable doubt).[587] When a court finds an offender to be a dangerous offender. There are three options: 1. Impose an indeterminate sentence of detention 2. Impose a sentence for a minimum of 2 years and order the person be subject to long-term supervision for a period that does not exceed 10 years; or 3. Impose a standard determinate sentence for which the person has been convicted.[588]
Long-term offenders	To be considered a 'substantial risk' of reoffending, the court must be satisfied that the offender: • has been convicted of a serious sexual offence or engaged in serious conduct of a sexual nature in the commission of another offence; and ○ shows a pattern of repetitive behaviour of the offence convicted of forms a part, that shows likelihood of causing death, injury or severe psychological damage to others; or ○ by conduct in any sexual matter, including from the index offence, has a shown a likelihood of causing injury, pain or other evil to other persons in the future through similar offences.	The court may find an offender to be a 'long-term offender' if the court is satisfied that: • it would be appropriate to impose a sentence of imprisonment of 2 years or more for the offence for which the offender has been convicted; • there is a substantial risk that the offender will reoffend; and • there is a reasonable possibility of eventual control of the risk in the community. If the court finds an offender to be a long-term offender, it must impose a sentence for the offence for which the offender has been convicted, which must be for a minimum term of 2 years and order that the offender be subject to long-term supervision for a period that does not exceed 10 years. If the court is found not to be a long-term offender, it proceeds to impose a standard determinate sentence. The supervision period is not part of the person's sentence and is a post-sentence order.

5.4.2 England and Wales

General rules applying to parole

In England and Wales, parole (referred to as 'release on licence') is automatic after a prisoner on a fixed-term sentence has served one-half of their sentence.[589] This does not apply to prisoners sentenced as offenders of particular concern, serving extended sentences or a fixed term sentence for a terrorism-related offence, or who have been released on licence and recalled to prison.[590]

The system of automatic parole in England and Wales was introduced in 1991 for offenders serving less than 4 years.[591] In 2003, this was extended to all fixed-term prisoners.[592] Prior to 1991, most prisoners were eligible for release on discretionary parole after they had served one-third of their sentence.[593]

For sentences of more than 1 day, but less than 2 years, the person is also subject to a 'supervision period' that ends on the expiry of 12 months beginning immediately after the person has served the requisite 'custodial period' (for a prisoner serving one sentence, one-half of the sentence).[594] The stated purpose of the supervision period is 'the rehabilitation of the offender'.[595]

Earlier release (at any time during the period of 135 days before the person has served the entirety of the non-parole period – called the 'requisite custodial period') is also possible provided the length of the requisite non-parole period is at least 6 weeks and the person has served at least 4 weeks of that period and at least one-half of that period.[596] This does not apply to sentences that are for a term of 4 years or more.[597] There are a number of other exclusions to eligibility for early release including if the person being sentenced:

- is sentenced to an extended sentence for a violent, sexual or terrorism offence, or a special custodial sentence if sentenced as an offender of particular concern;
- is a prisoner who has been convicted of a terrorism offence;
- is a prisoner subject to the notification requirements under Part 2 of the *Sexual Offence Act 2003* (c. 42) (this applies to offenders convicted of offences listed in a schedule to that Act);[598]
- is a prisoner who has been released on licence and has been recalled to prison.[599]

582 There is one exception where the Crown gives notice to the offender of possible intention to make an application not later than 6 months after sentence and it is shown that relevant evidence not reasonably available to the prosecutor at the time the sentence was imposed became available in the interim: *Criminal Code* RSC 1985, c C-46 s 753(2).
583 Ibid s 752.1(1).
584 See ibid s 753(1) for the criteria.
585 *R v Currie* [1997] 2 SCR 260, [17] (Lamer CJ on behalf of the Court).
586 *R v Boutilier* [2017] 2 SCR 936, [21]–[23] (Cote J).
587 See *R v Carlton* [1981] 69 CCC (2d) 1 (ABCA), per McGillivray JA (6:1).
588 *Criminal Code* RSC 1985, c C-46 ss 753(4) and (4.1).
589 *Criminal Justice Act 2003* (c 44) (UK) s 244.
590 Ibid ss 244(1)–(1A).
591 Nicola Padfield, *Parole: Reflections and Possibilities: A Discussion Paper* (Discussion Paper, Howard League for Penal Reform, 2018) 2 referring to reforms under the *Criminal Justice Act 1991* (UK).
592 Ibid referring to the enactment of the *Criminal Justice Act 2003* (c 44) (UK) which also introduced the Indeterminate Sentence for Public Protection and the extended sentence.
593 Ibid.
594 *Criminal Justice Act 2003* (c 44) (UK) ss 256AA and s 244(3) (definition of 'requisite custodial period').
595 Ibid s 256AA(5).
596 Ibid s 246.
597 Ibid s 246(4)(aa).
598 *Sexual Offences Act 2003* (c 42) (UK) sch 3. It also applies to people found not guilty of a Schedule 3 offence by reason of insanity, found to be under a disability and to have done the act charged in respect of a Schedule 3 offence, and who has been cautioned in respect of such an offence: ibid s 80. Schedule 3 lists 42 provisions covering a broad range of conduct.
599 *Criminal Justice Act 2003* (c 44) (UK) s 246(4).

Minimum sentences and post-sentence supervision schemes

England and Wales have several schemes relating to the non-parole period of a sentence and parole supervision post a sentence of serious offenders. Table 14 sets out the current schemes.

Table 14: Minimum sentences and post-sentence supervision schemes in England and Wales

Scheme	Offences it applies to	Details

Sentencing of 'dangerous offenders'	Applies to:
	life sentences for 'serious offences' (first offence);
	
	life sentences for a second listed offence;
	
	extended sentences for certain violent, sexual or terrorism offenders; and
	
	release on licence of certain violent or sexual offenders
		A different sentencing regime applies to the sentencing of 'dangerous offenders'.
		
		The decision-making process followed by judges in sentencing is:
		
		• For an offence listed in Schedule 18 (for extended sentences) or Schedule 19 (for life sentences) of the Sentencing Code, to consider whether the offender is 'dangerous'. That is, there is a significant risk that:
		  • the defendant will commit further specified offences; and
		  • by doing so, will cause serious physical or psychological harm to one or more people.
		
		If the offender is 'dangerous':
		(a) consider whether the seriousness of the offence and offences associated with it justify a life sentence (in which case the judge must pass a life sentence in accordance with section 285 of the Sentencing Code);
		(b) if a life sentence for the individual offence is not justified, consider whether section 283 of the Sentencing Code applies (life sentences for second listed offence) and if it does, a life sentence must be imposed;
		(c) If no life sentence is imposed, consider whether a determinate sentence alone would be sufficient;
		(d) If a determinate sentence is not sufficient, consider imposing an extended sentence.[600]
		
		In making the assessment of whether there is a significant risk to members of the public of serious harm occasioned by the commission by the offender of further specified offences, the court —
		(a) must take into account all the information that is available to it about the nature and circumstances of the offence;
		(b) may take into account all the information that is available to it about the nature and circumstances of any other offences for which the offender has been convicted by a court anywhere in the world;
		(c) may take into account any information which is before it about any pattern of behaviour of which any of the offences mentioned above forms part; and
		(d) may take into account any information about the offender which is before it.[601]

Table continued over page.

600 United Kingdom Judicial College, *Crown Court Compendium Part II* (2020) 5-32–5-33 [1]–[3] 'S5.10 Extended sentences (21+)' <https://www.judiciary.uk/wp-content/uploads/2020/12/Crown-Court-Compendium-Part-II-Sentencing-December-2020-amended-18.03.21.pdf>.

601 Sentencing Code (UK) s 308(2).

Scheme	Offence it applies to	Details
Minimum sentences for listed offences	Serious offences including: Single offence involving prohibited firearms and threatening with weapon or bladed article or some repeat serious offences including a third conviction for a class A drug trafficking offence and for domestic burglary.[602]	The court is required to consider these minimum sentences but has discretion to depart by setting a lower sentence where they consider the circumstances of the offence or offender would make the imposition of the minimum sentence unjust. A reduction for an early guilty plea of up to 20 per cent is also permitted. The court must take into account these minimum sentences before imposing sentence, but it is not mandatory to order them. There is no power to suspend a sentence imposed under the minimum sentence provisions.[603]
Sentences for offenders of particular concern	Applies where the court imposes a sentence of imprisonment for an offence where— • the offence is listed in Schedule 13 of the Sentencing Code;[604] the court does not impose an extended sentence, a life sentence and/or a serious terrorism sentence	This order comprises a custodial term[605] and a mandatory year of licence to be served at the end of that custodial term.[606] It aims to discontinue automatic release of certain offenders at the half-way point, by requiring them to apply for parole only after serving at least 50% of their sentence.[607] The 12 months additional mandatory licence period is intended to ensure where an offender has not been released prior to the end of their custodial term, they will not be released without supervision.[608] When criteria are met, a court must, when imposing a term of imprisonment on an offender, make this form of order — and must also ensure that the total term of the sentence does not exceed the maximum term of imprisonment with which the offence is punishable.[609]
Extended determinate sentences for certain violent, sexual or terrorism offences	A 'specified offence' (being a specified violent offence, a specified sexual offence, or a specified terrorism offence[610]) listed in Schedule 18 of the Sentencing Code. Over 60 violent offences are included in the Schedule, including: manslaughter, infanticide, malicious wounding, cruelty to children, arson, torture and stalking involving fear of violence or serious alarm or distress. Over 90 sexual offences are listed in the Schedule under 11 separate Acts including: rape, sexual assault, rape or sexual penetration of a child under 13, incest, indecent assault, and child exploitation material offences.	An extended sentence of imprisonment is a sentence of imprisonment the term of which is equal to the aggregate of: 1. the appropriate custodial term; and 2. a further period (the 'extension period') for which the offender is to be subject to a licence.[611] Can only be applied to offenders aged 18 years and over when convicted of the offence and the court determines there is a significant risk to the community of serious harm from the offender. The extension period is 'a period of such length as the court considers necessary for the purpose of protecting members of the public from serious harm occasioned by the offender of further specified offences' and must: be at least 1 year; and not exceed: • 5 years (for a specified violent offence), • 8 years (in the case of a specified sexual offence, specified terrorism offence and serious terrorism offence), or • 10 years in the case of a serious terrorism offence for which the sentence is imposed on or after the commencement of section 18 of the *Counter-Terrorism and Sentencing Act 2021*.[612] The combined total of the custodial term and extension period must not exceed the maximum term of imprisonment with which the offence is punishable.[613] Offenders subject to an extended sentence can apply for parole two-thirds of the way through their custodial term.[614] On release, they remain under supervision on licence until the expiry of the extension period and are liable to be recalled to prison if they fail to comply with the conditions.[615]

602 They also apply to a single offence for certain firearms offences listed in schedule 20 to the Sentencing Code (UK): Sentencing Code (UK) s 311; and bladed articles/offensive weapons offences under the *Criminal Justice Act 1988* (c 33) (UK) s 139AA (Offence of threatening with article with blade or point or offensive weapon and *Prevention of Crime Act 1953* (c 14) (UK) s 1A (offence of threatening with offensive weapon in public: Sentencing Code (UK) s 312. The Sentencing Code was enacted as part of the *Sentencing Act 2020* (c 17) (UK) (see s 1 - Parts 2 to 13 called the 'Sentencing Code'). The Code commenced operation on 1 December 2020: s 416 and *Sentencing Act 2020* (Commencement No. 1) Regulations. It applies to offenders convicted on, or after the date of commencement.

603 *R v Whyte* [2018] EWCA Crim 2437. The Court found the reference to 'imprisonment' under the minimum sentence provisions is a reference to a term of 'immediate imprisonment'.

5.4.3 New Zealand

General provisions applying to parole: 'short-term' and 'long-term' sentences

There are two kinds of sentences in New Zealand — short-term and long-term sentences. Only the latter is subject to the parole regime and therefore, legislation regarding minimum NPPs.[616]

A short-term sentence[617] is a sentence or notional single sentence (combined cumulative terms)[618] of imprisonment of 24 months or less, or imprisonment of 12 months or less imposed before the 30 June 2002 commencement date of the *Parole Act 2002* (NZ) (called a 'pre-cd sentence').

A long-term sentence is a sentence or notional single sentence of more than 24 months, or pre-cd sentence of imprisonment of more than 12 months' duration.[619] However, pre-cd sentences do not have NPPs.[620]

A court imposing a long-term sentence of imprisonment may impose a minimum period[621] exceeding the general statutory NPP of one-third of the length of the sentence.

A 'statutory release date' means 'the release date of the sentence to which the offender is subject' (being the later of any multiples).[622] An imprisoned offender must be released from detention on their statutory release date[623] and is no longer subject to recall.[624] Offenders can be released earlier under the *Parole Act 2002* (NZ) and may be subject to 'release conditions' after their statutory release date.

A 'release date' is separately defined as the date on which the offender on a determinate sentence is no longer liable to be recalled.[625] Release dates are:

- for a short-term sentence — generally the half-way mark.[626] Such an offender is subject to any release conditions imposed by the court;[627]
- for a long-term sentence — its sentence expiry date.[628] Such an offender is subject to the standard statutory release conditions[629] for 6 months from the statutory release date, as well as any special conditions[630] (within the same timeframe) which the New Zealand Parole Board imposes;[631]
- for a pre-cd short-term sentence — the final release date as determined by 1985 legislation;[632]
- for a pre-cd long-term sentence — the date 3 months before the expiry date.[633]

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604 Includes offences with an established terrorist connection and two sexual offences against children: the rape of a child under 13 and the assault of a child under 13 by penetration.
605 This is the appropriate custodial term that 'in the opinion of the court, ensures that the sentence is appropriate': Sentencing Code (UK) s 278(3).
606 Sentencing Code (UK) s 278(2). The total term must not exceed the maximum term of imprisonment for which the offence is punishable.
607 See Explanatory Notes, Criminal Justice and Courts Bill (UK) 3.
608 Ibid.
609 Sentencing Code (UK) s 278(2).
610 Ibid s 306(1).
611 Sentencing Code (UK) s 279.
612 Ibid ss 281(3)–(4).
613 Ibid s 281(5).
614 *Criminal Justice Act 2003* (c 44) (UK) s 246A.
615 Ibid s 254.
616 *Parole Act 2002* (NZ) ss 6(4) and 20(4).
617 See ibid: s 4.
618 Ibid. Cumulative sentences forming notional single sentences are addressed: ss 4 and 75.
619 Defined in *Parole Act 2002* (NZ) s 4.
620 Ibid s 85.
621 *Sentencing Act 2002* (NZ) s 86.
622 *Parole Act 2002* (NZ) s 17(1).
623 Ibid ss 6(2), 17.
624 Ibid s 6(2). A recall application is one which seeks an offender's recall to custody to continue serving a sentence of imprisonment in prison. It can be made regarding prisoners on parole, most relevantly those on a determinate sentence who have not reached their statutory release date: s 60(2). Grounds for recall include undue risk to the safety of others, breach of release conditions and commission of an offence: ss 61, 66.
625 Ibid s 4.
626 Ibid s 86(1), subject to s 86(2).
627 Ibid s 18(1). For exceptions see ss 18(3) and 19.
628 Ibid s 86(2).
629 Ibid s 14.
630 Ibid s 15.
631 Ibid s 18(2).
632 Ibid s 87(1).
633 Ibid s 87(2).

An offender's parole eligibility date is the date on which they have finished serving the NPP of every long-term sentence, and passed the release date of any short-term sentence, to which they are subject.[634]

For indeterminate sentences or determinate sentences of 10 years or more, the Board can make a 'postponement order' if satisfied that, absent a significant change in the offender's circumstances, he or she will not be suitable for release during the postponement order period, being up to 5 years beyond the most recent parole hearing.[635]

Sentencing schemes for serious violent offences

There are three main schemes in New Zealand that apply to the sentencing of offenders for serious violent offences (see Table 15):

1. Discretionary minimum NPPs for determinate sentences of imprisonment.
2. Sentences of preventative detention.
3. 'Three strike' sentencing for repeated serious violent offending.

Table 15: Sentencing schemes in New Zealand

Scheme	Offences it applies to	Details
Preventative detention (indeterminate sentence)	A 'qualifying sexual or violent offences': A sexual crime under Part 7 of the *Crimes Act 1961* (NZ) punishable by 7 or more years' imprisonment A violent offence under the *Crimes Act 1961* (NZ)	The scheme's aim is 'to protect the community from those who pose a significant and ongoing risk to the safety of its members'.[636] There are statutory criteria for courts to consider when determining whether to impose preventative detention. Preventative detention sentences are 'indeterminate', along with imprisonment for life.[637]
Discretionary minimum period for determinate sentence of imprisonment	Any offence where a determinative sentence of imprisonment of more than 2 years may be ordered.	A sentencing court imposing a long-term sentence (over 2 years) 'for a particular offence' can, at the same time, order that the offender serve a minimum period of imprisonment 'in relation to that particular sentence' not exceeding two-thirds of the full term or 10 years (whichever is less).[638] The court must be satisfied that the standard one-third period is insufficient for all or any of the following purposes: • holding the offender accountable for the harm done to the victim and the community by the offending; • denouncing the conduct in which the offender was involved; • deterring the offender or other persons from committing the same or a similar offence; and • protecting the community from the offender.[639] The central consideration is culpability. Relevant factors to assess this includes 'unusual callousness, extreme violence, vulnerable or multiple victims and serious actual or intended consequences'.[640]

Table continued over page.

634 Ibid s 20(1). For pre-cd sentences, see ss 20(2), (3).
635 Ibid s 27.
636 *Sentencing Act 2002* (NZ) s 87(1).
637 Ibid s 4.
638 Ibid s 86(4).
639 Ibid s 86(2).
640 *R v Brown* [2002] 3 NZLR 670, [32].

Scheme	Offence it applies to	Details
'Three strike' sentencing scheme for repeat serious violent offending	One of 40 'qualifying sexual or violent offences' under the *Crimes Act 1961* (NZ). All carry a maximum penalty of 7 years' imprisonment or more.	A scheme of graduated minimum mandatory penalties for repeat adult offenders who commit listed serious violent offences.[641] **Stage 1:** When a court convicts an offender aged over 18 at the time of the offence of one or more serious violent offences, the court must warn the offender of the consequences if convicted of any serious violent offence committed after that warning and make a record of that warning as well as issuing the offender with a written notice setting out the consequences.[642] **Stage 2:** When a court convicts an offender of one or more offences committed at a time when the offender had a record of a first warning (called a 'Stage-2 offence' other than for murder), the court must, similarly to the process in Stage 1, warn the offender of the consequences of being convicted of any serious violent offence committed after that warning, make a record of that warning and give the offender a written notice.[643] In this case, the court must also, if sentencing the offender to a determinate sentence of imprisonment, order that the offender serve the full term of the sentence (with no possibility of release on parole in the case of a sentence over 2 years).[644] Where a court would have set a minimum term beyond the statutory one-third, the court must state the minimum period of imprisonment it would have imposed but for the operation of this section.[645] **Stage 3:** If an offender commits another serious violent offence (other than murder) after having received a final warning on being sentenced for a Stage-2 offence, the court must sentence the offender to the maximum term of imprisonment prescribed for the offence or offences, and order the offender serve the sentence without parole, unless satisfied it would be manifestly unjust to do so.[646] These cases can only be heard by the High Court and no other court other than the High Court (or the Court of Appeal or Supreme Court on an appeal) may sentence an offender for a Stage-3 offence.[647] For Stage 3 convictions for manslaughter, the minimum NPP must not be less than 20 years, unless the court considers given the circumstances of the offences and offender, this would be manifestly unjust – in which case the court can set an NPP not less than 10 years.[648] It does not matter, for any of them, whether any future serious violent offence is of a different kind to that giving rise to a preceding warning (except for murder); it matters only that any further offence is one of the 40 listed.[649] The warnings do not expire (but are subject to the outcome of successful appeals).[650]

641 Ibid. Section 86A defines a 'stage-1 offence', 'stage-2 offence' and 'stage-3 offence' for the purposes of the scheme.
642 Ibid s 86B.
643 Ibid ss 86C(1), (7)
644 Ibid ss 86C(4)(a).
645 Ibid s 86C(6).
646 Ibid ss 86D(2)–(3).
647 Ibid s 86D(1).
648 Ibid s 86D(4).
649 Ibid ss 86B(1)(a), 86C(1)(a), 86D(2).
650 Ibid s 86F.

PART B

Application of the SVO scheme

Chapter 6

By the numbers — the application of the SVO scheme

Chapter 7

Characterising the scheme: Offences and offenders

Chapter 8

Sentencing outcomes and appeals

Chapter 9

Parole and actual time served in custody

Chapter 6

By the numbers — the application of the SVO scheme

Key Findings

1. There were 437 SVO declarations made in the data period from 2011–12 to 2019–20 (MSO).

2. Almost half of all declarations made were for non-sexual violence offences (46.5%), over one-third were for sexual violence offences (37.5%) and 14.9 per cent were for serious drug offences.

3. Of those Schedule 1 offences (MSO) eligible for a declaration sentenced to 5 years or more, 15.8 per cent were declared to be serious violent offences. This percentage decreased to 4.8 per cent where the making of a declaration was discretionary.

4. The offence of maintaining a sexual relationship with a child was the most common offence to attract an SVO declaration (n=91), followed by rape (n=71) and drug trafficking (n=65). The remaining offences mostly comprised a variety of non-sexual violence offences, including malicious acts, manslaughter, and attempted murder, amongst others.

5. Discretionary SVOs were most commonly made for non-sexual violence offences. In contrast, discretionary SVOs were rarely made for sexual violence offences or serious drug offences.

6. Overall, the vast majority of cases sentenced for a Schedule 1 offence (MSO) were not subject to the SVO scheme, because the cases were not eligible. In fact, less than 1 per cent of cases involving a Schedule 1 offence sentenced in all Queensland courts resulted in an SVO declaration.

7. A post-sentence supervision or detention order under the *Dangerous Prisoners (Sexual Offenders) Act 2003* (Qld) was made in 33.9 per cent of SVO cases involving a rape, and 17.3 per cent of cases involving maintaining a sexual relationship with a child.

6.1 Overview of the SVO scheme

Part B of this report responds to the following items of the Terms of Reference received by the Council:

- assess how the serious violent offences ('SVO') scheme is being applied (including where the making of an SVO declaration is discretionary);
- assess how the SVO provisions are impacting on court sentencing practices; and
- identify any trends or anomalies that occur in the application of the SVO scheme that create inconsistency or constrain the sentencing process.

As set out in section 1.7 of the introduction to this report, the Council has drawn on a range of data sources and research including:

- Courts data on sentencing outcomes for Schedule 1 offences of the *Penalties and Sentences 1992 Act* (Qld) ('PSA') from 2011–12 to 2019–20.
- Queensland Corrective Services ('QCS') data about prisoners who served a sentence of imprisonment for a declared SVO at any time during the operation of the SVO scheme from 1997–98 to 2019–20.

Chapter 6 examines the application of the SVO scheme, the types of offences that commonly attract an SVO declaration, and mandatory and discretionary declarations made under the scheme. Chapter 7 presents the socio-demographics of offenders and characteristics of offences. Chapter 8 provides information on sentencing outcomes and appeals. Finally, Chapter 9 presents parole outcomes.

6.1.1 Classification of the SVO scheme

The SVO scheme primarily applies to certain listed offences ('prescribed' offences under Schedule 1) that are sentenced in the District or Supreme Courts (higher courts). For more detail refer to section 2.9, Chapter 2 in Part A of this report.

For the purposes of analysis, the Council classified these offences into four broad categories. These categories include:

- **non-sexual violence offences** (such as manslaughter, grievous bodily harm (GBH), acts intended to cause grievous bodily harm and other malicious acts (referred to in this analysis as 'malicious acts'), torture, robbery, serious assault and assault occasioning bodily harm);
- **sexual violence offences** (such as rape, maintaining a sexual relationship with a child, incest and indecent treatment of children under 16); and
- **serious drug offences** (trafficking and aggravated supply of dangerous drugs, aggravated production of dangerous drugs); and
- **other offences** (offences that do not fall into any of the above three categories such as dangerous operation of a motor vehicle and offences that attracted an SVO declaration but were not prescribed offences under Schedule 1).[1]

Table A1 in Appendix 5 provides an overview of offences included in Schedule 1 and the Council's classification of offences into categories of non-sexual violence, sexual violence, and serious drug offences. This report refers to these broad categories for the purpose of simplifying the analysis presented. For more information on the methodology used in this report, refer to section 1.7 in the introduction of this report.

There were 437 cases in which an SVO declaration was made in the data period from 2011–12 to 2019–20. The majority of these cases involved sentences imposed for non-sexual violent offences (46.5%), followed by sexual violent offences (37.5%), and serious drug offences (14.9%) — see Figure 6. Only 1 case (MSO) received an SVO declaration for an offence that was not a prescribed offence under Schedule 1.

The SVO scheme was most commonly applied to the offence of maintaining a sexual relationship with a child, with 91 cases attracting an SVO declaration — see Figure 7. The second most common offence was rape, with 71 cases with an SVO declaration. These two offences accounted for almost all of the sexual violence offences that received an SVO declaration. There were only two other cases sentenced for a sexual violence offence, one for unlawful sodomy and one for incest.

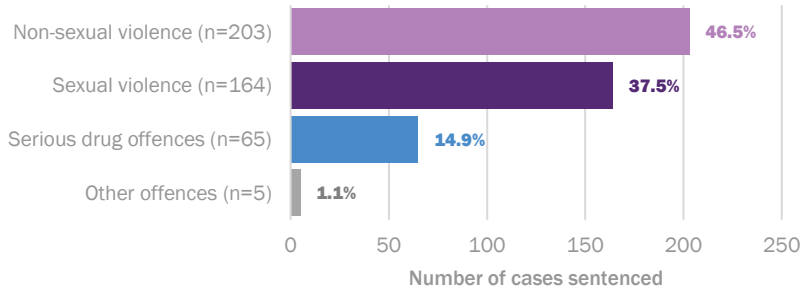
The SVO scheme was only applied to a very small number of eligible offences. Only 15 of the 60 offences listed in Schedule 1 received an SVO declaration during the data period for the MSO. Of those 15 offences, the scheme was overwhelmingly applied to only 9 offences (97.5%, n=426/437, see Figure 7).

Drug trafficking was the third most common offence sentenced under the SVO scheme, with 65 cases sentenced in the data period. Non-sexual violence offences comprised the majority of the remaining offences. The most common

[1] *Penalties and Sentences Act 1992* (Qld) s 161B(4) ('PSA').

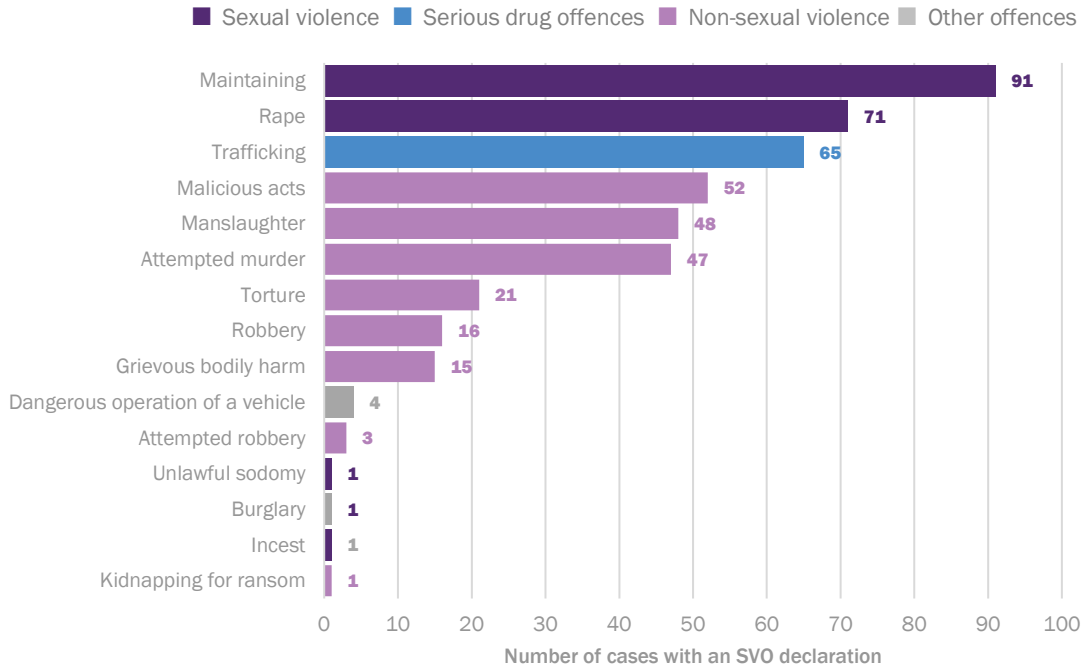
of these offences included malicious acts, manslaughter, and attempted murder. An SVO declaration was rarely made for offences other than those mentioned earlier in this section. For the majority of the offences listed in Schedule 1, an SVO declaration was never made. A full list of offences included in the Schedule can be found in Appendix 5.

Figure 6: Number of cases with an SVO declaration, by offence category (MSO)



Data includes cases sentenced with an SVO declaration, MSO, 2011–12 to 2019–20.
Source: QGSO, Queensland Treasury – Courts Database, extracted August 2020.

Figure 7: Number of cases with an SVO declaration, by offence (MSO)



Data includes cases sentenced with an SVO declaration, MSO, 2011–12 to 2019–20.
Source: QGSO, Queensland Treasury – Courts Database, extracted August 2020.

6.1.2 Mandatory and discretionary SVO declarations

This section provides information on the types of offences that attract mandatory and discretionary SVO declarations. As discussed in section 2.7, SVO declarations may be made automatically, if the sentence is 10 years or longer (a 'mandatory SVO declaration'), or by judicial discretion, if the sentence is 5 or more but less than 10 years (a 'discretionary SVO declaration').

Mandatory SVO declarations were far more common than discretionary declarations, accounting for almost three-quarters of declarations made (72.8%). This means that most offenders who received an SVO declaration were sentenced to imprisonment for 10 years or more. As shown in Table 16, of the 437 cases in which an SVO declaration was made, the declaration was mandatory in 318 cases.

Discretionary SVO declarations accounted for 27.2% of all SVO declarations. Almost all of these discretionary declarations were made for Schedule 1 offences with terms of imprisonment of 5 years or more but less than 10 years (n=112). Only 7 discretionary declarations were made for Schedule 1 offences of less than 5 years, or non-Schedule 1 offences.

The making of a discretionary SVO for sexual violence offences and serious drug offences is rare. Most of the sexual violence offences attracted a mandatory declaration — in only 18 cases of sexual violence (11.0% of the declarations) was a discretionary declaration made. A similar pattern was observed for serious drug offences. The majority of declarations were mandatory, with only 7.7% of serious drug offences attracting a discretionary declaration (n=5).

For non-sexual violence offences, the proportion of discretionary and mandatory declarations was more balanced. Almost half of the non-sexual violence offences (45.8%) for which a declaration was made attracted a discretionary declaration — see Table 16.

Table 16: Number of cases with an SVO declaration, by offence category and type of SVO (MSO)

SVO Flag Type	N	%	Non-sexual violence	Sexual violence	Serious drug offences	Other offences
Mandatory SVO	318	72.8%	110	146	60	2
Discretionary SVO – s 161B(3)	112	25.6%	89	16	5	2
Discretionary SVO – s 161B(4)*	7	1.6%	4	2	0	0

Data includes cases sentenced with an SVO declaration, MSO, 2011–12 to 2019–20.
Source: QGSO, Queensland Treasury – Courts Database, extracted August 2020.
*One of the s 161B(4) cases was for a non-Schedule offence and is not displayed in this table.

Common offences for mandatory and discretionary SVO declarations

Table 17 shows the most common offences to have received a mandatory SVO declaration. Maintaining a sexual relationship with a child was the most common offence to attract a mandatory SVO declaration, clearly pointing to the very serious nature of this type of offending behaviour and the level of harm caused to the child victim. Other common offences attracting a mandatory declaration included trafficking in dangerous drugs, rape, attempted murder and manslaughter.

Table 17: List of offences with a mandatory SVO declaration (MSO)

Offence Section	Offence Description	SVO Category	Cases
229B	Maintaining a sexual relationship with a child	Sexual violence	86
5	Trafficking in dangerous drugs (*Drugs Misuse Act 1986* (Qld))	Serious drug offences	60
349	Rape	Sexual violence	58
306	Attempted murder	Non-sexual violence	46
303 and 310	Manslaughter	Non-sexual violence	40
317	Malicious acts	Non-sexual violence	13
411	Robbery	Non-sexual violence	4
320A	Torture	Non-sexual violence	4
328A	Dangerous operation of a vehicle	Other offences	2
320	GBH	Non-sexual violence	1
412	Attempted robbery	Non-sexual violence	1
222	Incest	Sexual violence	1
208	Unlawful sodomy	Sexual violence	1

Data includes cases sentenced with an SVO declaration, MSO, 2011–12 to 2019–20.
Source: QGSO, Queensland Treasury – Courts Database, extracted August 2020.

Table 18 shows the most common offences to have received a discretionary SVO declaration. Malicious acts, torture, rape and GBH were the most common offences with discretionary SVO declarations. The vast majority of torture cases that attracted an SVO declaration were discretionary, with only 4 torture cases receiving a mandatory declaration. The two offences most likely to receive a discretionary declaration were malicious acts offences (18.7% of eligible offences under 10 years) and torture (17.3% of eligible offences under 10 years). Serious drug offences were least likely to result in a discretionary declaration being made (0.2% of eligible offences under 10 years).

Table 18: List of offences with a discretionary SVO declaration (between 5 and 10 years for a Schedule 1 offence, MSO)

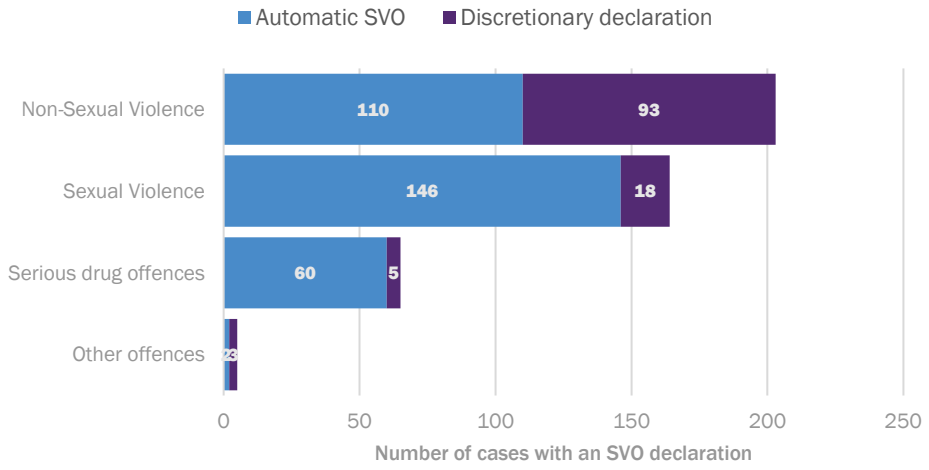
Offence Section	Offence Description	SVO Category	Cases
317	Malicious acts	Non-sexual violence	37
320A	Torture	Non-sexual violence	16
349	Rape	Sexual violence	13
320	GBH	Non-sexual violence	13
411	Robbery	Non-sexual violence	11
303 and 310	Manslaughter	Non-sexual violence	8
5	Trafficking in dangerous drugs (*Drugs Misuse Act 1986* (Qld))	Serious drug offences	5
229B	Maintaining a sexual relationship with a child	Sexual violence	3
412	Attempted robbery	Non-sexual violence	2
328A	Dangerous operation of a vehicle	Other offences	2
306	Attempted murder	Non-sexual violence	1
354A	Kidnapping for ransom	Non-sexual violence	1

Data includes cases sentenced with an SVO declaration, MSO, 2011–12 to 2019–20.
Source: QGSO, Queensland Treasury – Courts Database, extracted August 2020.

Figure 8 shows the proportion of each offence category that resulted in a mandatory or discretionary SVO declaration. The offence profile for mandatory SVOs was distinctively different to that of discretionary SVOs in the data period. While non-sexual violence cases that received an SVO declaration were comprised of both mandatory and discretionary declarations, cases of sexual violence predominately attracted mandatory SVO declarations. Serious drug offences had the lowest proportion of discretionary SVO declarations, indicating that SVO declarations in these cases are most commonly a result of an offender being sentenced to a term of imprisonment of 10 years or more.

Almost 80 per cent of discretionary SVO declarations were for offences of non-sexual violence (78.2%).

Figure 8: Number of cases with an SVO declaration by category of offence and type of declaration (MSO)



Data includes cases sentenced with an SVO declaration, MSO, 2011–12 to 2019–20.
Source: QGSO, Queensland Treasury – Courts Database, extracted August 2020.

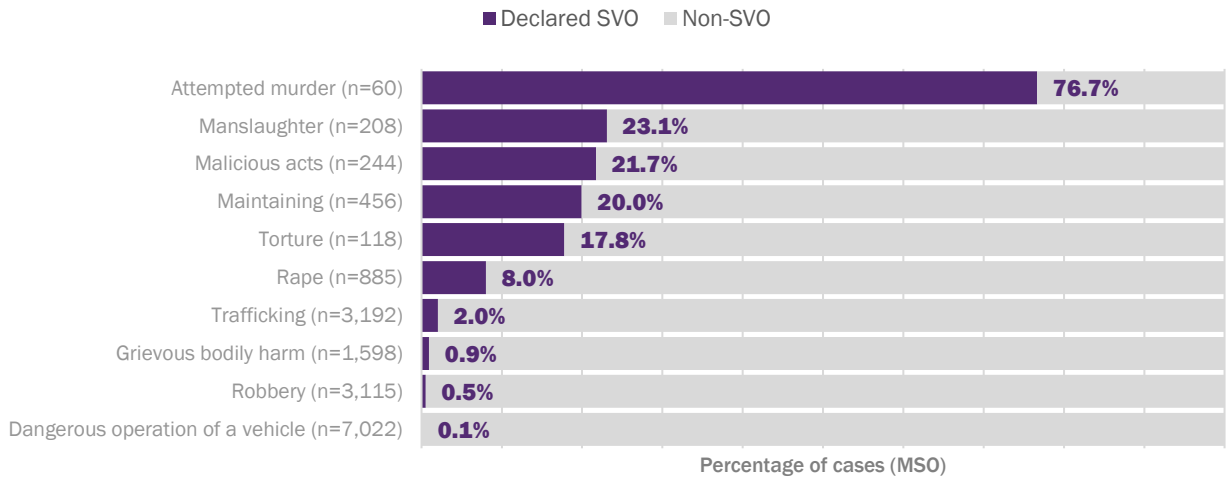
6.1.3 Prevalence of SVO declarations by offence type

Very few sentenced Schedule 1 offences were declared as SVOs during the 9-year data period — less than 1 per cent of cases sentenced across all Queensland courts involving a Schedule 1 offence resulted in an SVO declaration being made (mandatory or discretionary). This indicates that the SVO scheme was only applied to the most serious of cases. The proportion of SVOs was highest for sexual violence offences with 3.7 per cent of cases sentenced as an SVO.

For certain offences, the proportion of SVO cases was much higher, demonstrating that the SVO scheme is predominately applied to a limited number of offences — see Figure 9 (see Figure 6 for more detail on offences that attracted an SVO in the data period).

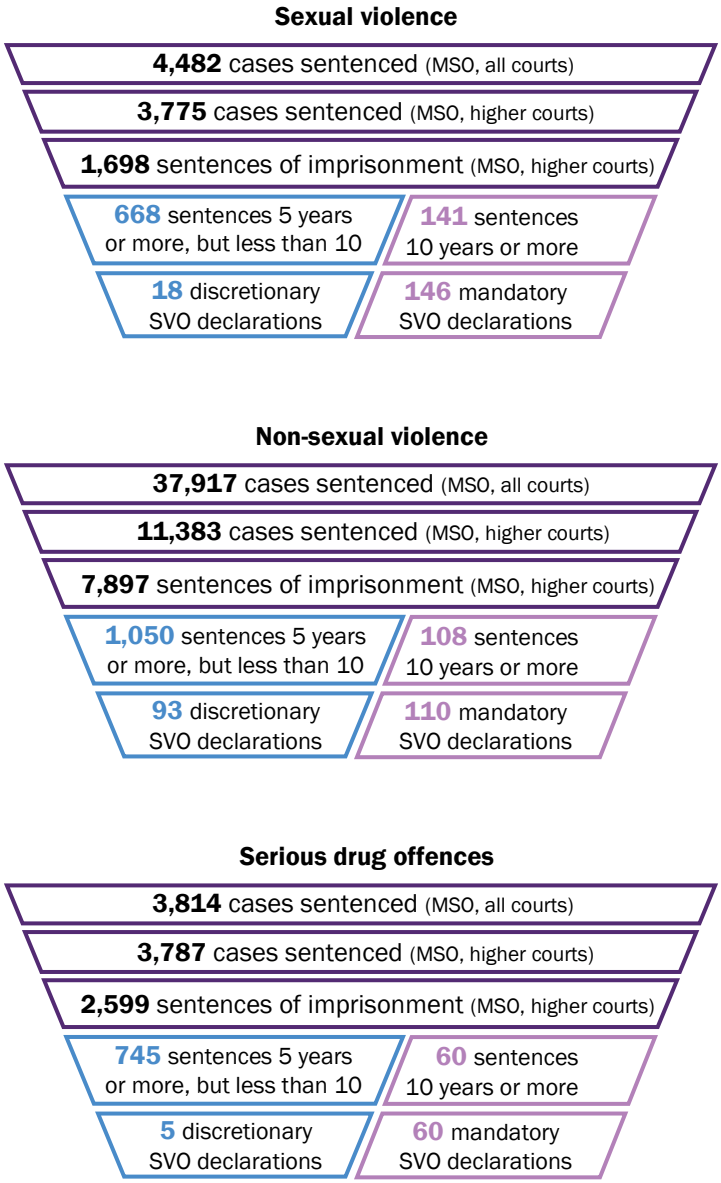
Due to the very serious nature of this type of offending and the high likelihood of cases attracting a sentence of 10 years or more, attempted murder had the highest proportion of declared SVOs with 76.7 per cent. Other offences with a comparatively high proportion of SVO declarations were manslaughter (23.1%), malicious acts (21.7%), maintaining a sexual relationship with a child (20.0%), and torture (17.8%). The next highest was rape at 8.0 per cent. The proportion of declared SVOs was very low for trafficking in dangerous drugs, GBH, robbery and dangerous operation of a vehicle. Beyond these offences, the scheme was only applied to a very small number of cases or never applied to the offence at all during the data period (see Table A1 in Appendix 5).

Figure 9: Percentage of cases declared to be an SVO, by type of offence (MSO)



Data includes cases sentenced with an SVO declaration, MSO, 2011–12 to 2019–20.
Source: QGSO, Queensland Treasury – Courts Database, extracted August 2020.

Figure 10: Number of Schedule 1 offences sentenced, compared to the number of SVO declarations made (MSO)



Data includes cases sentenced with an SVO declaration, MSO, 2011–12 to 2019–20.
Source: QGSO, Queensland Treasury – Courts Database, extracted August 2020.
Note: There were 4 life sentences for a sexual violence offence, and 4 life sentences for a non-sexual violence offence. These have not been displayed in these diagrams.
The number of mandatory declarations may be slightly higher than the number of cases sentenced for 10 years or more. This is due to cumulative sentences where the combined effect of multiple sentences results in a sentence of 10 years or more, yet the MSO offence remains less than 10 years.

There were 2,772 Schedule 1 offences sentenced that were eligible for an SVO declaration. Of these 15.8 per cent resulted in an SVO declaration (437/2,772). This percentage decreased to 4.8 per cent (119/2463) for offences sentenced to less than 10 years.

Figure 10 illustrates a 'funnel' from the total number of offences sentenced (at the top) to the number that resulted in an SVO declaration (at the bottom). The top layer shows the total number of cases sentenced for each offence category (MSO). The next level shows the number of cases sentenced in the higher courts only. The third layer shows only cases sentenced to a term of immediate imprisonment.[2] The fourth layer shows cases eligible to attract an SVO declaration (i.e. sentenced to 5 years or more).[3] The final layer depicts cases in which an SVO declaration was made.

For sexual violence offences, there were 4,482 cases sentenced over the data period in which the Schedule 1 offence was the MSO. Of these cases, 84.2 per cent (n=3,775) were sentenced in the higher courts. Just under half – 45.0 per cent – of those cases resulted in a term of imprisonment being imposed (n=1,698). Of those, just under half (47.6%) received a term of imprisonment of 5 years or longer. Discretionary declarations were made in 18 cases and mandatory declarations were made in 146 cases.

The number of non-sexual violence cases sentenced in the data period was much greater (n=37,917) compared to other offence categories. A smaller percentage of these cases were sentenced in the higher courts (30.0%, n=11,383). Of those cases, over two-thirds resulted in a sentence of imprisonment (69.4%, n=7,897). However, only a small proportion of those cases resulted in a sentence of 5 years or longer (14.7%, n=1,158). A discretionary SVO declaration was made in 93 cases, and a mandatory declaration was made in 110 cases.

Serious drug offences had the smallest number of cases sentenced during the data period, with 3,814 sentenced cases in the lower and higher courts. Almost all of these cases were sentenced in the higher courts (99.3%, n=3,787). Of those sentenced in the higher courts, two-thirds received a sentence of imprisonment (68.6%, n=2,599), and almost one-third received a sentence of 5 years imprisonment or more (31.0%, n=805). A mandatory SVO declaration was made in 60 cases. Very few cases received a discretionary declaration (n=5).

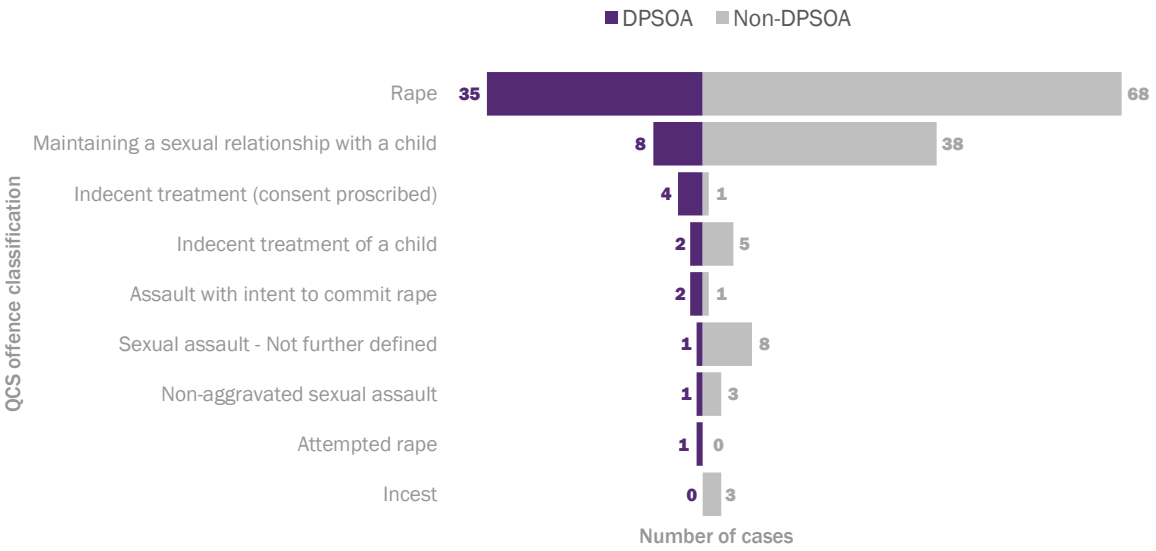
6.1.4 Relationship with the *Dangerous Prisoners (Sexual Offenders) Act 2003* scheme

A prisoner may be detained or supervised beyond the expiry of their sentence under the *Dangerous Prisoners (Sexual Offenders) Act 2003* (Qld) ('DPSOA'). The DPSOA allows the Attorney-General to apply for a continuing detention order, or a supervision order, if the prisoner has been convicted of a serious sexual offence. To make an order, the court must find there is an unacceptable risk of the prisoner committing a serious sexual offence if they are released from custody and an order is not made.[4] If an order is made, the person is detained or subject to supervision after they have fully served their sentence.

The DPSOA scheme operates independently of the SVO scheme. An SVO declaration must be made at the time the person is sentenced and the sentencing court must not have regard to the existence, or possible future existence, of any DPSOA order.[5] An application for a DPSOA order can only be brought by the Attorney-General in the last 6 months of the prisoner's period of imprisonment,[6] and the order comes into effect once the sentence has expired. As noted in Chapter 1, detailed examination of the DPSOA scheme is excluded from the Council's Terms of Reference. This section provides a brief overview of the relationship between the SVO and the DPSOA schemes.

Figure 11 shows the number of DPSOA orders made for prisoners within the data period who were sentenced to a declared SVO for a sexual violence offence and fully served their sentence. For offenders sentenced for rape, orders were made in 35 cases (33.9%). For offenders sentenced for maintaining a sexual relationship with a child, 8 offenders (17.3%) were the subject of a DPSOA order. Beyond these two types of offences, DPSOA orders were rarely made.

Figure 11: Number of cases with an SVO declaration that also received a DPSOA order



Data includes cases sentenced with an SVO declaration, July 1997 to June 2020. Only includes cases where the prisoner had fully served their sentence.
Source: QCS – unpublished data.

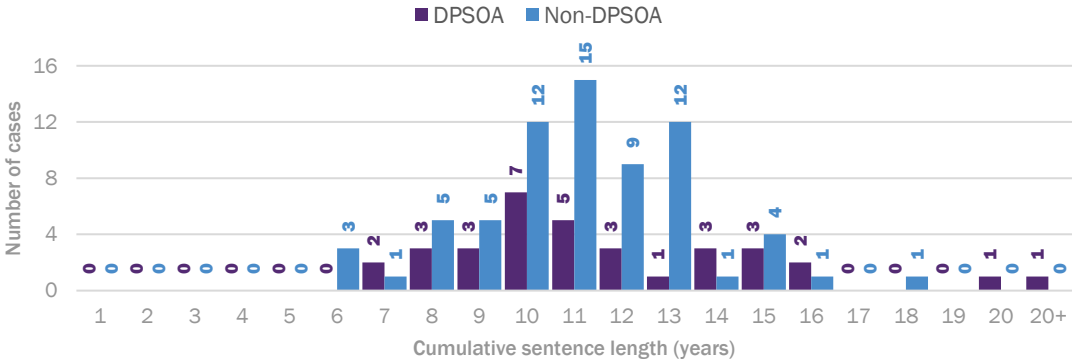
2 This data excludes sentences of imprisonment that are suspended in whole or in part, or ordered to be served by way of intensive correction in the community. See PSA (n 1) ss 144, 112.
3 An SVO declaration can also be made for sentences of less than 5 years where certain criteria are met. See ibid s 161B(4) discussed in 6.1.2 of this paper.
4 Ibid s 13.
5 Ibid s 9(9).
6 *Dangerous Prisoners (Sexual Offenders) Act 2003* (Qld) s 5(2)(c).

No correlation was identified between the length of sentence and the making of a DPSOA order. This may indicate that sentence length is not an adequate predictor for determining whether a person requires post-sentence supervision.

For the offence of rape, DPSOA orders were made for prisoners sentenced for a range of sentence lengths, from sentences of 7 years to sentences longer than 20 years of imprisonment. Figure 12 shows the distribution of sentence length by whether the prisoner was subject to a DPSOA order.

The average imprisonment length for offenders who were subject to a DPSOA order was 10.6 years — slightly shorter than the average sentence of 11.1 years for non-DPSOA prisoners. This difference was not statistically significant.[7]

Figure 12: Distribution of imprisonment length for the offence of rape, SVO declarations, by DPSOA status



Data includes cases sentenced between 1997 and 2020, and only includes prisoners who had fully served their sentenced by 30 June 2020, SVO offenders only.
Source: QCS unreported data.

[7] Independent groups t-test: $t(20.937) = 1.00, p = 0.3311, r = 0.21$ (equal variances not assumed).

Chapter 7

Characterising the scheme: Offences and offenders

Key Findings

1. Offenders declared convicted of a serious violent offence ('SVO') were predominantly men (96.3%).

2. One in five SVO declarations were applied to offences committed by Aboriginal and Torres Strait Islander peoples (20.1%).

3. Aboriginal and Torres Strait Islander peoples were over-represented across most Schedule 1 offences, including all SVO offence categories except trafficking in dangerous drugs.

4. Non-sexual violence offences with an SVO declaration were more likely to be a domestic violence offence ('DV offence') than those without an SVO declaration.

5. Rates of guilty pleas were lower for cases with an SVO declaration compared to those without an SVO declaration for most Schedule 1 offences.

6. Cases with a mandatory SVO declaration had a higher proportion of offenders who had previously been sentenced to imprisonment.

7. Four in five offenders who received an SVO declaration for maintaining a sexual relationship with a child (MSO) were also sentenced for rape (81.3%).

8. Two-thirds of offenders sentenced for rape with an SVO declaration (MSO) were also sentenced for additional rape offences (67.6%).

9. Drug trafficking offences (MSO) with an SVO declaration were most likely to be associated with other drug-related offences — two-thirds of drug traffickers (MSO, SVO) were also sentenced for possession of drugs.

7.1 Demographic characteristics of offenders

This section presents the Council's findings on demographic characteristics of offenders declared convicted of an SVO offence over the 9-year data period.

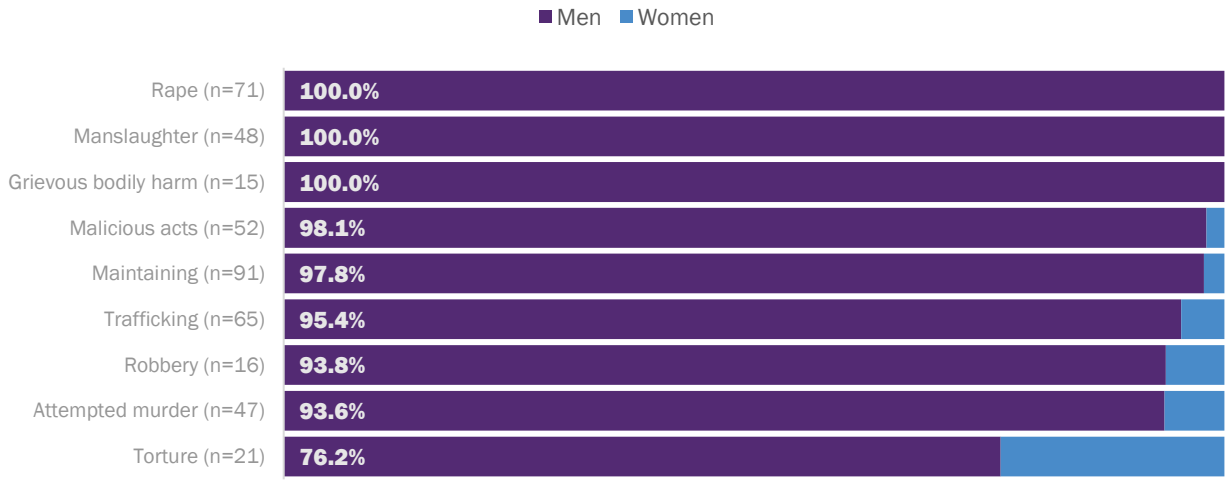
7.1.1 Gender of sentenced offenders

Offenders declared convicted of an SVO offence were predominantly men (96.3%). Figure 13 shows that for the offences of rape, manslaughter and GBH, every case sentenced to an SVO was committed by a man. The proportion of male offenders was very high across all offence categories commonly attracting an SVO.

Very few SVO declarations were made for female offenders. The offence with the highest number of female offenders was torture, where 23.8 per cent of offenders were women (n=5 women). In fact, across all of the 437 cases in which an SVO declaration was made, only 16 declarations were made for female offenders.

Due to the very small number of women to receive an SVO declaration, it was not possible to conduct any meaningful analysis of this cohort.

Figure 13: Proportion of men and women sentenced for a declared SVO, by type of offence (MSO)



Data includes cases sentenced with an SVO declaration, MSO, 2011–12 to 2019–20.
Source: QGSO, Queensland Treasury – Courts Database, extracted August 2020.

7.1.2 Over-representation of Aboriginal and Torres Strait Islander peoples

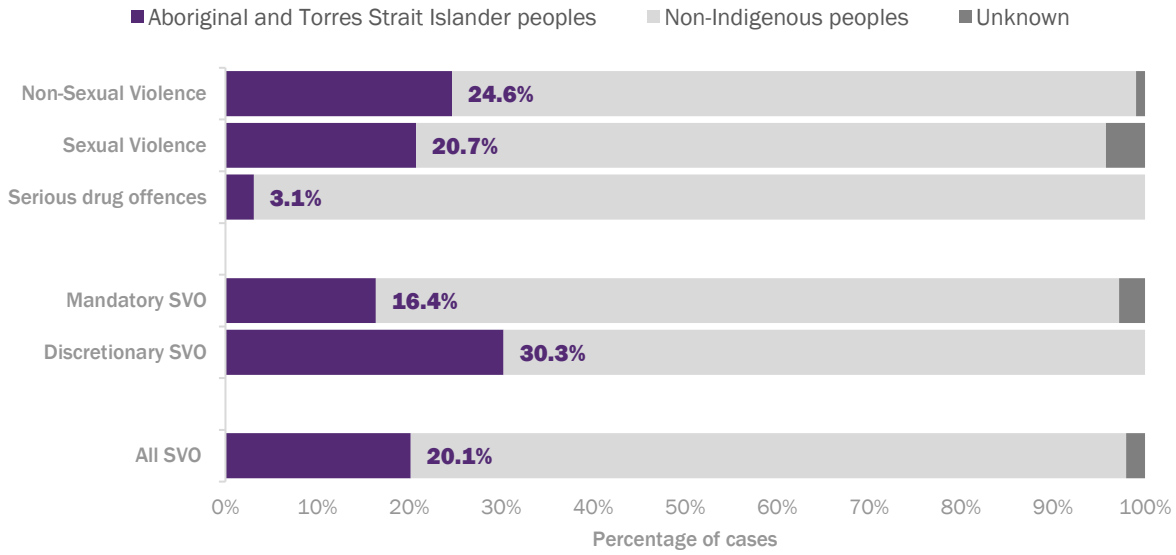
In Queensland, Aboriginal and Torres Strait Islander peoples are over-represented in all areas of the criminal justice system. This is a result of a range of complex current and historical factors that continue to impact on the lives of Aboriginal and Torres Strait Islander peoples. The types of offences that Aboriginal and Torres Strait Islander peoples are more likely to be sentenced for is different to the types of offences non-Indigenous peoples are more likely to be sentenced for. Generally, Aboriginal and Torres Strait Islander peoples are more likely to be sentenced for offences involving acts intended to cause injury, unlawful entry, public order offences, and offences against justice and government.[8] The SVO scheme disproportionately affects Aboriginal and Torres Strait Islander peoples due to this difference in offending profiles.

Aboriginal and Torres Strait Islander offenders were over-represented across all offence categories commonly attracting an SVO, apart from trafficking in dangerous drugs — see Figure 14. People who identify as Aboriginal and Torres Strait Islander represent approximately 3.8 per cent of Queensland's population aged 10 years and over.[9] During the data period, of the 437 SVO declarations made, 20.1 per cent were made for offences committed by Aboriginal and Torres Strait Islander peoples (n=88). The proportion of cases in which an Aboriginal or Torres Strait Islander offender was declared convicted of an SVO was higher for discretionary SVOs at 30.3 per cent compared to 16.4 per cent for mandatory SVOs.

8 Queensland Sentencing Advisory Council, *Connecting the Dots: The Sentencing of Aboriginal and Torres Strait Islander Peoples in Queensland* (Sentencing Profile, 2021) 22–4.
9 Ibid 12.

The highest proportion of over-representation was for non-sexual violence offences (24.6%), followed closely by sexual violence offences (20.7%). Serious drug offences were not over-represented, with 3.1 per cent of these offences committed by Aboriginal and Torres Strait Islander peoples.

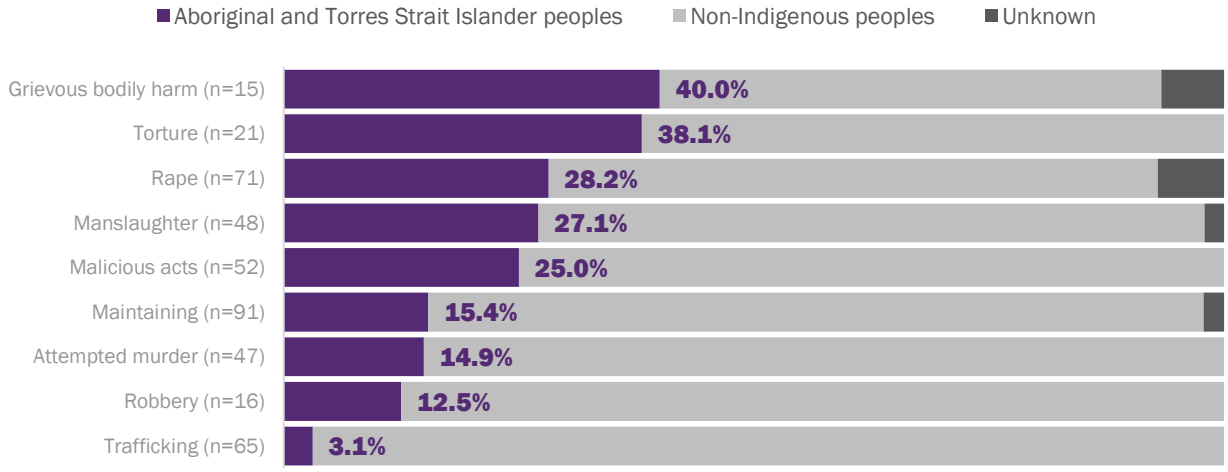
Figure 14: Over-representation of Aboriginal and Torres Strait Islander peoples sentenced for a declared SVO, by various breakdowns (MSO)



Data includes cases sentenced with an SVO declaration, MSO, 2011–12 to 2019–20.
Source: QGSO, Queensland Treasury – Courts Database, extracted August 2020.

Figure 15 shows that the highest levels of over-representation were found for GBH, however caution is advised due to the small sample size as only 15 cases of GBH sentenced in the data period received an SVO. Other declared offences with a high proportion of Aboriginal and Torres Strait Islander offenders included torture, rape, manslaughter and malicious acts, ranging between a proportion of 38.1 per cent to 25.0 per cent of Aboriginal and Torres Strait Islander peoples sentenced. The offence of maintaining a sexual relationship with a child in circumstances where an SVO declaration was made was committed by an Aboriginal or Torres Strait Islander person in 15.4 per cent of cases.

Figure 15: Proportion of Aboriginal and Torres Strait Islander peoples sentenced for a declared SVO, by type of offence (MSO)



Data includes cases sentenced with an SVO declaration, MSO, 2011–12 to 2019–20.
Source: QGSO, Queensland Treasury – Courts Database, extracted August 2020.

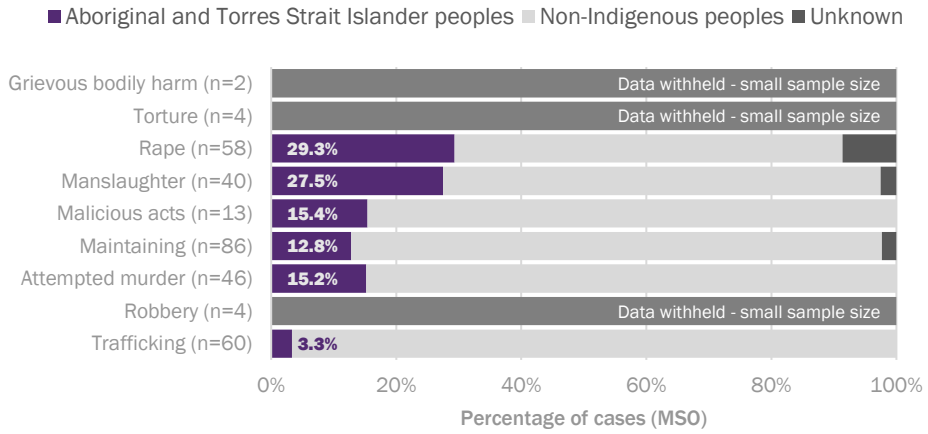
Further analysis was conducted to determine whether these levels of over-representation were confined to cases involving an SVO declaration. The analysis found that Aboriginal and Torres Strait Islander peoples were over-represented for all cases except for drug trafficking, regardless of whether or not an SVO declaration was made. Over-representation was highest for cases that involved a discretionary SVO.

Over-representation for mandatory SVO declarations

Figure 16 shows mandatory SVO declarations for Aboriginal and Torres Strait Islander peoples and can be compared with Figure 17, which shows discretionary SVO declarations. Regarding mandatory SVO declarations, there were high levels of over-representation for the offences of rape, manslaughter, malicious acts, maintaining, and attempted murder. Trafficking was relatively low at 3.3 per cent.

There were not enough cases sentenced to a mandatory SVO in the remaining offence categories to allow for this type of analysis.

Figure 16: Mandatory SVO declarations by proportion of Aboriginal and Torres Strait Islander peoples (MSO)

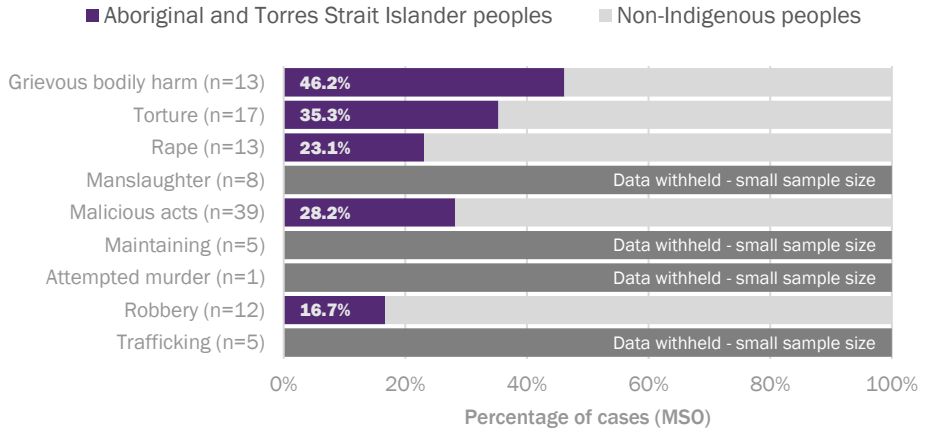


Data includes cases sentenced with a mandatory SVO declaration, MSO, 2011–12 to 2019–20.
Source: QGSO, Queensland Treasury – Courts Database, extracted August 2020.

Over-representation for discretionary SVO declarations

In cases where a discretionary SVO declaration was made (Figure 17), almost half of all GBH declarations (46.2%) were made for Aboriginal and Torres Strait Islander peoples. The level of over-representation was also high for cases involving torture (35.3%), rape (23.1%) and malicious acts (28.2%). However, the number of cases sentenced for these offences was relatively low and caution is advised when interpreting these figures.

Figure 17: Discretionary SVO declarations by proportion of Aboriginal and Torres Strait Islander peoples (MSO)



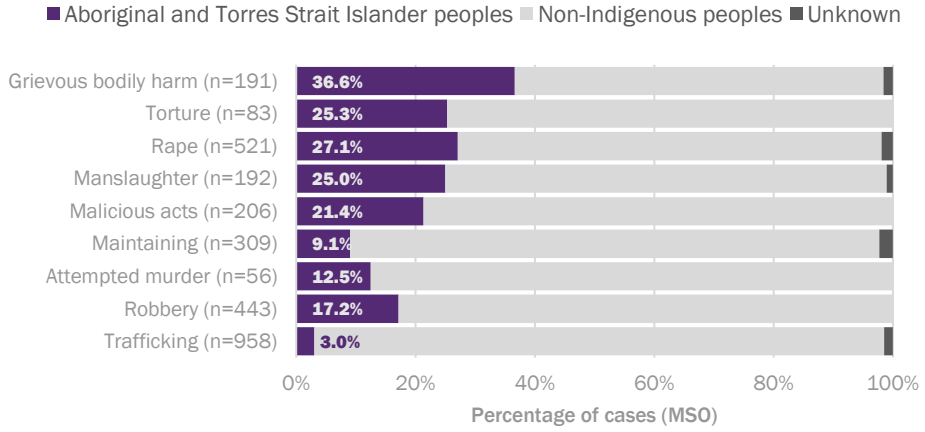
Data includes cases sentenced with a mandatory SVO declaration, MSO, 2011–12 to 2019–20.
Source: QGSO, Queensland Treasury – Courts Database, extracted August 2020.

Over-representation for cases that were eligible for an SVO declaration

The following two figures show the proportion of Aboriginal and Torres Strait Islander peoples sentenced for these offences irrespective of whether an SVO declaration was made. Figure 18 shows all cases sentenced to a term of imprisonment of 5 years or more (that is, offenders who were eligible to both types of SVO declarations). Whereas, Figure 19 only shows cases with a term of imprisonment of 5 years or more but less than 10 years (that is, only offenders who were eligible for a discretionary SVO declaration, regardless of whether an SVO declaration was actually made).

Figure 18 shows the levels of over-representation remained high even for cases that did not attract an SVO declaration. For most offences, the level of over-representation for non-SVO cases was slightly lower compared to cases that attracted an SVO declaration (compare Figure 15). The offence of maintaining was the exception, with considerably lower levels of over-representation for non-SVO cases compared to cases that attracted an SVO. Robbery was also an exception, in that non-SVO robbery cases saw a higher level of over-representation compared to robbery cases that attracted an SVO.

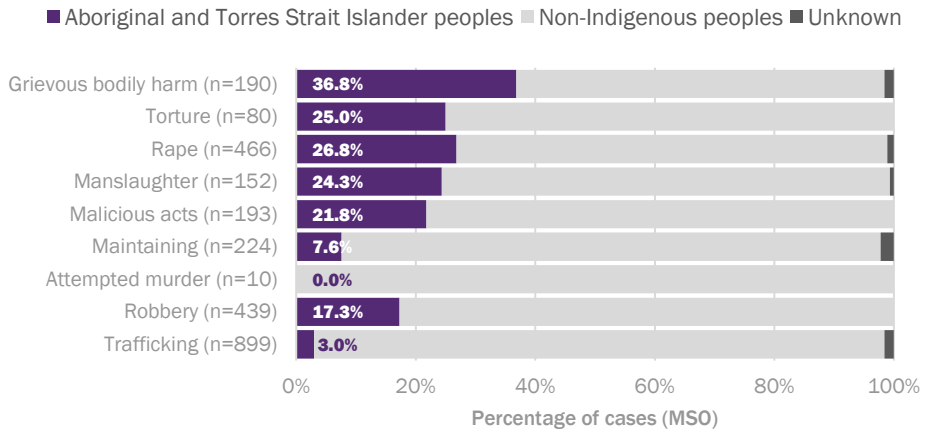
Figure 18: Over-representation for cases eligible for an SVO declaration, cases with sentences of imprisonment of 5 years or more (MSO)



Data includes cases sentenced, MSO, 2011–12 to 2019–20.
Source: QGSO, Queensland Treasury – Courts Database, extracted August 2020.

Figure 19 only shows cases which were eligible for a discretionary SVO (irrespective of whether a declaration was actually made). That is, cases with a sentence of imprisonment of 5 years or more, but less than 10 years. Similar to the previous figure, the level of over-representation was very high for most of these offences. GBH had the highest rate of over-representation, with 36.8 per cent of cases eligible for a discretionary SVO involving an Aboriginal and/or Torres Strait Islander offender. Torture, rape, manslaughter and malicious acts were all particularly high, at between 21.8 and 26.8 per cent.

Figure 19: Over-representation for cases eligible for a discretionary SVO declaration, cases with sentences of imprisonment of 5 years or more but less than 10 years (MSO)



Data includes cases sentenced, MSO, 2011–12 to 2019–20.
Source: QGSO, Queensland Treasury – Courts Database, extracted August 2020.

7.2 Characteristics of the declared cases

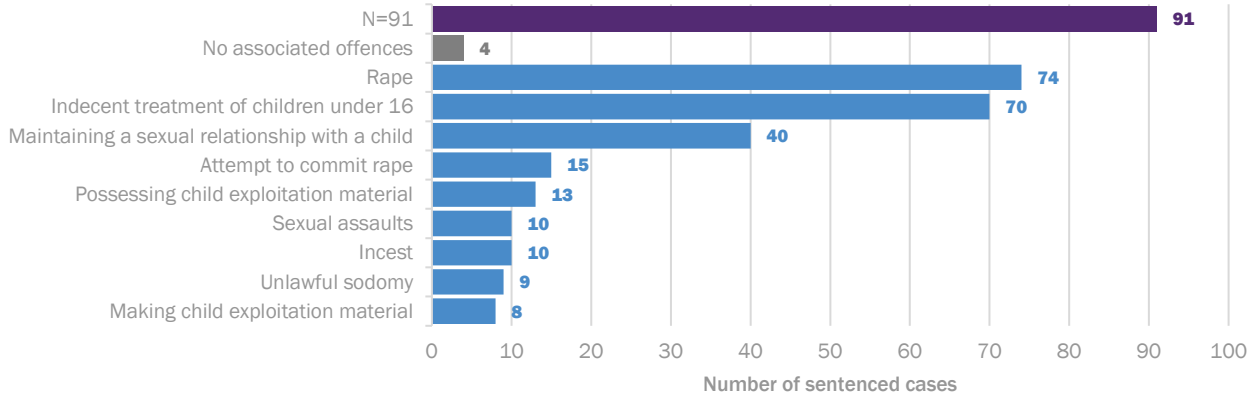
This section sets out characteristics of the cases that received SVO declarations during the 9-year data period. These characteristics include analysis of associated offences, offences which were also domestic violence offences, guilty plea rates and prior sentenced imprisonment.

7.2.1 Association of offences sentenced as SVOs and other offences

This section provides information on offences sentenced as the same sentencing event as a declared SVO (MSO).

SVO declarations for maintaining a sexual relationship with a child as an MSO were closely associated with rape (81.3% overlap), followed by indecent treatment of children under 16 (76.9% overlap) — see Figure 20. Other associated offences included multiple maintaining counts, attempted rape, possession and making of child exploitation material, sexual assault, incest and unlawful sodomy.

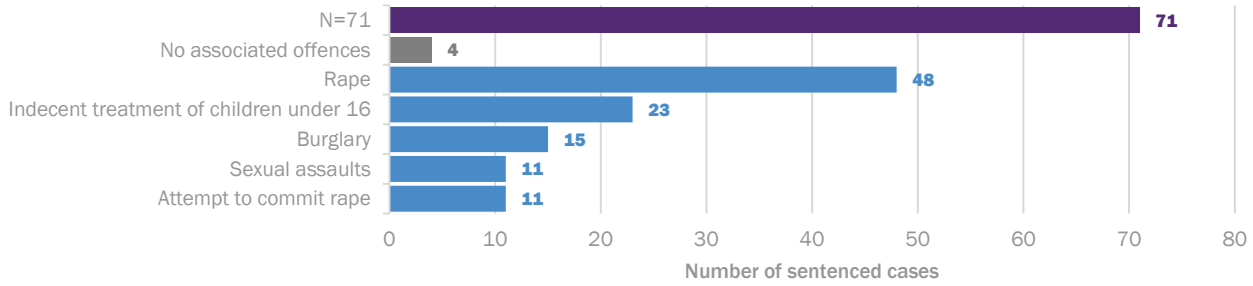
Figure 20: Offences most commonly associated with maintaining a sexual relationship with a child (SVO, MSO)



Data includes cases sentenced with an SVO declaration, MSO, 2011–12 to 2019–20. Only the top 9 most common associated offences have been displayed.
Source: QGSO, Queensland Treasury – Courts Database, extracted August 2020.

Figure 21 shows that where rape was the MSO and an SVO declaration was made, cases were closely associated with multiple counts of rape (67.6% overlap), followed by indecent treatment of children under 16 (32.4% overlap). This finding suggests that the victim in these cases of rape may have been a child. Other associated offences included burglary, sexual assault and attempted rape.

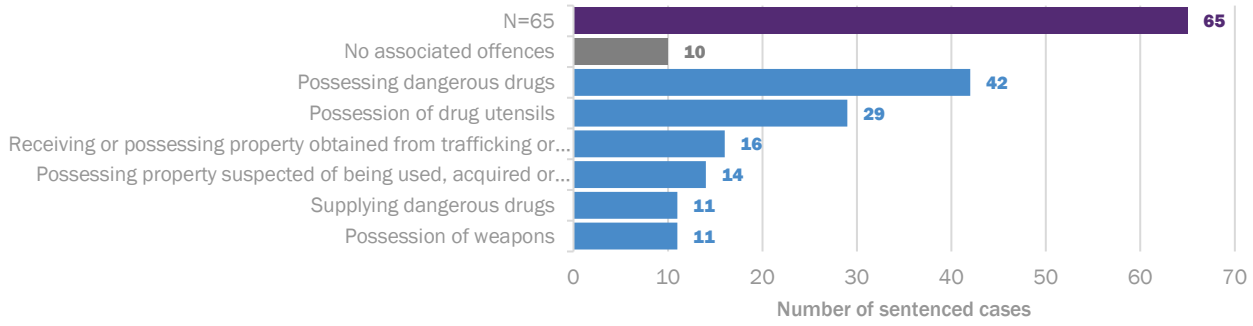
Figure 21: Offences most commonly associated with rape (SVO, MSO)



Data includes cases sentenced with an SVO declaration, MSO, 2011–12 to 2019–20. Only the top 5 most common associated offences have been displayed.
Source: QGSO, Queensland Treasury – Courts Database, extracted August 2020.

Figure 22 illustrates that drug trafficking cases in which the MSO was declared an SVO were mainly associated with other drug-related offences, including possession of drugs, and possession of drug utensils. There was a 16.9 per cent overlap with possession of weapons.

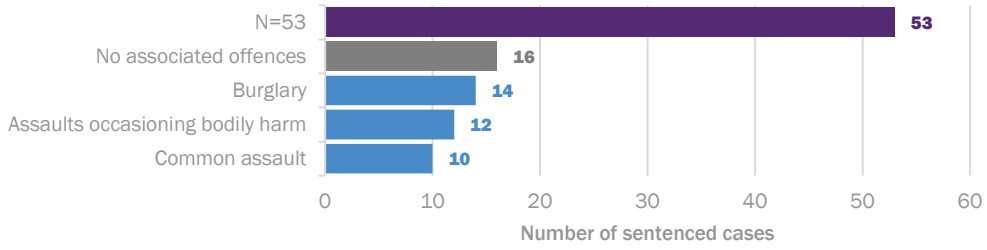
Figure 22: Offences most commonly associated with trafficking in dangerous drugs (SVO, MSO)



Data includes cases sentenced with an SVO declaration, MSO, 2011–12 to 2019–20. Only the top 6 most common associated offences have been displayed.
Source: QGSO, Queensland Treasury – Courts Database, extracted August 2020.

Figure 23 shows that SVO declarations for malicious acts were associated with burglary (26.4% overlap), followed by assaults occasioning bodily harm (AOBH) and common assault.

Figure 23: Offences most commonly associated with malicious acts (SVO, MSO)



Data includes cases sentenced with an SVO declaration, MSO, 2011–12 to 2019–20.
Source: QGSO, Queensland Treasury – Courts Database, extracted August 2020.

7.2.2 The SVO scheme and domestic and family violence

In 2015 and 2016, domestic and family violence amendments to the *Penalties and Sentences Act 1992* (Qld) came into effect. These amendments included:

- where a conviction is recorded[10] for an offence charged[11] as a domestic violence offence, it must be recorded as a domestic violence offence;[12]
- where an offender is convicted but a conviction is not recorded, it must nonetheless be entered into the offender's criminal history as a domestic violence offence;[13] and
- where there is a conviction for a domestic violence offence, the court must treat the fact that it was a domestic violence offence as an aggravating factor for the purposes of sentencing unless the court considers this is not reasonable because of the exceptional circumstances of the case.[14]

This means that since 2015, where an offender has been convicted of a domestic violence offence ('DV offence') it will be flagged as such in the Queensland courts database. Figure 24 provides an overview of the proportions of cases that were flagged as being DV offences for SVO and non-SVO cases between 2016–17 and 2019–20.

10 PSA (n 1) s 12 provides that the court may exercise its discretion to record or not to record a conviction, having regard to the nature of the offence, the offender's character and age, and the impact that recording a conviction will have on their economic or social wellbeing, or their chances of finding employment. Section 152 provides that the court must record a conviction if a term of imprisonment is imposed.

11 An offence may be charged as a DV offence on an indictment under section 564 of the Criminal Code.

12 PSA (n 1) s 12A.

13 Ibid. Further, a court can also order that a previous conviction be recorded as a domestic violence offence when it is satisfied that it was one: s 12A(5).

14 Ibid s 9(10A). This section requires courts to treat domestic and family violence as an aggravating factor at sentencing, unless the court considers it is not reasonable because of the exceptional circumstances of the case.

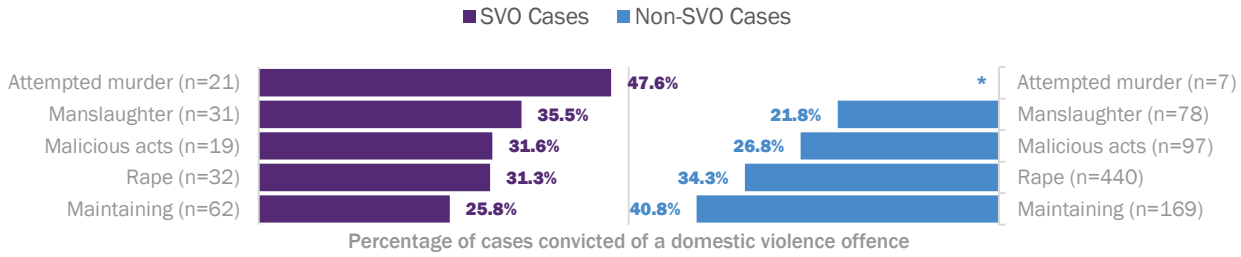
The proportion of offences convicted as a DV offence was higher for non-sexual violent offences that were declared to be an SVO compared to non-SVO cases. For the offence of manslaughter, offences were recorded as a DV offence in 35.5 per cent of SVO cases. In contrast, 21.8 per cent of non-SVO cases contained a DV offence. For malicious acts, 31.6 per cent of SVO cases contained a DV offence, compared to 26.8 per cent of non-SVO cases.

The pattern is different for sexual violence offences. For rape, the proportion of offences recorded as a DV offence is similar for both SVOs and non-SVOs. For the offence of maintaining a sexual relationship with a child, 40.8 per cent of cases with an offence not declared as an SVO were recorded as a DV offence. The proportion of DV offences among cases of maintaining a sexual relationship with a child declared to be an SVO was lower at 25.8 per cent.

The Council acknowledges that the data analysis presented will not have captured all offences that were committed in the context of domestic and family violence. This may be because the offending was not recorded as a conviction for a DV offence for a number of reasons, including that the matter may not have been charged or indicted as a DV offence, nor raised orally at sentence by the prosecution.

Another offence that involves domestic violence is choking, suffocation or strangulation in a domestic setting under s 315A of the Criminal Code. This offence was introduced on 5 May 2016 and rarely saw sentences approaching the 5-year threshold to become eligible for an SVO declaration. In fact, only 2 cases (MSO) have received a sentence of more than 5 years imprisonment since the offence was introduced (see Appendix 11). For further discussion on this offence, see section 18.9.5 in Part D.

Figure 24: Percentage of cases that were convicted domestic violence offences, by SVO declaration (MSO)

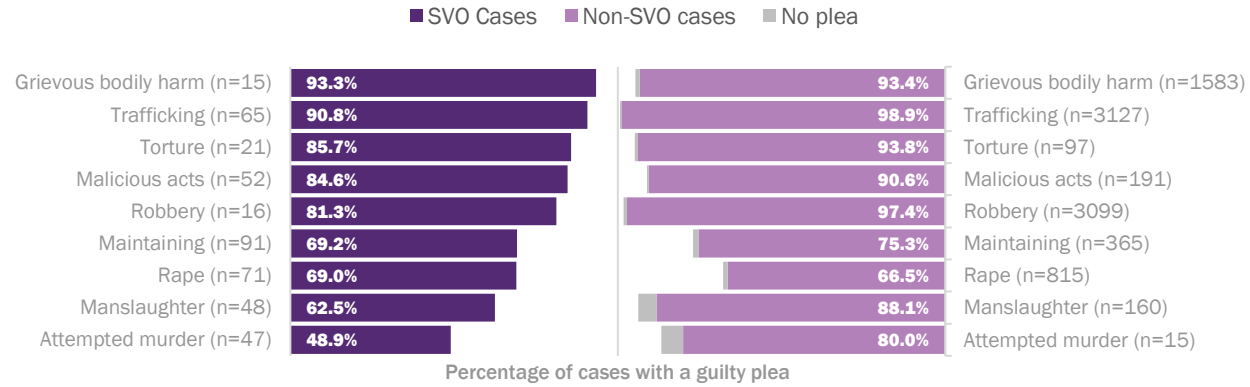


Data includes cases sentenced with an SVO declaration, MSO, 2016–17 to 2019–20.
Source: QGSO, Queensland Treasury – Courts Database, extracted August 2020.
* data not displayed due to small sample size.

7.2.3 Proportion of guilty pleas

The rate of guilty pleas varied considerably by type of offence, as well as depending on whether the offence was ultimately declared an SVO — see Figure 25. Overall, the rates of guilty pleas were high across all Schedule 1 offences. With the exception of GBH and rape, guilty plea proportions were consistently lower for declared SVO cases across all offences.

Figure 25: Percentage of cases with a guilty plea, by type of SVO (MSO)



Data includes cases sentenced with an SVO declaration, MSO, 2011–12 to 2019–20.
Source: QGSO, Queensland Treasury – Courts Database, extracted August 2020.
Note: A small number of homicide cases involved a plea of 'not guilty' to the offence of murder, where the defendant was later found guilty of the lesser charge of manslaughter. The judgments involving SVO declarations were reviewed and have been re-coded as 'not guilty'. Given the volume of non-SVO cases, these remain coded as 'no plea' in Figure 24.

The rates of guilty pleas were lower for non-sexual violence offences that attracted an SVO compared to those that did not attract a declaration.

The difference in plea rates between GBH cases sentenced as an SVO and those that were not, was minor. Offenders pleaded guilty to torture in 93.8 per cent of non-SVO cases, compared to 85.7 per cent in cases that attracted an SVO. Malicious act was pleaded guilty to in 90.6 per cent of non-SVO cases, compared to 84.6 per cent of cases sentenced as an SVO.

The difference was particularly stark for attempted murder, with offenders pleading guilty in 80.0 per cent (non-SVO) and 48.9 per cent (SVO) of cases respectively. For manslaughter, defendants pleaded guilty in 88.1 per cent of non-SVO cases, compared to only 62.5 per cent in cases attracting an SVO.

Rates of guilty pleas were lower for offences of sexual violence, which may be due to evidentiary reasons.[15] Offenders pleaded guilty to the offence of maintaining a sexual relationship with a child in 75.3 per cent of non-SVO cases, compared to 69.2 per cent in cases that were declared to be an SVO. The difference in rates of guilty pleas was minor for rape, with 66.5 per cent (non-SVO) and 69.0 per cent (SVO) respectively.

The rates of guilty pleas for drug trafficking offences were very high. Almost all sentenced offenders for a non-declared offence of drug trafficking pleaded guilty (98.9%), compared to 90.8 percent for cases sentenced as an SVO.

7.2.4 Prior sentenced imprisonment

Analysis of offenders' prior history of being sentenced to imprisonment found that cases attracting a mandatory SVO declaration had a higher proportion of prior imprisonment, compared to cases without an SVO declaration.

The analysis was conducted by identifying all cases with an SVO declaration sentenced between 2011–12 and 2018–19 (n=388). For each offender, the five years prior to this sentencing event were analysed to determine whether the person had been sentenced to imprisonment for a previous offence.

Offenders with long periods of prior imprisonment (i.e. for very serious prior offending) are undercounted due to having been in custody for all or most of the data period, which limits the amount of time that the person was able to offend in the community.

Figure 26 shows the percentage of offenders sentenced between 2011–12 and 2018–19 who had a prior sentenced offence that resulted in a term of imprisonment. For some sub-groups, only a small number of cases were sentenced in the data period, making it impossible to compare between groups.

The analysis resulted in mixed findings. Cases that attracted a mandatory SVO declaration had a higher proportion of prior imprisonment, whereas cases that did not have an SVO declaration had a lower proportion of prior imprisonment.

The offence of maintaining a sexual relationship with a child was the least likely to have a prior sentence of imprisonment, irrespective of whether an SVO declaration was made.

Figure 26: Percentage of offenders with a prior sentence of imprisonment

Offence	Mandatory SVO	Discretionary SVO	Non-SVO
Malicious acts	63.6%	36.1%	31.6%
Attempt to murder	35.0%	< 10	7.1%
GBH	< 10	63.6%	23.6%
Maintaining	2.6%	< 10	2.3%
Manslaughter	35.1%	< 10	24.1%
Rape	18.9%	< 10	12.3%
Robbery	< 10	50.0%	27.7%
Torture	< 10	25.0%	31.8%
Trafficking in dangerous drugs	13.7%	< 10	12.3%

Data includes cases sentenced, MSO, 2011–12 to 2018–19. Prior offences included where sentenced within 5 years of the data period. Data has been withheld from cells with fewer than 10 sentenced cases.
Source: QGSO, Queensland Treasury – Courts Database, extracted August 2020.

15 Australian Law Reform Commission, *Family Violence – A National Legal Response* (Report No. 114, 2010) 1200.

Chapter 8

Sentencing outcomes and appeals

Key Findings

1. Close to one-quarter of sentences of imprisonment for maintaining a sexual relationship with a child (23.4%) were sentences of 10 years or more — resulting in a large number of mandatory serious violent offence ('SVO') declarations (n=86).

2. The most common manslaughter sentence was 9 years, just below the cut-off for a mandatory SVO declaration. Most manslaughter sentences fell below 10 years (78.9%).

3. The majority of sentences for attempted murder (82.1%) were for a period of 10 years or more and were therefore subject to a mandatory SVO declaration.

4. The most common sentence for drug trafficking was 3 years, however there was an increase in sentences of 9 years as compared to 8 and 10 years, suggesting that sentences may be gravitating towards the 9-year mark — below the level at which a mandatory SVO declaration applies.

5. An appeal was lodged in almost half of all cases with an SVO declaration (n=216, 46.1%). The SVO declaration was removed in 6.8 per cent of these appeals (n=32).

6. Over two-thirds of drug trafficking cases that received an SVO declaration were appealed (68.8%).

7. Over half of rape cases that received an SVO declaration were appealed (53.0%).

8. Cases with a mandatory SVO declaration were more likely to be appealed (48.1%) than cases with a discretionary declaration (37.8%).

8.1 Sentencing outcomes for the SVO scheme

This section presents the Council's analysis of sentencing outcomes for the SVO scheme.

8.1.1 Length of imprisonment and SVO declarations

Table 19 summarises the length of imprisonment for the most common Schedule 1 offences to attract an SVO declaration. The purple boxplots[16] represent sentences that attracted a mandatory SVO declaration (10 years or more), blue boxplots represent sentences for discretionary SVOs (5 years to less than 10 years), and the grey boxplots represent cases that were not subject to an SVO declaration. Boxplots and summary statistics have not been presented for categories with a small number of sentenced cases (5 or fewer). Schedule 1 offences have different maximum penalties, and the offences in Table 19 range from a maximum penalty of 5 years for the dangerous operation of a motor vehicle to life imprisonment for several offences, including manslaughter and rape.

For offences that resulted in a mandatory SVO declaration, sexual violence offences generally attracted the longest sentences of imprisonment. Cases with a mandatory SVO declaration were sentenced to an average of 12.1 years for the offence of rape[17] and 11.9 years for the offence of maintaining a sexual relationship with a child.[18] These offences had the widest range of lengths of imprisonment, with non-SVO cases receiving much shorter sentences (an average of 5.8 years for rape, and 6.1 years for maintaining) compared to SVO cases.

Comparatively, robbery[19] and GBH[20] received the shortest sentences of imprisonment. There were very few cases of these offences sentenced to 10 years or more (therefore receiving a mandatory SVO declaration). The average sentence length for cases with a discretionary SVO was 7.3 years for robbery, and 6.8 years for GBH. For non-SVO cases, robbery received an average sentence of 3.2 years and GBH an average of 3.1 years.

8.1.2 Distribution of sentence length

Figure 27 provides an overview of the sentence length distribution of different offences sentenced under the scheme. It shows similar patterns between certain sexual offences (maintaining a sexual relationship with a child and rape), and distinctive patterns for other offences.

The sexual offences of rape and maintaining a sexual relationship with a child both show three distinct clusters of sentencing outcomes, with a lower range of sentencing outcomes (3 to 5 years for maintaining; 2 to 3 years for rape), a middle range (8 to 10 years for maintaining; 5 to 7 years for rape) and a high range (12+ years for maintaining; 13+ years for rape). Both of these offences have a maximum penalty of life imprisonment.

The non-sexual violent offences of malicious acts, manslaughter and attempted murder each show different patterns of sentence length distribution. For malicious acts, most cases are sentenced to between 5 and 7 years, with only a small number of cases exceeding 8 years. The distribution for manslaughter shows a clear central tendency at 9 years and a relatively steep decline either side of the mode. Sentences for attempted murder are very high, most exceeding 10 years and attracting a mandatory declaration, which is indicative of the seriousness of this type of offence. These offences each have a maximum penalty of life imprisonment.

Torture had a relatively low central tendency at around 5 to 6 years. All cases of torture sentenced to 9 years attracted a discretionary SVO — there were no cases sentenced to 9 years (in the data period) in which the discretion to make a declaration was not exercised. This indicates that the cruelty and level of violence common in torture cases gives rise to a discretionary SVO declaration being made.[21] At 14 years, torture has the lowest maximum penalty of the offences examined in Figure 27.

Trafficking in dangerous drugs appears to have an increased number of cases sentenced at the 9-year mark, relative to sentences of 8 and 10 years, which may indicate that sentences are gravitating to the 9-year-mark. This offence has a maximum penalty of 25 years imprisonment.

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16 For information on how to interpret these boxplot diagrams, refer to the Technical Paper for Research Publications, available on the Council's website.

17 Rape has a maximum penalty of life imprisonment: Criminal Code s 349.

18 Maintaining a sexual relationship with a child has a maximum penalty of life imprisonment: ibid s 229B.

19 Robbery *simpliciter* has a maximum penalty of 14 years and robbery with circumstances of aggravation (being armed, in company with one or more persons, wounds or uses personal violence) has a maximum penalty of life imprisonment: ibid s 409. Both are in Schedule 1.

20 Grievous bodily harm has a maximum penalty of 14 years: ibid s 320.

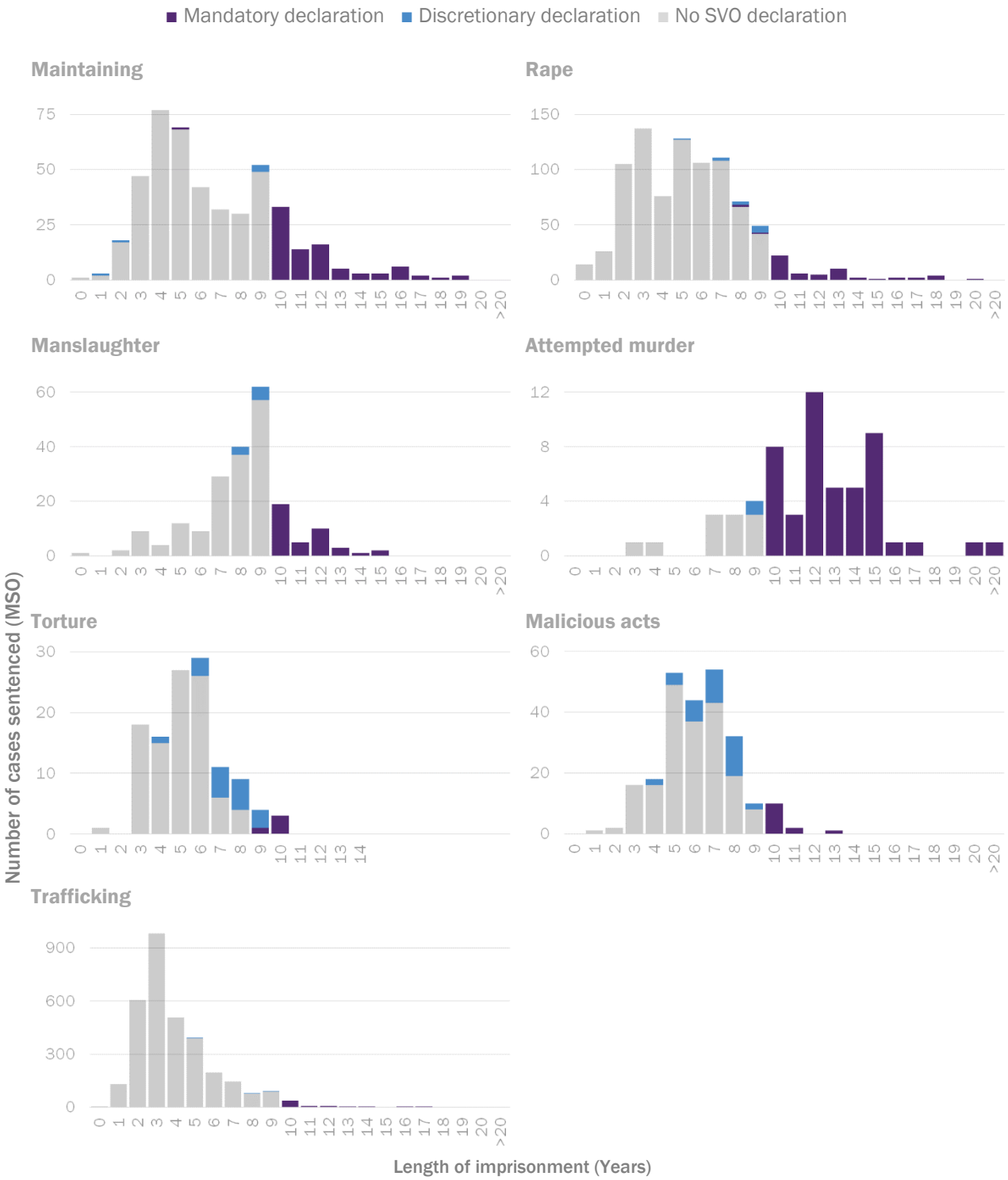
21 In the Court of Appeal judgment of *R v B* (2000) 110 A Crim R 499, Moynihan and Atkinson JJ said 'It is likely that a person who is convicted of the crime of torture, particularly where it involves the intentional infliction of pain or suffering on more than one occasion will be declared a serious violent offender. To do so reflects the nature of the offence': at [32].

Table 19: Length of imprisonment for Schedule 1 offences, by type of SVO declaration

Offence (MSO)	Declaration type	N	Median (years)	Average (years)	Imprisonment Length Distribution
Malicious acts	Mandatory	13	10.0	10.4	
	Discretionary	39	7.0	7.0	
	Non-SVO	170	6.0	6.1	
Manslaughter	Mandatory	40	11.0	11.3	
	Discretionary	8	9.0	8.8	
	Non-SVO	142	8.0	7.8	
Attempted murder	Mandatory	46	12.8	13.1	
	Discretionary	1			
	Non-SVO	9	8.0	8.2	
Torture	Mandatory	4			
	Discretionary	17	7.5	7.4	
	Non-SVO	81	5.5	5.2	
GBH	Mandatory	2			
	Discretionary	13	7.0	6.8	
	Non-SVO	1,007	3.0	3.1	
Robbery	Mandatory	4			
	Discretionary	12	8.0	7.3	
	Non-SVO	2,487	3.0	3.2	
Trafficking	Mandatory	60	10.0	11.0	
	Discretionary	5			
	Non-SVO	2,236	3.0	4.1	
Maintaining a sexual relationship with a child	Mandatory	86	11.0	11.9	
	Discretionary	5			
	Non-SVO	277	6.0	6.1	
Rape	Mandatory	58	11.0	12.1	
	Discretionary	13	8.0	8.0	
	Non-SVO	561	6.0	5.8	
Dangerous operation of a vehicle	Mandatory	2			
	Discretionary	2			
	Non-SVO	2,665	1.0	1.5	

Data includes cases sentenced with an SVO declaration, MSO, 2011–12 to 2019–20.
Source: QGSO, Queensland Treasury – Courts Database, extracted August 2020.

Figure 27: Distribution of imprisonment length for cases with an SVO declaration (MSO)



Data includes cases sentenced with an SVO declaration, MSO, 2011–12 to 2019–20.
Source: QGSO, Queensland Treasury – Courts Database, extracted August 2020.
Note: cases that received a sentence of life imprisonment have been excluded from this figure.

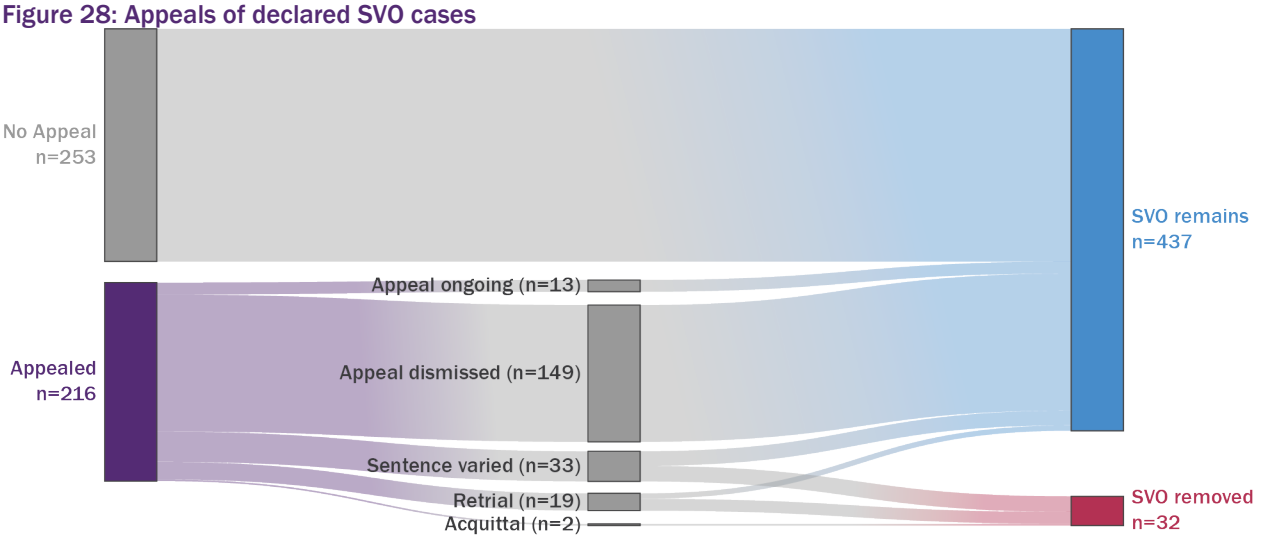
8.1.3 Appealed SVO cases

This section presents the analysis of appeal outcomes for SVO cases. As the coding of appeal outcomes was undertaken manually and not all details were recorded, the Council is not able to report on appeal rates by appeal type (i.e. whether they involved an appeal against sentence, conviction or both).

Offenders or the Crown on behalf of the Attorney-General can appeal the court's decision. The cases that the Court of Appeal hears involving SVOs were originally decided in the District or Supreme Court.

An appeal was lodged in almost half the cases in which the MSO was an SVO (n=216/469, 46.1%) — see Figure 28. In 6.8 per cent of cases (n=32), the SVO declaration was overturned on appeal. This was done either because the sentence was varied on appeal, or because the conviction was overturned altogether, including via a retrial that did not result in a subsequent SVO conviction. Retrials that were still in progress as of 30 June 2020 were classified as 'SVO removed', as a new sentence had not yet been imposed. For retrials, the SVO is categorised as 'removed' until a new sentence is handed down that contains an SVO.

Figure 28: Appeals of declared SVO cases

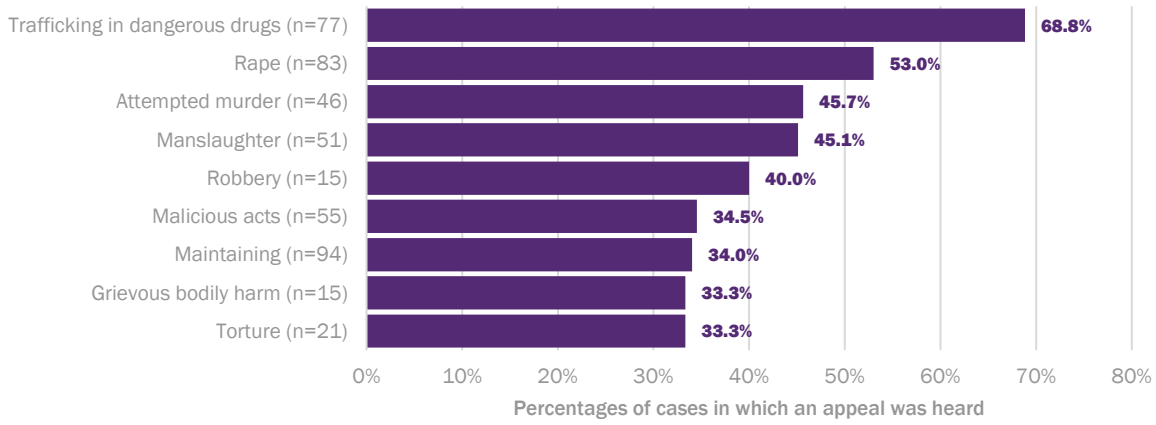


Data includes cases sentenced with an SVO declaration (either at first instance sentence, or on appeal), 2011–12 to 2019–20.
Source: QGSO, Queensland Treasury – Courts Database, extracted August 2020.

The most common offences among SVO cases which were subject to an appeal included trafficking in dangerous drugs, rape, attempted murder, manslaughter and robbery. Figure 29 provides a breakdown of appealed cases by type of offence sentenced as an MSO.

Trafficking in dangerous drugs was the most likely to be subject to an appeal, with over two-thirds of cases appealed (68.8%). Rape was the second most likely offence to be appealed with half of cases appealed (53.0%). Cases that involved malicious acts, maintaining a sexual relationship with a child, GBH and torture were the least likely to be appealed at one-third of sentenced cases.

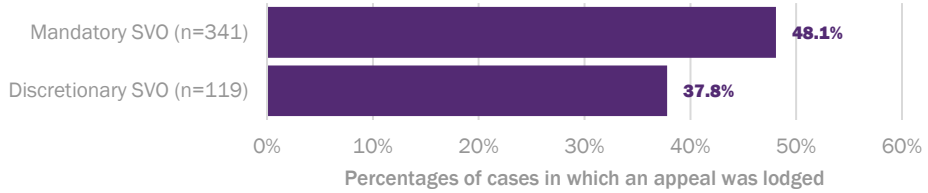
Figure 29: Appealed cases that involved an SVO declaration, by type of offence (MSO)



Data includes cases sentenced with an SVO declaration (either at first instance sentence, or on appeal), MSO, 2011–12 to 2019–20.
Source: QGSO, Queensland Treasury – Courts Database, extracted August 2020.

Cases involving a mandatory SVO declaration were more likely to be appealed than cases involving a discretionary SVO declaration. Figure 30 shows the proportion of cases that were subject to an appeal by whether the MSO received a mandatory or discretionary SVO over the data period. Out of all cases with a mandatory declaration, almost half of cases were appealed (48.1%), whereas one-third of cases with a discretionary declaration were appealed (37.8%).

Figure 30: Appealed cases that involved an SVO declaration, by type of declaration



Data includes cases sentenced with an SVO declaration (either at first instance sentence, or on appeal), MSO, 2011–12 to 2019–20.
Source: QGSO, Queensland Treasury – Courts Database, extracted August 2020.
Note: 9 cases were not displayed as the MSO did not have an SVO declaration at first instance sentence.

Chapter 9

Parole and actual time served in custody

Key Findings

1. Nearly two-thirds of offenders sentenced with a serious violent offence ('SVO') declaration who applied for parole were approved and released to supervision in the community (63.0%). Almost a quarter of offenders with an SVO declaration had their parole application refused (23.4%).

2. Offenders sentenced for a sexual violence offence with an SVO declaration were the least likely to be granted parole (35.1% for maintaining and 38.1% for rape).

3. Offenders sentenced for rape with an SVO declaration served the longest time in custody beyond their parole eligibility date (median of 8.1 months).

4. Offenders sentenced for a drug trafficking offence with an SVO declaration were the most likely to be granted parole (75.9%).

5. Offenders sentenced for drug trafficking with an SVO declaration were released earlier than other offenders sentenced for sexual violence or non-sexual violence offences with an SVO declaration, being released at, or very close to, their parole eligibility date (median).

6. Over three-quarters of offenders (80.8%) who were sentenced for a Schedule 1 offence and did not receive an SVO declaration had their parole application granted.

7. Less than 10 per cent of parole applications were refused for offenders serving a sentence of imprisonment for a Schedule 1 offence without an SVO declaration being made (9.0%).

8. Parole eligibility dates clearly cluster around one-third and half of the sentence length across all Schedule 1 offences when no SVO declaration is made.

9.1 Introduction

Chapter 9 examines parole applications, outcomes and total time served in custody both for offenders with an SVO declaration and offenders convicted of a non-SVO Schedule 1 offence sentenced to between 5 and 10 years. Differences in counting rules mean that some of the findings presented cannot be directly compared.

The data analysis presented in this section is based on data obtained from QCS for the period between July 1997 and June 2020. The analysis presented in section 9.2 below is based on the offence classification used by QCS and therefore differs to the offences included in Chapter 6 to Chapter 8. Further information on the methodology and counting rules can be found in Appendix 12.

Discussed in section 2.4 in Part A of this report, under the SVO scheme, a prisoner is eligible to be released on parole after serving 80 per cent of their sentence (or 15 years, whichever is less).

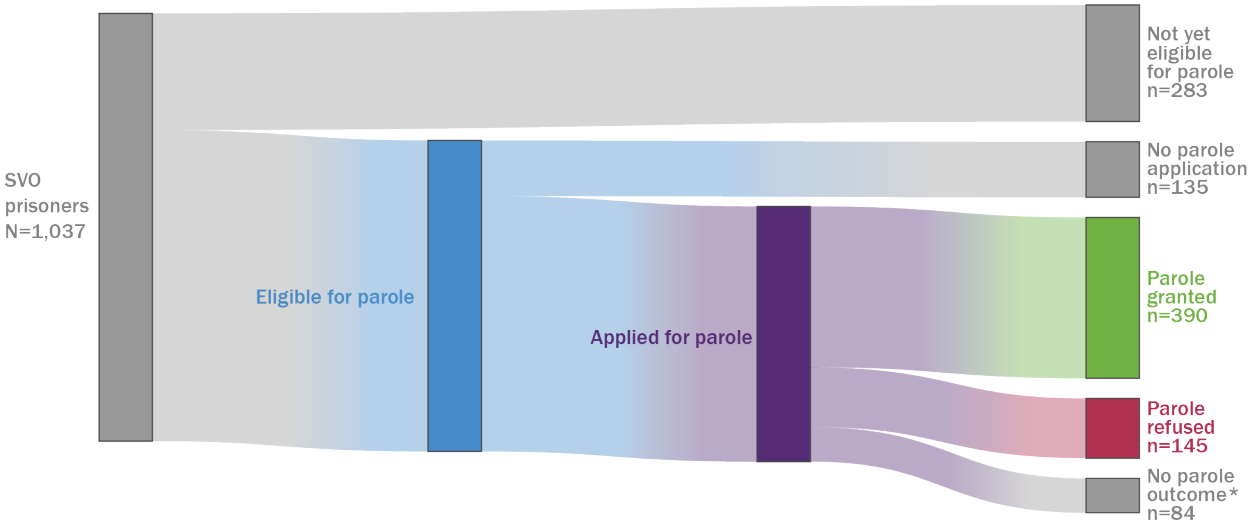
When the SVO scheme does not apply, a parole eligibility date will often be set at the one-third mark of the head sentence for an offender who pleads guilty and has other mitigating features (such as a lack of criminal history or genuine remorse).[22] If a court makes no express order, the eligibility date is generally the day after reaching 50 per cent of the period of imprisonment.[23] This is commonly applied to offenders who have been convicted after a trial.

9.2 Analysis of parole outcomes for SVO cases

9.2.1 Parole application outcomes for SVO cases

Information about the 1,037 prisoners who were sentenced for a declared SVO between July 1997 and June 2020 were analysed to determine how many were released on parole over this period. This analysis below includes both standard parole applications under s 180 of the CSA as well as exceptional circumstances parole under s 176 of the CSA. Exceptional circumstances parole can be applied for at any time during a prisoner's sentence, subject to some exceptions.

Figure 31: Parole application outcomes for prisoners sentenced for an offence declared to be an SVO



Source: QCS unpublished data.
Data includes prisoners sentenced between July 1997 and June 2020, see Appendix 12 for further details.
Note: * 'No parole outcome' refers to cases in which no final outcome was recorded in the QCS system. There are many reasons for this, including situations in which the parole application was incomplete and additional information was not provided by the prisoner, the prisoner decided to withdraw the application, the application may have been cancelled, the parole application may still be in progress pending review, or other similar reasons.

22 Where the non-parole period is not mandatory, it is common for an offender who enters an early guilty plea — accompanied by genuine remorse — to have a parole eligibility date or release date set, or suspension of their sentence after serving one third of their head sentence in custody. See *R v Crouch* [2016] QCA 81, 9 [29] (McMurdo P, Gotterson JA and Burns J agreeing), *R v Tran; Ex parte A-G* (Qld) [2018] QCA 22, 6–7 [42]–[44] (Boddice J, Philippides and McMurdo JA agreeing), *R v Rooney* [2016] QCA 48, 6 [16]–[17] (Fraser JA, Gotterson JA and McMeekin J agreeing) and *R v McDougall* [2007] 2 Qd R 87, 97 [20] (Jerrard, Keane and Holmes JJA).

23 *Corrective Services Act 2006* (Qld) s 184(2).

Over one-quarter of prisoners had not yet reached their parole eligibility date as of 30 June 2020 (n=283, 27.3%). The remaining 72.5 per cent of prisoners had been eligible for parole. Of these, 135 prisoners did not make an application for parole (17.9%).

There were 619 prisoners who applied for parole. The majority of these were granted parole and were subsequently released into supervision in the community (n=390, 63.0%). Almost a quarter of prisoners who applied for parole had their application refused (n=145, 23.4%). The remaining applications (n=84, 13.6%) did not have a parole outcome recorded. This may be because the parole application was still pending review, the application may have been withdrawn, cancelled, deferred, or otherwise not received a final outcome. Figure 31 provides an overview of parole outcomes of prisoners convicted of an SVO.

There were differences in the proportion of parole applications that were granted based on the type of offence committed – see Figure 32.[24]

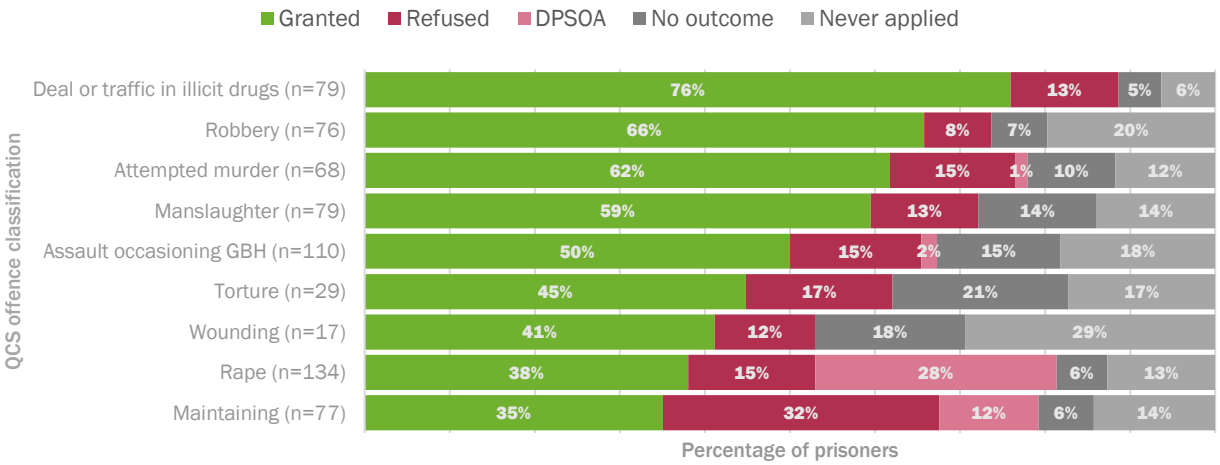
Offenders convicted of sexual violence offences were the least likely to be granted parole. A proportion of those offenders were subject to *Dangerous Prisoners (Sexual Offenders) Act 2003* (Qld) ('DPSOA') orders. A DPSOA is not a parole order, but a post-sentence order that can be made by the Supreme Court towards the end of a prisoner's sentence and requires additional set periods of incarceration and/or community supervision to be served after the person has completed their sentence. The proportion of DPSOA orders was much higher for rape (28.4%), compared to maintaining a sexual relationship with a child (11.7%). Both offences had similar rates of successful parole applications, with around one-third of prisoners granted parole (38.1% for rape, 35.1% for maintaining).

Offenders convicted of trafficking in dangerous drugs were most likely to be granted parole. Over three-quarters of prisoners sentenced for drug trafficking were granted parole (75.9%), with only 12.7 per cent of prisoners having their parole application refused.

Parole outcomes for non-sexual violence offences ranged considerably, with between 41 and 66 per cent of prisoners granted parole. Offenders convicted of robbery and homicide offences were the most likely to be granted parole (65.8% for robbery, 61.8% for attempted murder, 59.5% for manslaughter). Prisoners convicted of torture and wounding were the least likely to be granted parole (44.8% for torture, 41.2% for wounding). The category of 'assaults occasioning grievous bodily harm' contains a combination of the offences of grievous bodily harm and malicious acts. Parole applications for prisoners convicted of offences in this offence category fell in the middle of the range at 50.0 per cent.

Figure 32 shows a small number of DPSOA orders were made for attempted murder and assault occasioning grievous bodily harm. While these offences alone are not eligible for a DPSOA order, the prisoners would have been sentenced for an associated sexual violence offence not displayed.

Figure 32: Parole application outcomes for prisoners sentenced for an offence declared to be an SVO, by offence



Source: QCS unpublished data.
Data includes prisoners sentenced between July 1997 and June 2020, see Appendix 12 for further details.
Note: For more details on the QCS offence classification, including how it corresponds to legislative offences, see Appendix 5, Table A4.
'No outcome' refers to cases in which no final outcome was recorded in the QCS system. There are many reasons for this, including: situations in which the parole application was incomplete and additional information was not provided by the prisoner; the prisoner decided to withdraw the application; the application may have been cancelled; the parole application may still be in progress pending review; or other similar reasons.

24 Each prisoner could have zero, one, or multiple parole applications. For the purposes of this analysis, a prisoner's earliest parole application that resulted in actual release on parole was selected.

9.2.2 Time served in custody beyond parole eligibility date for SVO cases

The time prisoners served in custody varied considerably based on the specific offence the prisoner was convicted of, with those imprisoned for drug trafficking serving the shortest median time and those convicted of sexual violence offences serving the longest median time post their parole eligibility date. Figure 33 shows the time served in custody before release on parole, as well as the average number of days served beyond the parole eligibility date.

There are a range of reasons why someone may remain in prison beyond their parole eligibility date. These reasons are not explored here, but may include:

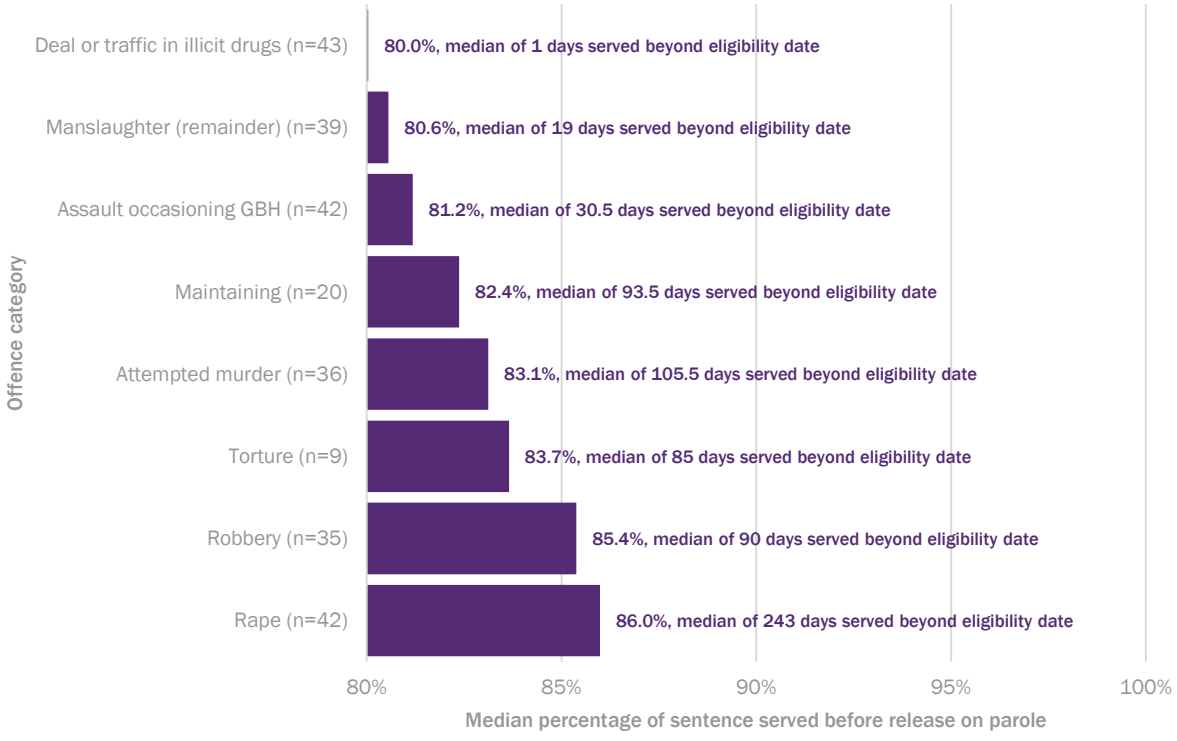
- the Parole Board Queensland has considered that there is an unacceptable risk to the community if the prisoner is released to parole;
- the prisoner did not make an application for parole at the earlier possible date;
- parole was granted under certain conditions that have not been met;
- the Parole Board Queensland is waiting for further information to be provided before making a decision; or
- other reasons.

Drug traffickers were the offender cohort most likely to be released as soon as they became eligible for parole.

Comparatively, prisoners sentenced for rape served the longest period of time in custody beyond their parole eligibility date. Prisoners sentenced for rape served a median of 8.1 months in custody beyond their parole eligibility date.

Robbery was the second longest, with prisoners serving a median of 3 months beyond their parole eligibility date.

Figure 33: Median percentage of sentence served in custody before release on parole, and median number of days served beyond parole eligibility date for cases declared to be an SVO



Source: QCS unpublished data.
Data includes prisoners sentenced between July 1997 and June 2020, see Appendix 12 for further details.
For more details on the QCS offence classification, including how it corresponds to legislative offences, see Appendix 5, Table A4.

9.3 Analysis of parole outcomes for non-SVO Schedule 1 cases

9.3.1 Parole eligibility and outcomes for Schedule 1 cases sentenced to 5 years or more but less than 10 years not declared to be an SVO

The analysis presented in this section includes cases of selected Schedule 1 offences[25] sentenced to imprisonment of 5 years or more but less than 10 years that did not receive a discretionary SVO declaration.

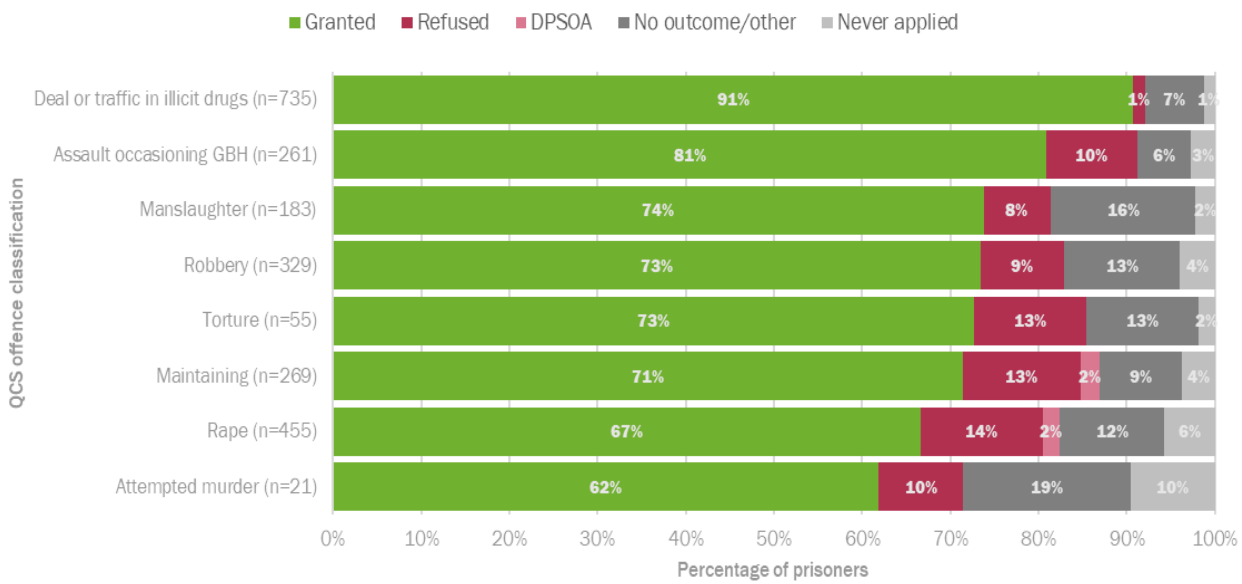
In total, parole application data for 2,576 prisoners was included in the analysis. Approximately one in 10 prisoners had not yet reached their parole eligibility date as of 30 June 2020 (n=268, 10.4%) and a further 3 per cent (n=74) had not made a parole application despite being eligible to do so.

This means that 2,234 prisoners applied for parole within the data period. Over three-quarters of these prisoners were granted parole and were released under supervision in the community (n=1,804, 80.8%). Just under 10 per cent had their parole application refused (n=202, 9.0%). The remaining parole applications had various outcomes, including the application pending or being withdrawn, the death of the prisoner or release from QCS custody into the custody of the Commonwealth Department of Immigration.

Figure 34 shows differences in outcomes of parole applications based on the type of offence committed. Drug trafficking was the most likely offence to be granted parole. Nine in 10 prisoners were granted parole (90.8%) and only 1 per cent of prisoners had their application refused. Prisoners sentenced for rape were the most likely to have a parole application refused (14% of applications were refused), closely followed by maintaining a sexual relationship with a child (13.4%). In these offence categories, a small proportion of offenders were subject to a DPSOA order (2%).

Approved parole applications for non-sexual violence offences ranged from 62 per cent (attempted murder) to 81 per cent (assault occasioning grievous bodily harm), while the proportion of refused applications for non-sexual violence offences was approximately 10 per cent.

Figure 34: Parole application outcomes for prisoners sentenced to 5 years or more but less than 10 years imprisonment and not declared to be an SVO, by Schedule 1 offence



Source: QCS unpublished data.
Data includes prisoners sentenced between July 1997 and March 2021, see Appendix 12 for further details.
Note: For more details on the QCS offence classification, including how it corresponds to legislative offences, see Appendix 5, Table A4.
'No outcome/other' refers to cases in which either no final outcome was recorded in the QCS system or there was an alternate outcome. This may include: where the parole application was incomplete and additional information was not provided by the prisoner; the prisoner decided to withdraw the application; the application was cancelled; the parole application is still in progress pending review; or other reasons. Alternate outcomes include the death of the offender and the offender being released into the custody of the Commonwealth Department of Immigration.

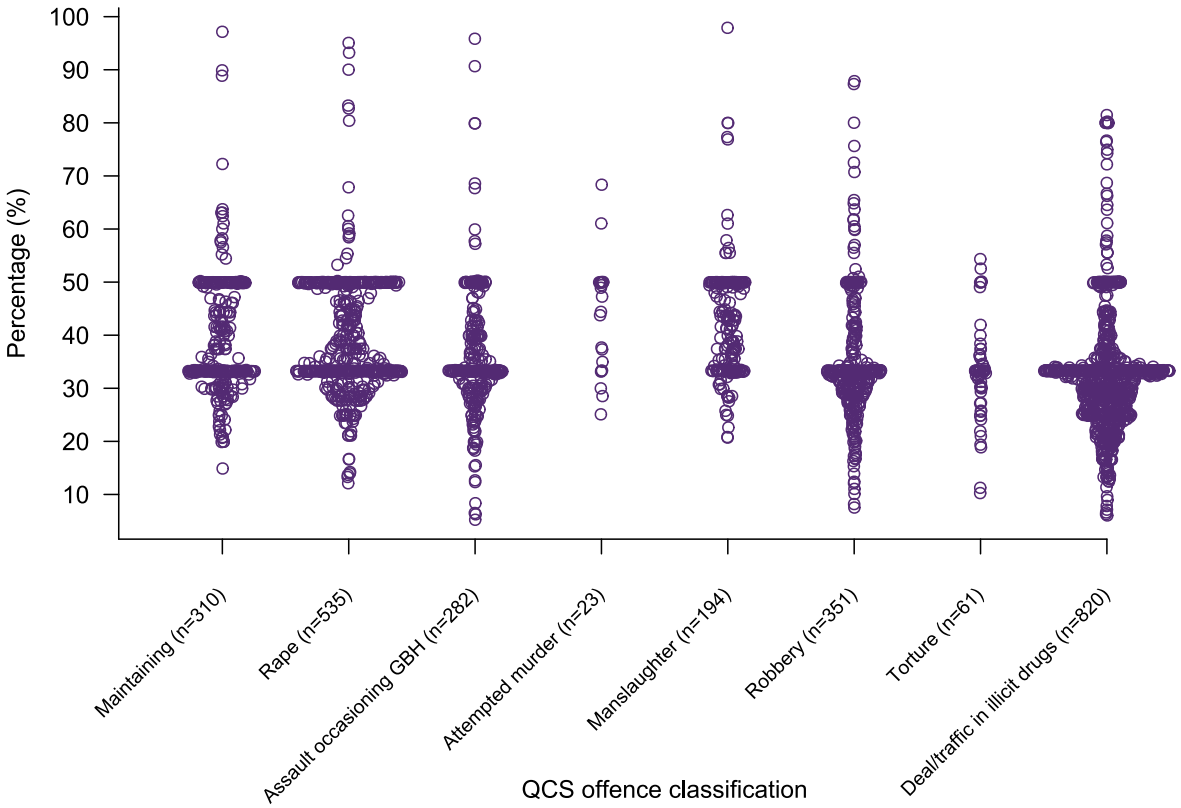
25 Offences most relevant to the SVO scheme (determined by number of cases declared to be an SVO in the offence category) were included in the analysis.

As noted earlier, courts have discretion to set the parole eligibility date for offences sentenced to 5 years or more but less than 10 years imprisonment that are not declared to be an SVO. If no parole eligibility date is fixed by the court, the offender must serve half of their sentence before being eligible for release on parole. This means the proportion of the sentence served in custody before an offender is eligible to be released on parole varies.

Analysis of the parole eligibility date as a proportion of the head sentence showed that while there was a wide spread of proportions of the head sentence, there was a clear propensity for parole eligibility dates to fall around one-third and half of the sentence length — Figure 35. There was only a comparatively small number of cases with a parole eligibility higher than 50 per cent, with the vast majority of parole eligibility dates falling below the 50 per cent mark. This was consistent across all offence categories examined.

Parole eligibility was most commonly set at 50 per cent for attempted murder, manslaughter and rape, likely impacted by the fact that rates of guilty pleas were comparatively low for these offences (see Figure 35). For all other offences, parole eligibility was most commonly at one-third.

Figure 35: Parole eligibility date as a proportion of the head sentence for Schedule 1 offences sentenced to 5 years or more but less than 10 years imprisonment and not declared to be an SVO, by offence

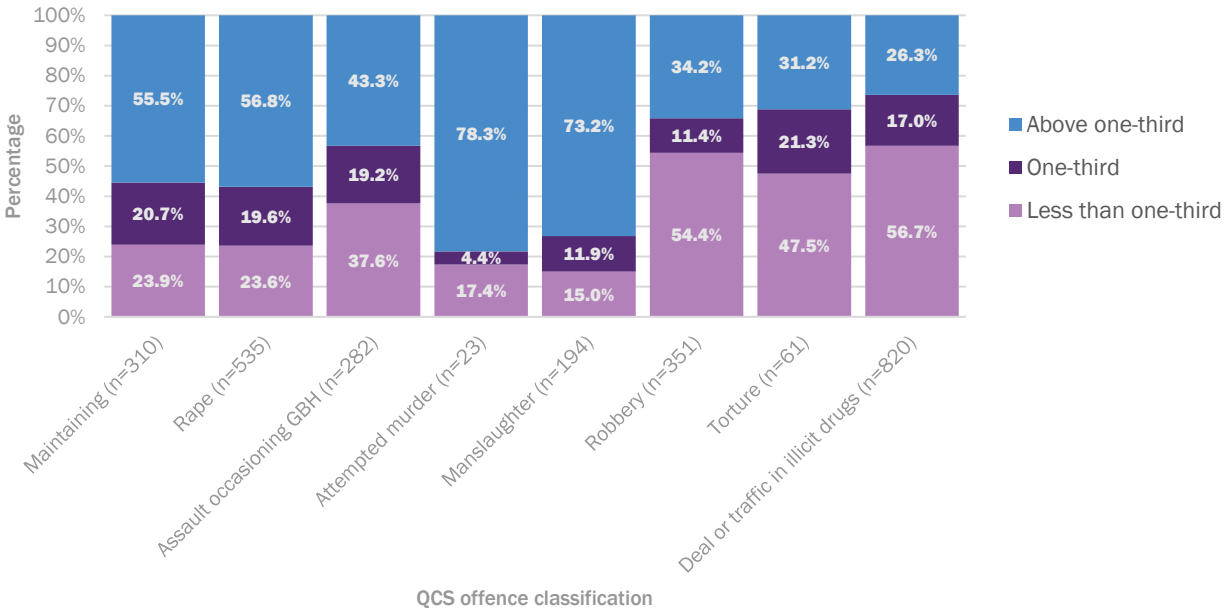


Source: QCS unpublished data.
Data includes prisoners sentenced between July 1997 and March 2021, see Appendix 12 for further details.
Note: For more details on the QCS offence classification, including how it corresponds to legislative offences, see Appendix 5, Table A4.

The offences of drug trafficking and robbery showed considerable clusters of parole eligibility dates below one-third, as shown in Figure 35. For both offences, more than half of the sentenced offences had a parole eligibility date below one-third of the sentence length (drug trafficking 56.7%; robbery 54.4% — see Figure 36). Approximately one-quarter of drug trafficking offences had a parole eligibility date set above one-third (26.3%).

Less than one-quarter of sexual offences had a parole eligibility date below one-third (rape 23.6%; maintaining 23.9%). Manslaughter had the lowest proportion of offences with parole eligibility dates below one-third at 15 per cent and one of the highest proportions above one-third (73.2%). Assault occasioning grievous bodily harm had roughly equal proportions receiving parole eligibility dates above one-third (43.3%) and below one-third (37.6%),

Figure 36: Parole eligibility dates in relation to one-third as a proportion of the head sentence for Schedule 1 offences sentenced to 5 years or more but less than 10 years imprisonment and not declared to be an SVO, by offence



Source: QCS unpublished data.
Data includes prisoners sentenced between July 1997 and March 2021, see Appendix 12 for further details.
Note: For more details on the QCS offence classification, including how it corresponds to legislative offences, see Appendix 5, Table A4.

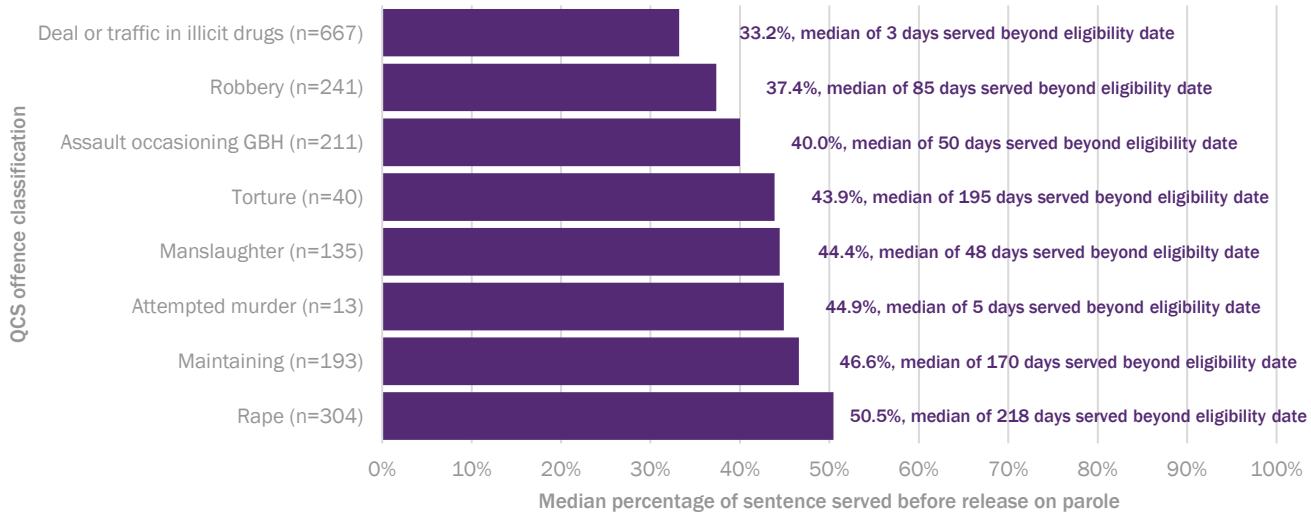
The length of time prisoners convicted of Schedule 1 offences without an SVO declaration served in custody before release on parole varied considerably by offence, with sexual offences (rape and maintaining) the most likely to serve time in custody beyond the parole eligibility date. Figure 37 shows the median percentage of sentence length served in custody before release on parole, as well as the median number of days served beyond the parole eligibility date by offence type.

Offenders imprisoned for drug trafficking offences served the shortest median time before being released on parole (33.2% of the head sentence) and were the most likely to be released as soon as they became eligible for parole, with a median release of 3 days beyond their parole eligibility date.

In comparison, prisoners sentenced for rape served the longest median time before being released (median of 50.5% of the head sentence). These prisoners served the longest period in custody beyond their parole eligibility date with a median of 7 months (218 days). This was followed by prisoners sentenced for maintaining a sexual relationship with a child, who served a median of 5.6 months (170 days) in custody beyond their parole eligibility date.

While the median percentage of time served in custody before being released on parole was largely consistent across non-sexual violence offences, there was large variability in the number of days served beyond parole eligibility across these offences. Prisoners sentenced for torture had a median release on parole of 43.9 per cent of the head sentence but served a median of 195 days (6.5 months) beyond their eligibility date. Comparatively, prisoners sentenced for attempted murder had a similar median release on parole (44.9% of head sentence) but only served a median of 5 days beyond their eligibility date.

Figure 37: Median percentage of sentence served in custody before release on parole, and average number of days served beyond parole eligibility date for Schedule 1 offences sentenced to 5 years or more but less than 10 years imprisonment and not declared to be an SVO, by offence



Source: QCS unpublished data.
Data includes prisoners sentenced between July 1997 and March 2021, see Appendix 12 for further details.
Note: For more details on the QCS offence classification, including how it corresponds to legislative offences, see Appendix 5, Table A4.

This section presented the Council's key data findings regarding the application of the SVO scheme. Part C explores key issues identified by the Council with the operation of the scheme and provides summaries of stakeholder feedback.

PART C

Impact and efficacy of the SVO scheme

Chapter 10

Impact of the scheme on court sentencing practices

Chapter 11

Ability of the current scheme to meet its intended objectives

Chapter 12

Potential of the SVO scheme to create inconsistency or constrain the sentencing process

Chapter 13

Victim satisfaction with the sentencing process

Chapter 14

Other impacts of the SVO scheme

Chapter 10

Impact of the scheme on court sentencing practices

Key Findings

1. There is evidence that the SVO scheme is having a 'distorting effect'[1] on head sentences by reducing the sentence that might otherwise have been imposed. This is because it is a common practice for courts to sentence offenders towards the lower end of the established sentencing range for an offence where a declaration is made.[2]

2. While courts often adjust the head sentence down to take the making of a declaration into account, courts are not obliged to do so.[3]

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

4. It is unclear if, and by how much, head sentences might increase if the SVO scheme did not exist at all and courts instead had full discretion to set parole eligibility. It is not usual for courts to specify the reduction given in this way.[4]

5. Where the automatic making of a declaration is narrowly avoided, courts appear less likely to set parole eligibility at one-third of the head sentence, as is the common practice in Queensland, to take an offender's guilty plea into account.

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1 See *R v Sprott; Ex parte A-G (Qld)* [2019] QCA 116, [41] (Sofronoff P) ('*Sprott*').
2 This approach was explained in *R v McDougall and Collas* [2007] 2 Qd R 87, 96–7 at [19] ('*McDougall and Collas*').
3 *R v Carrall* [2018] QCA 355 ('*Carrall*') citing *R v Cowie* [2005] 2 Qd R 533, 538 [19] (Keane JA and McMurdo J).
4 There are, however, some examples of this. See, for example, *R v O'Sullivan and Lee; Ex parte A-G* [2019] (2019) 3 QR 196 ('*O'Sullivan*'). The Court noted: 'It is usually wrong to attempt to try to put forward a mathematical formula to explain the degree to which factors in mitigation of sentence have affected a penalty that would otherwise have been imposed in their absence'. However, this was viewed as being 'necessary to explain as fully as possible the effect of … legislative changes' discussed in that judgment 'upon the range of sentences that have been wrongly accepted as a basis for sentencing'. It found that, taking into account the factors in mitigation, particularly his early guilty plea, the sentence should be one of 12 years for manslaughter reduced from a 15-year sentence that would have otherwise been appropriate: at 247 [163].

10.1 Introduction

This chapter considers the impacts of the SVO scheme on head sentences for Schedule 1 offences and how the scheme has impacted on the setting of parole eligibility dates post-commencement of the scheme in 1997.

Based on the Council's analysis and feedback received, the Council has found evidence that the scheme is having the reported 'distorting effect' on head sentences observed by the Queensland Court of Appeal in *R v Sprott; Ex parte Attorney-General (Qld)*.[5] However, it cannot be established that this is happening in all cases, nor can any impact of the scheme in reducing head sentences in Queensland be quantified.

The scheme also appears to impact decisions made by sentencing courts about the appropriate parole eligibility date in circumstances where a declaration is not made. In particular, it appears to make the setting of parole eligibility at an earlier point than the statutory half, less likely in cases where an offender has narrowly avoided the automatic application of the scheme. This practice is consistent with statements made by the Court of Appeal cautioning against providing offenders with a 'double benefit' by both reducing the head sentence below the 10-year threshold and setting an earlier parole eligibility date based on an offender's guilty plea in the absence of there being 'some circumstances to warrant such an approach'.[6]

10.2 Parole pre- and post-introduction of the SVO scheme in 1997

Sentencing and the parole system prior to 1997 when the scheme was introduced were very different to the legislative frameworks that exist now.

The major change brought about through the introduction of this scheme was the courts' approach to the setting of parole eligibility dates for those declared convicted of a serious violent offence.

Following the scheme's introduction, instead of usually being eligible for parole after serving 50 per cent of the sentence (or other relevant, usually shorter, period specified by the court), offenders declared convicted of a serious violent offence were now subject to a fixed 80 per cent parole eligibility date.[7] This remains the case today. Offenders subject to a declaration were further not eligible for remissions — which also existed at this time.[8] The system of remission was exercised separately from the prior exercise of judicial power. It shortened a head sentence and involved no supervision whatsoever.[9]

In *R v Collins*,[10] a Court of Appeal decision handed down shortly after the commencement of the new SVO scheme, Ambrose J noted that the effect of the insertion of Part 9A into the Act was that it:

> gives a sentencing judge a discretion to make a declaration which will have the effect of –
>
> (a) depriving the offender of an eligibility for remission of sentence which he would otherwise have pursuant to the *Corrective Services Regulations* etc.; and also
>
> (b) postponing eligibility for parole until 80 per cent of the imposed sentence has been served.
>
> With respect to (a), this is a power never before bestowed upon a sentencing judge, whereas with respect to (b), this is a power of the sort which has been exercised at least since 1983 when *R. v. Lennard*[11] was decided.[12]

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5 *Sprott* (n 1) [41] (Sofronoff P).

6 *R v King* [2020] QCA 9, 9 citing *R v Tran; Ex parte A-G (Qld)* [2018] QCA 22 ('*Tran*'). These cases both involved charges of drug trafficking.

7 The impact of the introduction of the scheme was explained by the then Attorney-General, Denver Beanland, in the second reading speech: Queensland, *Parliamentary Debates*, Legislative Assembly, 19 March 1997, 595 (Denver Beanland, Attorney-General and Minister for Justice). The original s 161D of the *Penalties and Sentences Act 1992* (Qld) ('PSA') stated: 'the sentence of an offender convicted of a serious violent offence cannot be remitted under the Corrective Services Act 1988'.

8 The original s 161D of the PSA (n 7) stated: 'the sentence of an offender convicted of a serious violent offence cannot be remitted under the *Corrective Services Act 1988*'.

9 Remissions were: 'An administrative arrangement whereby the Prisons Department could release a prisoner on the grounds of good behaviour. Previously, a remission system had operated on a rewards basis for good behaviour in custody by the Queensland Prison Service': Walter Sofronoff, *Queensland Parole System Review* (Final Report, 2016) 43 [170] ('*Queensland Parole System Review Report: Final Report*'). This 'created two streams of release from custody, via parole at one half or remission at two-thirds', with the consequence that 'many offenders stopped applying for parole': ibid 43 [173].

10 [2000] 1 Qd R 45 ('*Collins*').

11 'In *R v Lennard* [1984] 1 Qd R 1 the Court of Criminal Appeal held that in making a recommendation for eligibility for release on parole, a sentencing judge had a discretion to recommend that the offender be released at a time earlier than or later than halfway through the custodial term imposed': ibid at 61 [72] (Ambrose J).

12 Ibid 62 [76]–[77] (Ambrose J) (emphasis in original).

Following the introduction of the SVO scheme into Part 9A of the *Penalties and Sentences Act 1992* ('PSA'), the *Corrective Services Act 2000* 'created new parole legislation':[13]

> Remissions were abolished to create an incentive for prisoners to work towards parole. The two tier system was abolished, being considered as involving wasteful duplication of work. Instead, the regional boards decided parole applications for prisoners serving less than 8 years and the Queensland Board considered all other applications.[14]

Subsequently, the current 2006 Act was passed. It was:

> Intended to represent a new phase in corrections in Queensland, the introduction of 'truth in sentencing'. The objective of the Bill was to ensure that every prisoner sentenced would serve 100 per cent of a sentence, either in custody or under supervision in the community.[15]

It also 'abolished a range of pre-release options that had previously been available, including conditional release (which was essentially remission), home detention and leave of absence schemes'.[16]

The new parole system established following the commencement of this new Act is largely the same as the current parole system in Queensland.

10.3 Impact of the SVO scheme on head sentences

10.3.1 Introduction

The SVO scheme was intended to have the effect of ensuring an offender was no longer entitled to remission of their sentence and would be required to serve 80 per cent of their sentence prior to being eligible for parole. However, it was not anticipated at the time of its introduction that the scheme would have any effect on head sentences.

When the Penalties and Sentences (Serious Violence Offences) Amendment Bill was introduced in 1997, the then Attorney-General said:

> The public need not fear that the 80% rule and the intention of Parliament will be circumvented by the lowering of sentences or tariffs. The public can have every faith in Queensland's criminal courts.[17]

As justification, the then Attorney-General raised the following issues:

- A 1986 Court of Appeal comment paraphrased as 'to be able to depart from a range of sentences which was then applicable it would need to see some legislative indication that the community regard certain offences more seriously now than before and evidence that current sentences are not achieving a sufficient deterrent effect'.[18] 'This Bill will right that wrong'.[19]
- Queensland Corrective Services Commission advice that 'the number of prisoners serving 10 years to less than life for offences which come within the Schedule and housed as at 30 June 1996 had increased to 338 from 237 on 30 June 1994; an increase of about 42%. Clearly then current sentences for serious violent offences have not had and are not having a sufficient deterrent effect'.[20]
- A 1994 Court of Appeal case which pointed out that courts should not be constrained to any sentence range established by prior court decisions when parliament increases maximum penalties.[21]

Despite these early public pronouncements, the Council noted in its Issues Paper that the SVO scheme might be exerting downward pressure on head sentences. We suggested the scheme might be having this effect as:

- a just sentence outcome may warrant sentencing an offender to less than 10 years where there are mitigating factors that cannot otherwise be taken into account in setting an earlier parole eligibility date; and

13 *Queensland Parole System Review Report: Final Report* (n 9) 4 [24].
14 Ibid.
15 Ibid 55 [249].
16 Ibid 55 [251].
17 Queensland, *Parliamentary Debates*, Legislative Assembly, 19 March 1997, 597 (Denver Beanland, Attorney-General and Minister for Justice).
18 Ibid citing *The Queen v F* (Queensland Court of Appeal No. 1 of 1986, 26 May 1986).
19 Ibid.
20 Ibid.
21 Ibid.

- a just sentence outcome may warrant sentencing an offender towards the 'lower end of the applicable range' and/or reduce the head sentence where an SVO declaration is made (for both mandatory and discretionary declarations).[22]

Unlike the usual sentencing discretion that applies when imposing a sentence, when a person is sentenced to 10 years or more and subject to a mandatory SVO declaration, the sentencing court cannot adjust the parole eligibility date to recognise mitigating factors such as a guilty plea or cooperation with law enforcement. Pre-sentence custody that cannot be declared as time served under the sentence may also need to be taken into account. In this sense, the SVO scheme constrains judges' ability to take all circumstances of the case into account and balance them appropriately, leaving the length of the head sentence as the only adjustable component of the sentence.

Concerns over downward pressure of scheme on head sentences identified in previous review

The potential for the SVO scheme to reduce what would otherwise be an appropriate head sentence was first raised by the Council in its report on sentencing for child homicide. In that report, the Council expressed concern that the SVO scheme may be exerting downward pressure on head sentences for child manslaughter and that this problem would not be avoided through the introduction of a new aggravating factor based on a child's defencelessness and vulnerability – as the Council had recommended.[23] The Council concluded that while the reforms may lead to higher sentences being imposed than was currently the case and more offenders being subject to an automatic SVO declaration:

> even with the introduction of this new aggravating factor, the SVO scheme may result in head sentences being set at a lower level than they otherwise might should courts have full sentencing discretion in relation to setting the parole eligibility date because of the need to take mitigating factors (such as a guilty plea) into account in a meaningful way.[24]

The current review of the SVO scheme is in part a response to the Council's stated concerns.[25]

In a later review completed in 2019 the Council reiterated its concerns that the SVO scheme may be operating counter-productively. By removing the court's discretion, the ways to express the effect of mitigating factors are severely limited:

> A review of cases where an offender has been declared to be convicted of an SVO indicates that head sentences are being reduced to take into account a plea of guilty and other matters in mitigation …
>
> Reducing a head sentence to take into account mitigating factors that cannot otherwise be taken into account in the setting of a parole eligibility date due to the mandatory nature of these provisions can result in a head sentence being imposed that does not reflect the true criminality of the offending.[26]

10.3.2 Court of Appeal guidance and its application by sentencing courts

As discussed in Chapter 3, the Court of Appeal has made clear that, as part of an integrated approach to sentencing, courts may consider that in fashioning a sentence that is 'just in all the circumstances' to fulfil the purpose of sentencing under s 9(1) of the PSA, courts may consider the consequences of making a declaration when setting the head sentence.[27] Part of this consideration is how to take an offender's guilty plea and mitigating personal factors into account, as courts are required to do by law, when the making of a declaration means the offender's parole eligibility date is fixed at 80 per cent of the head sentence.[28]

Based on its review of select sentencing remarks over a two-year period (1 January 2019 to 28 February 2021), the Council found sentencing courts often made reference to sentencing offenders towards the 'lower end' of the sentencing range in circumstances where a declaration was made, whether on an automatic or discretionary basis.[29]

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22 Queensland Sentencing Advisory Council, *The '80 Per Cent Rule': The Serious Violent Offences Scheme in the Penalties and Sentences Act 1992* (Qld) (Issues Paper, November 2021) 7–44 ('*SVO Scheme Issues Paper*').

23 Queensland Sentencing Advisory Council, *Sentencing for Criminal Offences Arising from the Death of a Child* (Final Report, 2018) Advice 3.

24 Ibid.

25 Ibid.

26 Queensland Sentencing Advisory Council, *Community-Based Sentencing Orders, Imprisonment and Parole Options* (Final Report, July 2019) 90 ('*Community-Based Sentencing Orders, Imprisonment and Parole Options*'). See also ibid xxxix, 158 [9.4.4].

27 *R v Cowie* [2005] 2 Qd R 533, 538 ('*Cowie*').

28 For a detailed discussion of key Court of Appeal judgments on this issue, see Queensland Sentencing Advisory Council, *Analysis of Key Queensland Court of Appeal Decisions and Select Sentencing Remarks* (Background Paper 3, 2021) sections 2.2 and 2.3 ('Background Paper 3').

29 Ibid sections 9.2.1 and 9.3.3.

However, while this is a common practice, there is no requirement for a sentencing judge to be 'constrained to sentence at the lower end of an appropriate range' as the Court of Appeal has said this 'would be contrary to the apparent purpose of pt 9A, which was to affect a prisoner's eligibility for parole rather than to result in some general lessening of sentences'.[30] Whether this approach is applied therefore must be determined with reference to the individual facts and circumstances of the case.

Sentencing at, or near the 10-year mark, at which point the making of a declaration becomes mandatory, presents special challenges. In these circumstances, based on the Council's analysis of sentencing remarks, courts often have difficulty in arriving at a just and appropriate sentence. A number of case examples were discussed by the Council in Background Paper 3 based on its review of key Court of Appeal decisions and select sentencing remarks.[31]

The common approach of adjusting the head sentence, taking into account the fixed non-parole period that applies, is not unique to Queensland. Other Courts of Appeal in Australia have observed that where mandatory minimum non-parole period schemes operate, the usual sentencing principles continue to apply, such as a discount for a plea of guilty. This means that:

> there will be a compression of sentences towards the lower end of the range, with offences at the bottom of the range of culpability treated effectively in the same way as those which are towards the lower end, but not at the extreme lower end, of culpability.[32]

Setting a lower head sentence due to the operation of the scheme is distinct from attempts to deliberately structure sentences to avoid the automatic operation of the SVO scheme, as was proposed on appeal in *R v Carrall*.[33] The Court of Appeal made clear in *Carrall* that 'an invitation to the court to structure a sentence to evade the consequence for parole that is mandated by statute' is something the Court will not do.[34]

The fixed and mandatory nature of the scheme has attracted judicial comment on the basis of its 'distorting effect' on sentencing. In the 2019 decision of *Sprott*,[35] the Court of Appeal dismissed an appeal against a 9.5-year sentence for two counts of attempted murder (with parole eligibility at 4.5 years) on the basis that the case involved 'singular circumstances'[36] which required the sentencing judge to 'give substantial weight to the factors in mitigation'.[37] In his remarks, the President observed that in this case the SVO scheme impaired the court's ability to sentence appropriately:

> But for the distorting effect of the *Penalties and Sentences (Serious Violent Offences) Amendment Act 1997* (Qld), which introduced the regime under which prisoners sentenced to 10 years or more must serve at least 80 per cent of the sentence before becoming eligible for parole, this was a case which might have been dealt with by the imposition of a sentence of 10 to 12 years accompanied by a parole eligibility date after about four years. But that option was unavailable.[38]

This issue is explored further in Chapter 12.

As discussed in Chapter 2, once a sentence falls below 10 years, courts have discretion as to whether an SVO declaration is made. The focus then turns, as discussed by the Court of Appeal in *R v Free; Ex parte Attorney-General (Qld)* ('*Free*'), to 'whether there are circumstances which aggravate the offence in a way which suggests that the protection of the public, or adequate punishment, requires the offender to serve 80 per cent of the head sentence before being able to apply for parole'.[39]

10.3.3 The SVO scheme and sentences for child manslaughter post the Council's 2018 review

There have only been a limited number of sentences imposed for the manslaughter of a child since the reforms recommended by the Council to establish a new statutory circumstance of aggravation for sentencing purposes

30 *Cowie* (n 27) 538.
31 Background Paper 3 (n 28).
32 *Mammoliti v The Queen* (2020) 281 A Crim R 511, 517 [23] (McLeish and Emerton JA) citing *DPP (Cth) v Haidari* (2013) A Crim R 134, 144 [42] and *Atherden v Western Australia* [2010] WASCA 33, [42]–[43] (Wheeler JA, McLure P agreeing at [1] and Owen JA agreeing at [3]).
33 *Carrall* (n 3).
34 Ibid [23] (Sofronoff P), citing *R v Crossley* (1999) 106 A Crim R 80, 87 [30] (McPherson JA) ('*Crossley*'). For a discussion of this case see *Background Paper 3* (n 28) section 4.1.3.
35 *Sprott* (n 1).
36 Ibid [35] (Sofronoff P).
37 Ibid [40] (Sofronoff P).
38 Ibid [41] (Sofronoff P).
39 *R v Free; Ex parte A-G (Qld)* (2020) 4 QR 80, 99 [53] ('*Free*').

came into effect.[40] The impact of the reforms are therefore too early to determine and it is difficult to know to what extent the SVO scheme might be having an impact.

Of the sentences for child manslaughter identified,[41] a number involved offenders sentenced for manslaughter on the basis of criminal negligence. The only SVO declarations made were with respect to sentences of 10 years or more where the manslaughter offence involved the use of physical violence.[42]

In the month immediately prior to the commencement of the new aggravating factor, a sentence of 12.5 years was imposed on an offender convicted of the manslaughter and torture of his 21-month old son.[43] There were multiple acts of violence perpetrated over a lengthy period. Due to the length of the sentence, it attracted an automatic SVO declaration. An appeal against sentence was dismissed.[44]

In December 2019, the Queensland Court of Appeal delivered the judgment of *R v O'Sullivan and Lee; Ex parte Attorney-General* (*'O'Sullivan'*),[45] which is now a leading judgment on appropriate sentencing practices for child manslaughter where this involves the use of violence against a young child. In allowing the appeal by the Attorney-General against a sentence of 9 years imposed on one of the respondents, O'Sullivan, for the manslaughter of his 22-month old step-son, the Court found that the sentencing range set by earlier sentences for child manslaughter involving a young child where there had been use of violence had been 'wrongly accepted as a basis for sentencing'.[46] This is because this approach failed to take into account subsequent legislative changes intended to result in sentences that were more severe than those previously imposed. The Court found:

> This sequence of legislative changes since 1997 puts it beyond question that the legislature has made a judgment about the community's attitude towards violent offences committed against children in domestic settings. The amendments constitute legislative instructions to judges to give greater weight than previously given to the aggravating effect upon a sentence that an offence was one that involved infliction of violence on a child and that the offender committed the offence within the home environment.[47]

O'Sullivan was resentenced to 12 years' imprisonment for the 'deliberate infliction of fatal violence' on the child leading to his death (attracting an automatic SVO declaration). The offence was sentenced as a domestic violence offence.[48] But for O'Sullivan's plea of guilty, taking into account a separate offence of cruelty to a child under 16 years (for failure to seek medical treatment for the injured child), the sentence would have been 15 years' imprisonment.

Had the SVO scheme not been in operation and required a fixed 80 per cent of the sentence to be served, the Court's reasoning suggests that a higher sentence would have been imposed with mitigating factors instead reflected by the Court by setting an earlier parole eligibility date. The Court commented that the sentence of 12 years: 'takes into account the fact that it is not possible to reflect these mitigating factors in the most desirable way, by setting an earlier parole eligibility date'. [49]

The appeal against the 9-year sentence imposed on Lee, the child's mother, convicted of manslaughter on the basis of criminal negligence as well as child cruelty, was dismissed. Parole eligibility in her case was set at 3 years (one-third of the sentence). Lee was the subject of domestic violence perpetrated by O'Sullivan who was described as 'a violent and controlling man' and assessed as having a post-traumatic stress disorder and unspecified mood disorder in the period leading up to her son's death.[50] The Court concluded that her 'personal circumstances, as O'Sullivan's victim in an oppressive relationship and as the victim of her own upbringing operated heavily in mitigation of her moral culpability' for her son's death.[51] In these circumstances, the Court found 'a severe head sentence was warranted in this case but an early parole date [set at the one-third point of the sentence for manslaughter] was apt to give effect to her personal circumstances as well as to her early plea and her true remorse'.[52]

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40 The amendments to s 9 of the PSA (n 7) — inserting this new aggravating factor came into effect on 7 May 2019.

41 SC 1904/2021 — sentence delivered on 11 November 2021; *R v Daley* [2021] QSCSR 445; *R v Lewis* [2021] QSCSR 78; *R v Stokes and Moore* [2021] QSCSR 49; SC 830/2019 — sentence delivered on 21 August 2019; SC 63/2017 - sentence delivered 9 May 2019.

42 *R v Stokes and Moore* [2021] QSCSR 49 (an 11-year sentence imposed on the offender Stokes, who was also sentenced for causing grievous bodily harm to his 3-year-old daughter); and SC 63/2017 — sentence delivered 9 May 2019 (involving an offender, reputed to be the 12-week-old child's father, who was sentenced to 10 years' imprisonment).

43 SC 260/2019 — sentence delivered 11 April 2019.

44 Note, the appeal dismissal is reported in Queensland Sentencing Information Service database, however the judgment is not linked.

45 (2019) 3 QR 196 ('*O'Sullivan*').

46 Ibid [163].

47 Ibid [65].

48 The significance of this is that a court must treat the fact that an offence is a domestic violence offence as an aggravating factor for the purposes of sentencing, unless the court considers it is not reasonable because of the exceptional circumstances of the case: PSA (n 7) s 9(10A).

49 *O'Sullivan* (n 45) 247 [162].

50 Based on a pre-sentence expert report prepared by a psychiatrist: ibid 248 [169] and 249 [175].

51 Ibid 249–50 [177].

52 Ibid.

10.3.4 Stakeholder views

Some submissions referred to the SVO scheme as having had a discernible impact on the length of head sentences in Queensland — particularly for cases around the 10-year threshold.[53] Legal Aid Queensland ('LAQ') provided the following case examples of how this applied in practice:

> In *R v Tran; Ex parte Attorney-General (Qld)*,[54] the Court of Appeal recognised the original sentence of 9 and ½ years, (instead of 10 years), to take into account the offender's plea of guilty, as a significant benefit as it avoided the imposition of an SVO declaration.[55] Although the Attorney's appeal was ultimately successful on another point, the approach taken in relation to the head sentence was upheld as sound by the appellate court.
>
> This case was referred to in a similar case of *Delander*.[56] In upholding the original sentence, the Court of Appeal noted the sentencing judge correctly 'recognised that the head sentence would be above the 10 year mark but for the mitigating circumstances. He considered the mitigating circumstances including the applicant's cooperation warranted the head sentence being reduced below 10 years.'[57]
>
> The recent case of *Levi*[58] involved a conviction following a plea of guilty for the rape of the offender's neighbour. In determining a sentence of 8 years, the sentencing judge noted "I would consider that the appropriate penalty before taking into account the mitigating features, in particular, your plea of guilty would be one of 10 years imprisonment. Such a penalty would probably reflect the serious nature of your offending…Such a penalty would require you to serve eight years in custody before becoming eligible for parole. The most significant mitigating factor present is your early pleas of guilty. And I accept that in the circumstances of this case, where the complainant is a particularly vulnerable woman, that your pleas of guilty are of significance."[59]

LAQ further noted:

> By reducing a sentence just enough to remove it from the mandatory SVO scheme, and thereby granting a significant benefit, the court has another means by which to give recognition to a number of mitigating factors, including the guilty plea, as required by the PSA.[60]

10.3.5 Views from expert interviews

Legal stakeholders who participated in subject-matter expert interviews shared their views that at the 9- to 10-year mark (being the cusp of when the automatic SVO declaration must be made), 'head sentences are being reduced to reflect the plea rather than the plea being reflected in the bottom [being the parole eligibility date]'.[61] In some instances, this could result in a reduction both in the head sentence to recognise mitigating circumstances, and a reduction in parole eligibility to take into account a defendant's guilty plea — providing a 'double benefit'.[62]

Overall, the impact of the mandatory nature of the scheme at 10 years was described as giving 'rise to complete artifice' regarding how courts were forced to approach the sentencing of 'people who are facing a sentence around the 10- to 11-year mark'[63] while still taking into account mitigating factors. The comment was made that there are people who could be sentenced to 10 years, but that this would not result in a just sentence if this meant they then had to serve 8 years before being eligible for parole.[64]

One legal stakeholder described sentences at the cusp of 10 years as being unnecessarily 'difficult sentences' because of the mandatory and fixed nature of the non-parole period under the scheme.[65]

> If you sentence someone to nine years on a plea of guilty then you will probably be giving them a parole eligibility date of three years. If you sentence someone to 10, then they are going to serve at least five years more [8 years]. It's a substantial issue between a nine-year head sentence and a 10-year head sentence and there doesn't seem to be any rational reason for that. They're liable to serve five more years.[66]

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53 For example, Submission 13 (Legal Aid Queensland), Submission 16 (Confidential).
54 *Tran* (n 6).
55 Ibid [40].
56 [2019] QCA 69.
57 Ibid [56].
58 [2020] QDCSR 1503.
59 Submission 13 (Legal Aid Queensland) 13–14.
60 Ibid 14.
61 Subject-matter expert interview I8.
62 Subject-matter expert interview I11.
63 Ibid.
64 Subject-matter expert interview I33.
65 Ibid.
66 Subject-matter expert interview I42.

Another said the scheme could lead to 'artificially low sentences' and skew what is the appropriate penalty 'because people can lower something where it might actually be 10 or 12 years but give nine and a-half and in fact it really is 10 or 12 but because of the SVO scheme a lower sentence is given'.[67]

Legal practitioners interviewed also commented on the practice of sentencing offenders toward the lower end of the range in recognition of the automatic nature of the scheme at 10 years:

> I think that … there's recognition that … if you automatically should attract an SVO because of the sentence, that you should perhaps sentence at the bottom of the range and that's why, I guess. But whether the bottom of the range is actually 10 or it's 12, it's getting a little bit difficult to discern because … I think there's a fair bit of variability in all the people that are getting 10. That some of them should have gotten, perhaps, 12 or 15 might be warranted.[68]

One commented that, in their view sentences were:

> compressed around the 10-year mark [under and over] whereas in the past, people would get much higher head sentences and it was much easier to properly differentiate between people in terms of their culpability and their prospects for rehabilitation.[69]

This interviewee reflected that the range for attempted murder used to go as high as 18 years and you would see those convicted of armed robbery getting sentences of 20 years — whereas someone who might have received an 18-year sentence might get substantially lower due to the operation of the scheme.[70]

Legal stakeholders generally expressed their views that the SVO scheme tended to cause a reduction in sentence lengths, likely to result in the mandatory application of the scheme being avoided.

The impact of the scheme in reducing what would otherwise have been an appropriate head sentence raised concerns that it may impact negatively on community satisfaction and public confidence as it might lead to a view that sentences imposed for these serious offences are unreasonably short.

10.3.6 The extent of the impact of the scheme on court sentencing practices

The Council's analysis of Court of Appeal decisions, select sentencing remarks and views expressed by legal stakeholders in expert interviews, provides evidence that the SVO scheme is having an impact on court sentencing practices and is reducing head sentences — primarily due to its fixed and mandatory nature.

What is unclear from the evidence gathered, however, is the extent to which the scheme, overall, is impacting on the length of head sentences in circumstances where a declaration can or must be made. Quantifying the extent to which the scheme is resulting in lower head sentences, and by how much courts are reducing what might otherwise have been an appropriate sentence, is very challenging.

Data analysis presented in Part B shows the distribution of sentences for the 7 most common Schedule 1 offences sentenced between 2011–12 and 2019–20. This analysis is descriptive only and can therefore not provide clear answers regarding the extent of the impact of the scheme on court sentencing practices. Analysis of sentencing outcomes for the offence of drug trafficking showed an increased number of cases sentenced at the 9-year mark, relative to sentences of 8 and 10 years, which may indicate that sentences are gravitating to the 9-year-mark — see Figure 27. The same pattern was not found for other common offences included in the scheme (see Part B).

Criminal justice data collected prior to 1997 is incomplete and recorded under different counting rules and methodologies to those that apply to data collected in more recent years. Due to these differences, it was not possible for the Council to undertake a direct comparison of sentencing outcomes pre- and post-introduction of the scheme. In addition, other factors not related to the SVO scheme might have impacted on sentencing outcomes, making it impossible to accurately assess the impact of the scheme.

The only feasible way for the Council to further examine the extent of the impact of the SVO scheme on head sentences was to analyse sentencing outcomes pre-introduction of the scheme in 1997 with those outcomes directly following the scheme's introduction for similar offences of a similar level of seriousness based on a review of published Court of Appeal decisions. The purpose of this review was to establish if the sentencing ranges had changed post the introduction of the scheme.

The Council reviewed 77 Court of Appeal decisions over the period 1992 to 1997 relating to the offences of attempted murder (n=21), manslaughter (n=31), maintaining a sexual relationship with a child (n=8) and trafficking in a dangerous drug (n=17) to identify patterns in sentencing practices. The findings of this analysis are presented in full in Appendix 13 of this report.

67 Subject-matter expert interview I68.
68 Subject-matter expert interview I15.
69 Subject-matter expert interview I69
70 Ibid.

The Council recognises the inherent limitations of this approach, including that only a small number of matters were appealed, which may mean the cases reviewed may not be representative of broader sentencing practices. A review of first-instance sentencing remarks was not possible due to these remarks not being readily available. Some Court of Appeal cases related to appeals against conviction only, and therefore did not comment on the appropriateness of the sentence imposed. Further, it is well-recognised that sentences are 'historical statements of what has happened in the past'[71] and 'history does not establish that the range is the correct range, or that the upper or lower limits to the range are the correct upper and lower limits'.[72] Changes in sentencing practices therefore cannot be attributed solely to the introduction of the SVO scheme.

For example, in *O'Sullivan* the Court of Appeal noted that there have been significant legislative changes that have occurred in sentencing that impact on the sentencing of child manslaughter involving the use of violence. Many of the legislative reforms noted by the Court in this decision apply generally to the sentencing of offences involving the use of physical violence against a victim or resulting in physical harm.[73]

The Council's review of pre-1997 Court of Appeal decisions for the select offences reviewed suggests some potential to achieve higher head sentences should the court have discretion to set an earlier parole eligibility. However, apart from cases of attempted murder, sentences for other offences did not fall outside the range of current sentences typically imposed for these types of offences.

10.4 Parole eligibility for non-declared offences and sentencing towards the higher end of the range

The SVO scheme not only potentially impacts on head sentences in circumstances where a declaration is made, but also may lead to parole eligibility being delayed or an offender being sentenced at the higher end of the sentence range in circumstances where the making of a declaration is narrowly avoided. Based on its analysis of select sentencing remarks, the Council found a tendency of courts to delay parole eligibility beyond the 'usual' one-third mark in these instances, and/or to sentence the offender towards the higher end of the sentencing range.[74]

In *R v Bojovic*, discussed in Chapter 3, the Court of Appeal recognised that the imposition of a sentence 'towards the higher end of the sentencing range' in circumstances where a court gives an offender the benefit of not making a declaration, is an approach that may be required to achieve a just sentence and 'to maintain reasonable consistency between sentences'.[75]

The Council's analysis of case law (see Background Paper 2) found that there were a number of cases sentenced on the cusp of 10 years in circumstances where a declaration had not been made, where the court declined to set a parole eligibility date (meaning the offender would be eligible for parole after serving 50 per cent of the sentence due to the operation of s 184(2) of the *Corrective Services Act 2006* (Qld)). This included cases where the offender had pleaded guilty and there were other mitigating factors present that in other circumstances might have meant the court might have considered setting parole eligibility closer to one-third.[76] For cases not involving sentences so close to the cusp of 10 years, there appeared be a greater willingness to set parole eligibility at or just below the statutory halfway mark, and in a number of cases, at one-third, however this very much depended on the individual circumstances involved.[77]

To some extent, the delaying of parole eligibility may be a product of courts being conscious not to provide an offender with a 'double benefit' of both avoiding the automatic application of the scheme taking mitigating factors into account and applying those same factors as a reason to set an earlier parole eligibility date. This is also discussed further in section 3.3.6 of this report.

In *Free,*[78] the Court of Appeal concluded that 'the penalty of eight years' imprisonment already factored into account, to a substantial degree, the respondent's plea of guilty and cooperation; requiring consideration of whether further

71 *Hili v The Queen* (2010) 242 CLR 520, 537 [54] quoting *DPP (Cth) v De La Rosa* (2010) 79 NSWLR 1, 71 [304].
72 Ibid 537 [54]. See also *DPP (Vic) v OJA* (2007) 172 A Crim R 181, 196 [31].
73 For example, amendments to s 9 of the PSA (n 7) inserting subsections (3) and (4) which require a court when sentencing an offender for an offence that involved the use, or attempted use of violence or resulted in physical harm to another person, to have primary regard to specific factors, including to protect any members of the community from the risk of physical harm if a custodial sentence were not imposed. These are discussed more fully in Part A of this report.
74 *Background Paper* 3 (n 28) section 9.3.2.
75 *R v Bojovic* [2000] 2 Qd R 183, 191–2 [34] (de Jersey CJ, Thomas JA, and Demack J) ('*Bojovic*').
76 *Background Paper* 3 (n 28).
77 See case outcomes reported in ibid section 5.2 ('Reasons why an SVO declaration was not made').
78 *Free* (n 39). The facts of this case and principles as they apply to the operation of the SVO scheme are discussed in Chapter 3 of this report.

leniency, in terms of an earlier parole eligibility date, was warranted'.[79] It found the sentencing judge had made an error because they had:

> moved directly from the conclusion about the serious violent offender declaration, to a conclusion that parole eligibility after the "conventional" one-third was appropriate without considering the overall effect of that conclusion, and whether there were factors (including punishment, denunciation, deterrence and community protection) favouring a later release date.[80]

In allowing the appeal, the Court left the original sentences imposed at first instance unchanged, but declined to fix a parole eligibility date (meaning the offender would be eligible for parole after serving half of the sentence). It did so on the basis that 'a further reduction in the time to be served before becoming eligible for parole' in the circumstances of the case was 'not justified, given the very serious nature of the offending, and the need to send a strong message of denunciation of, and deterrence against, offending of this kind'.[81]

The Council undertook further analysis of where parole eligibility was set for cases that did not attract an SVO declaration. The data analysis showed that as sentences approach the 10-year mark, the average proportion of the sentence required to be served before an offender is eligible for parole increases — with offenders who plead guilty much less likely to have their parole eligibility date set at one-third — see Appendix 14.

10.4.1 Stakeholder views

In its submission, LAQ cited numerous case examples, including Attorney-General appeals and first-instance sentencing decisions, where a court had declined to set parole eligibility earlier than the statutory 50 per cent mark. The examples provided included cases where the sentence had fallen just below 10 years thereby just avoiding the automatic application of the scheme, and where the sentence was set in the range of 5 years but less than 10 years and while the court had discretion, the making of a declaration was in serious contemplation due to the serious nature of the conduct involved. [82] Among the appeal cases referred to was *Free* (discussed earlier in section 10.4).

LAQ also supported the Council's findings about the impact on head sentences where a declaration was not made, noting that there is 'sometimes a tendency for sentencing judges to recognise the availability of an SVO declaration and impose a higher than usual head sentence where the discretion is exercised not to make the SVO declaration'.[83] It submitted:

> There are numerous instances where, in declining to make an SVO declaration, the court determines to order a substantial head sentence instead as a means to sufficiently address the aggravating features of an offence. The end result is that although the parole eligibility date is not delayed by the imposition of the declaration, the head sentence is in fact at the higher end of the range of expected sentences for the offence type.[84]

It referred to the statements made by the Court of Appeal in *Free* in rejecting the need, in this case, to make a declaration on the basis that the objective of punishment 'can be achieved by the imposition of a substantial head sentence' with the Court further noting that the protection of the community (being the scheme's other purpose) 'is relevant both to the fixing of the head sentence and the period before the offender becomes eligible for parole'.[85]

As a further example, LAQ also referred to the case of *SDM*[86] and noted that the removal of the declaration in this case had resulted in the Court of Appeal increasing the head sentence from 7 to 7.5 years with no parole eligibility date set.[87] As a result, 'substantial head sentences' are still imposed. It commented: 'If served in full, will recognise the seriousness of the offending conduct, but also allows for the possibility of early release and a lengthy period of supervision'.[88]

LAQ also provided case examples where the circumstances were found by the sentencing court to justify special leniency being extended including:

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79 Ibid 99–100 [56].
80 Ibid 99 [55].
81 Ibid 108 [93].
82 Submission 13 (Legal Aid Queensland) 15–17.
83 Ibid 14.
84 Ibid.
85 *Free* (n 39) 107 [90]. A similar statement was made by the Court at 106 [84].
86 *R v SDM* [2021] QCA 135 (Fraser and Mullins JJA and Henry J) ('*SDM*').
87 Submission 13 (Legal Aid Queensland) 14. The submission also referred to the case of *R v Badaa and Kruezi* [2020] QSCSR 441 in which the sentencing judge declined to make an SVO declaration but expressly stated the sentences ordered were in the case of Mr Badaa 'a significant head sentence for this criminal conduct', and in the case of Mr Kruezi 'a head sentence towards the upper end of the range'. In this case, sentences of 8.5 years and 8 years respectively were imposed for a malicious act with intent charge with very dangerous conduct in the context of a violent home invasion, however the court took the above steps noting the offenders' relative youth, relatively limited criminal history, and overall circumstances into account when setting the head sentence.
88 Ibid 15.

- *Ware,*[89] in which on a sentence of manslaughter of an infant, the Court declined to make an SVO due to the desirability of the offender being subject to a longer period of supervision upon release. Parole eligibility was set at 40 per cent of the total sentence.
- *BZG*,[90] involving an offender who had a terminal illness which led the sentencing judge to reduce the head sentence from 11 to 9 years for 3 counts of rape, and declined to declare the conviction to be a conviction of a serious violent offence. The Court set parole eligibility close to 50 per cent. The Court noted that although the offender was unlikely to survive until his eligibility date, the wider circumstances of the case did not call for the level of leniency sought by the defence, particularly as the matter was a sentence after trial.
- *Foley*,[91] in which the Court imposed a sentence of 7 years for dangerous operation of a vehicle causing grievous bodily harm whilst adversely affected, and declined to declare the conviction a conviction for a serious violent offence, with parole eligibility set after one third. The case involved a drug affected driver hitting a group of cyclists. The need for parole eligibility to be deferred was thought to not be necessary given the Court did not consider that either public protection or adequate punishment required this considering the offender's actions were reckless rather than intentional.[92]

LAQ concluded from these cases that: 'the current regime has seen the development of guidance through caselaw that continues to allow for elements of sentencing discretion that can be exercised in such a way as to ensure a sentence that is just in all the circumstances'.[93]

89 [2021] QSCSR 418.
90 [2021] QDCSR 647.
91 [2021] QSCSR 328.
92 Ibid 4.
93 Submission 13 (Legal Aid Queensland) 18.

Chapter 11

Ability of the current scheme to meet its intended objectives

Key Findings

1. The current SVO scheme is meeting its objectives of punishment, denunciation and community safety only in part and to a limited extent.

2. The making of a declaration does increase the minimum time an offender must spend in custody, thereby promoting the purposes of punishment and denunciation. It also may achieve short-term community protection by keeping the person in custody (referred to as 'incapacitation').

3. However, the fixed 80 per cent non-parole period means long-term community protection is more difficult to achieve because it:

    - may act as a disincentive to offenders to apply for parole and to participate in rehabilitative programs while in custody — thereby increasing the risk offenders convicted of serious non-sexual violence offences or sexual violence offences will be released at the end of their sentence under no form of parole supervision and without having engaged in appropriate programs;
    - assumes all offenders in custody have access to targeted programs and other forms of support to address their offending behaviour, which may not be the case;
    - shortens the period an offender on parole is subject to supervised release in the community — contrary to evidence that suggests offenders serving longer periods of imprisonment require longer periods under supervision, not less to reduce their risks of reoffending;
    - can result in courts imposing shorter head sentences than might otherwise be imposed — thereby reducing the period the person is under sentence.

4. The ability of the scheme to achieve punishment and denunciation as well as other sentencing purposes such as general deterrence, is also reduced as a result of reductions in head sentences to take the making of a declaration into account.

11.1 Background

As discussed in Chapter 2, although the purposes of the scheme are not legislatively articulated, based on statements made by the then government at the time of its introduction, these appear to be primarily concerned with punishment, denunciation and community protection.

In his second reading speech, the then Attorney-General and Minister for Justice pointed to the SVO scheme as providing 'a separate regime for the punishment of criminals convicted of serious violent offences'[94] resulting from an election promise to introduce legislation 'that reflects our concern for community safety as well as community outrage with this form of crime'.[95] He indicated the new Part introducing the scheme would 'expressly reflect the Government's concern with community safety in relation to serious violent offences, as well as community denunciation of this type of crime'.[96]

As also discussed in section 3.3, in 2020, the Court of Appeal in *Free*[97] endorsed comments in McMurdo P's judgment in *Collins* that:

> The intention to protect the community from future violent offending seems to have been the paramount consideration of the legislature in enacting the 1997 Act.[98]

and

> The clear intention of the legislature in enacting the 1997 Act was that judges should exercise the s. 161B(3) discretion in appropriate circumstances. Section 3 demonstrates that protection of the community was an important consideration for the legislature, as was punishment and rehabilitation. Sections 9(3), 9(4)(a) and 9(4)(b) reinforce the view that the legislature was primarily concerned to protect the community from offenders who pose an on-going risk to the community. The Attorney-General's second reading speech of the 1997 Act is also consistent with this approach.[99]

The Court in *Free*, referencing this earlier decision, wrote:

> As identified in *R v Collins* [2000] 1 Qd R 45, 49 [20], 52 [29], having regard to extrinsic materials, it appears the paramount consideration of the legislature in enacting the legislation by which ss 161A and 161B were included in the *Penalties and Sentences Act 1992* was protection of the community from offenders who pose an ongoing risk to the community.
>
> Where a case calls for consideration of whether to exercise the discretion to make a serious violent offence declaration, as part of the integrated process, what the sentencing court is required to do is consider all relevant circumstances, including in a case such as this the matters in ss 9(1), 9(2) and, primarily, s 9(6) *Penalties and Sentences Act 1992*, to determine whether there are circumstances which aggravate the offence in a way which suggests that **the protection of the public, or adequate punishment**, requires the offender to serve 80 per cent of the head sentence before being able to apply for parole.[100]

Free was a case involving sexual conduct as opposed to violence in the context of marked physical injury. Section 9(6), read with s 9(4) ('sentencing an offender for any offence of a sexual nature committed in relation to a child under 16 years or a child exploitation material offence') is the analogue provision to ss 9(2A) and (3) (regarding an offence that 'involved the use of, or counselling or procuring the use of, or attempting or conspiring to use, violence against another person; or that resulted in physical harm to another person'). Section 9(6)(d) is: 'the need to protect the child, or other children, from the risk of the offender reoffending'. This text is comparable to s 9(3)(a) in that it requires assessment of future risk, but it lacks the phrase 'if a custodial sentence were not imposed' which formed part of McPherson J's reasoning in *Collins*.

11.2 Features of the scheme that either promote or limit its ability to achieve community protection, adequate punishment and denunciation

As discussed in Chapter 3 of this report, the purposes of sentencing set out in section 9(1) of the PSA are various. A court is permitted, when sentencing, to have regard to these purposes, and to place appropriate weight on these purposes depending on the type of offence involved.

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94 Queensland, *Parliamentary Debates*, Legislative Assembly, 19 March 1997, 595 (Denver Beanland, Attorney-General and Minister for Justice).
95 Ibid.
96 Ibid.
97 *Free* (n 39).
98 *Collins* (n 10).
99 Ibid.
100 *Free* (n 39) 99 [52]–[53] (emphasis added).

Specific sentencing purposes are prioritised under the Act for certain types of offences. For example, under section 9(3) of the PSA, sentencing for an offence that involved the use, or attempted use, of violence against another person, or that resulted in physical harm, must have primary regard to factors including the risk of physical harm to any members of the community if a custodial sentence were not imposed, as well as the need to protect any member of the community from that risk.

The SVO scheme adds an additional layer to these general sentencing purposes and prioritises some purposes (punishment, denunciation and community protection) over others. It also assumes they are best achieved by applying a non-parole period that bears a particular relationship to the head sentence — being 80 per cent. The SVO scheme, when applied, does result in offenders being detained in custody longer (by requiring them to serve 80 per cent of their term of imprisonment in custody before being eligible for parole) and, on this basis, could contribute to achieving the sentencing purposes of punishment and denunciation. However, there is no evidence that the scheme supports rehabilitation, and in practice, it results in offenders subject to it spending far less time than they otherwise might in the community under supervision — if released at all.

Although not a stated objective of the scheme, there is no evidence that threat of a longer prison term acts as either a specific or general deterrent,[101] with the same principles applying to minimum non-parole periods.[102]

The permitted practice of adjusting the head sentence down to take into account the making (or potential making) of an SVO declaration also means that the true nature and seriousness of offenders' conduct may not be recognised by head sentences imposed for SVO-declared offences. While a court will always take the non-parole period into account as part of the integrated process of sentencing because the level under the SVO scheme is set so high — at 80 per cent of the head sentence — a greater reduction is arguably needed when a declaration is made because there is no possibility of the offender being granted parole during this period. This then compromises the ability of the scheme to achieve its intended objectives of punishment and denunciation as these purposes cannot be recognised to the full extent they otherwise might have been through the setting of a lengthy head sentence, in conjunction with an earlier parole eligibility date. It also means offenders are under sentence for a shorter period of time, which means any potential period of supervision is reduced.

11.2.1 Council's data findings

The Council's analysis shows that while up to 20 per cent of an offender's sentence for an SVO-declared offence can be spent on parole, a number of those subject to an SVO declaration (between 12 to 29% for non-sexual violent offences, and up to 14% for sexual violent offences) over a 23-year data period chose not to apply for parole at all. This means these offenders were released into the community on reaching the end of their sentence under no form of parole supervision. In contrast, a much smaller proportion of non-SVO declared offenders over the same data period were recorded as not having applied for parole (between 2 to 10% for non-sexual violent offences, and between 4 to 6% for sexual offences).

Of those SVO-declared offenders who did apply for parole, the median time served ranged as high as 86.0 per cent for rape — leaving very little of the sentence to be served prior to the sentence end date.

11.2.2 Stakeholder views

Most stakeholders submitted that the objectives of the scheme were not clear, and were not being met.

The Australian Lawyers Alliance ('ALA') pointed to mandatory sentencing schemes as being 'based on flawed assumptions about the nature of human decision-making: that a more severe sanction will deter more effectively and that imprisoning offenders will necessarily lead to a lower crime rate'.[103]

LAQ identified that while punishment and community safety were intended as objectives of the scheme, 'the application of the scheme to offences not strictly within this intended ambit is confusing, problematic and worthy of

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101 Andrew Day, Katherine McLachlan and Stuart Ross, *The Effectiveness of Minimum Non-Parole Period Schemes for Serious Violent, Sexual and Drug Offenders and Evidence-Based Approaches to Community Protection, Deterrence and Rehabilitation* (Summary Report, University of Melbourne, August 2021) ('*University of Melbourne Literature Review*') 14 citing Patricia Menendez and Donald James Weatherburn, 'Does the Threat of Longer Prison Terms Reduce the Incidence of Assault' (2016) 49(3) *Australian and New Zealand Journal of Criminology* 389.

102 Ibid 12. The authors note: 'Despite their apparent influence in justifying sentencing decisions, legal scholars have critiqued attempts to invoke general and personal deterrence as lacking empirical support' citing Mirko Bagaric and Theo Alexander, 'The Capacity of Criminal Sanctions to Shape the Behaviour of Offenders: Specific Deterrence Doesn't Work, Rehabilitation Might and the Implications for Sentencing' (2012) 35(3) *Criminal Law Journal* 159 and Kate Warner, Julia Davis and Helen Cockburn, 'The Purposes of Punishment: How Do Judges Apply a Legislative Statement of Sentencing Purposes' (2017) 41(2) *Criminal Law Journal* 69. See also Doriz MacKenzie and Pamela Lattimore, 'To Rehabilitate or Not to Rehabilitate: That is the Question for Corrections' (2018) 17(2) *Criminology and Public Policy* 355.

103 Submission 2 (Australian Lawyers Alliance) 10–11.

reform'. LAQ referred to the reduced capacity for supervision in the community under the scheme, the inclusion of 'offences which are not objectively nor inherently serious and/or violent' and the 'mandatory elements of the provisions and limitations on judicial discretion' as providing 'distorted outcomes … which can undermine public confidence and truth in sentencing'.[104] It submitted:

> As noted in the Queensland Parole System Review Report, deterrence and community protection could better be served by parole order supervision as an offender adjusts after a significant period in custody. The SVO scheme reduces significantly this long-term supervision option.[105]

It suggested: 'Any effective strategy will need to utilise a combination of discretionary sentencing, informed parole decision-making, effective parole supervision as well as rehabilitative and post-release support measures'.[106]

The 'rigidity' of the current scheme gave rise to concerns that it 'drastically reduces the period of time offenders who commit the most heinous offences are to be supervised in the community' and also limited 'the ability of the Courts and the parole authorities to exercise their discretion to target interventions which take into account the severity of the offence, and the risk posed by the offender'.[107] LAQ also commented that it did 'not consider there to be substantive evidence to support an 80% threshold will contribute to improved community safety' and, to the contrary, '[i]t seems likely that longer periods of supervision in the community would be more effective'.[108] In doing so, it pointed to evidence that offenders released onto parole took longer to commit a new offence, were less likely to commit a new indictable offence, and committed fewer offences than those who were released without any supervision.

The incentive provided by an earlier parole eligibility date to cooperate and participate in programs was also viewed as a benefit over the SVO scheme and as promoting longer-term rehabilitation in the interests of community safety.

Comments made by other legal stakeholders consulted included concern about the potential impact of imposing a sentence towards the lower end of the sentencing range as impacting the scheme's ability to meet its objective of reflecting the seriousness of these offences. But for the existence of the scheme, it was suggested, longer head sentences and more effective pre-release periods could be attained.

Those representing the views of victims also generally felt the scheme was failing to meet its intended purposes, for reasons including: declarations were not being made for cases falling under 10 years and the impact of the scheme in reducing head sentences. The Queensland Homicide Victims' Support Group (QHVSG) commented that while the scheme:

> seems well intended … its application seems to have been at best inconsistent and at worst, avoided … From the firsthand experiences of QHVSG members, the scheme is not doing what is it was supposed to and is in fact reducing the average sentence for homicide in QLD. It not meeting the expectations of homicide victims.[109]

Victim and survivor legal support organisation, knowmore similarly submitted the mandatory nature of the scheme and attendant reductions in head sentences could result in a sentence that 'may not reflect the "true facts and serious nature" of cases'.[110]

Full Stop Australia submitted that the scheme was meeting the objective of denunciation but was unsure if it was meeting the objective of community safety. It acknowledged that since the introduction of the scheme 'not only have community attitudes changed, but so has our understanding of the impacts of sexual, domestic and family violence'.[111]

Fighters Against Child Abuse Australia ('FACAA') was more positive about the capacity of the scheme to meet the objective of community protection through its perceived deterrent effect, and commented positively on the scheme's ability to ensure sentences were more appropriate and met the expectations of victims:

> FACAA believe the current SVO scheme is helping to protect the public. With longer sentences being handed out and longer non parole periods being handed down there must be a deterrence effect in place. Plus, we have heard directly from victim-survivors that they are feeling much more positive towards the legal system as a result of those who have committed crimes against them being given much more appropriate sentences.[112]

104 Submission 13 (Legal Aid Queensland) 4.
105 Ibid 4 citing *Queensland Parole System Review Report: Final Report* (n 9).
106 Ibid 7.
107 Ibid 8.
108 Ibid.
109 Submission 19 (Queensland Homicide Victims' Support Group) 3.
110 Submission 10 (knowmore) 7–8.
111 Submission 7 (Full Stop Australia) 6–7.
112 Submission 4 (Fighters Against Child Abuse Australia) 12–13.

11.2.3 Views from expert interviews

The capacity of the scheme to achieve its objective of community protection was widely criticised by participants in the expert interviews. A strong theme across most stakeholder groups was concern that offenders subject to an SVO then had limited time under supervision and were lacking in support following their release on parole.

> It is really, to me, it's really troubling because almost by definition someone about whom you're making a declaration is someone who, once they're released from prison, is going to be most in need of supervision and the window for supervision becomes so narrow as to be of minimal utility. And so if you sentence someone to 12 years and they're on supervision for 18 months, or whatever the maths are, that's not long enough in the community to demonstrate rehabilitation. It's not long enough for the individual to adjust … it's just not going to protect the community because you only protect the community long-term if the individual concerned can function in the community as a law-abiding citizen.[113]

A related concern among some interviewees was that prisoners convicted of an SVO may choose to serve their whole sentence in order to be released to freedom with no supervision. This was particularly a concern when, after serving 80 per cent and undergoing the parole process, it may not leave much extra time to be served. There is also the possibility that offenders may have their parole application refused and subsequently be released with little or no parole supervision.

A contrary position was taken by some victim support and advocacy services. One commented that in response to these arguments when raised with them they would say, taking a 9 to 10-year sentence as an example 'two years [on parole] is not a short period of time. Two years is a significant amount of time and in two years with the right processes in place, the right support in place, continued education … then that's very achievable in two years'.[114]

11.3 Findings of University of Melbourne Literature Review

The conclusion reached by the authors of the University of Melbourne Literature Review, drawing on the findings of reviews undertaken by Sentencing Advisory Councils across Australia were that:

> There is evidence to suggest that the setting of non-parole periods does not achieve effective deterrence and fails to support rehabilitation but will incapacitate people in prison in the short term and result in longer periods of imprisonment. On this basis, they can be considered to achieve the sentencing purposes of punishment and denunciation.[115]

The authors note that while 'community safety and public protection are often equated with incapacitation and punishment, and a focus on general deterrence … community safety can be promoted in many ways'.[116]

They also note that judges have considerable discretion in weighting different sentencing purposes, and refer to research suggesting judges are most likely to make express reference to the sentencing purposes of deterrence, incapacitation and rehabilitation in their sentencing remarks.[117] Criticisms of imposing sentences of imprisonment with the intention of achieving general and personal deterrence and punishment, they note, are that it may 'instead delay or undermine opportunities for rehabilitation'.[118]

Offenders not being released from custody to parole, or receiving only a limited period of supervision in the interest, at least partly, of community safety, is contrary to evidence that parolees are substantially less likely to re-offend than prisoners released unconditionally — and that this is particularly the case for higher-risk offenders. It is also contrary to the conclusion reached by the authors of the University of Melbourne Literature Review that evidence suggests that 'those who have been convicted of more serious offences and who have served longer sentences will require longer periods of supervision in the community' rather than less.[119]

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113 Subject-matter expert interview I35.
114 Subject-matter expert interview I51.
115 *University of Melbourne Literature Review* (n 101) 12.
116 Ibid 17.
117 Ibid 18 citing Ben Livings, 'What Do Judges Mean When They Sentence to Protect the Safety of the Community?' (2020) 33(2) *Current Issues in Criminal Justice* 247 and Kate Warner et al, *Jury Sentencing Survey* (Report, Criminology Research Council, April 2010).
118 Ibid citing James Byrne, 'After the Fall: Assessing the Impact of the Great Prison Experiment on Future Crime Control Policy' (2013) 77(3) *Federal Probation* 3 and Ian O'Donnell, *An Evidence Review of Recidivism and Policy Responses* (Report, Ireland Department of Justice and Equality, 2020).
119 Ibid 13.

11.4 Conclusion

Based on the Council's research and feedback received, it can be concluded that the current SVO scheme is meeting its objectives of punishment, denunciation and community safety only in part and to a limited extent. This is because while the scheme increases the minimum time an offender must spend in custody when a declaration is made, thereby promoting the purposes of punishment and denunciation and community protection through the offender's extended period of incarceration[120] it:

- provides a potential disincentive to offenders to apply for parole — thereby increasing the risk offenders convicted of serious non-sexual violence offences and sexual violence offences will be released at the end of their sentence under no form of parole supervision;
- shortens the period an offender who has applied for, and been granted, parole is subject to supervised release in the community — contrary to evidence that suggests offenders serving longer periods of imprisonment require longer periods under supervision, not less to reduce their risks of reoffending;[121] and
- can result in courts reducing head sentences to enable an offender's guilty plea and other mitigation circumstances to be taken into account — thereby reducing the overall term of the sentence that would otherwise be warranted due to the seriousness of the offending. This means the period an offender is under sentence, and subject to being recalled to prison if released on parole, is shorter.

While the scheme results in offenders being detained in custody longer before being eligible for parole in support of the objectives of punishment and denunciation, there is no evidence that the scheme supports rehabilitation, and it is unlikely to achieve community protection in the long-term.

Further, where a head sentence is reduced to take the making of a declaration into account, it may compromise the scheme's ability to meet the purposes of punishment, denunciation, community protection and general deterrence through the imposition of a lengthy head sentence, in conjunction with an earlier parole eligibility date.

120 The community protection achieved through imprisonment is also sometimes referred to as 'incapacitation'. However, just because an offender is in custody does not mean their opportunity to offend is completely removed. For example, the Parole Board in its submission referred to information provided to the Board in the case of domestic violence offenders often revealing that prisoners are continuing to commit domestic violence from prison (for example, by using the prison telephone system to threaten violence directly or indirectly against the victim): Submission 14 (Parole Board Queensland) 3–18.

121 *University of Melbourne Literature Review* (n 101) 13.

Chapter 12

Potential of the SVO scheme to create inconsistency or constrain the sentencing process

Key Findings

1. The SVO scheme, as a form of mandatory sentencing, constrains sentencing and leads to inconsistencies in parole eligibility between sentences that attract an SVO declaration and those that do not. The SVO scheme increases the complexity of sentencing for offences subject to it — particularly when a court is sentencing offenders for multiple offences, only some of which are listed in Schedule 1.

2. The mandatory application of the scheme at 10 years can interfere with the court's capacity to maintain parity and consistency.[122] Co-offenders can receive significantly different parole eligibility dates based on whether the sentence falls above or below 10 years.

3. The limited guidance provided as to the circumstances in which a declaration should be made has potential to lead to concerns about 'inconsistencies' in the scheme's application, but equally supports the exercise of courts' sentencing discretion.

4. There was 'considerable variety, indeed inconsistency' in the interpretation of the SVO provisions in the years immediately following the scheme's introduction.[123] However, at least since the early to mid-2000s,[124] there has been consistency in the approach to sentencing under the scheme through the guidance provided by the Court of Appeal.

5. The Court of Appeal in *Free* has clarified that the correct approach is to consider 'all relevant circumstances', including those set out in section 9 of the Act: 'to determine whether there are circumstances which aggravate the offence in a way which suggests that the protection of the public, or adequate punishment, requires the offender to serve 80 per cent of the head sentence before being able to apply for parole'.[125]

122 See comments to this effect in *Bojovic* (n 75) 191 [34], referred to in *R v Dang* [2018] QCA 331.
123 *R v Eveleigh* [2003] 1 Qd R 398, 427 [99] (Fryberg J) ('*Eveleigh*').
124 See the Council's discussion of key Court of Appeal decisions in Background Paper 3 (n 28) including: ibid and *McDougall and Collas* (n 2).
125 *Free* (n 39) 96 [45], 98 [49].

12.1 Introduction

The Council has been asked to advise on 'any trends or anomalies that occur in the application of the SVO scheme that create inconsistency or constrain the sentencing process'.[126]

This chapter explores issues identified through consultation, submissions received, and views expressed in expert interviews. It also draws on the Council's analysis of relevant sentencing data, review of minimum and standard non-parole period schemes operating in other jurisdictions, and case analysis (see Background Papers 2–4).

The Council identified the benefits of removing anomalies and minimising the complexity of sentencing and parole laws in undertaking previous reviews, including promoting greater certainty and clarity about how the law is to be applied, reducing the risk of error (and any appeals required to correct such errors), and reducing the duration of sentencing proceedings.[127] Such an approach also supports the fair and consistent application of the law and ensures courts are not unnecessarily constrained by legislation in making orders that respond to the individual circumstances of the case.[128]

The Council identified a number of examples of potential inconsistencies, anomalies and complexities concerning the current operation of the SVO scheme. These include:

- Problems arising from the setting of 10 years as the cut-off point for when an SVO declaration must be made — which means that the only way a court can take factors such as a plea of guilty or other factors in mitigation into account, as required by law, is to reduce the head sentence. The 10-year threshold for the application of the automatic declaration has also been criticised during consultation as being arbitrary.
- Limited scope for the application of the principle of parity in circumstances where a serious violent offence declaration is made in one case for an offender, but not made in another involving a co-offender.[129]
- The lack of clear rationale for the offences included and excluded from Schedule 1.[130]
- Additional complexities involved in sentencing offenders for multiple offences where only some of those convictions are serious enough to warrant, or can be subject to, an SVO declaration.
- Problems in understanding how to apply section 161C when calculating the relevant periods that apply for the purposes of section 161B. This has resulted in an additional layer of complexity to the sentencing process and problems in interpreting how the calculation of these periods, particularly in the years following its introduction, were intended to be applied.[131]

12.2 Impact of mandatory sentencing schemes

The Terms of Reference direct the Council to have regard to 'the importance of judicial discretion in the sentencing process and providing courts with flexible sentencing options that enable the imposition of sentences that accord with the principles and purposes of sentencing as outlined in the PSA'. One of the principal means of limiting flexibility and discretion is mandatory sentencing.

The mandatory application of the SVO scheme to sentences of 10 years and higher is a form of mandatory sentencing, as is the mandatory minimum non-parole period of 80 per cent when a declaration is made (either as a mandatory or discretionary declaration). When a person is sentenced to a term of imprisonment of 10 years or more for a Schedule 1 offence, they will automatically be subject to the SVO scheme. This means courts are restricted in their ability to recognise relevant mitigating factors, such as a plea of guilty or cooperation with law enforcement. It may also discourage offenders from cooperating with law enforcement authorities and pleading guilty.

The potential for anomalies and inconsistency caused by the automatic application of the scheme is most starkly illustrated in those cases involving co-offenders where one offender is sentenced to 10 years or more, and a co-offender is sentenced to a sentence of less than 10 years. The offender who receives a sentence of less than 10 years will, in many cases, likely receive a parole eligibility date that is much earlier than the mandatory 80 per cent if a declaration has to be made. The Court of Appeal for this reason has recognised that 'once a serious violence

126 See Terms of Reference, Appendix 1.
127 *Community-Based Sentencing Orders, Imprisonment and Parole Options* (n 26).
128 Ibid.
129 Background Paper 3 (n 28) section 2.4, section 2.9; *R v Crossley* (n 34).
130 On the history of the SVO scheme, see Chapter 2 of this report and Queensland Sentencing Advisory Council, *History of the Serious Violent Offences Scheme* (Background Paper 1, 2021).
131 As one example where a judge mistakenly thought the requirement to declare the offender convicted of an SVO did not apply, see *R v Dutton* [2005] QCA 17 ('*Dutton*').

offence is appropriately made in one case but not made in the other, the principle of parity that would ordinarily apply has little scope for operation'.[132]

The Council's review of the creation of the SVO scheme did not identify any information as to why the 10-year mark was chosen for the mandatory application of the scheme, nor why the non-parole period was set at 80 per cent. No evidence base was identified to justify the ratio of 80:20 or why it was considered appropriate for serious violent offences. Expert interviews conducted by the Council identified concerns amongst legal stakeholders regarding the arbitrary nature of the 10-year mark and its impact on sentencing practices.

The Council previously[133] observed that mandatory sentences may also have a distorting effect on sentencing. Generally, those supportive of mandatory penalties argue that schemes like the SVO scheme promote consistency in sentencing. However, there is evidence that fixed penalties may result in unjust outcomes by treating different cases alike. The existence of a mandatory penalty means courts are not able to take into account the individual circumstances of the offence and the offender when determining a sentence. Mandatory or fixed penalties suggest all offences within a category should attract the same penalty, irrespective of the individual circumstances of the case.

Arguments in favour, and against, mandatory sentencing provisions — as summarised in the Council's Issues Paper[134] — are set out in Table 20.

Table 20: Arguments for and against mandatory sentencing provisions

Against mandatory sentencing provisions	Support mandatory sentencing provisions
They constrain judicial discretion and interfere with the courts' capacity to adapt sentences to the objective facts and the subjective features of the case.	They deter offenders from engaging in criminal conduct (although there is little evidence they are effective and act as a deterrent).
They displace discretion in other parts of the criminal justice system, namely the police and prosecution.	They promote consistency in sentencing.
They are inconsistent with the rule of law and the separation of powers.	They denounce the offending behaviour.
They reduce the incentive to plead guilty, resulting in increased workloads for the courts and prosecution, and impacts on victims and witnesses who must participate in trials.	They ensure a minimum level of punishment for offenders convicted of the offence.
They increase the prison population and the associated cost to the state.	They protect the community through imprisonment and the incapacitation of the offender in prison.
There is little evidence they are effective and act as a deterrent.	They send a clear and strong message about community expectations of sentencing for serious offences.

12.2.1 Stakeholder views

Most legal stakeholders submitted that mandatory sentencing schemes were not appropriate in any circumstances.

Many of those who opposed mandatory sentencing referred to other key stakeholders such as the Law Council of Australia or findings from the Royal Commission into Institutional Responses to Child Sexual Abuse. They pointed to the consequence of mandatory sentencing of removing judicial discretion as having a detrimental impact on achieving a just sentence. For example, the Australian Lawyers Alliance, in supporting views of the Law Council of Australia, submitted that:

> mandatory sentencing schemes remove the ability of courts to consider relevant factors such as the offender's criminal history, individual circumstances or whether there are any mitigating factors, such as mental illness or other forms of hardship or duress. This can result in sentencing outcomes that are disproportionately harsh, unjust and anomalous.[135]

132 *R v Mikaele* [2008] QCA 261, [36] citing *Crossley* (n 34) as authority. See, however, comments made by Holmes CJ (dissenting) in *R v Williams; Ex parte A-G (Qld)* [2014] QCA 34 that to the extent there is anomaly in the very different outcomes for offenders based on whether a declaration is made, it is a product of the scheme itself: 'the inevitable result of a serious violent offence declaration, which requires service of 80 per cent of the sentence; the marked difference in parole eligibility exists between any two cases in one of which a declaration has been made and the other not … If there is an anomaly, it is the intended product of the different sentencing regime for serious violent offences. It does not follow that the custodial period before parole eligibility should be increased in other cases so as to reduce the relative onerousness of serious violent offence declarations': at [14].

133 See discussion of previous reports and advice provided by the Queensland Sentencing Advisory Council in section 10.3.1.

134 *SVO Scheme Issues Paper* (n 22).

135 Submission 2 (Australian Lawyers Alliance) 7–8 (citations omitted).

The QLS's primary position was that the SVO scheme — as a form of mandatory sentencing — should be abolished. QLS submitted that:

> Mandatory sentencing laws have the potential to lead to serious miscarriages of justice, are costly and there is a lack of evidence to support their effectiveness as a deterrent or their ability to reduce crime. Mandatory sentencing laws also artificially lower the proper sentencing tariff by creating perverse incentives … The Society's opposition to the use of mandatory sentencing schemes is premised on the basis that such schemes impose unacceptable fetters on judicial discretion.[136]

The potentially harmful effect that restricted judicial discretion can have on particularly vulnerable groups was also raised, including: people suffering from mental health conditions, psychosocial disability or other impairments;[137] victims and survivors who commit intimate partner homicides;[138] victims and survivors of child sexual abuse;[139] and Aboriginal and Torres Strait Islander peoples.[140]

ATSILS submitted that the SVO scheme, as a 'mandatory statutory rule' would 'inevitably … lead to sentences which are not appropriate taking into account the circumstances of offending and the personal circumstances of the offender' thereby resulting in sentences 'that are neither reasonable nor demonstrably justifiable'.[141] It expressed the view 'the scheme, and especially an expanded scheme' would 'almost inevitably be in breach of the human rights protected under the *Human Rights Act 2019* (Qld) and a number of international human rights instruments'.[142]

Legal Aid Queensland similarly submitted: 'Sentencing in this fashion inevitably leads to unjust outcomes, taking a 'one size fits all' approach where, in reality, the circumstances surrounding offences and the individuals who are being sentenced, differ greatly'.[143] It also raised concerns that:

> Mandatory sentencing reduces the incentive to offenders to plead guilty, leading to matters progressing to trial and victims being subject to cross-examination and the court process, where this may have otherwise been avoided.[144]

Submissions also noted that mandatory sentencing may lead to circumvention of the scheme if automatic application of the scheme would lead to injustices. For example, the Australian Lawyers Alliance, referencing work undertaken by the Law Council of Australia, referred to evidence:

> in jurisdictions where mandatory sentencing schemes have been introduced, lawyers, judges and juries will increasingly resort to accepted mechanisms such as plea bargaining to circumvent the harsh and unjust effects of mandatory minimum sentences.[145]

It therefore argued:

> While proponents of mandatory minimum sentencing state that such sentences are transparent, mandatory sentences tend to transfer decision-making powers in relation to the sentence from the judiciary to the prosecution and the police, given that the choice of the charge will determine the sentencing outcome. If prosecution agencies wish to avoid the imposition of mandatory penalties, they will charge an offender with offences that do not carry mandatory sentences.[146]

Sisters Inside noted its position that 'mandatory sentencing schemes are never appropriate' and expressed its support for sentencing judges to have 'full discretion to determine the appropriate sentence, including parole eligibility'.[147] It also raised issues with delays in parole decision-making and noted that these 'resulted in a substantial increase in applications to Queensland courts by prisoners for judicial review or for re-consideration of their sentence to mitigate the impact of parole delays'.[148] In some instances, it suggested, this is also being referred to in sentencing as a basis for imposing reduced sentences.[149]

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136 Submission 12 (Queensland Law Society) 2.
137 Submission 5 (Aged and Disability Advocacy Australia) 2–3.
138 Submission 7 (Full Stop Australia) 10.
139 Submission 10 (knowmore) 11–12.
140 Submission 11 (Sisters Inside) 10; Submission 10 (knowmore) 11–12.
141 Submission 20 (Aboriginal and Torres Strait Islander Legal Service) 4.
142 Ibid.
143 Submission 13 (Legal Aid Queensland) 24.
144 Ibid.
145 Submission 2 (Australian Lawyers Alliance) 8 (citations omitted).
146 Ibid (citations omitted).
147 Submission 11 (Sisters Inside) 10.
148 Ibid 11 citing K Dibben, 'Judge Slams Parole Board Amid 'Unprecedented' Delays' *The Courier Mail* (online 5 July 2021) <https://www.couriermail.com.au/news/queensland/eight-month-parole-delays-for-queensland-prisoners/news-story/3ed49d0c70e7a27c4d1e20db67dc976e >; D Murray, 'Sex Offender Paul Anthony Vaughan, seeking parole, 'would have killed again'' *The Australian* (online 2 August 2021) <https://www.theaustralian.com.au/nation/sex-offender-paul-anthony-vaughan-seeking-parole-would-have-killed-again/news-story/75d0ae3fed797c683dea833d6fd570e7>; Tony Keim, 'Six-Month Parole Backlog Leads to an Immediate Release' *QLS* Proctor (online 18 May 2021) < https://www.qlsproctor.com.au/2021/05/six-month-parole-backlog-leads-to-an-immediate-release/>.
149 Ibid.

While the opposition to mandatory sentencing by legal stakeholders, including some legal services representing the interests of victims, was evident, this view was not shared by other stakeholders, in particular, those providing advocacy and support services to victim and survivors of crime. For these stakeholders, mandatory sentencing is seen as a practical means of ensuring that sentences imposed reflect the seriousness of offences involving serious physical and sexual violence and which result in significant harm to victims, families and the broader community.

FACAA supported the use of mandatory sentencing and submitted this approach was necessary for offenders convicted of certain non-sexual violent offences and offences against children (violent and sexual) to ensure the imposition of appropriate sentences.[150] It referred to the case of *R v Ireland*[151] who was convicted of the manslaughter of an 18-month-old toddler and was sentenced to eight-and-a-half years imprisonment with parole eligibility after 4 years (of which 803 days was pre-sentence custody)[152] as an example of inadequate sentencing which it submitted provided evidence that 'mandatory sentencing isn't just appropriate but is absolutely necessary'.[153]

FACAA argued the mandatory application of the scheme should be extended to 'all offenders who take the life of a child under the age of 12 or get convicted of repeated sexual offences against children'.[154] It further expressed concern that the SVO scheme was used as a plea-bargaining tool and recommended that the scheme's mandatory nature be increased so that 'this scheme can … not be negotiated away as part of a plea deal'.[155]

Full Stop Australia submitted that mandatory sentencing schemes 'may be appropriate in certain limited cases of serious sexual offending and violent offending committed in the context of sexual, domestic and family violence',[156] but not 'in all cases of serious violent offending given the overall complexity involved in the sentencing process and the need to ensure fair outcomes for marginalised populations'.[157]

The views of victims who participated in consultation sessions with the Council are discussed in Chapter 13 of this report. A number of participants favoured either a mandatory or presumptive approach for similar reasons. In their view, in the case of very serious offending, sentences must reflect the seriousness of the harm caused to victims. Leaving this to the discretion of courts was viewed as risking sentences imposed which do not meet victim and community expectations.

Making the SVO scheme apply to all sentences reaching a particular threshold of seriousness was viewed as one way to end the confusion about what offences are serious enough to warrant a 'serious violent offence' declaration thereby 'minimising the burden' on the justice system (as one victim expressed this) of making these determinations at sentence, which may then be subject to appeal.[158]

12.2.2 Views from expert interviews

Views expressed by subject-matter experts interviewed are discussed in detail in section 12.3 and the following sections of this chapter.

In brief, the automatic application of the scheme and its fixed nature were met with concerns by legal practitioners, namely that it:

- 'introduces a substantial degree of inflexibility into the sentence or exercise of the sentencing discretion';[159]
- makes sentencing 'more complex';[160]
- 'skews sentencing'[161] and 'warps the sentencing discretion';[162] and

150 Submission 4 (Fighters Against Child Abuse Australia) 19. FACAA referred to the following offences as requiring mandatory sentencing — Murder with intent (premeditation); Multiple murders; Repeat (more than 5) domestic violence offences; A domestic violence offence resulting in hospitalisation of the victim-survivor; Domestic homicide; Murder or manslaughter of a child under 16; Multiple violent offences against a child under 16; Penetrative rape of a child under 16; Incest; Production of child abuse material by an adult involving threats of violence or manipulation of the child; Assault of a child requiring hospitalisation: at 15.

151 (Supreme Court of Queensland, McMeekin J, 5 June 2017).

152 Ibid. FACAA refer to the eligibility being under 2 years — which would be as a result of the 4 years — PSC. Transcript of Proceedings, *R v Ireland* (Mackay Supreme Court, 15/2017, McMeekin J, 5 June 2017).

153 Ibid 19.

154 Preliminary feedback (Fighters Against Child Abuse Australia).

155 Ibid.

156 Submission 7 (Full Stop Australia) 10.

157 Ibid.

158 Roundtable with victims and survivors of crime, 27 January 2022.

159 Subject-matter expert interview I66.

160 Subject-matter expert interview I68.

161 Subject-matter expert interview I62.

162 Subject-matter expert interview I42.

- tends to cause a reduction in sentence lengths.[163]

Some expressed the view that, as a form of mandatory sentencing, the scheme was 'fundamentally wrong', and that 'judges should have as much discretion as they can possibly get in fashioning appropriate sentences':[164]

> Each case is different. Each case should be approached on its own merits according to its own facts and circumstances and having discretion removed, I think, is not a good thing. I think it can lead to really artificial outcomes and it can lead to unfair outcomes which then have to be corrected in the Court of Appeal … I think we should put the trust in our courts to exercise their discretion fairly without imposing that – fettering that discretion.[165]

12.3 Impacts of the SVO scheme on sentencing and the 'instinctive synthesis' process

12.3.1 Introduction

The Court of Appeal has made clear that the discretion to fix a parole eligibility date is unfettered and there can be no mathematical approach to fixing that date, including on the basis of an offender's guilty plea.[166] The same principles apply to the setting of the head sentence given there 'are many conflicting and contradictory elements which bear upon sentencing an offender' that must be balanced as part of the integrated sentencing approach (known as 'instinctive synthesis').[167] Stakeholders in their submissions, and subject-matter experts during interview, commonly referred to the scheme's impact on judges' 'instinctive synthesis'.

12.3.2 Stakeholder views

In its submission, Legal Aid Queensland noted the Court of Appeal's recognition that the discretion to make an SVO declaration is only one component of the broader sentencing process[168] — a principle recently affirmed in *Free*[169] — and concluded:

> By extension, this means that varying competing factors in sentencing are synthesised into the decision to declare an SVO, as it is also in the decision as to the appropriate head sentence. This creates some tensions where the court must recognise some factual circumstances, particularly where the sentence is one that will or could potentially enliven the mandatory declaration provisions.[170]

In supporting the adoption of a presumptive SVO model, knowmore raised its concerns that 'the SVO scheme interferes with judicial officers' instinctive synthesis approach to sentencing and therefore means that sentencing may not reflect the '"true facts and serious nature" of cases'.[171] It raised concerns that this compromised the ability of the scheme to achieve its original objectives.[172] This is discussed further in Chapter 13.

12.3.3 Views from expert interviews

While the Court of Appeal has given guidance to courts that the making of a declaration is to be approached in an integrated way, as discussed in section 3.3, participants in expert interviews raised several concerns. The SVO scheme was criticised by some expert interview participants as not only contributing to the complexity of sentencing, but also as adding a mathematical component to the process. This is partly a product of the scheme's mandatory application at 10 years, and the 5-year threshold for discretionary applications. Comments included that:

> It really detracts from what the serious violent offence declarations were intended to convey from the community's point of view, or towards the community and had now become so focused on the mathematical number that it's almost become … like a big gate that you have to be able to walk through before you are able to reach a factual determination that the offence is a serious violent offence declaration.[173]

163 General view held by legal stakeholders.
164 Subject-matter expert interview I69.
165 Subject-matter expert interview I59.
166 See *R v Randall* [2019] QCA 25, [43] ('*Randall*'); and *Free* (n 39) [55] citing *R v Amato* [2013] QCA 158 as authority.
167 *Wong v The Queen* (2001) 207 CLR 584, 611–612 [74]–[76] (Gaudron, Gummow and Hayne JJ).
168 *McDougall and Collas* (n 2) 95–6 [17].
169 *Free* (n 39) [23].
170 Submission 13 (Legal Aid Queensland) 18.
171 Submission 10 (knowmore) 8.
172 Ibid 18.
173 Subject-matter expert interview I53.

> Clearly the first issue … is the varying limbs of the legislation that allow for the making of a declaration in certain circumstances is perhaps a bit more complex than it need be when you're looking if it's over three or if it's over five or if it's over 10, depending upon the circumstances. But the one that really, I think, causes the most difficulty is that of the 10 years plus and it creates difficulty in a number of ways because we say that sentencing isn't a mathematical exercise, and yet it's a mathematical component which is imported into the entirety of the regime.[174]

Most of those interviewed perceived the SVO scheme as impacting the approach to sentencing primarily by making the sentencing process more complex. Some commented that the extent of the impact was limited and that it was just another part of an already complex process — one of many factors to be considered during sentencing: 'You're still approaching sentencing the same way, which is by … looking at all the features and balancing up all of the purposes of sentencing'.[175]

Those who thought the SVO scheme increases the complexity of sentencing also stated that the degree of complexity varied widely between cases and stressed the need to consider a wide range of elements while crafting a fair sentence for the offender. These considerations include:

- guilty pleas;
- other mitigating factors, e.g. cooperation, remorse;
- individual circumstances, e.g. age, nature of the offence;
- pre-sentence custody;
- multiple charges where a cumulative sentence could see a mandatory SVO imposed;
- balancing punishment (imprisonment) with rehabilitation (parole).

One interviewee stated that the constraints resulting from the application of the scheme 'serve to skew the sentencing process' because courts don't have a flexible set of tools to deal with the particular problem but rather are 'trying to shoehorn it around a particular constraint'.[176]

The automatic application of the scheme at 10 years was identified as creating special difficulties by a number of stakeholders consulted. One interviewee reflected:

> what should be an integrated process that involves the exercise of a very broad discretion can resolve into a very narrow argument about whether something is worth nine and a-half or 10 and a-half, and that focus has just got more and more intense as time's gone on and it lends an artificiality and a distortion to the whole process …[177]

Another was concerned to make clear that the existence of the scheme would not bring a sentence artificially under 10 years if a sentence of 10 years or more was warranted: 'The law is that you must sentence in accordance with the principles and comparable circumstances. If that leads you to a sentence of 10 or more years, it leads you to that'.[178]

Once the scheme's application became discretionary, some participants viewed it as having limited practical benefit given that its only real purpose was to fix parole eligibility at 80 per cent:

> The trouble with … the discretionary SVO between five and 10 … is that all that it achieves is the imposition of an 80 percent point before parole. That's all it does. … And that's where the problem is with this that it's set up as a sort of a regime but there's a series of cases which say that you don't impose an SVO separately. So as soon as you get to that point, the whole thing self-destructs because there's just no point in having it. Because you're going to get to 80 per cent in some cases without reference to an SVO. So an SVO is really only going to be imposed where it happens to coincide with your judgment anyway.[179]

Some interviewees identified another limiting aspect of the scheme as being that it prioritised certain sentencing purposes, while effectively not allowing for the consideration of others. This difficulty was explained with reference to applying the sentencing purposes of specific and general deterrence:

> General deterrence is usually achieved by imposing an appropriate head sentence. Personal deterrence is the sentence which is arrived at by reference to the particular circumstances of the individual and that will sometimes mean that, while a heavy head sentence is imposed, there is a parole eligibility date, or some other form of relief given, to recognise the personal deterrence. Eighty percent does not allow for recognition of personal deterrence or the need, or the lack of need, for personal deterrence.[180]

174 Subject-matter expert interview I56.
175 Subject-matter expert interview I60.
176 Subject-matter expert interview I62.
177 Subject-matter expert interview I35.
178 Subject-matter expert interview I42.
179 Subject-matter expert interview I50.
180 Subject-matter expert interview I42.

The scheme was therefore described by this interviewee as being 'inconsistent with section 9' of the PSA as the focus is on the head sentence then, once a sentence reaches the 10-year mark, the requirement to take into account all those factors in section 9 'simply can't be done'.[181]

Views on the capacity of the scheme to meet its objectives are discussed in section 16.3 of this report.

12.4 Inability to take pleas of guilty and other mitigating factors into account when fixing the parole eligibility date

As discussed in section 3.3.5, due to the fixed nature of the 80 per cent non-parole period that applies once a declaration is made, the only way a court can take an offender's guilty plea and other mitigating circumstances into account, as required by law,[182] is to reduce the head sentence. This operates in a contrary way to the usual approach to setting parole eligibility, where the offender's plea and other mitigating factors personal to the offender are commonly taken into account to reduce the minimum period to be served by setting an earlier parole eligibility date.[183]

12.4.1 Stakeholder views

Legal Aid Queensland noted that while courts have responded to the requirement under section 13 of the PSA to take pleas of guilty into account, 'including commonly granting early parole release or eligibility, or in some cases reducing the head sentence':

> Complications arise where the offence, even with a plea of guilty, potentially calls for a sentence of 10 years or higher but where other mitigating factors are present that would tend to bode against delaying the parole eligibility to the 80% mark.[184]

LAQ referred to the case of *Levi* (discussed in section 10.3.4) as an example of how this had been resolved in circumstances where a sentence of 10 years would otherwise have been appropriate before taking the offender's guilty plea and other mitigating features into account.

The impacts of the scheme on head sentence lengths are discussed in Chapter 10.

12.4.2 Views from expert interviews

The reduction of head sentences to take an offender's guilty plea and other mitigating circumstances into account was referred to by a number of expert interview participants:

> In the sense that the scheme results in artificial head sentences potentially because head sentences are being reduced to reflect the plea rather than the plea being reflected in the bottom.[185]

For some legal stakeholders interviewed, the difficulties in being able to accommodate an offender's plea of guilty and specific features of the offender's circumstances, such as mental illness, into a sentence with parole eligibility fixed, factored into their decision whether to make a declaration:

> [The SVO scheme] introduces a substantial degree of inflexibility into the sentence or exercise of the sentencing discretion and so, to take one example, for example, if you have someone who, when assessing the objective seriousness of offence is 10 years or more, any matters in mitigation, including pleas of guilty, cooperation, prospects of rehabilitation, those sorts of things, can't be considered at the bottom, if you know what I mean, they can only be considered at the top. We go through these exercises which – sentencing exercises which can be somewhat artificial. Because what you end up with is a head sentence that may be below 10 years after you take into account mitigating features, which is out of whack, as it were, with what the appropriate sentence ought to be in terms of a head sentence.[186]

Many legal stakeholders noted that there are limited options available to allow consideration of mitigating circumstances where an SVO declaration is also at play:

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181 Ibid.
182 PSA (n 7) ss 13, 9(2)(g).
183 See, for example the approach taken to the sentencing of Lee, which the Court of Appeal considered in *O'Sullivan* (n 45), finding there was no error made by the learned sentencing judge as to the weight given to mitigating factors or in the sentencing judge's approach: at [177]. The general approach to fixing a parole eligibility date in Queensland is discussed in Part A of this report.
184 Submission 13 (Legal Aid Queensland) 18–19.
185 Subject-matter expert interview I8.
186 Subject-matter expert interview I66.

> When you get to this 10-year SVO, where the problem becomes is, firstly, you can't take the mitigating circumstances into effect by giving him over 10 and then making a parole declaration because you're stuck with the 80 percent. So what you've got to do is you've got to bring down the head sentence.[187]

> The existence of the SVO regime forces the court. There's no other way the court can do it than to reduce the head sentence to take into account the mitigating features.[188]

> I think [the SVO scheme] constrains [the sentencing process] because – say where it's mandatory for sentences over 10 years, you've got nowhere to – you've got less room to move in terms of taking into account mitigating factors where I'd often think it's more logical to take that into account in determining where the parole eligibility date is fixed rather than lowering the head sentence.[189]

12.5 The SVO scheme and recognition of pre-sentence custody

12.5.1 Principles applying to the treatment of pre-sentence custody when the automatic application of the SVO scheme is potentially triggered

The complexities of taking non-declarable pre-sentence custody into account, when the automatic operation of the SVO scheme might be triggered, are illustrated by the Court of Appeal's analysis in the decision of *R v Carlisle* ('*Carlisle*').[190] This issue is discussed in more detail in Background Paper 3.[191]

In *Carlisle,* the applicant appealed his sentence of 10 years' imprisonment imposed for drug trafficking. Mr Carlisle, contended that the starting point of a notional sentence of 12 years' imprisonment was manifestly excessive and the 2-year reduction by the sentencing judge did not adequately reflect his plea of guilty nor the time served in pre-sentence custody that was non-declarable.[192]

While the Court of Appeal did not state whether, in the Court's view, the starting point of 12 years was manifestly excessive,[193] the Court agreed that the 10-year sentence imposed was manifestly excessive having regard to the very early plea of guilty and the 'significant consequence' of an automatic SVO declaration.[194] The Court resentenced the applicant to 9 years' imprisonment with parole eligibility after serving 4 years. The court stated that an offender in these circumstances cannot necessarily expect to receive a 'double benefit'[195] of a reduction to the head sentence as well as parole eligibility after serving only one-third. The exercise of the discretion to make an SVO declaration is not necessary to reflect the seriousness of the conduct in this case. Taking all circumstances into account (his early plea of guilty, the seriousness of his offending, his role as a subsidiary in the trafficking business, his addiction to drugs and his substantial steps towards rehabilitation while in custody), parole eligibility after serving approximately 45 per cent of the sentence (four years) was a just sentence.[196]

In *R v Cumner*,[197] the Court of Appeal found the sentencing judge had not erred in applying the reduction for non-declarable time of 2 years and 7 months to the notional 12 year sentence (10 years from trafficking which was a Schedule 1 offence, and 2 years cumulatively for a non-Schedule 1 offence) and to the notional parole eligibility date of 8 years and 8 months that would otherwise have been applied (8 years for the trafficking charge, and 8 months for the non-Schedule 1 offence). The Court, in finding the sentence of 9 years and 5 months' imprisonment with parole eligibility after 6 years was not manifestly excessive, said this about the need to avoid a double benefit in these circumstances:

> to impose a lower non-parole period would distort the sentence and effectively convey a double benefit by not only reducing the non-parole period by the period of pre-sentence custody, but also avoiding the impact of the requirement to serve 80 per cent … Under the sentence actually imposed the period of six years [reduced from a notional non-parole period of 8 years and 8 months] is less than 80 per cent.[198]

In 2020, section 159A(1) of the PSA was amended to remove the words 'and for no other reason'. Two Justices of the Supreme Court of Queensland in two separate judgments have concluded that this means that it is now 'open

187 Subject-matter expert interview I50.
188 Subject-matter expert interview I66.
189 Subject-matter expert interview I24.
190 [2017] QCA 258 ('*Carlisle*').
191 Background Paper 3 (n 28) section 2.8.
192 The applicant had been on remand for just over a year for both the offences for which he was sentenced and for other offences.
193 *Carlisle* (n 190) [104].
194 Ibid [103].
195 Ibid [109].
196 Ibid [112].
197 *R v Cumner* [2020] QCA 54.
198 Ibid [68].

to the Court to formally declare time the offender has been held in custody, even where that is in respect of a previous sentence of imprisonment'.[199] The Court of Appeal in *R v Wilson*[200] affirmed this position, finding:

> The amended form of s 159A clearly empowers a sentencing court to make a declaration in relation to time the offender was on remand both for the subject offence and on remand for an offence which was not dealt with at the sentence hearing.[201]

Further, agreeing with the view expressed by Bowskill J in the earlier decision of *R v Whitely*[202] that the amended s 159A 'also empowers a sentencing court to make a declaration in relation to time the offender was on remand for the subject offence whilst serving a previous sentence of imprisonment'.[203]

The effect of this amendment, considered in the context of other provisions of the section, the Court found:

> seems designed to increase the flexibility allowed to sentencing courts to structure sentences in ways that facilitate the imposition of a just penalty in conformity with applicable statutory provisions and common law sentencing principles that are consistent with those provisions.[204]

It is not yet known what practice will most commonly be applied by courts when sentencing an offence or offences that might otherwise attract an automatic SVO declaration.

Further, in circumstances where a court is required to order that a sentence be served cumulatively on an existing sentence due to the operation of s 156A,[205] the Court of Appeal said that 'a sentencing judge must exercise the power under s 159A [of not formally declaring the time served] to avoid the consequence that a cumulative term of imprisonment will become in part a concurrent term'.[206]

12.5.2 Stakeholder views

Stakeholders commented on the impact on the SVO scheme both in circumstances where pre-sentence custody could and could not be declared, as time served under the sentence.

The required approach to take pre-sentence custody into account in circumstances where this cannot be declared as time served under the sentence was identified as further complicated by the operation of the scheme where the case authorities are clear the sentence must be in excess of 10 years. In these circumstances, Legal Aid Queensland noted:

> Ordinarily courts are able to take into account such time and moderate the head sentence and, if it is appropriate, the parole eligibility date. Within the SVO scheme, these issues are sometimes difficult to reconcile.[207]

Legal Aid Queensland referred to the case of *Armitage, Armitage and Dean*[208] to illustrate this point:

> The offenders each had a period of pre-sentence custody time that was not able to be expressly declared as time served on the sentences. As a matter of natural justice, it needed to be taken into account when setting parole eligibility as the time was spent in custody following convictions for the offence of murder which was ultimately quashed on a conviction appeal and substituted with convictions for manslaughter. When the matter was set for re-sentencing on the lesser charges, the sentencing judge had to proceed on the basis that the sentence was to start on the new sentencing date and could not be backdated to the original sentencing date, resulting in lengthy periods of non-declarable time.
>
> This issue could have been rectified with adjustments to the parole eligibility date with explanatory comments in the sentence remarks, but given that an automatic SVO declaration had to be made, all discretion to bring forward a parole eligibility date was removed. The end result of the sentencing order was that the offenders' parole eligibility dates were in fact more than 80% of the *effective sentence* or the actual time spent in custody overall including the non-declarable pre-sentence custody.[209]

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199 *R v Whitely* (2021) 290 A Crim R 199, 201–2 [10] ('*Whitely*')cited in *R v Stewart* [2021] QSC 187, 7 [30] (Henry J).
200 [2022] QCA 18.
201 *R v Wilson* [2022] QCA 18, [18] (Fraser JA, Morrison JA and North J agreeing) ('*Wilson*').
202 *Whitely* (n 199)
203 *Wilson* (n 201).
204 Ibid [32].
205 That section applies if the offender is convicted of offences against a provision mentioned in schedule 1 of the PSA (n 7) which were committed while the person was released on parole. Section 156A(2) of the Act requires that in such a case, a sentence of imprisonment which is being imposed must be ordered to be served cumulatively with any other term of imprisonment the offender is liable to serve.
206 *R v Braeckmans* [2022] QCA 25, [31] (McMurdo JA, Sofronoff P and Kelly J agreeing). In this case, the Court determined that due to considerations of totality, a sentence of 7 years should be substituted for the 9-year sentence originally imposed. The SVO declaration made at first instance was removed and parole eligibility was set at one-third.
207 Submission 13 (Legal Aid Queensland) 19.
208 [2021] QCA 185.
209 Submission 13 (Legal Aid Queensland) 20 (citations omitted) (emphasis in original).

> With reference to the previous case of *Carlisle*, the Court of Appeal stated '[w]hen accounting for non-declarable pre-sentence custody where a serious violent offence declaration is made, it is necessary to reduce the head sentence to reflect the fact that, if the non-declarable pre-sentence custody formed part of the sentence, the defendant would be eligible for parole after serving 80 per cent of it.' This means sentencing courts are left in a position where they are forced to artificially reduce a head sentence, and then declare a serious violent offender declaration to achieve a just sentence.[210]

In this case, it noted, the Court of Appeal 'was able to reconcile the issue by reasoning that that court, unlike the single sentencing judge, was in fact able to backdate the sentence to the original sentence date and thereby declare the pre-sentence custody'.[211] However, it submitted that 'the considerable cost of this appeal, and the uncertainty that came with the difficulties of the case, could have been avoided had the SVO scheme had a more discretionary framework to anticipate such complex circumstances'.[212]

Legal Aid Queensland also commented on sentencing judges, on occasion, acceding to submissions not to declare time that otherwise might have been. This can result in a sentence that:

> on its face is less than 10 years, but in actuality is higher. The result is that the automatic declaration provisions of the SVO scheme are avoided and the sentencing court is returned its discretion to order relief for mitigating factors in the form of an earlier parole eligibility date.[213]

The Council also noted this approach as part of its sentencing remarks analysis in Background Paper 3.[214]

12.5.3 Views from expert interviews

A number of participants viewed pre-sentence custody, in combination with other factors and the SVO scheme as increasing the complexity of sentencing and leading to 'artificial head sentences' which do not reflect the true criminality of the conduct involved.

One participant provided the following example:

> Where it becomes more difficult … is where the person has, for example, been in custody for four or five years, they were taken into custody originally because of the offence, they've served out some sentences and then it comes time to make the serious violent offence declaration. So now all of a sudden if the court does make that offence, so let's assume it's a 10-year sentence, and they serve eight years, well now this person's been in prison for 12 years, or will be in prison for 12 years, before they're released. And what will be kicking around in the back of the judge's mind will be, well you know, if he'd killed someone, your actual time in custody wouldn't be quite so great. Now this person hasn't killed anyone, it's a very serious offence, but it's not in that same category. And that will tend to push the exercise of discretion down to nudge it underneath that hard line of 10 years.
>
> So that's where I see the major impact on exercise of sentencing discretion. Not so much the number of offences on the indictment but the level of presentence custody the court has to deal with.[215]

Another similarly noted that in an effort to ensure the sentence imposed is proportionate, it might result in a reduction of the head sentence to give the person the benefit of the pre-sentence custody, which might then result in a sentence falling under 10 years — with the option to make a declaration on a discretionary basis:

> it's sort of an artificial head sentence to match the criminality of the offence, but there's no other option because otherwise you would be potentially getting a disproportionate sentence.[216]

12.6 The SVO scheme and parity

Another complexity is how the SVO scheme operates in the context of the common law principle of parity — which is an aspect of equal justice. The parity principle requires a court to assess differences between co-offenders including

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210 Ibid (citations omitted).
211 Ibid.
212 Ibid.
213 Ibid 19.
214 Background Paper 3 (n 28) 3–69. The judge in this case imposed an effective sentence of 10 years' imprisonment for attempted murder but declined to declare the first 6 months spent in pre-sentence custody, instead imposing a sentence of 9.5 years and setting parole eligibility at 7 years (translating to 70% of what would otherwise have been a 10-year sentence).
215 Subject-matter expert interview I49.
216 Subject-matter expert interview I46.

their 'age, background, criminal history, general character and the part each has played'.[217] In the application of the parity principle, both the non-parole period, as well as the head sentence, are to be considered.[218]

The SVO scheme, in some circumstances, makes it more difficult to apply the principle of parity because of the substantial differences that can arise in the non-parole period that must be served by an offender who is subject to a declaration and one who is not. As discussed in section 3.2.7, this typically arises when the making of an SVO declaration is automatic for one offender, but not for another (due to their sentence falling below 10 years), meaning rough equivalency or consistency between sentences for co-offenders cannot be achieved.

12.6.1 Stakeholder views

Sisters Inside gave an example, in the context of the principle of parity, of the decision of *R v McGuire*.[219] It provided the following summary of the circumstances involved and the sentencing outcome:

> This case involved SM, a woman, and TH, a man, charged as co-accused with a range of offences against a female complainant. SM appealed against her sentence for the offence of torture. After a trial, SM was given a head sentence of eight years imprisonment for the torture count, with a serious violent offence declaration made in respect of this offence. SM's co-accused TH was also convicted on one count of torture (and other related offences), but the particulars that constituted the offence of torture in his case were slightly different; significantly, SM was found to have committed the offence of rape and two offences of common assault against the complainant, while TH was present but did not participate in this conduct. TH pleaded guilty and was given a head sentence of six years imprisonment with no serious violent offence declaration.[220]

Sisters Inside found this outcome troubling on a number of grounds — but most notably on the basis that 'gendered ideas about violence often work to render women in these cases "doubly deviant" for their role in acts of serious violence "for violating not only the law but also conventional social norms associated with womanhood"'.[221]

Sisters Inside noted its detailed analysis was provided 'to illustrate two points':

> First, that the scheme can and does produce anomalous outcomes between co-accused and, secondly, that these disparities are influenced by gendered ideas about culpability that inform how particular acts of violence are perceived and punished. In our submission, the scheme results in unjust outcomes because it complicates the ability for courts to assess culpability, particularly in circumstances where gender (and race) are highly relevant, but unnamed, in the exercise of the sentencing discretion.[222]

Legal Aid Queensland also raised concerns that:

> Sentencing regimes such as the SVO scheme cause difficulties for sentencing judges to balance established ranges of sentences against the need to recognise differences in culpability for parties compared to principal offenders.[223]

It discussed the case of *Wales*[224] as illustrating these problems:

> In that matter the appellant was a party to a homicide offence where the principal offender ran a sword through a door during a home invasion which ultimately struck and killed the deceased. The appellant was sentenced on a plea of guilty to manslaughter to 9 years imprisonment with an SVO declaration. The appellant's complaint was that the sentencing judge 'did not adopt the required integrated approach to sentencing but instead reduced a notional ten year term to nine years (to give credit for the plea of guilty and a four month period of custody which could not be declared) and fixed upon the resulting nine year term without having regard to the making of the serious violent offence declaration'. In removing the SVO declaration the Court of Appeal made reference to a previous similar case of *Hicks and Taylor*, and found '[i]n these circumstances I would not exercise the discretion to make a serious violent offence declaration in relation to the applicant's offence, for which he (like Hicks) was liable under s 8 of the Code rather than as a principal offender'.[225]

It said that: 'the guidance this case provides would be difficult to apply, where authorities call for a head sentence of 10 years or more and thereby require an automatic declaration'.[226]

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217 *Green v The Queen; Quinn v The Queen* (2011) 244 CLR 462, 474–5 [31] (French CJ, Crennan and Kiefel JJ).
218 *Postiglione v The Queen* (1997) 189 CLR 295, 302 (Dawson and Gaudron JJ).
219 [2017] QCA 250.
220 Submission 11 (Sisters Inside) 6 (citations omitted).
221 Ibid citing Carly Lightowlers, 'Drunk and Doubly Deviant? The Role of Gender and Intoxication in Sentencing Assault Offences' (2019) 59(3) *The British Journal of Criminology* 693, 694.
222 Ibid 6–8.
223 Submission 13 (Legal Aid Queensland) 23.
224 [2019] QCA 64.
225 Ibid (citations omitted).
226 Ibid.

12.6.2 Views from expert interviews

Some interviewees reflected on the difficulties in applying the principle of parity in matters involving co-offenders. One reflected that this was particularly the case where:

> the person or the matter in which [an SVO declaration might be sought] might follow second [in time to] another person whose offending might be slightly less significant, or whose circumstances might less warrant a delay, has not received a declaration.[227]

And further suggested:

> that's probably an example also where mandatory tariffs can cause problems because, for example, it could be that if parity is to be factored in at all, it might result in a slightly lesser head sentence, but with a declaration but you might be precluded from doing that in some circumstances, depending upon the nature of the offending.[228]

Another interviewee illustrated the problems with reference to an example involving two co-offenders sentenced for armed robbery in circumstances where the first offender was sentenced to 10 years, and the second to 9.5 years.[229] Because of the mandatory nature of the scheme as it applies to sentences of 10 years or more, this would mean that while there would only be a 6 month difference in the head sentences imposed, the first offender would be required to serve 80 per cent of the sentence before being eligible for parole (8 years), while the second might have parole eligibility set at 50 per cent (4 years or 9 months).

Another pointed to the provisions of ss 13A and 13B resulting in some inconsistencies and 'the SVO procedure' being 'distorted because … the last person to cooperate, the person found guilty last, receives the full measure of the serious violent offence procedure, whereas the others, who have negotiated a deal, do not'.[230]

12.7 Additional complexities when sentencing offenders for multiple offences

12.7.1 The approach to sentencing for multiple charges

One of the main areas of complexity caused by the SVO scheme is sentencing offenders for multiple offences where only some of those convictions are serious enough to warrant, or can be subject to, an SVO declaration.

In section 3.3.7, the Council noted that there are two ways to sentence offenders convicted of multiple offences. The general sentencing approach of 'imposing sentences for a number of distinct, unrelated offences'[231] is to fix a sentence for the most serious offence, which is higher than it would be alone, but takes into account the overall criminality involved in the other offences. This is often referred to in Queensland as a 'global sentence', 'the *Nagy* approach' or '*Nagy* principle' after the case in which this approach was articulated.[232] This approach is complicated, however, in circumstances where the head sentence for an offence to which an SVO declaration attaches is increased on the basis that there is other offending for which a declaration is not (or cannot be) made.[233] In those circumstances it is generally necessary for the sentencing judge to moderate the sentence to recognise the impact of the SVO scheme.[234]

The other way to sentence an offender in this situation is to impose two or more cumulative sentences. However the Court of Appeal has noted this approach is vulnerable to 'inadvertent error' due to 'unintended consequences on parole eligibility and release dates'.[235] In circumstances where it could result in the 10-year threshold being triggered, it may result in the offender being required to serve 80 per cent of the total sentence imposed — assuming this involves the accumulation of sentences imposed for offences in Schedule 1.

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227 Subject-matter expert interview I56.
228 Ibid.
229 Subject-matter expert interview I50.
230 Subject-matter expert interview I49.
231 *R v Nagy* [2004] 1 Qd R 63, 72–3 [39] (Williams JA) ('*Nagy*').
232 Ibid.
233 *R v Derks* [2011] QCA 295, [44] (Fryberg J) ('*Derks*').
234 *R v Baker* [2021] QCA 150, [17]–[24] ('*Baker*'). Cf *R v Hasanovic* [2010] QCA 337 in which the Court determined 'the sentencing judge was not required to reduce the total period of imprisonment under the sentences for the SVOs to reflect that for the offences that were not SVOs the applicant would otherwise have been entitled to parole eligibility at an earlier date than the 80 per cent point' at [41].
235 *Derks* (n 233) [26] (McMurdo P).

12.7.2 Adopting a 'global approach' when sentencing for Schedule 1 and non-Schedule 1 offences

The Court of Appeal discussed the potential difficulties of setting a global sentence in circumstances in which only some of the offences sentenced are Schedule 1 offences in some detail in *R v Derks*.[236]

The Court noted that the benefit of imposing a global head sentence on the most serious offence to reflect the seriousness of all the offending, is to avoid the possibility of the judge not sufficiently ameliorating the cumulative sentences to reflect issues of totality, which may result in an unjust sentence. However, adopting this approach is complicated in circumstances where the head sentence for an offence to which an SVO declaration attaches is increased on this basis and there is other offending for which a declaration is not (or cannot be) made.

The Court of Appeal found that the sentencing judge had erred by imposing a 13-year global sentence and not stating that there had been a reduction to take into account the non-SVO declarable offending (for which the applicant would have otherwise been eligible for parole well before serving 80 per cent).

In re-exercising its sentencing discretion, the Court imposed a sentence of 11 years' imprisonment on the most serious charge of manslaughter together with a cumulative 2-year sentence for the dangerous operation of a vehicle while intoxicated, with parole eligibility after having served 80 per cent of the 11 years, plus one-third of the 2 years. The practical effect of this substitution to the sentence was that, while the overall sentence remained the same, the applicant became eligible for parole approximately one year earlier than the original sentence (about 9.5 years rather than 10.4 years).

In another example discussed by the Council in Background Paper 3,[237] and referred to by Legal Aid Queensland in its submission, the Court found a sentencing judge's decision to impose a global sentence had resulted in the judge falling into error. In the case of *Baker*[238] the Court was split as to the approach to be taken for multiple episodes of offending where the consequence would be a mandatory SVO declaration. The applicant, Mr Baker, had entered a guilty plea to a charge of malicious act with intent on the basis that he shot another man at point blank range in the leg. Other charges, spread across a total of six indictments, included some firearms-related offending which was assessed by both the original sentencing judge and all appellate judges as on their own potentially attracting sentences of 6 to 7 years imprisonment.[239] The original sentence was 11 years' imprisonment for the malicious act offence with lesser concurrent sentences imposed for the other charges (some of which were offences listed in Schedule 1, and others were not).

The majority, referring to the principle set down in *Nagy*,[240] noted Williams JA in that case said: 'that approach should not be adopted … where there would be collateral consequences such as being required to serve a longer period in custody before being eligible for parole …'.[241]

Legal Aid Queensland, in discussing this case, observed:

> As none of the other offences were declared SVOs, the practical effect of ordering a global sentence with a mandatory SVO was that it had the practical effect of essentially rendering all offences as SVOs, in that 80% was required to be served before being eligible for parole. This resulted in a lengthier non-parole period than had the sentences for the different sets of offending been separate yet cumulated terms of imprisonment.[242]

The majority of the Court in *Baker* ordered the sentence be moderated down to 9 ½ years with an SVO declaration, taking into account that the offender 'was still a relatively young person, with real prospects of rehabilitation and the support of a partner'.[243]

Justice Henry dissented on the basis that the head sentence's increase was only 'moderate' and in line with the totality of offending, which His Honour found was the case with Mr Baker's offending:

> An uplift of the head sentence from nine years to 11 years, to take account of the totality of the appalling criminal conduct, was moderate … [b]earing in mind the additional multitude of offending could readily justify a head sentence in its own right upwards of seven years, and even allowing for a totality discount to avoid too crushing an overall sentence …[244]

The Court noted that while:

> It was open to the judge to employ the *Nagy* methodology in this case … his Honour had to ensure that the result was not worse for the applicant than it would have been by an accumulation of the terms. That required a lower

236 Ibid.
237 Background Paper 3 (n 28) section 2.5.3.
238 *Baker* (n 234).
239 Ibid [19].
240 *Nagy* (n 231).
241 Ibid 72–73 [39].
242 Submission 13 (Legal Aid Queensland) 21.
243 *Baker* (n 234) [26] (Fraser and McMurdo JJA).
244 Ibid [35].

> sentence than 11 years for the most serious offence, to allow for the effect on the non-parole period of that being a serious violent offence.[245]

Legal Aid Queensland suggested the case was 'an example of how difficulties with SVOs are sometimes addressed with the application of established general sentencing principles'.[246]

Views from expert interviews

Some interviewed legal stakeholders viewed the use of global sentences as 'often the easiest and clearest way to do a sentence for multiple offending' but as 'sometimes and probably safer not to be the approach to take if an SVO offence is going to be involved'.[247]

This interviewee, discussing the cumulation of sentences, and the need to moderate the sentences imposed to take issues of totality into account commented:

> when you take out the discretion in such an extreme way as the SVO provisions do, you can get tied up pretty quickly. And it inevitably, I shouldn't say inevitably, it seems to me whatever happens with this sentence, it's going to go on appeal just because of those complexities and, you know, how serious the sentence has to be and how inflexible the provisions make it.[248]

Applying a global sentence in circumstances where some of the offences were not 'SVO offending' and would not have otherwise attracted a declaration, was described as bringing in 'the cavalcade of complexities that come with mandatory SVO provisions'.[249]

12.7.3 The cumulation of sentences and triggering of the requirement to make a declaration

The second approach of imposing two or more cumulative sentences equally can result in sentencing errors being made. This is because the court must take into account the operation of section 161C of the Act, which sets out how the 'specified years' of imprisonment are to be calculated for the purposes of sections 161A and 161B(3) of the Act. Section 161C reads as follows:

> 161C Calculation of number of years of imprisonment
>
> (1) This section applies for deciding whether an offender is sentenced —
>
> (a) under section 161A(a) — to 10 or more years imprisonment (the **specified years** of imprisonment); or
>
> (b) under section 161B(3) — to 5 or more, but less than 10, years imprisonment (also the **specified years** of imprisonment);
>
> for an offence —
>
> (c) against a provision mentioned in schedule 1; or
>
> (d) of counselling or procuring the commission of, or attempting or conspiring to commit, an offence against a provision mentioned in schedule 1.
>
> (2) An offender is sentenced to the specified years of imprisonment if —
>
> (a) the offender is sentenced to a term of imprisonment of the specified years for the offence; or
>
> (b) the term of imprisonment to which the offender is sentenced for the offence is part of a period of imprisonment of the specified years imposed on convictions consisting of the conviction on which the offender is being sentenced and any 1 or more of the following —
>
> (i) a conviction of an offence mentioned in subsection (1)(c) or (d);
>
> (ii) a conviction declared to be a conviction of a serious violent offence under section 161B.
>
> (3) For subsection (2), whether the offender is sentenced to the specified years of imprisonment must be calculated as at the day of sentence.[250]

245 Ibid [24]. The majority further noted that an example of such a sentence upheld by the Court was *R v Kruezi* (2020) 6 QR 119.
246 Submission 13 (Legal Aid Queensland) 22.
247 Subject-matter expert interview I10.
248 Ibid.
249 Ibid.
250 PSA (n 7) (emphasis added).

Calculation applies only to sentences for Schedule 1 offences imposed on the same day

The Court of Appeal in *R v Powderham* ('*Powderham*')[251] considered whether a 9-year sentence of imprisonment for manslaughter, with a concurrent term of 4 years' imprisonment for arson imposed on the applicant triggered the automatic application of the SVO scheme due to the requirement it be served cumulatively on a previously imposed 3-year term for other offences, including burglary.

The sentencing judge made an SVO declaration because her Honour was of the view that it automatically followed the imposition of an effective 12-year sentence for Schedule 1 offences. The sentencing judge made clear that, but for its automatic application, a declaration would not have otherwise been made for the manslaughter offence. The applicant challenged this interpretation of section 161C.

The Court concluded that given that the uncertainty and ambiguity of section 161C (particularly the words 'the day of sentence') and given that the imposition of an SVO declaration is penal and prejudicial, the provision should be construed narrowly to only include those sentences imposed on the same day. The appeal was allowed and the SVO declaration set aside.[252]

The approach in *Powderham* was affirmed by the Court of Appeal in *Dutton*. In *Dutton*, the sentence for the rape was 7 years' imprisonment with an SVO declaration. The sentences for six of the offences (involving different complainants) were made concurrent with each other but cumulative on the 7-year rape sentence. Because one of those six offences (an attempted rape, for which he received a sentence of 3 years) is in Schedule 1 of the Act, section 161C of the Act was enlivened and the applicant had to serve 80 per cent of the whole 10-year period. This was not what the sentencing judge had intended (his Honour had intended to confine the SVO declaration only to the 7-year sentence) and this amounted to an error.[253]

The Court of Appeal determined that it was appropriate to resentence the appellant 'to preserve the outcome his Honour evidently had in mind in arriving at the sentence he imposed' by reducing the 3-year sentence imposed on three of the offences ordered to be served cumulatively on the 7-year term for rape to 2.5 years.[254] This meant that the applicant would be eligible for parole after serving approximately 6 years and 10 months (nearly 7 years) in custody.

Sentencing for scheduled and non-scheduled offences

Sentencing courts adopted two common approaches when making orders for cumulation where only some of the offences for which the person is being sentenced are scheduled offences:

1. If the non-scheduled offences involve related charges, to make an order for the sentences imposed to run concurrently with those imposed for a scheduled offence or offences (which may then be ordered to be served cumulatively with sentences imposed for other Schedule 1 offences); or
2. To make separate orders for cumulation of sentences imposed for non-scheduled offences and for scheduled offences.

In the first situation, once the 10-year threshold is reached, the offender must serve 80 per cent of the total sentence imposed before being eligible for parole. In the second, the 80 per cent requirement applies only to that part of the sentence that relates to the scheduled offence or offences.

As discussed in section 3.2.7 in Chapter 3 of this report, the first situation arose in *R v RBD.*[255] The sentencing judge imposed cumulative sentences for three 'sets' of offending, with SVO declarations on all the Schedule 1 offences:

- 2 years' imprisonment for sexual assault (with an SVO declaration) and a 2-year concurrent sentence for a separate charge of choking (a non-Schedule 1 offence);
- 8 years' imprisonment for rape and burglary offences, both with SVO declarations (and lesser concurrent terms of imprisonment for other offences committed on that date); and
- 2 years' imprisonment for the dangerous operation of a vehicle with an SVO declaration.

Practically, this meant that the applicant would only be eligible for release on parole after serving 9.6 years of a 12-year sentence.

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251 [2002] 2 Qd R 417 ('*Powderham*').
252 Ibid 421–2 [13].
253 *Dutton* (n 131) [14].
254 Ibid [15].
255 [2020] QCA 136.

The sentencing judge discussed what his Honour would have otherwise imposed for each offence alone and the discounting exercise his Honour had undertaken to fashion a cumulative sentence that was not crushing.[256] In discussing the appropriate sentence, his Honour concluded that it was most appropriate that the sentences be made cumulative as a matter of 'sentencing principle' and as a matter of general deterrence to those who continue to offend.[257]

The applicant submitted to the Court of Appeal that the overall sentence ought to have been reduced to one of 10 years to reflect that the applicant would not be eligible for parole until serving 80 per cent for the other offences that did not attract an SVO declaration. This argument was not accepted by the Court of Appeal.[258]

The Court of Appeal agreed with the sentencing judge's approach and found that the sentence, while heavy for a young man with minor criminal history, was not manifestly excessive given the seriousness of the offending.[259]

Derks[260] is an example where the Court of Appeal adopted the second approach to cumulation. It set aside the original 13-year global sentence for manslaughter and dangerous operation of a vehicle while intoxicated, which would have carried an 80 per cent non-parole period. Instead, the court imposed a sentence of 11 years for the manslaughter charge (with parole eligibility after serving 80 per cent) and a 2-year sentence to be served cumulatively for the non-Schedule 1 dangerous driving charge (with parole eligibility set at one-third).

Where the sentencing courts make assumptions that all offences are scheduled offences that are caught by the scheme in instances in which they are not, courts can fall into error. This is illustrated by the case of *R v Stable (a pseudonym)* ('*Stable*').[261] The judge sentenced Mr Stable to an accumulated head sentence of 12 years, which comprised several sets of cumulated terms of imprisonment for 20 serious sexual offences committed against his daughter (both as a child and an adult) and all three of his granddaughters. The sentencing judge did not make an SVO declaration because he 'thought the total term of 12 years' imprisonment would engage the provisions of the Act [s 161A] … which would require the applicant to serve 80 per cent of his term of imprisonment before becoming eligible for parole'.[262] However, 'that was not the effect of the orders' and the cumulative total for scheduled offences was 'only six years and six months'.[263] The Court noted that the only way the sentencing judge's decision would engage the SVO scheme was if the offender 'is sentenced to a term of 10 years or more for a single scheduled offence or to a cumulative term of 10 years or more for several scheduled offences'.[264] The Court of Appeal agreed there was an error and considered whether another sentence should be set. To do this the Court reviewed Queensland and High Court sentencing case law for serious child sexual offences, and legislative amendments that had come into effect since the offender commenced his offending (e.g. increased maximum penalties and significant changes to sentencing practices and the PSA). The Court concluded that 'a 12-year sentence with parole eligibility deferred until the applicant had served 80 per cent of that period was a sentence that was well within the proper range' and gave leave to Mr Stable to consider whether he wished to continue his appeal.[265]

12.7.4 Stakeholder views

Legal Aid Queensland highlighted the many challenges faced by sentencing courts when sentencing for offences, only some of which would appropriately attract an SVO declaration. It commented:

> Sentencing courts are often faced with offenders who are pleading guilty to a multitude of offences across a number of different indictments, sometimes involving vastly different offending types. This requires a sentencing judge to balance the need to order sentences that justly address each series of offending by considering both the issues particular to each, as well as determining a global sentence outcome that addresses the offender's crimes in totality.[266]

Noting the two different approaches typically taken, as discussed earlier in this section, it referred to these becoming 'difficult' to apply 'where one of the offences calls for an SVO declaration to be made, particularly where the established range of head sentence for an offence is 10 years or over'.[267]

In addition to the case of *Baker* (discussed in section 12.7.2) it provided as another example of the complexity contributed by the scheme when section 156A of the PSA — another mandatory sentencing regime — came into play. This can result in a sentence that requires the offender not only to serve out the entire remaining portion of

256 Ibid [23]–[26], [31] (Jackson J).
257 Ibid [30].
258 Ibid [41].
259 Ibid [42].
260 *Derks* (n 233).
261 (2020) 6 QR 617 ('*Stable*').
262 Ibid [11].
263 Ibid.
264 Ibid.
265 Ibid [65].
266 Submission 13 (Legal Aid Queensland) 20–21.
267 Ibid 21.

their current sentence, but also 80 per cent of the new sentence imposed where a declaration must be made. It referred to the case of *R v Cook* in which the Court ordered a head sentence of 9.5 years for what was a 'very serious malicious act charge that involved firing a weapon during a violent arrest by police', as well as other robbery and assault offences', with parole eligibility set at 5 years and one week.[268]

12.7.5 Views from expert interviews

Despite efforts by the Court of Appeal to clarify the approach to be taken to applying s 161C, some described the position as 'still very confusing':

> I don't really think that's been sorted satisfactorily and I think there could have been – as I say, it's only because the Court of Appeal has … made decisions that say well this is penal law we will – where it's ambiguous we'll tighten it down in favour of the accused. Otherwise, it's really dangerous … I'm sure they [the legislature] didn't really mean if you're in jail for … one burglary and you get jailed for two more and you've already – nearly served your five years for that one and you get six years for this one but you're still there, so you've got 11 years [then the scheme should be applied].[269]

The interpretation taken also raised concerns by some that this might lead to inconsistent outcomes based solely on whether an offender is sentenced for two different series of offences on the same or different days — particularly where this occurs quite close in time:

> on that topic of inconsistencies in the legislation, 161C, which is the calculation of the number of years of imprisonment provision, it talks about SVOs and how they're calculated and how cumulative terms of imprisonment imposed on the same day for a same offender, if they're both SVO offences, and the total is over 10 years, results in an automatic 80 percent.
>
> If … for example, you were sentenced on a Monday for really bad sex offences against one child, and another child, and you went cumulative for the second child on the first child, such that your sentence was 11 years, that's 11 years to serve 80 percent mandatorily.
>
> If, though, you pleaded guilty on day 1, Monday, to the first child and day two to the second child, and even though that sentence might have been cumulative, 161C would say that … it's not automatically 80 percent.[270]

Although somewhat uncommon, the Council found some examples in its analysis of first instance sentencing decisions of the making of an SVO declaration being possibly avoided due to two series of offences being sentenced a few months apart.[271]

The same interviewee also commented on the lack of clarity even in light of *Powderham*, potential inconsistencies with the transitional provision in s 223 of the PSA, and the 'cumbersome' nature of dealing with these provisions.[272]

Others reflected that they thought 'it's misunderstood with respect to the cumulative effect where they add it on and whether it actually applies or not when you've got two scheduled offences' and 'people get a bit confused by whether it has to be applied or not'.[273] The rationality of adopting a 10-year threshold for its mandatory application in these circumstances was also questioned when the seriousness of some of these offences warranted a sentence of less than 10 years.[274]

Another interviewee referred to the added difficulties and totality concerns when offences are committed while an offender is on parole and there is a requirement, due to the operation of section 156A of the PSA, for the sentence to be made cumulative on that existing sentence. They provided the following case example:

> let's say the Crown got 10 years for [a series of serious offences involving a charge of malicious act with intent as well as other serious carjacking type offences]. That would … be 10 years – … cumulative because it was committed on parole, cumulative on the three years he was serving [for armed robbery]. So he would have to serve out the three years entirely and then serve eight years of the SVO, the mandatory SVO, which would have been a total of 11 years on what was an effective 13-year head sentence. … totality-wise that's just an incredibly crushing sentence for what he was being dealt with. He wouldn't be looking at much more if it was an attempted murder and that's one of the problems with the inflexibility that comes when the SVO has to kick in.

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268 [2021] QDCSR 841.
269 Subject-matter expert interview I22.
270 Subject-matter expert interview I67.
271 See, for example, QDC 2019/37 discussed in Background Paper 3 (n 28) 3–71 in which the sentencing judge commented that had the charges been dealt with at the same time, there was a 'real prospect' the offender would have received a sentence of 10 years, with the consequence that he would have been declared convicted of an SVO (although the charge of choking, one of the offences for which he was sentenced, it was noted, was not a scheduled offence).
272 Subject-matter expert interview I67.
273 Subject-matter expert interview I2.
274 Ibid.

> And it happens in a number of different ways, but when there has to be cumulation, it seems to be more acute and the result is you end up getting sentences that may not necessarily be the ideal one in terms of … totality [which means it has to be moderated]. [275]

Given the complexities involved, it can increase the likelihood of an appeal.[276]

12.8 Commonwealth versus State offences and sentencing inconsistencies

There is no set statutory ratio between the non-parole period and the head sentence for Commonwealth offences. There are some exceptions to this. In particular, Commonwealth offences which fall within the category of being a terrorism or espionage offence are subject to a 'three-quarter rule' where the non-parole period must be set that is at least three quarters of the head sentence.[277]

Trafficking in dangerous drugs and producing a dangerous drug (if certain circumstances apply) are Schedule 1 offences under the PSA. These offences are commensurate to the Commonwealth offences of trafficking controlled drugs[278] and commercial manufacture of controlled drugs.[279] In circumstances where an offender may be charged either under State provisions or Commonwealth provisions, the opportunity for inconsistency in sentencing arises with respect to both the relevant maximum penalty and parole release. An offender sentenced for a Queensland offence may be subject to either a mandatory or discretionary SVO declaration, depending on the length of the sentence imposed, making them subject to a non-parole period of 80 per cent, compared to an offender who is sentenced under an equivalent Commonwealth provision, where there is no fixed ratio for non-parole periods. This raises issues of consistency in sentencing and may also limit the usefulness of sentences imposed for comparative Commonwealth offences when sentencing Queensland offenders under State sentencing laws.

Two Queensland case examples illustrate the differences between the SVO scheme and Commonwealth sentencing for serious drug offences:

- An offender was convicted in Queensland of an offence of conspiring with others to traffic in a commercial quantity of a controlled drug (cocaine) was sentenced to 12 years' imprisonment with a non-parole period, fixed under s 19AB of the *Crimes Act 1914* (Cth), of seven years and six months (a little over 60 per cent of the head sentence).[280] Leave to appeal against sentence by the defendant on the grounds the sentence was manifestly excessive was refused by the Queensland Court of Appeal.[281]
- An offender was sentenced in Queensland to 11 years' imprisonment on each of one count of importing a commercial quantity of methamphetamine and one count of possessing a commercial quantity of methamphetamine, together with sentencing of a lesser period imposed for other related charges.[282] He was sentenced to 11 years' imprisonment with a non-parole period of five and a half years (50 per cent of the head sentence). Leave to appeal the sentence in this case was also refused.[283]

If convicted of drug trafficking under Queensland law, these offenders would have been required to serve 80 per cent of their sentences before being eligible for release on parole. This equates to approximately 9 years, 7 months in the case of the 12 year sentence, and 8 years, 9.5 months for the 11 years sentence. Even if the sentencing court moderated the sentence to allow for the operation of the SVO scheme and imposed a sentence of 10 years, the offender in this case would still have had to serve eight years before being eligible for release on parole.

Because very few discretionary declarations are made for drug trafficking, the same level of sentencing disparities do not arise when offenders receive a sentence of less than 10 years.

275 Subject-matter expert interview I10.
276 Ibid.
277 *Crimes Act 1914* (Cth) s 19AG(1).
278 Criminal Code (Cth) s 302. The maximum penalties for drug trafficking offences vary depending on the quantities involved. Trafficking in commercial quantities of controlled drugs under s 302.2 carries a maximum penalty of life imprisonment or 7,500 penalty units, or both. Trafficking in a marketable quantity of a controlled drug has a 25 year maximum penalty, or 5,000 penalty units or both. Trafficking in controlled drugs other than in a commercial or marketable quantity is punishable by up to 10 years' imprisonment, or 2,000 penalty units or both.
279 Ibid s 305.The penalties are aligned with those that apply for trafficking and are based on the quantity of drugs involved.
280 *R v Schmidt* (Unreported, Queensland Supreme Court, 13 December 2016, Douglas J).
281 *R v Schmidt* [2018] QCA 59. The applicant's appeal against conviction was also dismissed.
282 *R v Chu; R v Peng* (Unreported, Queensland Supreme Court, 30 August 2018, Douglas J).
283 *R v Chu; R v Peng* [2020] QCA 12.

12.9 The basis for making discretionary SVO declarations

12.9.1 Introduction

Another issue raised with the Council related to issues with the making of SVO declarations on a discretionary basis. Concerns were expressed about perceived inconsistencies in decision-making regarding whether a declaration should be asked, and whether this was ultimately made, and about the low number of declarations made for some types of offences — in particular for manslaughter offences where the sentence fell below 10 years and for forms of sexual offending.

An overview of how Queensland courts make discretionary SVO declarations, and the factors most commonly identified by legal practitioners and judges warranting a declaration is in section 3.4 of Part A of this report.

12.9.2 Queensland statutory guidance and common law on what constitutes a 'serious violent offence'

There is limited statutory guidance in Queensland as to what constitutes 'serious violence', and there is no definition of 'serious violent offence' in Part 9A of the PSA. While the term 'serious violent offence' is defined in section 4 of the PSA with reference to the making of a declaration under section 161A, the term 'serious violence' is not legislatively defined.

Discussed in Chapter 3 of this report, Queensland courts are required to consider a range of factors set out in section 9 of the PSA when sentencing an offender for manslaughter. Specifically, section 9(2A) of the PSA applies when sentencing an offender for offences involving the use or attempted use of violence, or that resulted in physical harm to a person and a court is to have primary regard to section 9(3) in such proceedings. The Court of Appeal has previously found that section 9(3) of the PSA focuses offences against the person and that psychological or emotional distress caused by other offending do not fall within the terms 'violence' and 'physical harm'.[284]

In contrast, the *Domestic and Family Violence Protection Act 2012* (Qld) ('DVFPA') sets out a wide range of behaviours that constitute 'domestic violence' committed in the context of a relevant relationship.[285] Under the DVFPA, domestic violence is behaviour by a person towards another person with whom the first person is in a relevant relationship that:[286]

1. is physically or sexually abusive; or
2. is emotionally or psychologically abusive; or
3. is economically abusive; or
4. is threatening; or
5. is coercive; or
6. in any other way controls or dominates the second person and causes that person to fear for their safety or wellbeing, or that of someone else.

Critically, the DFVPA does not limit violence to only physical abuse or sexual abuse but recognises a wider range of behaviour that may constitute violence.

In the 2002 case, *R v DeSalvo*,[287] the offender appealed his 8-year sentence with an SVO declaration for manslaughter, arguing the declaration was excessive. The majority of the Court of Appeal concluded the declaration was not justified and resentenced him to 9 years with no recommendation for parole. This case first introduced the concept of the offence needing to be 'outside the norm' to meet the threshold for a declaration.

Williams JA stated:

> There is no definition of 'serious violent offence' in the *Penalties & Sentences Act 1992 (Qld)*, and the inclusion of a particular offence in the schedule of serious violent offences clearly does not mean that the mere commission of such an offence warrants the making of a declaration that the conviction was of a serious violent offence. So much is made clear by the wording of s 161B(3) of the Act. The court is given an express discretionary power to declare the commission of an offence specified in that schedule to be a conviction for a serious violent offence. That must mean that there is something about the circumstances of the offence in

284 *R v Barling* [1999] QCA 16, 8 (de Jersey CJ): This case concerned property damage, arson of a caravan within a domestic and family violence context.
285 *Domestic and Family Violence Protection Act 1989* (Qld) Division 3 ('DFVPA').
286 Ibid s 8(1).
287 (2002) 127 A Crim R 229 ('*DeSalvo*').

> question which takes it beyond the norm and justifies the making of the declaration; such circumstance though need not be categorised as exceptional. Given the concentration on the 'offence' in ss 161A and 161B rather than on the 'offender', the criminal history of the offender will not ordinarily be a decisive consideration on the exercise of that discretion: *Keating* [2002] QCA 19.[288]

Williams JA also commented on the offence of manslaughter and the SVO scheme noting:

> Almost by definition manslaughter is an offence involving violence, and more often than not the use of some weapon is involved in that violence. In consequence it is not sufficient to say that the mere presence of either or both violence and use of a weapon as one of the circumstances justifies the making of the declaration.[289]

McPherson JA, in a separate judgment, expressed his view that sentences for these types of manslaughter (using a knife) 'may be somewhat lower than it should be. But the way in which to correct that state of affairs is to raise the general level of sentences for the crime, and not to use s 161B(3) of the Act as a means of correcting the deficit'.[290]

His Honour went on to say, in agreement with Williams JA, that:

> All but a few offences of manslaughter are, in a sense, serious and violent; but making general use of the declaration procedure in such cases will leave very little scope for severely punishing those that are much worse than others. If the legislature had intended declarations to be made in all or most cases of manslaughter committed by a deliberate act but without meaning to kill or inflict grievous bodily harm, it would surely have said so instead of leaving the matter of a declaration under s 161B to the judge's discretion.[291]

The subsequent leading Court of Appeal judgment of *McDougall and Collas*,[292] — which also involved manslaughter — said that exercising the discretion to make a declaration required a sentencing judge to consider whether the circumstances of the offence provided a 'good reason' to postpone a person's eligibility date on the basis of 'protection of the public or adequate punishment'.[293] The Court said such considerations 'will usually be concerned with circumstances which aggravate the offence in a way', requiring a sentencing judge to determine whether 'the offence is a more than usually serious, or violent example of the offence in question and, so, outside 'the norm' for that type of offence'.[294] The Court of Appeal has more recently moved away from this notion of 'the norm' in *Free*.[295]

In relation to serious violence committed against a child, the Court of Appeal has said legislative instruction in relation to the death of children under 12 should be given greater weight. In the case of *O'Sullivan* discussed in 10.3.3, the Attorney-General appealed the sentences for manslaughter of a 22-month-old child. The Court dismissed the case against Lee, but allowed it in respect of O'Sullivan. He was resentenced to 12 years and received an automatic SVO declaration. The Court referred to the 2010 amendment to insert section 161B(5) to the PSA, which requires courts to treat the use or attempted use of violence against a child under 12, or that caused the death of a child under 12, as an aggravating factor 'in deciding whether to declare the offender to be convicted of a serious violent offence'.[296]

In reference to this and other legislative amendments,[297] the Court stated:

> This sequence of legislative changes since 1997 puts it beyond question that the legislature has made a judgment about the community's attitude towards violent offences committed against children in domestic settings. The amendments constitute legislative instructions to judges to give greater weight than previously given to the aggravating effect upon a sentence that an offence was one that involved infliction of violence on a child and that the offender committed the offence within the home environment.[298]

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288 Ibid 232 [15] .
289 Ibid 232 [16].
290 Ibid 231–2 [8]. Although Byrne J dissented in this judgment and dismissed the appeal, his Honour agreed with McPherson JA on this point: [22].
291 Ibid.
292 *McDougall and Collas* (n 2).
293 Ibid 97 [20].
294 Ibid 97 [21].
295 *Free* (n 39). In 2002 the Court of Appeal affirmed that the 'approach [in *Free*] should be taken in determining whether to make a serious violent offence declaration': *R v Lewis; Ex parte A-G (Qld)* [2002] QCA 14, [73] (Morrison JA, Sofronoff P and Flanagan J agreeing).
296 Inserted by *Penalties and Sentences (Sentencing Advisory Council) Amendment Act 2010* (Qld) s 7. See Chapter 3 for more information.
297 *O'Sullivan* (n 45) 222–31 [68]–[90] (Sofronoff P, Gotterson JA, Lyons SJA), citing: The insertion of pt 9A (the SVO scheme) in the PSA (n 7); the insertion of ss 9(3) and (4) in the PSA which created an exemption to the principle that imprisonment is a last resort where the offending involved the use of, or counselling or procuring the use of, or attempting or conspiring to use, violence against another person or that result in physical harm to another person; the amendment of s 9(1)(d) of the PSA to replace the words 'does not approve of' with 'denounces' in this sentencing principle — 'to make it clear that the community, acting through the court, denounces the sort of conduct in which the offender was involved' (emphasis added); the replacement of the *Domestic and Family Violence Protection Act 1989* with the *Domestic and Family Violence Protection Act 2012* and various amendments made to that Act in subsequent years; and the insertion of s 9(10A) in the PSA, which requires the Court to treat the fact that the offending was domestic violence offending as an aggravating feature.
298 Ibid 231 [93].

12.9.3 Lack of consistency or clarity about what types of offences are 'serious enough' to warrant a declaration being made

Court of Appeal consideration

As discussed in Chapter 3, there are a number of key Court of Appeal decisions that have provided guidance to courts in the making of declarations in circumstances where this is discretionary.

One of these decisions, discussed in detail in Background Paper 3, was *R v Eveleigh*[299] ('*Eveleigh*') handed down 5 years after the scheme was introduced. In this case, Fryberg J set out the position of the law as it related to SVO declarations, including those key factors that were relevant in the making of a discretionary declaration:

> 8. Where the making of a declaration is discretionary:
>
> (i) seriousness of and violence in the course of the offence are not essential conditions for the making of a declaration;
>
> (ii) seriousness of and violence (actual or threatened) in the course of the offence are relevant factors in deciding whether a declaration is appropriate;
>
> (iii) seriousness of and violence (actual or threatened) in the course of the offence do not require the making of a declaration;
>
> (iv) where the making of a declaration is discretionary, the discretion is unfettered. In particular, it is not necessary that the circumstances of the case should take it beyond the 'norm' for cases of its type;
>
> (iv) all aspects of a sentence must have a legitimate purpose;
>
> (v) the sentencing judge should state the reasons for the sentence, both in terms of the nature of the components of the sentence and their severity. If the reasons are implicit in the remarks of the judge, the sentencing discretion will not be held to have miscarried.[300]

Reviewing earlier decisions, Fryberg J commented that they disclosed 'a considerable variety, indeed inconsistency, in the interpretations of the 1997 amendments adopted by various members of the Court'.[301] He resolved these inconsistencies in favour of the view that the scheme was to be viewed as 'an additional sentencing tool' applied as part of the integrated process of sentencing — not as part of a 'two-step' process.[302]

The Court provided further detailed guidance in *McDougall and Collas*.[303] It said:

> The considerations which may lead a sentencing judge to conclude that there is good reason to postpone the date of eligibility for parole will usually be concerned with circumstances which aggravate the offence in a way which suggests that the protection of the public or adequate punishment requires a longer period in actual custody before eligibility for parole than would otherwise be required by the [*Penalties and Sentences Act 1992*] having regard to the term of imprisonment imposed. In that way, the exercise of the discretion will usually reflect an appreciation by the sentencing judge that the offence is a more than usually serious, or violent, example of the offence in question and, so, outside 'the norm' for that type of offence.[304]

This view was reiterated by the Court of Appeal in the decision of *Free*[305] — although the court has sought to move away from the notion of an offence being 'outside the norm' to justify a declaration being made. The Court made the following observations in concluding the sentencing judge erred in taking too narrow an approach in focusing solely on whether the offending was 'outside the norm' for that type of offending:

> The exercise of the sentencing discretion in the present case was affected by error, in particular in relation to the exercise of the discretion whether to make a serious violent offence declaration, by focussing on a perceived need to find factors which take the case outside the norm for the type of offence; rather than considering more broadly whether there are circumstances of the case which aggravate the offence in a way which suggests the protection of the public or adequate punishment required a longer period in actual custody before eligibility for parole than would otherwise be required.
>
> We hasten to add that we apprehend the approach taken by the learned sentencing judge in this case is likely to have been the approach regularly taken by sentencing courts, when considering the exercise of the discretion to make a serious violent offence declaration. That is, to focus on whether there are factors in the particular case which take it outside 'the norm' for the type of offence. That is a short-hand expression frequently invoked as a means of conveying the 'test' to be applied. It is the analysis invited on this appeal that has drawn our attention to the fact, and persuaded us, that **such focus is too narrow**.

299 *Eveleigh* (n 123).
300 Ibid 430–431 [111] (Fryberg J).
301 Ibid 427 [99].
302 Ibid 427–8 [101]–[102].
303 *McDougall and Collas* (n 2).
304 Ibid 97 [20]–[21] (citations omitted).
305 *Free* (n 39).

> We also observe that, for a sentencing judge, it can be uncomfortable, to say the least, to be describing a 'norm' for an appalling offence – the present case is an obvious example; but there are many others. There is nothing normal or normative about this offending. It is shocking, and to speak of a 'norm' is justifiably jarring, for victims of the offending, and also for the broader community, let alone for the sentencing judge.
>
> ....
>
> The learned sentencing judge's focus on whether there were factors in the respondent's commission of the offence of taking a child for an immoral purpose 'which take it outside the norm for that appalling offence', obscured the need to also consider, as part of the integrated process, whether there were other factors, including factors relevant to community protection or adequate punishment, which warranted an order requiring the respondent to serve 80 per cent, as part of a just penalty. As submitted by the Attorney-General, an important consideration in this case was the need to protect the community from the risk of future offending by the respondent.[306]

In light of these decisions, and other key Court of Appeal decisions discussed in detail in Background Paper 3, it could be argued that the current guidance is now relatively settled as to the approach to be taken. This does not, however, mean that there will not be different conclusions reached by sentencing judges as to whether an SVO declaration is warranted in a particular case, in the proper exercise of their discretion.

Stakeholder views

Offender and victim advocacy and support organisations raised concerns in their submissions about what they viewed as inconsistencies in the way the scheme was applied in circumstances where the making of an SVO declaration was discretionary.

A number of these stakeholders pointed to lack of clarity about what types of offences were 'seriously violent enough' to attract a declaration. This gave rise to concerns that the scheme was applied inconsistently and with a lack of transparency about how decisions were made.

From a victims' perspective, it was suggested this could be resolved 'by clearly defining the crimes that fall under the scheme and not allowing courts to avoid the scheme in any way'.[307]

Victim and survivor views about this issue are explored further in section 13.6 of this report.

Sisters Inside included a detailed examination of what it saw as inconsistencies leading to unjust outcomes in cases involving the making of discretionary declarations, particularly in relation to gender and race (see discussion in section 12.6.1). Sisters Inside compared two different cases involving offences against young children. The first involved an Aboriginal woman convicted following a trial of four counts of torture, one count of rape and four counts of common assault against her five daughters. She was sentenced to 9 years' imprisonment with a discretionary SVO.[308]

The second case involved an offender convicted, on his own plea, of manslaughter of an 18-month-old child, and later, assault occasioning bodily harm against the child's three-year old sibling. He was sentenced to 8 years and 6 months' imprisonment for the manslaughter offence, with no SVO declaration made and parole eligibility set for a period of about two years after sentence, taking into account a significant period of pre-sentence custody.[309] Sisters Inside argued differences in the ways the offenders in these two cases were treated illustrated 'issues relating to the scheme and the gendered and racialised operation of the legal system'.[310] The organisation suggested 'the scheme contributes to anomalies in sentencing, by creating distinctions between certain offences (and as a consequence, certain 'typologies' of violence'.[311]

Views from expert interviews

The difficulty of determining whether a sentence of less than 10 years for a scheduled offence should be the subject of a discretionary SVO declaration was a topic of considerable discussion, with some interviewees referring to this as the most difficult aspect of the scheme:

> I think, because of the difficulties of discretionary SVOs, I mean I think they're a real challenge for judges and so it has to almost be a really striking situation where you're not at the 10 level but you can, as a judge, say it's sufficiently – I've got sufficient grounds that I can see my way through to why this is an SVO.[312]

306 Ibid 98–9 [49]–[51], 99 [54] (Philippides JA, Bowskill and Callaghan JJ) (emphasis added).
307 Submission 4 (Fighters Against Child Abuse Australia) 18.
308 *R v NX* [2018] QCA 325.
309 *R v Ireland; Ex parte A-G (Qld)* [2019] QCA 58.
310 Submission 11 (Sisters Inside) 10.
311 Ibid.
312 Subject-matter expert interview I31.

Some interviewees spoke about the difficulties of being put in the position of having to decide which example of rape or torture (or other offence) is 'bad enough' to warrant the making of a declaration. Prosecutors and judges alike referred to the discomfort they experienced being asked to assess whether a particular offence was sufficiently 'outside the norm' for that type of offending to warrant a declaration — which was acknowledged by many as the pre-*Free* benchmark typically applied:

> And it's hard, isn't it? Because most — well even thinking of manslaughters — they've all got their unique circumstances and there's generally something that's quite awful, … for want of a better word in each case. So how you define what should take it out the category and put it in the SVO category is really tricky.[313]

> Again, … you can categorise anything down and say, oh as this type this isn't so bad, you know … [it] gives rise to silly almost artificial thinking. Come back and think: 'hang on a minute, someone dragged someone off the street and raped them and … oh the rape just required the normal force you need to rape a woman as opposed to gratuitous force'. And you go: 'this guy hit her over the head with a rock. She was nearly unconscious. Is that not enough?' [314]

The assumption is that most of the offences listed in Schedule 1 are, by their very nature, serious and violent.

When asked to identify the particular features of an offence that might become a candidate for an SVO declaration, the following matters were most commonly listed:

- The nature and seriousness of the offence. The features of the offence that make it overall particularly serious include:
  - The use of unusual or gratuitous violence: 'Circumstances where there's gratuitous – extremely gratuitous violence but, despite the best efforts of the offender, the injuries aren't that bad'.[315]
  - Violence that leads to significant injury: 'I suppose the only really common feature is that there's generally a violence that inflicts, you know, pretty significant injuries'.[316]
- Whether weapons were involved, and to what extent they were made use of: 'I'll use an example of a home invasion where you're going to rob someone. If you go there with weapons, and you go to do something, and you just threaten them with the weapons but don't use the weapons, I would have thought previously, prior to *Free*, that that was a fairly run-of-the-mill type of burglary and home invasion. So in those circumstances, prior to *Free*, I would have thought you need to use those weapons in some fashion or you need to hold someone and detain them, cable tie them and beat them; that enlivens the discretion more than just saying, yeah someone's gone in with weapons and robbed someone'.[317]
- The duration of the violence: 'Where there's either significant violence that attaches to … a charge [such as] rape, or where there's offending over a really long period of time'.[318]
- An intention to inflict pain: 'in my experience, it's more about if someone intends to hurt or intends to inflict pain then you're more likely to consider whether to make the order and the Crown's more likely to ask for it'.[319]
- A deliberate attempt to humiliate or degrade the victim: 'I look for unusual violence, unusual deliberation, planning, humiliation, so if they've set out to humiliate the victim'.[320] Another participant stated: 'So there would be factors around the offence itself, so particularly with respect to sexual offences, gratuitous violence, degrading behaviour, things that showed a sadistic nature of the offending itself'.[321]
- Factors related to the motivation for committing the offence, how the injury was caused and pre-planning: 'Also the motivation. I think that home invasion case I talked about, the motivation was for some revenge of some sort for some really trivial incident'.[322]
- Another participant stated: 'It's about the mechanism of the injury, you know how the person injured the other party, what was going on in their mind as they did it, the level of intention, level of planning with respect to it …'[323]
- The nature of any relationship between the victim and offender, particularly in relation to intimate partner violence: 'So it might be that there was a domestic relationship – well that would be a circumstance of aggravation'.[324]

313 Subject-matter expert interview I38.
314 Subject-matter expert interview I11.
315 Subject-matter expert interview I49.
316 Subject-matter expert interview I1.
317 Subject-matter expert interview I67.
318 Subject-matter expert interview I60.
319 Subject-matter expert interview I21.
320 Subject-matter expert interview I49.
321 Subject-matter expert interview I2.
322 Subject-matter expert interview I16.
323 Subject-matter expert interview I53.
324 Subject-matter expert interview I47.

- For sexual offences, there were two sets of key features that interviewees spoke about as being important in deciding whether a discretionary SVO should be applied for or made, including:
  - the length of time over which the offending conduct occurred, and the age and vulnerability of the victim;[325] and
  - whether there was violence in the sense of physical force applied accompanying the offence.[326]

12.9.4 Inconsistencies in application of the scheme between offence categories

The SVO scheme is applied differently depending on the offence category, in particular to sexual violence and serious drug offences. There were 437 declarations made in the 9-year data period analysed by the Council. Mandatory SVO declarations accounted for almost three-quarters of these (72.8%) with only 27.2 per cent of all declarations made on a discretionary basis. The overwhelming majority of discretionary declarations were made for an offence in Schedule 1 of the PSA where the offender was sentenced to a term of imprisonment of 5 years or more but less than 10 years.[327]

The overwhelming majority of SVO declarations made for sexual violence offences were mandatory (89.0 per cent, n=146). Only 18 sexual violence cases received a discretionary declaration (11.0%).[328]

Serious drug offences attracted a discretionary SVO declaration even less frequently, with 92.3 per cent of declarations made being mandatory. There were only five discretionary declarations made (7.7%) for serious drug offences.[329]

The proportion of mandatory and discretionary declarations in the 203 declarations made for non-sexual violence offences was more balanced. Just over half of the SVO declarations made were mandatory (54.2%), with the remaining 45.8 per cent having received discretionary declaration. As shown in section 6.1.3, a wider range of non-sexual violence offences received declarations compared to sexual violence and serious drug offences.

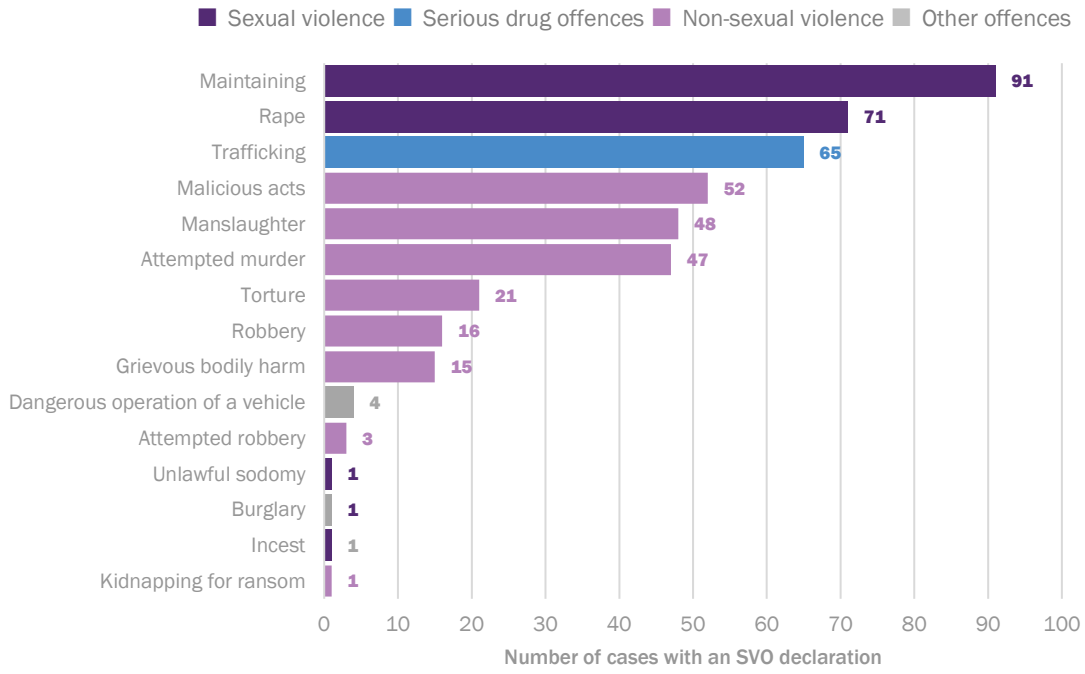
When considering the 119 discretionary SVO declarations made during the data period, almost 80 per cent were for non-sexual violence offences (78.2%, n=93/119), compared to 15.1 per cent for sexual violence offences (n=18/119) and 4.2 per cent for serious drug offences (n=5/119). The SVO scheme was applied to a larger number of non-sexual violence offences compared to a smaller number of different types of sexual violence offences. Despite Schedule 1 having almost equal numbers of sexual violence and non-sexual violence offences listed — 21 sexual violence offences and 23 non-sexual violence offences — there was a stark difference in the number of different offences commonly attracting an SVO declaration, with non-sexual violence offences accounting for over half of the offences to receive a declaration.

As discussed in Part B, only 15 Schedule 1 offences, received at least one SVO declaration in the data period.[330] Of those 15 offences, 8 were non-sexual violence offences, 4 were sexual violence offences, one was a serious drug offence and 2 were other offences.

As illustrated by Figure 38, of the 4 sexual violence offences, 2 offences accounted for almost all of the SVO declarations for those offences — maintaining a sexual relationship with a child and rape receiving 91 and 71 declarations respectively. Those 2 offences accounted for 162 of the 164 SVO declarations made for sexual violence offences. In contrast, 6 non-sexual violent offences accounted for 199 of the 203 SVO declarations made for this category of offence. All SVO declarations for the serious drug offence (MSO) were for drug trafficking.

325 Subject-matter expert interview I21.
326 Subject-matter expert interview I52.
327 PSA (n 7) s 161B(3).
328 A review of the sentencing remarks for those 18 cases found they applied to 17 individual offenders, as one offender received 2 discretionary SVO declarations in 2 separate cases which were then made consecutive to each other. In addition, 3 of the 17 offenders were already serving mandatory SVOs for very serious sexual offences (and the discretionary SVO sentence was applied cumulatively to those sentences). All 3 of those cases involved very serious sexual offences that the judge noted alone would have likely attracted a 10 year+ sentence and a mandatory SVO declaration. Excluding those cases involving more serious sexual offences which, if sentenced alone, would have been likely to attract a mandatory declaration, the number of discretionary SVO declarations for sexual violence offences over the 9-year data period was 14.
329 A review of sentencing remarks for those 5 cases revealed that in one case, while the trafficking offence was the most serious offence (MSO), the SVO declaration attached in fact to robbery charges, meaning only 4 discretionary declarations were made for drug trafficking in the data period.
330 MSO.

Figure 38: Number of cases with an SVO declaration, by offence (MSO)



Data includes cases sentenced with an SVO declaration, MSO, 2011–12 to 2019–20.
Source: QGSO, Queensland Treasury – Courts Database, extracted August 2020.

12.9.5 Discretionary application of the scheme to sexual violence offences

Discretionary declarations were made relatively infrequently for cases involving sexual violence. Of 164 declarations made where a sexual violence offence was the MSO over the period 2011–12 to 2019–20, only 18 were discretionary (11.0%). In contrast, of the 203 declarations made for non-sexual violence offences, almost half were discretionary (45.8%, n=93/203).

Of those 18 discretionary SVO declarations made for sexual violence offences (MSO), 13 were for rape and 5 were for maintaining a sexual relationship with a child. When the Council examined those cases more closely, it emerged that these cases often involved the application of physical violence and/or threats to coerce or make the victim comply. Based on the Council's analysis of sentencing remarks over a two-year period, it was unusual to find cases in which courts declared sexual offences that did not involve an additional level of physical violence causing serious physical harm as warranting a declaration.

It appears that sexual violence offences are less commonly characterised as reaching the threshold of offence seriousness to the level warranting the making of a 'serious violent offence' declaration. This was commonly the case where the sexual offence was not accompanied by separate acts of physical violence and/or the explicit use of violence or threats as part of the offending.

Cases in which a discretionary SVO declaration was made: Maintaining a sexual relationship with a child and rape

As noted earlier in this section (12.9.5), there were 18 discretionary SVO declarations made for sexual violence offences during the data period. Of those, 13 were made for offences of rape and the remaining 5 were made for offences of maintaining a sexual relationship with a child.[331]

When those 18 cases were examined in detail, some common themes emerged:

[331] Of the 18 cases, 17 applied to individual offenders, as one offender received 2 discretionary SVO declarations in 2 separate cases which were then made consecutive to each other. In addition, 3 of the 17 offenders were already serving mandatory SVOs for very serious sexual offences (and the discretionary SVO sentence was applied cumulatively to those sentences). All 3 of those cases involved very serious sexual offences that the judge noted alone would have likely attracted a 10 year+ sentence and a mandatory SVO declaration. Excluding those cases involving more serious sexual offences which, if sentenced alone, would have been likely to attract a mandatory declaration, the number of discretionary SVO declarations for sexual violence offences over the 9-year data period was 14.

- cases often involved multiple associated serious sexual violence and/or non-sexual violence offences;[332]
- cases were often committed against multiple complainants, particularly where the complainants were children; and
- the application of physical violence and/or threats to coerce or make the victim comply was a common feature.

A relevant criminal history was not present in all cases, meaning this was not a consistent factor the courts took into account for the making of a discretionary declaration.

The Council found differences in the factual scenarios involved in these two offences. The 5 maintaining cases were all domestic violence cases committed against daughters, granddaughters or stepdaughters,[333] and all the children were aged under 12 years or under when the offending commenced or took place. Associated offences for these maintaining charges all involved other sexual offences (usually child sexual offences), although one case also involved associated non-sexual violence offences.[334] When explaining why a declaration was justified, judges frequently commented on:

- the serious nature of the offending, including the young age of the child, and the significant breach of trust and duration of the period over which the sexual offending occurred;
- the frequent and persistent nature of the sexual violence, such as involving multiple counts of rape; and
- the use of coercion, threats and emotional and physical violence to facilitate the commission of the offences.[335]

Two of these offenders also received a mandatory SVO declaration for other serious sexual offences.

The 13 rape cases involved a wider range of victim ages, with 2 complainants under 16, one elderly complainant in her 60s, and the majority aged 17 or older. The majority of these cases involved a single episode of offending, in contrast to the maintaining offences — which reflects the very different nature of these offences. While sexual violence-associated offences were present in many cases, there were also many associated non-sexual violence offences, such as stupefying to commit an indictable offence, burglary and GBH. For the cases where non-sexual violence offences were associated, the courts focused on the violence used in commission of the offending when explaining why a declaration was required. Other factors mentioned included the premeditated nature of the conduct, use of a weapon and the age of the victim.

This analysis suggests that while offences of sexual violence are regarded as very serious by the courts, courts typically reserve the making of discretionary declarations to those situations where additional physical violence or threats are involved in the commission of the offending or, in the case of maintaining, where there is offending occurring over a long period involving repeated and very serious forms of sexual offending with additional violence, coercion or threats.

The analysis of cases attracting a discretionary SVO for rape and maintaining a sexual relationship with a child, indicates that courts and/or legal practitioners may identify violence more readily in the commission of rape. However, the offence of maintaining a sexual relationship with a child 'involves more than one unlawful sexual act over any period' and may include offences constituting rape.[336] These offences are not always particularised on an indictment, so a defendant is not convicted of the specific acts that take course during a maintaining offence.

Further, in cases involving children, the offender often does not need to use physical violence to commit the offences. This is because children are often less able to resist an adult offender due to being physically smaller, the offender is in a position of trust or authority and the child has been groomed.

While the Council was unable to determine which cases of rape that received an SVO declaration involved children, the analysis of common associated offences identified that almost one-third of these cases also involved an offence of indecent treatment of children under 16 (32.4% overlap). This finding suggests that the victim in these cases of rape may have been a child — see section 7.2.1 in Part B of this report.

The making of discretionary declarations for sexual violence offences is discussed further in section 16.2.2.

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332 Only one case involved a single count of rape: *R v Benjamin* (2012) 224 A Crim R 40. The Court of Appeal reduced the 11-year sentence to 9 years with an SVO declaration.

333 Several cases predated the commencement of the *Domestic and Family Violence Protection Act 2012* (Qld) and therefore could not be averred as DV offences.

334 However, while this involved multiple counts of AOBH and common assault, all of those offences were perpetrated against the complainants' mother and regarded as contributing to a 'violent environment in the house' so that violence against the children was not necessary to get compliance.

335 *R v FS* (District Court of Queensland, 4 August 2017); *R v NF* (District Court of Queensland, 11 October 2012); *R v DR* (District Court of Queensland, 18 November 2019); *R v WG* (District Court of Queensland, 26 July 2018); *R v PW* (District Court of Queensland, 13 June 2012).

336 Ibid.

Observations from expert interviews

Some participants of the Council's expert interview project highlighted concerns regarding the discretionary application of the SVO scheme for sexual violence offences. For sexual violence offences, there were several key features that interviewees referred to as being important factors in whether to consider a discretionary SVO. One participant explained that the length of time over which the conduct occurred and the age and vulnerability of the victim were primary considerations. This participant gave as an example of the type of case that would give rise to consideration of a the making of discretionary SVO declaration as being 'sex offences, with the big maintaining offences where children have been raped over a long time, perhaps pregnancies have resulted, they've been threatened, those type of offences'.[337]

Other participants specifically commented on the element of physical force when determining if a sexual offence warrants an SVO declaration. A legal stakeholder explained that 'serious sexual crimes where there's violence' would warrant making a submission for a discretionary SVO declaration, acknowledging that in the absence of physical force, SVO declarations would rarely be asked for.[338] Other participants made the following observations:

> You're looking at the worst aspect – you're looking at a more serious example of its type and it's kind of an exercise by feel, but if there's some aspects of violence or some aspect – and it's usually violence, even within a sexual context – then you're looking at a display of power and violence which strikes you as something which causes you to think that this person is a danger. [339]

> Normally the sexual offences which will attach the SVO when you're getting over the 10-year mark may not have a component of violence, they just may have a component of persistency. But they're not violence in themselves. But in terms of that, it's difficult to say that persistent rape of a child doesn't have a violent character.[340]

> Rapes certainly can be violent. Rapes, particularly you know stranger rapes – that sort of thing is very serious. With the … like the step-uncle or step-father and kids, it's rare you'd make an SVO between five and 10 years for those unless they were particularly violent, but they tend not to be – I mean the offences themselves are violent but there's no accompanying acts of violence generally.[341]

The Council's findings regarding differences in the application of the scheme for sexual violence and non-sexual violence offences may highlight a systemic problem that sexual violence is not always regarded as inherently violent or 'violent enough' in the sense of involving physical force to give rise to a discretionary SVO declaration. This issue is discussed in more detail in Chapter 16, section 16.2.2.

Queensland statutory guidance and common law on *violence* and *sexual violence*

As discussed in Chapter 3, there is limited statutory guidance in Queensland as to what constitutes 'serious violence'. However, some legislation may reinforce the interpretation by legal practitioners and the courts that violence which constitutes physical injury is distinct and separate to sexual violence, particularly where the victim is a child.

'Serious violent offence' is only defined in section 4 of the PSA by reference to the making of a declaration under section 161A, and the term 'serious violence' is not legislatively defined. Section 9 of the PSA distinguishes between violence and sexual violence offences committed against children by having two separate sections that courts must take into account when sentencing these offences. Section 9(2A) applies when sentencing an offender for violence or physical harm offences and section 9(6) applies when sentencing an offender for an offence of a sexual nature committed in relation to a child.[342] Seven of the factors are directed to circumstances affecting the child victim or potential victims.[343] For example, section 9(6)(c) requires the court to consider whether the offence involved 'any physical harm or the threat of physical harm to the child or another', which is distinct from 'the effect of the offence on the child'.[344] The remaining four factors concern the offender. As recognised by the Court of Appeal, these are factors to which the sentencing judge 'must have regard primarily' when sentencing for these offences.[345]

Other legislation which shares this distinction is the *Dangerous Prisoners (Sexual Offenders) Act 2003* ('DPSOA'). The term 'serious sexual offence' is defined for the purposes of the DPSOA in a way that distinguishes offences of a sexual nature 'involving violence' from those committed 'against a child' (as well as offences committed 'against a person, including a fictitious person represented to the prisoner as a real person, whom the prisoner believed to be

337 Subject-matter expert interviews, participant I21.
338 Subject-matter expert interviews, participant I52.
339 Subject-matter expert interviews, participant I43.
340 Subject-matter expert interviews, participant I13.
341 Subject-matter expert interviews, participant I68.
342 For the full list of provisions the court must consider see Table 1 in Chapter 3.
343 PSA (n 7) ss 9(6)(a)–(e), 9(6)(k).
344 Ibid s 9(6)(a). By comparison the Judicial College of Victoria, *Victorian Sentencing Manual* (4th ed, July 2021) sets out common factors relevant to assessing gravity and the offender's culpability including 'was [there] additional violence, force or threats of violence?' noting sexual penetration of a child 'is in itself an act of violence': at 340.
345 *Stable* (n 261) [43].

a child under the age of 16 years').[346] Violence is defined to include intimidation and threats.[347] This means that a DPSOA order can only be made against an offender who has committed offences of a sexual nature against an adult complainant if it is found to 'involve violence'.

As noted earlier in this section (12.9.5), the DFVPA includes behaviour that is sexually abusive as a form of domestic violence, along with a range of other behaviours.

In 2012, the Court of Appeal considered the DPSOA's definition of 'serious sexual violence' and whether the offences constituted violence in *Attorney-General for the State of Queensland v Phineasa* ('*Phineasa*').[348] Muir JA commented:

> The word 'violent', like a great many words in the English language, is capable of bearing a variety of meanings depending on its context. An offence, to be a serious sexual offence, must be 'of a sexual nature' **and** involve 'violence' unless it is against children.[349]

He referred with approval to Margaret Wilson J's conclusion in the earlier decision of *Tilbrook* that 'to constitute "violence" for present purposes something more than mere physical contact is required',[350] finding that the definition which 'best captures the meaning of "violence" in the definition of serious sexual offence is the definition of "violent" in The New Shorter English Dictionary'.[351] The definitions referred to included:

1. Of things: Having some quality or qualities in such a degree as to produce a very marked or powerful effect (esp. in the way of injury or discomfort); intense, vehement, very strong or severe.
2. Of an action: involving or using great physical force or strength, esp. in order to cause injury; not gentle or moderate.'
3. Of persons: Acting with or using physical force or violence, esp. in order to injure, control, or intimidate others; committing harm or destruction in this way; ... '[352]

His Honour concluded:

> the 'violence' referred to in the definition of serious sexual offence is force significantly greater in degree than mere physical contact or even, at least as a general proposition, acts such as pawing, grasping, groping or stroking... the 'violence' contemplated by the Act (excluding for present purposes threats and intimidation) would normally involve the use of force against a person to facilitate the 'rape' of that person within the meaning of s 349 of the Criminal Code or which caused (or in the case of predicted conduct would be likely to cause) that person significant physical injury or significant psychological harm.[353]

And further:

> It will always be necessary to determine whether conduct involves 'violence' by reference to the particular facts and circumstances of the case under consideration. However, rape, involving as it does the violation of the victim's body would normally, if not invariably, involve 'violence'.[354]

The Court concluded in this case that the prisoner's offending was not 'violent' and therefore did not meet the threshold required by the DPSOA. Given the seriousness of the DPSOA scheme to deprive citizens 'of their liberty because of a perceived risk that they might commit' an offence in future, the Court concluded 'the language of the statute compels' a high threshold and parliament did not intend it apply to 'relatively minor offences'.[355] White JA, agreed with Muir JA and noted that had the definition argued by the appellant been adopted it would 'expose virtually all those convicted and sentenced to punishment by imprisonment for any sexual assault to the extraordinary regime of that Act', and this was not supported by any extrinsic material.[356]

In relation to the SVO scheme and what constitutes violence, the Queensland Court of Appeal in the 2002 case of *Eveleigh*,[357] considered whether violence was a requirement for an offence to be regarded as eligible for a declaration. The Court in that case said that 'seriousness of and violence in the course of the offence are not essential conditions for the making of a declaration'.[358]

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346 *Dangerous Prisoners (Sexual Offenders) Act 2003* (Qld) schedule 1.
347 Ibid.
348 [2013] 1 Qd R 305 ('*Phineasa*').
349 Ibid 312 [24]–[25] (emphasis in original).
350 Ibid citing *A-G (Qld) v Tilbrook* [2012] QSC 128, [5].
351 Ibid.
352 [2013] 1 Qd R 305, 310 [16], 314 [37] (Muir JA, White JA and Philippides J agreeing).
353 Ibid.
354 Ibid 314 [39], citing *R v Evans* (1999) 8 Tas R 325; *R v Brown* [1987] Tas R (NC) 193.
355 Ibid 313 [31].
356 Ibid 318 [59].
357 *Eveleigh* (n 123).
358 Ibid 430–1 [111] (Fryberg J).

In the later decision of *R v BAX*,[359] the Court of Appeal considered whether a declaration could be made for serious sexual offences, namely maintaining a sexual relationship with a child. McPherson JA observed:

> Under s 161A of [the Penalties and Sentences] Act, an offender is convicted of such an offence if convicted on indictment of an offence against a provision mentioned in the schedule to the Act: s 161A(a)(i)(A). **The schedule lists a number of offences that may, and in practice often are, unaccompanied by 'violence' in the ordinary acceptation of that term. In those and other instances, violence in that sense is not an ingredient of or a condition precedent to the making of a declaration under the statutory provisions referred to**. Among those offences are that of maintaining a relationship of a sexual nature with a child: s 229B of the Code.[360]

That position was reinforced by the Court of Appeal in the leading decision of *McDougall v Collas*,[361] in which the Court commented, that in deciding if a discretionary declaration should be made:

> a critical matter is whether the offence has features warranting a sentence requiring the offender to serve 80 per cent of the head sentence before being able to apply for parole. By definition, some of the offences in the Schedule to the Act will not necessarily — but may — involve violence as a feature, such as trafficking in dangerous drugs or maintaining a sexual relationship with a child.[362]

However, there were also alternative views expressed by the Court of Appeal, most notably in 2002 with *R v DeSalvo* — see section 3.3 — and it became apparent to the Council during this review that the existence of separate acts of physical violence was often regarded as a crucial element in the offence to warrant a declaration.[363]

Whether the victim is a child or an adult will likely have bearing on how the courts interpret violence and sexual violence, particularly in relation to the making of SVO declarations.

Sexual violence committed against adults may require a higher threshold of violence. In *R v Benjamin*,[364] the Court of Appeal considered whether an offender should have received an SVO declaration for one count of rape. The complainant had been out jogging when the applicant had struck her from behind, rendering her unconscious before raping her. On appeal, the applicant argued the sentencing judge had erred in concluding 'the nature of the offence involved gratuitous violence of a significant degree', with his counsel submitting the violence used was merely 'to overcome any resistance'.[365] The Court rejected this argument, although it concluded that the sentence was excessive and reduced it from 11 to 9 years with an SVO declaration.

In 2014, the Court of Appeal observed that 'sentences for rape do not tend to exceed 10 or 11 years unless accompanied by substantial violence',[366] thereby resulting in an automatic SVO declaration.

The Court of Appeal has observed that the offence of maintaining a sexual relationship with a child can involve 'infinite variation' so the courts 'should not be rigidly tied to ranges as such, but flexible enough to give due allowance to significant variations from case to case'.[367] For example, former Chief Justice de Jersey observed that for maintaining cases involving a father committing regular oral and penile intercourse against their daughter over a 2-3 year period, that:

> In light of what I have said earlier and not wishing to be unduly prescriptive about ranges, I would nevertheless assert 10 years' imprisonment would mark the lowest level at which one could appropriately sentence for this offending where there has been a plea of guilty … On an Attorney-General's appeal this Court would customarily be circumspect about increasing a nine year sentence to one of 10 years absent other considerations. But here a 10 year sentence, carrying the consequential automatic requirement that 80 per cent be served, is a penalty on a substantially different scale from a nine year sentence absent a declaration, and the Court should not baulk at such an increase should it be persuaded of clear error — as I believe to be the case here.[368]

In the above case, the Court of Appeal disagreed with the sentencing judge's assertion that none of the offending had 'involved a significant or indeed any real violence', noting the complainant had submitted to her father out of fear and regularly 'kicked and screamed and cried in certain situations, and was on one occasion subjected to a pillow being placed over her head to quell her objectives'.[369] The Court noted that the offending had involved 'literally

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359 [2005] QCA 365 (McPherson JA and Fryberg J agreeing, Jerrard JA dissenting).
360 Ibid [4] (emphasis added).
361 [2006] QCA 365.
362 *McDougall and Collas* (n 2) [19] (citations omitted).
363 See section 2.4 in Part A.
364 (2012) 224 A Crim R 40.
365 Ibid [30]–[31].
366 *R v GAR* [2014] QCA 30, [33] (Muir JA, Fraser JA agreeing at [37] and Morrison JA agreeing at [38]).
367 *R v C; Ex parte A-G (Qld)* [2003] QCA 134, 4 (de Jersey CJ, Jerrard JA and White J agreeing at 8) ('*R v C*').
368 Ibid 6–7 (de Jersey CJ). See *R v Young; Ex parte A-G (Qld)* (2002) 135 A Crim R 253, which said: 'For multiple violent rapes by a mature man committed upon a girl as young as 12, over a period as long as nine months, amounting to maintaining, even allowing for the pleas of guilty, imprisonment of the order of 10 to 12 years was, in my view warranted': at 254 [3].
369 *R v C* (n 367) 6 (de Jersey CJ).

hundreds of acts of sexual intercourse, including rape as such, although we must not lose sight of the fact that all of the sexual acts must from the complainant's point of view be regarded as non-consensual'.[370]

In relation to child sexual offences generally, the Court of Appeal has recognised that sexual violence against children may cause 'physical harm, bleeding and enduring psychological injury'.[371] In *Stable*,[372] the Court gave an overview of the many reforms related to child sexual offences in Queensland, citing explanatory notes for 2003 amendments that, 'the reforms to the sentencing in the Bill "are designed to ensure that child sex offences are recognised as offences *equating in seriousness to offences of violence*"'.[373]

Despite this guidance, it appears that section 161B(5) of the PSA, which directs courts to treat offences involving the use or attempted use of violence against a child under 12 years, or that caused the death of a child under 12 years, as an aggravating factor in deciding if a declaration should be made, has not been applied to cases of sexual violence offences committed against children under 12. Discussed above, the Court of Appeal said in 2019 that this aggravating factor and other legislative amendments since 1997 in relation to:

> violence offences committed against children in domestic settings … constituted legislative instructions to judges to give greater weight than previously given … [where] an offence was one that involved infliction of violence on a child and that the offender committed the offence within the home environment.[374]

Apart from an August 2021 decision,[375] to the Council's knowledge *O'Sullivan* is the only case where section 161B(5) has been raised in relation to the making of a discretionary SVO declaration. The 2021 decision involved non-sexual violence offences against a baby and the judge in that case declined to make a declaration.

Commentary from other jurisdictions

Whether sexual violence is regarded as distinct from and/or less serious than physical violence has been considered in other Australian jurisdictions and by the High Court. In 2016, the High Court said current sentencing practices with respect to sexual offences may be seen to depart from past practices by reason of changes in understanding about the long-term harm done to victims.[376]

In the 2017, High Court decision of *Director of Public Prosecutions v Dalgliesh (a pseudonym)*,[377] the Court cited with approval comments made by the Victorian Court of Appeal:

> In the three decades since [the earlier decision of *Kaye* (1986) 22 A Crim R 366], sexual abuse of children by those in authority over them has been revealed as a most serious blight on society. The courts have developed – as the Court of Appeal accepted in 'emphatically' rejecting the respondent's submission that 'there was no violence accompanying the offence' – an awareness of the violence necessarily involved in the sexual penetration of a child, and of the devastating consequences of this kind of crime for its victims.[378]

When responding to Mr Dalgliesh's assertion that his offending was not violent, the Victorian Court of Appeal extensively referenced criticisms by the Victorian Sentencing Advisory Council about the failure of courts to recognise the offence of sexual penetration of a child as inherently 'violent':

> We must at this point address CD's submission that 'there was no violence accompanying the offence' and that this constituted a mitigatory circumstance. Arguments of this kind are often advanced in pleas in mitigation for such offending. They must be emphatically rejected, as must the associated implication that no harm was really done to the victim.
>
> Such arguments rest on a serious misconception about the nature of sexual abuse of a child. The crime of incest involves sexual penetration of a child which is, by its very nature, an act of violence. The Sentencing Advisory Council made this point strongly in its recent report on *Sentencing of Offenders for Sexual Penetration with a Child under 12*:
>
> > [I]t is concerning that the courts do not sufficiently recognise, or articulate, the inherent violence involved in the sexual penetration of a young child, regardless of whether such acts are accompanied by additional non-sexual violence.
> >
> > …
> >
> > This characterisation of 'violence' as encompassing only non-sexual violence has the consequence of diminishing the equally destructive and terrifying violence inherent in sexual offending against children, which more often takes the form of physical or emotional coercion, or the simple act of being

370 Ibid 3 (de Jersey CJ).
371 *R v CCT* [2021] QCA 278, [245] (Applegarth J, Sofronoff P and McMurdo agreeing).
372 *Stable* (n 261).
373 Ibid [29] (emphasis in original).
374 *O'Sullivan* (n 45) 231 [93].
375 *R v MJB* [2021] QDC 170, 3 [5], 11 [55], 19 [108]. This case involved grievous bodily harm against a baby.
376 *R v Kilic* (2016) 259 CLR 256, 267 [21] (Bell, Gageler, Keane, Nettle and Gordon JJ).
377 (2017) 262 CLR 428.
378 Ibid 447 (Kiefel CJ, Bell and Keane JJ, Gageler and Gordon JJ providing separate reasons, but agreeing as to the orders proposed).

> overpowered. It can also have the effect of rendering invisible and irrelevant the extreme physical pain inherent in the act of an adult forcibly penetrating the genitals and anus of a child. Many of the sexual penetration cases simply did not mention, in the relevant description of the offending the terror and/or extreme physical pain that objectively would have been caused by the offence. The reason for this is unclear, but it has the effect of diminishing harm. [379]

The Court, referring to earlier comments it had made in *Clarkson v The Queen*,[380] further remarked:

> the absolute prohibition on sexual activity with a child is 'founded on a presumption of harm'. The significance of the violence and harm which such conduct entails cannot be overstated.[381]

Similar comments were made in more recent cases in relation to other sexual offences, such as in *Director of Public Prosecutions v Mokhtari*,[382] where the Court of Appeal said:

> The very act of rape is inherently serious, simply by virtue of the invasion of the victim's bodily integrity without consent. It is, quite simply, an act of violence, whether or not accompanied by other violent conduct. The violation is physical, emotional and psychological. It follows that, aggravating features apart, all acts of non-consensual penetration are objectively serious, irrespective of the form and the extent of the penetration.[383]

12.9.6 Discretionary application to serious drug offences is rare

As discussed in section 6.1.2, there were five cases identified as being discretionary SVO declarations made with respect to serious drug offences over the data period. All related to trafficking in dangerous drugs. However, in one case, while the trafficking dangerous drug offence was the most serious offence, the SVO declaration attached to robbery charges.[384] That case has been excluded for the purposes of this discussion.

When the four remaining cases were examined in detail, a combination of the following factors were found to be usually present:

- sophisticated commercial and wholesale supply of methylamphetamine and other drugs;
- elements of violence, either by way of threats or actual violence to enforce debts;
- other people were employed/assisted in the operation;
- offender was on bail/probation/parole/suspended sentence at the time of the offending;
- offender had a relevant and significant criminal history;
- complex pre-sentence custody issues/other mandatory sentencing complexities were involved.

Notably, only two of the four discretionary trafficking SVO cases involved the use of or threats of violence.

This analysis suggests that the courts considered elements of violence in the drug trafficking as a relevant factor in making a discretionary declaration — although this was not true in all cases. The courts also focused on the nature and scale of the trafficking and the type of drug being trafficked, as well as the antecedents of the offender. Personal factors taken into account in making a declaration included that the person had a relevant or significant criminal history and that they were on an existing sentencing order or bail order at the time they offended (although even in these circumstances, as discussed above, declarations for trafficking offences sentenced to less than 10 years were rarely made).

In contrast to most other non-sexual violent offences and sexual violence offences included in Schedule 1 of the PSA, serious drug offences do not involve the use of violence as a necessary element of the offence — although these offences may occur in a context in which violence is used or threatened. This means the few serious drug cases were regarded as serious enough to require a longer period in custody to be served for the purposes of community protection and/or punishment.

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379 *DPP v Dalgliesh (a pseudonym)* [2016] VSCA 148, [45]–[47].

380 (2011) 32 VR 361 (Maxwell ACJ, Nettle JA, Neave JA, Redlich JA and Harper JA agreeing). In this case the Court of Appeal held that under the legislative scheme, a child under 16 cannot consent to sexual penetration. This prohibition services two purposes: protecting the child from harm that can come from premature sexual activity; and deterring adults who would contemplate having sex with someone aged under 16. This is based on the presumption that premature sexual activity will cause long term physical and psychological harm and is unaffected by the apparent consent.

381 Ibid [47]

382 [2020] VSCA 161 (Maxwell P, Beach and Weinberg JJA agreeing). The respondent had been sentenced to 6 years' imprisonment on each of the first two charges of rape and 6.5 years on each of the other two charges of rape, with a total effective sentence of 11 years and a non-parole period of 7 years and 9 months. The Court of Appeal increased those sentences to 8.5 years and 9 years and a new total effective sentence of 13 years and a non-parole period of 10 years. The complainant was a 23-year old woman who had recently arrived in Australia.

383 Ibid [41].

384 *R v Lacey* (Supreme Court of Queensland, 27 July 2012).

Observations from expert interviews

Participants of the Council's expert interview project highlighted concerns regarding the discretionary application of the SVO scheme for serious drug offences. For serious drug offences, there were several key features that interviewees referred to as being important factors in whether to consider a discretionary SVO. The primary considerations raised by participants related to the quantum and complexity of the drug operation.

Participants made the following observations:

> if you start to get drug offending that involves the sorts of considerations that would warrant a discretionary SVO, so you're talking about huge profits, you're talking about someone at the top of the chain without an addiction, you're talking about threats made to people paying, people owing money, you're talking about people recruiting their sons and daughters. Once you've got those considerations that make the offending really serious, you're up at 10 years anyway.[385]

> But it's just the scale of the trafficking, you know, the motivation for the trafficking, you know, not just in quantities, are there employees, the persistence. Once it gets to a particular level, a sentence of more than 10 is warranted.[386]

> but there are cases that have sort of come to be almost seen as guideline cases that say that for a drug trafficking, you know, the features are the drugs trafficked in, the length of time that the trafficking occurs, whether there's multiple drugs trafficked, whether the person is a user or an addict, the degree of profit, the degree of organisation, the extent to which violence is present or – and/or weapons are used.[387]

Many participants called for serious drug offences to be removed from the SVO scheme on the basis that the offences are not inherently violent and a 'serious violent offence' declaration is not an appropriate designation for this offending. Participants thought offences involving sexual violence and non-sexual violence were appropriate for the scheme due to their nature and the harm caused, with one participant stating, 'I just don't agree that [a drug trafficker's] risk to the community is as high as somebody who commits a violent brutal rape against somebody. I have a very strong view about that'.[388]

This issue is further discussed in Chapter 18 of Part D of this report.

385 Subject-matter expert interviews, participant I20.
386 Subject-matter expert interviews, participant I15.
387 Subject-matter expert interviews, participant I31.
388 Subject-matter expert interviews, participant I7.

Chapter 13

Victim satisfaction with the sentencing process

Key Findings

1. The impact of the SVO scheme on victim and survivor satisfaction is mixed:
   - Victim and survivor satisfaction appears to be enhanced when a declaration is made.
   - In contrast, where a declaration is not asked for or made, it can be very difficult for victims and survivors to understand why the offence was not considered to be 'seriously violent enough' by the justice system to be declared a 'serious violent offence' leading to feelings of anger, hurt and frustration. It signals that an objectively very serious offence is not considered 'seriously violent enough' by the justice system to warrant its recognition as such through the making of a declaration.

2. From a victim and survivor perspective, the primary benefit of the SVO scheme is that it requires the offender to spend a substantial proportion of their sentence in custody prior to being eligible for release on parole. This provides victims with greater certainty that the offender will spend a long period in custody when a declaration is made, thereby better satisfying the purposes of most concern to them (punishment/retribution, denunciation and their own personal safety as well as the protection of family members and the broader community).

3. While there is general support for some form of scheme to be retained, victims and survivors and victim advocacy and support organisations are dissatisfied with how the scheme is being interpreted and applied in practice. Concerns include:
   - the scheme has the effect of reducing head sentences for what are very serious forms of offending, which can result in a sentence of 10 years or more being reduced to less than 10 years — at which point the making of a declaration becomes discretionary;
   - once the decision to make a declaration becomes discretionary, only a small proportion of cases result in a declaration being made;
   - the grounds upon which one offence is determined to be 'seriously violent' enough to warrant a declaration while another is not, are unclear and inconsistently applied.

4. Victim and survivor stakeholders want reassurances that offenders who commit serious offences involving non-sexual and sexual violence have access to evidence-based rehabilitation programs and psychological support, both while in prison and in the community. If offenders are released on parole, they support close and intensive supervision to reduce the risks of the offender reoffending and acknowledge the risks they pose to victims and the broader community.

13.1 Introduction

The Terms of Reference ask the Council to examine whether the SVO scheme is impacting victims' satisfaction with the sentencing process and if so, in what way.

To better understand the SVO scheme's impact on victims and survivors, the Council explored issues of victim knowledge of the scheme and satisfaction through:

- expert interviews with victim support and advocacy organisations and prosecutors;
- submissions invited in response to the Issues Paper released in November 2021;
- victim/survivor forums and individual consultation sessions hosted by the Council in partnership with the Queensland Homicide Victims' Support Group (with families of homicide victims) and the Gold Coast Centre Against Sexual Violence (with members of staff) in January/February 2022.

The Council is immensely grateful to those victims and survivors who participated in this review and provided the Council with invaluable information about the scheme's impact on victims, survivors and their families.

13.2 Consultation with victims and survivors

The Council consulted with victims and survivors and their families to understand the impact of the SVO scheme on their satisfaction with the sentencing process and outcome.[389] Participants in these consultation sessions raised that the SVO scheme is important for victims and survivors and their families, both in terms of the acknowledgment of the harm and seriousness of the offending, as well as the certainty that a mandatory non-parole period provides. Participants felt that more information needs to be provided to victims and survivors and their families about the SVO scheme and its significance.

Victims' experiences with the criminal justice process varied, with many having a generally negative experience. Some had a more positive experience, largely due to particular individuals, such as public prosecutors, who kept them informed throughout the process and made them feel respected. As an example, at one session, one victim reported 'not once have I felt or heard empathy by those involved in the system',[390] while another indicated they and their family had been treated very respectfully, were kept informed throughout the process, and asked for their views 'on everything'.[391]

Based on the Council's consultation with victims, there appears to be a general lack of awareness about the SVO scheme and its implications. Some victims reported not being informed about the existence of the scheme prior to sentence — with comments made suggesting that they only found out about it after the fact, having not been informed by the prosecutor that this was an option prior to sentence, or having learnt about it in the process of providing court support to other victims.[392]

13.2.1 Sentencing outcomes and victim satisfaction

For victims and survivors and their families, punishment, denunciation and the protection of themselves, their families and the wider community were viewed as the most important purposes of sentencing. The consultation sessions clearly demonstrated to the Council that victims and survivors of serious violent offending live with life-long trauma and fear of the offender, and many feel that the criminal justice system does not appropriately acknowledge what they have gone through and continue to go through.

Victims and survivors consulted spoke about the importance from their perspective of the 'punishment fitting the crime' and 'the justice system delivering justice'.[393] The view that sentences are not long enough was also a general concern expressed by many victims and survivors with whom the Council consulted — but with this issue generally being raised separately to discussions about the SVO scheme and minimum non-parole periods, which victims supported retaining.[394] While there was acceptance that sentencing practices were based on what was described as 'established precedent', equally there were concerns that past sentencing practices were now 'outdated' and did not reflect contemporary values and expectations.[395]

389 The Council did not audio-record the consultation sessions. The quotes provided in this section are based on detailed notes and may therefore not be exact verbatim.
390 Victim/survivor consultation session, 25 January 2022.
391 Ibid.
392 Victim/survivor consultation sessions, 25 and 27 January 2022.
393 Ibid.
394 Ibid.
395 Ibid.

While the consultation sessions identified that victims want just sentencing outcomes that punish the offender, denounce these forms of very serious offending and contribute to keeping themselves, their families and the wider community safe, it became clear that many victims do not view their participation in the criminal justice system as a process that helps them live with the trauma they have experienced and, to the contrary, can contribute to their re-traumatisation.

While the Council's consultation with victims and survivors clearly identified that sentencing and sentencing schemes like the SVO scheme are very important to victims and survivors of serious crime, it also became clear that victim satisfaction with the criminal justice process is dependent on much more than the sentences imposed and the non-parole period an offender is subject to.

13.2.2 Discretionary application perceived as flawed and applied inconsistently

The discretionary application of the scheme was perceived as problematic by participants in the consultation sessions, in particular in light of the determination of what constitutes a 'serious violent offence'. For victims, survivors and their families, the offence committed against them is very serious, and participants expressed confusion and frustration over the discretionary application of the scheme.

> What we're really hoping for is to see any violent offence should be immediately deemed as SVOs and all of them should receive that mandatory thing. It shouldn't be something that's left to discretion of someone, should be enacting in law that if it's an SVO, everyone faces the same penalty. Don't leave it open to appeals or making it difficult because the judge has to listen to arguments by 10 different barristers. If it's a simple cut-and-dried this is the offence, that's the nature of it, that's what it should be. No confusion.

A participant also expressed disapproval of the threshold of 10 years set for the scheme to apply automatically, as well as using sentence length as the criteria to decide whether an SVO automatically applies.

> That's the bizarre thing, how come it applies if sentence is x length as opposed to y length? I can only see that if it's the nature of crime then that SVO should always apply.

Participants raised the issue that, in cases in which either no submission for a discretionary SVO declaration is made, or the court decides not to make one, this can be very distressing to victims. As one participant stated, 'for courts and the justice system to say "Yeah, it wasn't that serious", it's a kick in the teeth'. The perceived inconsistency of sentencing outcomes and resulting actual time spent in custody concerns victims/survivors and their families, in particular, if offences viewed as similarly violent to SVO-declared offences do not receive a declaration.

Perceived inconsistencies in the application of the scheme was of great concern to those victims consulted who struggled to understand why one offence attracted a declaration, while another did not in circumstances where both involved the direct use of physical violence resulting in serious harm.[396] This generated some support for the scheme to be applied in a mandatory way (or with very limited ability to depart[397]) based on the nature of the act, without the need for judges to determine its appropriateness in a given case.

13.2.3 Views on parole eligibility and impact on non-parole period

Some victims and survivors felt that parole eligibility should be deferred to ensure the safety of themselves and their family members. Victims and survivors consulted were generally supportive of the 80 per cent level set for parole eligibility under the scheme — although one participant was supportive of offenders instead serving out the full term of the sentence.[398]

Participants in the consultation sessions outlined a 'struggle to understand and accept' why offenders are not serving the whole or the majority of their sentence. Participants described being 'shocked' when learning about parole eligibility commonly being set at one-third or the halfway mark. In the words of one participant, 'a sentence should be a sentence'.

> I did want to point out one thing. The community doesn't care about cost of keeping people incarcerated. The community wants to see violent offenders who have potential for recidivism to remain in jail as long as possible. They don't care about cost as long as we have safer streets. That's my point of view.

396 Ibid.

397 Discussion at one session centred on the scenario of a woman who had been subjected to domestic and family violence and kills or seriously injures the perpetrator in circumstances that would not support self-defence being successfully argued.

398 Victim/survivor consultation sessions, 25 and 27 January 2022.

The re-traumatisation and fear felt by victims, survivors and their families if an offender is approaching parole eligibility was commonly raised, with one participant declaring that victims and families are the ones serving the sentence.

> We had to live in a house where we didn't reveal where we were, kept bars on windows/doors because children were terrified he was going to turn up. When talking about short sentences, it really does affect family life and I can tell you we lived in a lot of fear. We kept everything off the internet, didn't allow photos being published, school couldn't do anything, kept very quiet. With the impending release date, we were terrified we weren't going to secure their safety as well and we got down – three months away from release date – [we] cried on the day that the judge awarded us custody because we'd been living under a cloud. We were so terrified. This is a thing courts need to take into account. It's not them serving a sentence, it's the sentence that families/victims get. We have to live with this for the rest of our lives. It is always a terrifying thing to think when somebody's released, you don't know where or when, and they could just turn up at your front door. We were terrified he would take kids straight out of school. To us sentencing and SVOs are extremely important.

A non-parole period provides victims and survivors and their families with certainty to plan their lives and their safety. One participant stated that 'without the reassurance of an SVO, you are allowing these people back in society', sparking concerns amongst victims, survivors and their families that offenders might re-offend and commit violence against other people.

13.2.4 Providing input into parole decisions is perceived as difficult and traumatic

Participants also reflected on the process of providing input into the decision-making of the Parole Board on whether an offender would be released, and if released, under which conditions, difficult and re-traumatising. One participant described it as 'extremely traumatic', while another pointed out that victims feel as they have no rights in the criminal justice system.

> Like others, I'd say it's extremely traumatic, frightening, it was just one of hardest things to go through and accepting is another thing, once they're released accepting that is another ordeal to go through and constantly worrying about where they are, what they're doing, all the things [he] was saying before and it never goes away.

> I have come into contact with his mother, girlfriend and child in that environment and yet I have no rights and no say within this system. He's forgiven, done time, continue his life as normal. I often wonder what they must think. Does he recall event? Does he think about it at all? There are so many errors within system of that and I find it very degrading that I have to once again apply and expose myself and my vulnerability to a system that doesn't have much element of care at all for myself, my family or what my concerns are. I don't understand why we have to argue and fight for such things.

One participant raised that victims and families should be provided with an opportunity to speak to the Parole Board in person and have an opportunity to be heard. In the participant's view, 'when dealing with Parole Board, you have to deal with it like a lawyer, not a family or victim'. Another participant felt that there was no space for victims' voices in the criminal justice system and while the perpetrator is given a voice, victims are not.

13.2.5 Other issues raised

Some participants raised the following additional issues:

- lack of sufficient information provided to victims by prosecutors and by the Parole Board Queensland — although the experience of victims varied, with some indicating a high level of satisfaction with the information and support provided by prosecutors;
- concerns about offenders being given a discount at sentence for a plea of guilty;
- insufficient recognition of the harm caused to victims and the impact on their lives during the court sentencing process;
- dissatisfaction with the weight placed on an offender's mental health issues and the absence of a criminal history — including in cases occurring in the context of domestic and family violence, where underreporting is an issue;
- concerns about funding and the availability of rehabilitation and re-integration programs and support services for offenders;
- the need for proper rehabilitative programs offered to offenders in custody and in the community and effective transitional services.[399] For program delivery, ensuring those running the programs were appropriately skilled and that there was proper oversight and accountability in place to ensure offenders were actively participating was viewed as important.

399 Ibid.

13.3 Views expressed in submissions and expert interviews on victim satisfaction with the SVO scheme

The Council received submissions and conducted expert interviews with victim support and advocacy organisations. This section highlights the most important issues raised by those organisations.

Some services reported having no or very limited interaction with the SVO scheme due to the nature of the support they provided to clients and their clients as having generally a low level of awareness about the scheme.[400] Promoting broader awareness about the scheme was viewed as one way in which the current operation of the scheme could be improved.[401]

13.3.1 Most important aspects of sentencing

A number of recent Australian inquiries and reviews have examined issues of importance to victims in responding to crime — including the current Queensland Women's Safety and Justice Taskforce inquiry,[402] the Royal Commission into Institutional Responses to Child Sexual Abuse,[403] and the Victorian Law Reform Commission's review of the justice system's response to sexual offences.[404]

Common themes, many of which were also raised with the Council, include:

- a desire for information and participation – 'to know how their case is progressing, any decisions made and their role in the process';[405]
- being able to 'tell their full story in their own words' and to have a voice — and not being limited to 'what is legally relevant';[406]
- being believed and heard: 'Victim survivors would like justice officials to believe their account and react with empathy to the injustice they have experienced' and for the justice system to acknowledge the harm they have suffered;[407]
- the system appropriately reflecting the community's condemnation of the offending: that 'the law … denounces the violence and stands with the victim', including through the punishment imposed;[408]
- offenders being held accountable and facing consequences for their offending. This includes accepting responsibility for their actions, receiving an appropriate sentence, and committing to address their offending, such as by undertaking treatment.[409]

13.3.2 Stakeholder views

Submissions by victim support and advocacy organisations, and consultation with victims and survivors of serious violent offending raised similar key considerations. The primary issue identified by victim support and advocacy organisations was participation in the justice process and victims and survivors feeling heard.[410]

Victim support organisations submitted the following about these aspects of sentencing:

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400 Subject-matter expert interview I61: 'I've been in [service] for 18 months and I've never heard of it internally. It's only through my own reading and research and talking with people I've heard about it so I would suspect the knowledge of it is very, very, low'. Another service provider referred to the scheme not being mentioned by victims or survivors in their interactions with them: subject-matter expert interview I55.

401 Subject-matter expert interview I61; subject-matter expert interview I44.

402 For more information on the work of the Taskforce and reports released, see: <https://www.womenstaskforce.qld.gov.au/>.

403 The Commission's recommendations on criminal justice system reforms are presented in *Royal Commission into Institutional Responses to Child Sexual Abuse: Criminal Justice Report* (Report, 2017) (*'Royal Commission into Institutional Responses to Child Sexual Abuse Report*').

404 Victorian Law Reform Commission, *Improving the Justice System Response to Sexual Offences* (Final Report, September 2021).

405 Ibid [2.35]–[2.38].

406 Ibid [2.39]–[2.40].

407 Ibid [2.41]–[2.44]. See also *Royal Commission into Institutional Responses to Child Sexual Abuse Report* (n 403) 143, 160.

408 Ibid [2.45].

409 Ibid.

410 Submission 4 (Fighters Against Child Abuse Australia) 28; Submission 7 (Full Stop Australia) 13–16; Submission 10 (knowmore) 6.

- 'If you want victim survivors to be satisfied with the sentencing process, hear them. Let them speak for themselves if they can. Let them be a part of the process, show them the options available to them and let them decide which one they would like the judge to pursue in regard to sentencing.'[411]
- 'Victim-survivors … [f]eel silenced and unheard by the criminal law system and consider that the criminal justice system is "offender centric" and geared towards the needs and wants of perpetrators rather than victim-survivors.'[412]
- 'Victim survivors … [f]eel re-traumatised by the investigation of offending and the court process including the giving of evidence and particularly when they are cross-examined.'[413]
- 'Victim survivors … [d]erive therapeutic satisfaction from telling their story and providing their input in a safe and supported way. In particular, in relation to issues of sentencing and parole in their own matters.'[414]
- 'It is very important for victim/survivors to be believed and validated in order to begin their healing journey, but the criminal justice system does not often deliver in the offender focussed quest for proof rather than truth.'[415]
- 'It is of utmost importance that victims of homicide are given the opportunity to receive timely information around ongoing investigations, court processes and correctional service information. And whilst some may not wish to be involved, the option to be kept informed and have input into the relevant decisions that are made.'[416]

13.3.3 Views from expert interviews

The Council interviewed representatives from victim and survivor support and advocacy organisations as part of the expert interview project. Participants raised several key issues as particularly important to victims and survivors in regarding sentencing outcomes:

- Procedural justice aspects — 'feeling that as a victim, they are respected through the court process',[417] 'being able to be heard',[418] 'listened to and acknowledged in the process',[419] including through the making of a victim impact statement,[420] as well as supported throughout the process and kept informed.[421]
- Substantive justice components — 'the sentence [imposed]'[422] — wanting 'to see justice and punishment done'.[423]
- Knowledge and understanding of sentencing and, in particular, parole; with concerns that there is a general lack of knowledge by victims and survivors about what parole is, what it is intended to achieve and how restrictive the conditions on parole can be.[424]

13.4 Victim satisfaction with sentencing outcomes

13.4.1 Stakeholder views

The Queensland Homicide Victims' Support Group, in its submission, included extensive comment about the views of victims on the adequacy of sentences imposed for homicide — in particular, manslaughter. It reflected:

> The harm associated with this kind of loss is life-long, severe, and impacts all dimensions of a person's health. While the imprisonment of the offender/s does not bring their loved on[e] back, it does provide an opportunity for the justice system to strongly denounce and punish offenders for their actions. Punishment is a critical factor

411 Submission 4 (Fighters Against Child Abuse Australia) 28.
412 Submission 7 (Full Stop Australia) 14.
413 Ibid.
414 Ibid.
415 Submission 18 (Gold Coast Centre Against Sexual Violence) 2.
416 Submission 19 (Queensland Homicide Victims' Support Group) 3.
417 Subject-matter expert interview I61.
418 Ibid. Also, subject-matter expert interview I32.
419 Subject-matter expert interview I51. Similar comments were made by participants in subject-matter expert interview I41.
420 Subject-matter expert interview I14.
421 Subject-matter expert interview I51.
422 Subject-matter expert interview I61.
423 Ibid. Similar comments were made by others, e.g. subject-matter expert interview I51.
424 Subject-matter expert interview I61.

> here – we are not talking about financial fraud or political corruption. We are talking about a person intending to seriously harm another person, resulting in death.[425]

Noting that the average sentence for manslaughter in Queensland is less than 10 years,[426] it submitted that for victims:

> 'their day in court' too often becomes a devastating experience when they discover that the offender will not serve a long period of time in prison … Witnessing the killer walk free (due to time served or having just a few years remaining of their sentence) is re-traumatising and creates a mistrust for the system.
>
> What is their loved one's life worth, and how can our community accept that this is adequate?
>
> … Put simply, we feel that the current average length of sentence for manslaughter in Queensland is grossly inadequate. [427]

It referred to these views being 'based on the firsthand experiences of thousands of families' and advocated for more research to be focused on understanding victims' perspectives.[428]

Providers of services to victims and survivors of sexual violence expressed similar concerns about the adequacy of sentences for offending involving sexual violence. Legal support organisation, knowmore, which provides legal support to victims and survivors of child sexual abuse, submitted:

> We have found that for our clients, meaningful and significant sentencing is achieved when the seriousness of the offence is reflected in the sentence. Survivors live with the impact of each offence against them and feel that this reality should be reflected in the prison time served by the perpetrator/s. This relates both to the length of the sentence, and the actual length of time that a perpetrator spends in prison (i.e. the non-parole period of the sentence).[429]

It reported: 'The common view of survivors is that sentences for child sexual offences should be more severe, based upon the increasing societal understanding of the ongoing impact of the abuse on the survivor.'[430]

Similar comments were provided by Full Stop Australia, which provides support to victim survivors of sexual and domestic violence, who noted that victims and survivors '[f]eel let down by what they see as inadequate sentences'.[431]

The sentences imposed were viewed by Fighters Against Child Abuse Australia as important to making victims and survivors 'feel heard' when 'they feel like their abuser is getting a decent sentence especially when compared to non-SVO scheme conviction and sentences'.[432]

The Gold Coast Centre Against Sexual Violence highlighted misunderstanding regarding the nature of prison sentences and the availability of parole submitting: 'both victims and the general community expect that offenders will serve their whole sentence, or at least almost all of it, thinking they may get a small amount of remission for good behaviour'.[433] They reported that '[v]ictim/survivors are shocked that offenders may only serve a fraction of their sentence'.[434]

13.4.2 Views from expert interviews

Representatives of victims' support and advocacy organisations spoke about victims holding a wide range of views about what an appropriate sentence would be. Generally, many victims feel that sentences are inadequate and do not punish the offender sufficiently — 'the punishment isn't genuinely sufficient'[435] given the nature of the offending is more lenient than they expected — particularly in light of the maximum penalty.[436] Some participants spoke about victims' perceptions that the 'criminal justice system lets them down' because they considered 'the punishment doesn't meet the crime'.[437]

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425 Submission 19 (Queensland Homicide Victims' Support Group) 1.
426 See Part B, section 8.1.2. The most common manslaughter sentence over the period 2011–12 to 2019–20 was 9 years, just below the 10-year threshold at which the requirement to make an SVO declaration is mandatory.
427 Submission 19 (Queensland Homicide Victims' Support Group) 1.
428 Ibid.
429 Submission 10 (knowmore) 6.
430 Ibid (citations omitted).
431 Submission 7 (Full Stop Australia) 14.
432 Submission 4 (Fighters Against Child Abuse Australia) 26.
433 Submission 18 (Gold Coast Centre Against Sexual Violence) 3.
434 Ibid.
435 Subject-matter expert interview I61. See also subject-matter expert interview I26. This interviewee referred to regular feedback they received that sentencing for child sexual offences is too lenient — although there were a range of views and a wide range of effects of trauma.
436 Subject-matter expert interview I61.
437 Subject-matter expert interview I32. Similar comments were made in subject-matter expert interview I19.

A service provider who works with child sex offence victims and their families was of the view that the length of the sentence was of less importance to the victim than the fact a sentence was being imposed at all. 'For [victims and survivors, this] is symbolic of them being believed and the offender being held accountable for their offences':[438]

> There's certainly some [victims] who become … frustrated or upset in terms of the length of sentence. But for the majority … the fact that someone has been found guilty and has been sentenced for the offence is most important for them because they've … been made to be held accountable … that they are responsible for the offence that's occurred.[439]

While one service provider reported most victims of sexual violence offences are dissatisfied with the sentences imposed, they also discussed that sentencing outcomes could lead to feelings of guilt for the victim in circumstances where the victim and offender are known to each other. Referring to a case of a young woman who was raped by an offender who was in her friendship group and was sentenced to 7 years' imprisonment, they explained that the victim felt 'extremely guilty … because she didn't actually see that … coming … that [the sentence] would be so severe' and 'felt somewhat responsible for the impact that was going to have on his life and what that meant to the people around him'.[440] Had restorative justice been an option available, it was suggested the victim might have chosen to pursue this avenue.[441]

13.5 Sentencing purposes

13.5.1 Stakeholder views

The QHVSG's submission referred to the sentence imposed as providing 'an opportunity for the justice system to strongly denounce and punish offenders for their actions' and noted '[p]unishment is a critical factor here'.[442]

Victim and survivor legal support organisation, knowmore, raised concerns that the purposes of the scheme — 'to ensure sentencing reflects the "'true facts and serious nature of the violence and harm in any given case"' were not being realised on the basis that:

> the mandatory nature of the SVO scheme means that judges, to avoid enlivening an SVO declaration, may be forced to reduce a head sentence that may have been more reflective of the offending. This therefore creates a dissonance between the intention of the SVO scheme and the realities of its application.[443]

FACAA submitted that the purpose of the scheme should be the 'protection of the public' and further submitted that 'particular emphasis should be placed on the protection of children'.[444]

Full Stop Australia supported sentencing schemes for sexual and domestic violence offences that uphold the principles of punishment, deterrence, community safety and denunciation.[445]

13.5.2 Views from expert interviews

Participants in the expert interviews, in particular providers of services to victims and survivors, identified punishment as the most important purpose of sentencing for victims.[446] A typical response to the question of what is most important to victims was 'seeing some consequences, some serious consequences, in terms of jail time' [447] and victims wanting to know 'that someone's been held accountable for [the offence] and has had consequences for that'.[448]

Denunciation, while less frequently mentioned as a sentencing purpose, was also thought to be a primary sentencing purpose.[449] One service provider spoke about the experiences of victims of child sexual abuse, and the

438 Subject-matter expert interview I44.
439 Ibid.
440 Subject-matter expert interview I41.
441 Ibid.
442 Submission 19 (Queensland Homicide Victims' Support Group) 1.
443 Submission 10 (knowmore) 7.
444 Submission 4 (Fighters Against Child Abuse Australia) 12.
445 Submission 7 (Full Stop Australia) 7.
446 For example, subject-matter expert interview I61; subject-matter expert interview I51; subject-matter expert interview I65; subject-matter expert interview I41.
447 Subject-matter expert interview I65.
448 Ibid.
449 Subject-matter expert interview I55; Subject-matter expert interview I44.

importance of the sentencing process for victims recognising the offender's actions as being recognised as 'illegal and denounced'.[450]

A comment was made that while punishment is often what the broader community calls for when responding to child sex offences, the views of victims and survivors are commonly more nuanced and there is often a strong focus on what will be effective in stopping the offender from reoffending.[451]

Concerns about community safety and the risk of re-offending were expressed by victims as a serious concern.[452] One participant referred to a number of their clients for whom safety and knowing that the person is not able to harm them again or harm others is of utmost concern.[453]

A service provider who works with sexual assault victims noted that in some cases, including where the offending has occurred within the family, what the victim wants is 'something that's more holistic [than a traditional criminal justice system response] that will give them some closure'. The participant referred to the restorative justice process as having more of a rehabilitative focus.[454] While punishment is an important focus for victims, survivors and their families, 'equally so is rehabilitation', particularly as this applies to family members.[455] Rehabilitation was also viewed as particularly important if the offender was young — even where the offence involved was quite serious.[456]

For services working primarily with victims of domestic and family violence offences, the importance of purposes of sentencing were more varied and depended on the nature of the relationship between the victim and perpetrator. For example, if the offences involved an adult son offending against his mother, then rehabilitation might be the primary concern, while if the offence has occurred in the context of an intimate partner relationship, it might involve a mixture of punishment and personal deterrence — as well as rehabilitation if children are involved.[457] In the latter context, both deterrence and rehabilitation were considered important:

> because [victims] want to feel safe, they want to feel safe to be able to let their children have some contact with the father, but for that, rehabilitation is important because if that's not happening then … how can they trust their children to be with their dad?[458]

13.6 Support for the scheme and its impact on victim satisfaction

13.6.1 Stakeholder views

Stakeholder views about the potential impact of the SVO scheme on victim satisfaction varied.

Both FACAA and the Centre Against Sexual Violence were of the view the SVO scheme has a potentially positive impact on victims. For FACAA, the benefits were both about the victim 'being heard' and the perceived adequacy of the sentence:

> The main way we find victim satisfaction with the sentencing process being positively [affected] is that the victim survivor feels heard, they feel like their abuser is getting a decent sentence especially when compared to non SVO scheme conviction and sentences.[459]

For the Centre against Sexual Violence, the scheme was viewed as useful 'in providing survivors with more assurances that the perpetrator will be imprisoned for a longer period of time aiding in their time to recover from the act/s of sexual violence'.[460]

The Queensland Homicide Victims' Support Group was concerned about what it viewed as inconsistencies in its application and possible avoidance of the scheme which it viewed as compromising its ability to meet its objectives. It commented:

450 Subject-matter expert interview I44.
451 Ibid.
452 This was mentioned by a number of those interviewed. See subject-matter expert interview I26; subject-matter expert interview I51; subject-matter expert interview I44.
453 Subject-matter expert interview I14.
454 Subject-matter expert interview I41.
455 Ibid. Similar comments were made by another referring to those clients who know the offender or the person was a family member, where rehabilitation is their main concern: subject-matter expert interview I14.
456 Subject-matter expert interview I55.
457 Subject-matter expert interview I32.
458 Ibid.
459 Submission 4 (Fighters Against Child Abuse Australia) 26.
460 Submission 3 (Centre Against Sexual Violence) 2.

> Our position in relation to the Serious Violent Offender Scheme is that it seems well intended, however its application seems to have been at best inconsistent and at worst, avoided. Violent criminals who have stabbed, strangled and shot victims have frequently escaped its use. Sentences over ten years for manslaughter seem to be routinely avoided to prevent the automatic application of the scheme.
>
> From the firsthand experiences of QHVSG members, the scheme is not doing what it was supposed to and is in fact reducing the average sentence for homicide in QLD. It [is] not meeting the expectations of homicide victims.[461]

The Queensland Homicide Victims' Support Group further commented:

> the SVO is used infrequently and without logic. There is a feeling that the court fails to understand what the term 'serious' means. How can a person who stabs or shoots another person not be categorised as seriously violent? We are lost for words as to how the current SVO scheme came to be. How did the judicial system fail to recognise the seriousness of such crimes despite a scheme being in place to address this exact issue?[462]
>
> While we are uncertain why the SVO appears unattractive to judges, we suspect that there may be increased concerns around a decision being appealed and in addition the rigidity of the SVO scheme reduces the prosecution's option to obtain a plea bargain.
>
> If the ten-year limit is a roadblock that prevents judges from making appropriate decisions, then it should be removed … Judicial discretion is essential, and the community must be confident that the punishment will fit the crime.[463]

Victim and survivor legal support organisation, knowmore, expressed support for a presumptive model that would result in perpetrators of child sexual abuse spending 'a significant amount of time in custody, in conjunction with appropriate supervision upon release on parole'.[464] It expressed concerns that while in 'a narrow sense' the SVO scheme can contribute to victims' satisfaction with sentencing … [by ensuring] that perpetrators serve a large part of their sentence',[465] it was equally concerned that victim and survivor satisfaction may be negatively impacted as a result of the scheme's mandatory operation due to the risk of offenders receiving reduced head sentences:

> With a mandatory scheme where judges are sometimes forced to strategically navigate the enlivening of an SVO declaration, perpetrators of child sexual abuse may receive a shorter overall sentence and non-parole period. This increases instances where survivors may feel the sentencing decisions do not reflect the seriousness of the offending or the enduring impacts of the abuse.[466]

It raised concerns regarding the potential for the scheme to 'negatively affect victim-survivors' satisfaction with sentencing decisions', suggesting that the risks were 'particularly evident where offences straddle the 10-year mark' at which point the making of a declaration becomes mandatory.[467] Its primary concern was that 'perpetrators of child sexual abuse should receive and serve significant sentences that reflect the terrible abuse survivors experience and the enduring impacts of that abuse'.[468]

13.6.2 Views from expert interviews

While general awareness of the scheme among victims was considered by many interviewed to be low, some services were of the view that their clients were likely to be supportive of it and that the concept was likely to be 'very positively received':[469]

> our families would be very, very supportive of the SVO concept of you must serve 80 percent of your sentence for particular crimes or those over 10 years. I've got no doubt that would be strongly welcomed and supported.[470]

It was suggested by one service provider who works with victims of sexual violence that their clients would 'generally like that idea that there [are] some rules that [if] they're sentenced to a particular sentence that most of that is going to be served' – although given many of these cases resolve as guilty pleas to less serious charges, there was a risk they would be ineligible for a declaration under the scheme.[471]

Victim satisfaction was seen to be of most relevance where the victim was aware that a declaration could be made. Where an offender had been declared convicted of a serious violent offence, the scheme was viewed as having

461 Submission 19 (Queensland Homicide Victims' Support Group) 3.
462 Ibid 1.
463 Ibid 2.
464 Submission 10 (knowmore) 5.
465 Ibid 6.
466 Ibid 7.
467 Ibid 6–7.
468 Ibid 5.
469 Subject-matter expert interview I61.
470 Ibid.
471 Subject-matter expert interview I65.

potential to 'heighten [victims'] trust in the system and their faith in the sentencing outcomes' and to 'give them more sense that, yes, this is a strong sentence'.[472]

Another service provider commented on the impact of the making of a declaration on validating a victim's experience:

> Very few times I've been involved where there's been a declaration of SVO under the scheme and when that occurs, it's the opposite of what I've been saying; that actually validates what the victim thought in first place, that it was a serious offence and that person is a serious violent offender, but it happens rarely. We can't make too much comment around how multiple people experience that. The ones I've had, that's validated their thoughts and feelings about what's right and what it should be, it seems fair and just to them.[473]

Service providers stated that the making of a declaration 'does help [victims]'[474] and provides recognition of a serious crime having been committed.[475]

In contrast, in circumstances where a judge determined it was not appropriate to make a declaration — including cases where the sentence came close to the 10-year mark — the outcome for victims was 'losing a little bit more faith in the system'.[476] Listening to submission in court about whether the offence was indeed serious enough to warrant a serious violent offence declaration was perceived by victims as 'offensive' and 'humiliating',[477] causing serious harm to the victims and survivors if a declaration was not made.

> Most sexual violence complainants going through court would think that the offence committed against them is a serious violent offence and that's just an assumption that that will be taken on board during the process.[478]

> When they hear the Crown Prosecutor say we're going to ask for SVO declaration, they hook onto that and they're waiting for that to happen. When it doesn't happen, it's kind of a double-whammy, almost negating it, further distressing the person.[479]

Interview participants observed that for victims and survivors, to hear in court that it was not serious enough to warrant a declaration can be retraumatising. For this reason, representatives of the support organisation commonly do not explain the SVO scheme to victims/survivors unless viewed as very likely to be raised during the court hearing.

Another interview participant referred to comments made in *Free* in discussing the problematic concept of an offence needing to be 'outside the norm' to attract a discretionary declaration. The participant explained that many victims of a serious violent offence 'would be absolutely insulted if you were to say to them, yeah sorry, what happened to you is just normal'.[480] Greater clarity around the circumstances in which a declaration should be made and meets the legal criteria of being 'seriously violent' was viewed in this context by some as important.[481]

The vast difference in actual time to be served in custody between cases based on whether the sentence was set at 10 years or just below this, was described as a particularly difficult outcome for victims and survivors to comprehend:

> I think it does and I think it's very difficult to come to terms with the difference between the two. If they hear head sentence and they know a person is out after a quarter or a third, it's difficult to accept that, especially the discrepancy between a nine-year and 10-year sentence. For a nine-year sentence, they can apply for parole and be out in 3. For a 10-year sentence, they have to serve eight years before applying for parole. It's a huge difference. Often they don't realise at that time and with counselling we don't want to go into that too much, let the information sink in and follow up once they've processed that.[482]

One participant expressed a clear preference for a presumptive scheme over a discretionary model:

> As a general comment I think in any part of the law when there's a discretion people are going to find fault with it. I think if we're going to set that 5-10 years where it's discretionary and it's used infrequently then maybe we need to be looking at the presumption that something will be decided then and if it's not to be providing reasons why it's not. Turn it round a bit to make it more transparent and clearer for everyone, victims, community, offenders. There are so many areas of law where there's a discretionary component and it never goes smoothly in my experience. I think a presumption might be a better way between that 5–10 years. I think the numbers speak for themselves and I do wonder how many times it was argued and if there was some sort of guideline if this would assist. There needs to be consistency around everyone looking at the same components that's leading to decision making.[483]

472 Subject-matter expert interview I44.
473 Subject-matter expert interview I71.
474 Subject-matter expert interview I51.
475 Subject-matter expert interview I55.
476 Subject-matter expert interview I14.
477 Subject-matter expert interview I71.
478 Ibid.
479 Ibid.
480 Subject-matter expert interview I19.
481 Subject-matter expert interview I51.
482 Subject-matter expert interview I71.
483 Ibid.

13.7 The importance of the non-parole period for victims and survivors

13.7.1 Stakeholder views

Legal support organisation, knowmore, while supportive of retaining the scheme in a presumptive form, submitted their concerns that 'perpetrators of sexual offences against children should serve a significant non-parole period', which needed 'to be balanced with considerations of supervision and community safety upon release'.[484] It suggested:

> This is an area where the SVO scheme falls short, because the 80 per cent rule means that the time an offender is actively supervised in the community is limited. This could potentially result in an increased risk of reoffending, rather than a reduction.[485]

The Gold Coast Centre Against Sexual Violence emphasised that victims and survivors may be unaware of the 'usual' sentencing practices surrounding non-parole periods and expect they will serve the whole sentence, or most of it, in custody.[486]

A number of victim and support organisations submitted on the impacts that the parole process can have on victim survivors, especially those of sexual and domestic violence:

- DVConnect highlighted that the parole process is stressful and traumatic for victims, submitting: 'certainty of a parole date and longevity of sentence supports a victim/survivors' sense of autonomy and safety'.[487]
- Full Stop Australia submitted that victims:

  'e) Can feel safer while perpetrators are incarcerated and can suffer from increased and heightened anxiety close to a release date.

  f) Can suffer from increased and heightened anxiety when release dates are unknown or subject to change.'[488]

13.7.2 Views from expert interviews

Impact of fixed non-parole periods on victims and survivors

Victim and survivor support and advocacy organisations identified that the non-parole period is viewed as very important by victims and survivors as they 'tend to assume the non-parole period is realistically what [the offender] is going to do inside [prison]'.[489] Many victims focus on the time spent in prison as the offender's punishment and most victims, it was suggested, would likely be of the view the time on parole relative to the head sentence should be minimal.[490]

Service providers commented that parole in general, and what is involved, is not well understood; and unless specific comment is made at the time of sentence about an offender's parole eligibility date, or the victim is advised independently of this, many would not have awareness of this date.[491]

An offender's release on parole can be deeply traumatic for victims — with one service provider referring to an extreme case of a child who committed suicide when an offender was released on parole because she knew he was back in the community.[492] In another example, the victim did not know until quite late that the offender was being released on parole, and had to relocate quickly at short notice.[493] 'Knowing they're in their community and that fear of bumping into somebody is huge and it is constantly in their minds weighing them down and preventing them from healing and getting on with [their lives]'.[494] A service provider working with victims of sexual assault referred to safety being a 'big driver' for their clients.[495]

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484 Submission 10 (knowmore) 10.
485 Ibid.
486 Submission 18 (Gold Coast Centre Against Sexual Violence) 3.
487 Submission 6 (DVConnect) 2–3.
488 Submission 7 (Full Stop Australia) 14.
489 Subject-matter expert interview I61.
490 Subject-matter expert interview I44.
491 Subject-matter expert interview I14.
492 Subject-matter expert interview I61.
493 Subject-matter expert interview I14.
494 Subject-matter expert interview I61.
495 Subject-matter expert interview I65.

A service provider also commented that some victims and survivors were not well-informed about when an offender will be released from custody and are shocked and retraumatised when they learn that the offender has been released on parole. One participant stated, 'lots of women assume because it's something that happened to them that they'll be kept more informed than they are. It's quite a shock to hear that they're about to get out or they're out already'.[496] The participant warned that not all victims and survivors are aware of the Queensland Corrective Services Victims Register[497] and assume that they will automatically be kept informed.

Other participants observed a similar impact of parole release on people they support:

> There's a re-traumatisation at trial, there's a re-traumatisation if the person is released and … I have seen the most capable, intelligent, well-adjusted individuals who, leading up to parole, really had a very logical point of view. When that person was released, they fell apart. The traumatisation that occurs for some people, it takes them back to that moment of [the offence] and the fear is real for them. So there's another complete adjustment in what life looks at, and then we talk about what this new normal is.[498]

For victims and survivors of domestic and family violence ('DFV'), the certainty of a non-parole period can be important to enable them to plan for their safety.

> For victims of DV, I think that certainty of sentencing is important for safety, they know that they're going to be in for eight years so they can plan their life and plan safety around that release date. Levels of anxiety that exist 10 years later, this guy tried to kill them, she thinks he will again and could, but that certainty that – when we were at DVO court there were so many women who had to get DVO orders straight away, somehow she's heard he's about to be released, she's terrified. Trying to get protection and what that means for victims is that this scheme provides certainty in those very serious matters…The closer the relationship the more angst there is and more concerned about certainty of time they'll be out of circulation.[499]

The comment was made that for some women who were victims of offending in a DFV context, the only way they say they would feel safe 'is if you threw [the offender] in a jail cell and … threw away the key' as 'they'll never feel safe again if he's out under any circumstance'.[500]

Making submissions to the Parole Board

Knowledge of what information to provide to the Parole Board to inform its decision-making was an area identified as one that requires additional support. A service that provides support for victims of child sex offences referred to victims and survivors typically wanting to communicate to the Parole Board the trauma they have suffered, that the offender is a 'horrible person' and their view that the offender will reoffend.[501] This service discussed support they provide to victims about making practical submissions about restrictions on the offender's movements to limit potential contact with the victim.

An interviewed service provider identified the process of making a written submission to the Parole Board Queensland as difficult for many victims and survivors:

> while the offender is in jail, they're able to feel safe and secure, both themselves and for the community more broadly. And then once … the offender comes up for parole they have to start thinking about it again and to be able to … put down on paper the impacts and how their life has been changed by the offence is really difficult for many. So … sitting down and writing that is really hard … it can be really retriggering.[502]

Organisations, such as the Queensland Homicide Victims' Support Group, provide support to victims to assist with this process. The Council acknowledges that there may be opportunities to enhance the information and support provided to victims and survivors, including to ensure more regular contact with victims being maintained through the parole process.

For victims of child sexual abuse, making a submission to the Parole Board is also connected to the broader purpose of community safety. While victims may understand the importance of supervised release on parole 'they're usually still very concerned that they're out because for many victims one of the primary concerns is that the offender will hurt another child, so for many it's like, well they've let them out early, so now they're out there and they can hurt another child. So there is that real fear'.[503]

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496 Subject-matter expert interview I71.
497 The Queensland Corrective Services Victims Register is an information service established to provide certain information to eligible persons regarding prisoners who have been convicted of offences and are serving a period of imprisonment, including on parole, in accordance with ss 320(1)(a)–(c) of the *Corrective Service Act 2006* (Qld).
498 Subject-matter expert interview I51.
499 Subject-matter expert interview I71.
500 Subject-matter expert interview I32.
501 Subject-matter expert interview I61.
502 Subject-matter expert interview I44.
503 Ibid.

The process can also be time-consuming and if they have caring responsibilities, they might not have the capacity to make a submission.[504]

One service provider spoke about victims feeling like they have done an inadequate job of getting their message across to the Parole Board when an offender is released on parole and may feel as if their submissions were not adequately taken into account.[505]

The process adopted in NSW which allows victims to appear before the State Parole Authority was commented upon positively by some victim support workers who had supported victims involved in this process and considered it had potential to increase the acceptance by victims of decisions to grant parole release, and to reduce associated trauma.[506]

Understanding of parole and parole conditions

A number of service providers commented on the lack of information victims had access to about parole and parole conditions.[507] A service provider commented on a general lack of information provided to victims about the level of supervision and restrictions imposed — with the victim only aware of the fact that the offender is out in the community.[508] This may then give rise to concerns that the level of supervision is not sufficient to stop the person from reoffending.[509]

Some service providers referred to the information they provided to victims about the value of parole and the benefits of having someone supervised rather than released under no form of supervision.[510] They acknowledged that this can be a difficult discussion to have — although many of their clients would agree that if the sentence has an end date, it is better that the person is supervised rather than released under no supervision.[511]

Another participant commented that victims are 'in the dark' about specific parole conditions other than exclusion conditions (not to come within certain areas).[512] Even if victims know about exclusion zones, this may not always make them feel safer. The comment was made that for DFV victims, an offender being paroled to another location might not necessarily make the victim feel safer as there is always potential for the offender to travel to where the victim is and a breach of conditions can be difficult to prove.[513]

The Victims Register was viewed as an important mechanism to keep victims informed — although the process of ensuring victims are kept informed can be problematic when the offender has been in custody for a number of years and the person listed as a contact may no longer be in contact with other family members or may be deceased.[514] The victim might also have been notified of this by the prosecutor at the time of sentence, but not applied to be registered at the time, and some years later when the offender is eligible for parole, forgotten that this was an option available to them.[515] Some aspects of prisoner management are also not captured by this scheme, such as decisions relating to the interstate transfer of prisoners.[516]

Another participant described the level of case management and rehabilitation undertaken while offenders were on parole as a 'black hole of information where no one really is that well informed about it'.[517] This service provider suggested that changing public perception of parole and the level of case management involved, parole conditions and the work that goes into rehabilitation if done to a good standard, would contribute to greater acceptance of parole release.[518]

The 80/20 spilt between time spent in custody and time on parole

The 80/20 split between the sentence and non-parole period under the SVO scheme was expressly supported by some service providers interviewed as appropriate and as supporting the objectives of the scheme — including signalling the seriousness of these offences.

504 Subject-matter expert interview I32.
505 Subject-matter expert interview I44.
506 Victim/survivor consultation session, 25 January 2022.
507 See, for example, subject-matter expert interview I61 and subject-matter expert interview I51.
508 Subject-matter expert interview I44.
509 Ibid.
510 Subject-matter expert interview I51.
511 Ibid.
512 Ibid.
513 Subject-matter expert interview I32.
514 Subject-matter expert interview I51.
515 Subject-matter expert interview I44.
516 Subject-matter expert interview I51.
517 Subject-matter expert interview I61.
518 Ibid.

A service provider commented on the expectation of victims and survivors that an offender will spend the majority of their sentence in prison:

> Most of the community – and most victims we've worked with – don't understand when offenders might be able to apply for parole, what SVO means and it's not something that I would usually discuss with people prior to sentence. We talk about what the sentencing outcome might be. There is a perception that whatever the head sentence is, that person will serve most of that time, and maybe a bit of time off for good behaviour. That's the expectation. They're really shocked to know that somebody with a nine-year sentence might be only serving three before they are able to apply for parole. There is quite a sense of outrage about that and they feel like what's happened to them is not being taken seriously. It's often the worst thing in their lives and it's not reflected in the sentence. [519]

The observation was made that for most people subject to the scheme who receive a sentence of 10 years or more, the potential period of supervision is two years or more[520] and it was felt that this was a significant amount of time, in particular with 'the right processes in place, the right support in place, continued education'.[521] One participant emphasised the importance of continuity of support provided by service providers working with the offender both during their time in custody and in the community.[522]

Another service provider felt that the 80 per cent required to be served under the scheme was 'very reasonable' given the need for a supervised transitional period and time required to complete programs in custody prior to release:

> for many offenders that transition out of prison is a really volatile period in time and having a reasonable length of time … one–fifth of the sentence being … able to be managed in the community and to be supported in that reintegration and then not of reoffending is really important.
>
> I think the 80 percent also gives a good level of time for, when we're talking about sex offenders in particular, to be able to complete programs within prison and I think that that is really important. I think that's one of the frustrations with some of the shorter sentences where they don't actually have that time to be able to complete any treatment programs and there's very little available in the community so that's always a real concern. So I think that 80 percent does allow for that to happen.[523]

Having a standard percentage that an offender must serve before being eligible for release on parole was viewed by this participant as important for many victims on the basis that it shows 'that what happened to them matters, that it's being treated seriously, and that the offender is being held accountable'.[524] The concept of having a sliding percentage scale that applied based on offence seriousness (lower, mid and high-range offences) was also raised.[525]

Some interview participants raised the need for a sufficiently long period on parole to provide the offender with adequate supervision once released from custody. One participant was of the view that the longer an offender spends in prison, the longer time the parole period should be — which should be a period of years, not months.[526] In the case of repeat offenders, it was suggested they should be required not only to serve an extended period in prison, but also an extended period on parole.[527]

Another interviewee reflected that the success of the sentence and parole in reducing sexual reoffending 'really depends on what kind of interventions are available' to the offender and suggested there could be a role for restorative justice processes, post-imprisonment, to generate greater insight by the offender into their offending and its impact on victims' lives.[528]

Referring to a case involving an offender sentenced to 7 years' imprisonment for rape, one service provider suggested the offender being subject to the scheme might be evidence that the scheme 'worked because this is a guy who has the potential to be a serial offender' based on his behaviour with previous girlfriends.[529] In this sense, 'receiving that [sentence] is a deterrent and it also works in community safety because … if he hadn't been held accountable for this rape, then there would have been others'.[530]

Another interviewee spoke about the scheme meeting community expectations about the time the offender should serve in custody:

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519 Subject-matter expert interview I71.
520 Subject-matter expert interview I51; subject-matter expert interview I55.
521 Ibid.
522 Ibid.
523 Subject-matter expert interview I44.
524 Ibid.
525 Ibid.
526 Subject-matter expert interview I32.
527 Ibid.
528 Subject-matter expert interview I41; subject-matter expert interview I14.
529 Subject-matter expert interview I41.
530 Ibid.

> Part of that expectation is that these are crimes we're talking about that are really personal, that are things that the community are incredibly fearful of, so that notion of personal safety and community safety is really important. So for them that idea that if somebody commits this type of offence that they will be punished quite harshly [and they] know that they will stay in custody for that period of time and there's that level of protection to community … as far as those community expectations … if these sorts of things are … being utilised well in the courts, then that [objective] to me [is being met].[531]

At the same time, this interviewee questioned whether retaining judicial discretion was preferable and commented that expectations of the public and the complex reality of what the criminal justice system is trying to achieve may be quite different.[532]

13.8 Services and support for victims

13.8.1 Stakeholder views

The Royal Australian and New Zealand College of Psychiatrists ('RANZCP') in its submission noted the importance of mechanisms that would allow support to be provided — such as reforms proposed to the *Mental Health Act 2016* (Qld) by the Health and Other Legislation Amendment Bill, which 'will clarify that a government entity may use and disclose victim personal information for both the initial identification of victims, and also to provide ongoing support'.[533] RANZCP recommended that similar reforms be reflected in any reform to the SVO scheme to improve support for victims.

Full Stop Australia commented that 'victim-survivors find the justice system confusing and do not feel equipped with enough information to properly navigate the system'[534] and suggested that sentencing frameworks are explained in 'as plain language as possible' and having 'the objectives of the scheme explicitly laid out in legislation or alternatively, extrinsic material'.[535] Full Stop Australia also referred to the Victorian Law Reform Commission's report into the justice system's response to sexual offences which found that victim survivors need plain language and easily accessible information about how the justice system works and what the likely outcomes are.[536]

The Queensland Homicide Victims' Support Group submitted that victim survivors need to receive timely information about the investigation, court processes and corrective services information.[537] They also emphasise that specialist support is important:

> This voice will be best heard with ongoing support for organisations who specialise in support and understand the unique needs. It is best heard by dedicated organisations who are prepared to advocate for the rights [and] needs of victims of homicide. Generic support is not effective.[538]

13.8.2 Views from expert interviews

One service provider identified that for victims and survivors, the 'general lack of control and communication throughout the court process' was difficult.[539] They described victims as sometimes feeling like they were 'pawns in a game' as their case was proceeding through the court process 'and now it's between the police, the Magistrates, defence, trying to figure out how they're going to play with very little … input or feedback' provided to the victim.[540] The period during which responsibility for the case is being transitioned from police to the ODPP was identified as particularly difficult as victims often do not hear anything during the period about the progress of the case.[541] The support provided varies, however, with some arresting police officers and prosecutors described as 'amazing' and 'very supportive'.[542]

Other service providers emphasised the importance of educating those involved in the criminal justice system, including police and prosecutors, as well as future journalists on what works in communicating effectively with victims, how to deal with victims and their families in a sensitive and non-judgmental way, and the importance of

531 Subject-matter expert interview I14.
532 Ibid.
533 Submission 15 (Royal Australian and New Zealand College of Psychiatrists) 2.
534 Submission 7 (Full Stop Australia) 7.
535 Ibid 7.
536 Ibid 14 citing Victorian Law Reform Commission (n 404) 30.
537 Submission 19 (Queensland Homicide Victims' Support Group) 3.
538 Ibid 3.
539 Subject-matter expert interview I41.
540 Ibid.
541 Subject-matter expert interview I14.
542 Ibid.

ethical reporting practices.[543] Victim-blaming behaviour was mentioned as particularly traumatising for victims and affecting their faith in the criminal justice system.[544] A more victim-centred approach to communication and the provision of information was suggested as one way to improve current responses.[545]

A number of service providers interviewed spoke about the long-term trauma experienced by victims, who might hope various stages of the process will provide them with closure — this commonly fails to eventuate:

> they never feel the closure they expect. They've been thinking, when he or she goes inside, this is over and I can start my life again. And unfortunately they think that feeling, that closure, will come when they give evidence. They think it will come when they're found guilty. They think it will come when the sentencing is given out. And it doesn't. And that's often when people start to realise they've got a long-term significant amount of trauma inside them.[546]

In this context, the support provided to victims and survivors both during the court process, and after sentence, was viewed as critical — whether this be by way of support and advocacy organisations, and/or a victim-focused legal advice service.[547] For victims of DFV, building in a role for a women's advocate who checks in regularly with the victim while the offender is on parole — as occurs in some cases — was also seen as highly beneficial.[548] For the clients who were both victims of child sexual abuse and offenders (whether of child sexual abuse or other types of offending), the service emphasised the need for better targeted and broader availability of programs that were both trauma-informed and culturally safe.[549]

Another issue was also raised that victims and survivors living in regional and remote areas do not have access to the same support agencies that exist in South East Queensland.[550]

13.9 Other aspects of sentencing and criminal justice processes of importance to victims

13.9.1 Stakeholder views

Victim and survivor legal support organisation, knowmore, highlighted the difficulties for victims when the charges for which the offender is convicted do not reflect the true criminality of the offender's actions:

> For many reasons, it is often the case that the criminal charges that constitute the basis for the eventual trial and/or plea are not reflective of all of the incidents of abuse that the survivor suffered, especially due to difficulties with particularising offences and obtaining evidence. This means that survivors can feel that what the perpetrator is being sentenced for does not reflect the full extent of their criminality and the survivor's experience of abuse.[551]

The Gold Coast Centre Against Sexual Violence reflected on the difficulty for victims to hear mitigating circumstances relevant to the offender, especially where it leads to no conviction being recorded:

> If there is a guilty plea or finding, it is distressing for victim survivors to hear what is taken into account on sentencing particularly the focus on the rights of the offender e.g. glowing character references submitted; no conviction recorded because of the severe impact it might have on their life and employment.
>
> A scenario where no conviction [is] recorded, particularly after a guilty plea, is very difficult for the victim/survivor and indeed the general community to understand.[552]

Victim and survivor egal support organisation knowmore also highlighted issues for offenders who might themselves be victims of childhood victimisation and the importance of this continuing to be a relevant factor at sentencing:

> Queensland's sad history of serious sexual abuse being perpetrated against so many children in detention means that a sentencing model that allows for judicial discretion is essential. A survivor's experience of child sexual abuse and the impact of that experience, where it is known to the court, should in our submission be a relevant factor in sentencing.[553]

543 Subject-matter expert interview I51.
544 Subject-matter expert interview I32.
545 Subject-matter expert interview I14.
546 Subject-matter expert interview I61.
547 For example, subject-matter expert interview I26.
548 Subject-matter expert interview I32.
549 Subject-matter expert interview I26.
550 Subject-matter expert interview I55.
551 Submission 10 (knowmore) 6.
552 Submission 18 (Gold Coast Centre Against Sexual Violence) 3.
553 Submission 10 (knowmore) 17.

The issues raised by these stakeholder organisations reflect similar issues to those highlighted by the Royal Commission into Institutional Responses to Child Sexual Abuse — particularly those relating to criminal justice reform.[554] This fact was noted by both the Queensland Sexual Assault Network and Gold Coast Centre Against Sexual Violence which highlighted the importance of these recommendations being acted upon.[555]

The most recent Queensland Government progress report reporting on implementation of the Commission's recommendations was tabled in Parliament in April 2022.[556]

13.9.2 Views from expert interviews

Recognition of time spent on remand was identified by most service providers as being very difficult for victims and survivors to understand, particularly when it results in the person having their sentence suspended or the person being immediately released (or eligible for release) on parole.[557] Victims 'can get quite a shock [if the offender is] going to be released on the day of sentence'[558] and it can leave victims feeling as if the offender has 'basically … got nothing'.[559] Another participant reflected that a reason for this was that victims may not view the period spent on remand as part of the punishment as it is what happens after the person is found guilty and 'made to serve their time' that is considered by victims to be most important.[560]

The central role prosecutors and support services could play in assisting victims to have realistic expectations about the likely outcome and an understanding of the legal process was described as helpful and as 'a really key thing' to meeting those expectations.[561] This could prepare victims, survivors and their families for an outcome where the time spent on remand means the person is released on the day of sentence.[562]

The practice of imposing concurrent sentences for a number of sexual offences was also the subject of comment. One service provider commented that this was often viewed by victims as unfair and potentially contributing to their view of the inadequacy of the sentence imposed because of the apparent failure of the sentence to reflect the impact of each of these separate incidents on the victim and the compounding of their trauma.[563] Another spoke about victims feeling like the other charges 'didn't matter'.[564]

Some interviewees referred to specific concerns by victims and survivors that too many mitigating factors are taken into account at sentence:[565]

> they want the sentence to reflect the ordeal they've been through and the trauma they're going to live with for many years to come; and … they don't care what the excuse and mitigating factors were, it happened to them and for them it's inexcusable.[566]

Victims and survivors can find submissions made pointing to the person's disadvantaged background and other factors very distressing, and some may dispute the truth of the information being presented to the court.[567]

Delays in sentencing through continued adjournments was also identified by one service provider as causing disappointment and frustration to victims and survivors, as were pleas accepted to lesser charges in cases in which victims felt they were not involved enough in the process.[568] This can have a retraumatising effect on victims and survivors and leave them feeling angry about the outcome.[569]

Another service provider brought up concerns about the impact of the sentencing process on victims and survivors, in particular with regards to having to listen to character references:

> Some women are very keen to go to sentencing and listen and see what's said and we very rarely get anyone happy to hear what's said on sentencing. Invariably they'll sit through glowing references about the person, how

554 See *Royal Commission into Institutional Responses to Child Sexual Abuse Report* (n 403).
555 Submission 18 (Gold Coast Centre Against Sexual Violence) 4; Submission 17 (Queensland Sexual Assault Network) 5.
556 Queensland Government, Queensland Government Fourth Annual Progress Report: Royal Commission into Institutional Responses to Child Sexual Abuse (December 2021).
557 See, for example, subject-matter expert interview I51.
558 Subject-matter expert interview I14.
559 Subject-matter expert interview I19. One service provider, when discussing the issue of shorter sentences, referred to their clients being 'furious' on finding that an offender will be released shortly after sentence on this basis and for victims, having gone through the court process, as 'a kick in the teeth': subject-matter expert interview I65.
560 Subject-matter expert interview I44.
561 Subject-matter expert interview I14.
562 Subject-matter expert interview I55.
563 Subject-matter expert interview I26.
564 Subject-matter expert interview I14.
565 Subject-matter expert interview I61.
566 Ibid.
567 Subject-matter expert interview I14.
568 Subject-matter expert interview I32; subject-matter expert interview I41.
569 Subject-matter expert interview I41.

> great they are, how influential they are, how they volunteer. Victims sit and listen to that, and particularly in instances where the person has pleaded guilty to a sexual crime, or been found guilty, and now we're hearing about how great he is. I don't know why we bother to listen to that on those occasions.[570]

The issue of criminal conviction for sexual offences was also raised by participants in the expert interviews, stating that victims and survivors find it difficult when they learn that an offender does not have a criminal conviction recorded against them:

> The second thing victims are concerned about and really don't understand, is … how someone who pleads guilty to a sexual crime could end up not having a conviction recorded against them. And the last time that happened the person said 'What do you mean they're not going to have a conviction? They've admitted offending and now they're not having conviction recorded.' The information put forward about why they're not having a conviction [recorded] is because of the serious impact it would have on offender's life. A lot [of attention] is focused on the human rights of the offender and not on victim. The victim is thinking — this has seriously impacted my life, is that taken into account? Often women have already left their job because they can't continue working and then they hear that the judge is not recording a conviction against this person because it might impact his job. Some of that is the process, so it's not just the number that's arrived at. [571]

One service provider interviewed reflected on the experience of victims and survivors of child sexual abuse who are in custody. In this context in particular, the participant raised the over-representation of Aboriginal and Torres Strait Islander peoples who have been victims of sexual offending as a child and are incarcerated.[572] For these victims, it was suggested, spending a longer period in prison can be 'really damaging for two reasons':

> one is that they don't get the help that they need to help them to go deal with their trauma stemming from what happened to them as children; but also they're not getting the help that they need … to rehabilitate in terms of what is needed in the parole system for their actual offences.[573]

This service provider referred to the barriers for external service providers going into prisons to provide the necessary support, the lack of face-to-face counselling options, the lack of culturally safe supports for Aboriginal and Torres Strait Islander clients and, in some cases, clients not being able to access the rehabilitation they need to be eligible for parole due to the lack of programs and services.[574]

Some clients in prison serving very long sentences may only engage with services in the last three to four years of their sentence when they consider this is worthwhile, and there is also a risk of them becoming institutionalised.[575]

570 Subject-matter expert interview I71.
571 Ibid.
572 Subject-matter expert interview I26.
573 Ibid.
574 Ibid.
575 Ibid.

Chapter 14

Other impacts of the SVO scheme

Key Findings

1. It is unclear whether and to what extent the SVO scheme may be impacting on rates of guilty pleas.

2. While some participants in expert interviews considered the scheme is likely to have no bearing on defendants' willingness to plead guilty, independent of other factors that generally influence this decision, others identified the potential for an SVO declaration to be made might either act as an incentive, or disincentive, to offenders pleading guilty.

3. The SVO scheme might be contributing to more appeals against sentence — particularly where the scheme is applied on a mandatory basis — but the extent to which the scheme might do so is unknown. The making of an SVO declaration is usually only one aspect of appeals against sentence initiated on the basis that a sentence is either manifestly excessive or manifestly inadequate.

4. A number of stakeholders also raised the costs arising from the making of a declaration as an issue to be considered due to the increased time an offender must serve in custody before being eligible for release on parole.

14.1 Introduction

In addition to the broader impacts of the scheme discussed earlier in this part, the SVO scheme has other potential impacts across the justice system. In this chapter, we discuss the potential impact of the scheme on pleas and plea negotiations, and rates of appeal.

14.2 Plea rates and impact on plea negotiations

In section 7.2.3, we noted that rates of guilty pleas were lower for cases with an SVO declaration compared to those without a declaration for most Schedule 1 offences. The rate of guilty pleas also varied by offence type.

A number of factors are likely to influence rates of pleas and prosecutorial decision-making, including in the case of sexual offences, evidentiary matters.[576]

14.2.1 Stakeholder views

There was limited feedback provided on the impact of the scheme on plea negotiations; although the impact of the scheme on the willingness of offenders to plead guilty was referred to in a number of submissions.

For example, the ALA pointed to mandatory sentencing schemes, such as the SVO scheme, as removing an incentive for defendants to plead guilty, 'thereby earning the right to a sentencing discount' as well as potentially impacting on the willingness of defendants 'to assist authorities with investigations (in the expectation that such assistance will be taken into account in sentencing)'.[577] As a consequence, it concluded: 'mandatory minimum sentences result in more contested hearings requiring the use of extra resources', thereby increasing the costs of the administration of justice.[578]

FACAA, which supported the adoption of a mandatory SVO model, submitted that offences included within the scheme 'need to be exempt from plea deals that include the removal of the SVO scheme'.[579]

The Queensland Homicide Victims' Support Group was concerned the current rigidity of the scheme might be impacting on the ability of the prosecution to secure a guilty plea as part of the plea negotiation process.[580]

Legal Aid Queensland made general comments noting that 'it is a well-established principle that a plea of guilty should be taken into account in mitigation' and that this is legislated in Queensland under section 13 of the PSA.[581] It noted this provided 'a benefit to complainants, the courts and the wider community in avoiding unnecessary trials'.[582]

14.2.2 Views from expert interviews

The subject-matter expert interviews discussed the impact of the SVO scheme on plea negotiations and the likelihood of pleading guilty. Multiple legal stakeholders stated that, if a mandatory SVO is very likely, then the case is likely to be taken to trial as there is no incentive or benefit to pleading guilty. It was argued that if the SVO scheme didn't exist, it would be likely that more people would plead guilty.

> I think it does come into decisions of a lot of clients not to plead guilty where they probably sensibly should, is that, oh well, it's going to be [a] huge [sentence] either way.[583]

One legal stakeholder noted that this is the case for any type of mandatory sentencing and is not unique to the SVO scheme.

Interviewees thought the SVO scheme had the most impact on cases where the expected sentence is on the cusp of a mandatory SVO declaration. It was argued that clients potentially receiving sentences at the cusp are more likely to plead guilty in the hope that recognition of the plea would help to keep the sentence under 10 years.

> There is a sentence you would get after trial, there's a sentence you would get after sentence. If the sentence after trial is one where it will go over 10, your client is going to get an SVO. If the sentence on a plea is going to be one where there is a possibility that they might get less than 10, the attraction for that to be a plea from a defence point of view is high.[584]

A legal stakeholder stated that some defendants might decide not to risk going to trial, with the threat of having to serve 80 per cent — they might rather have the certainty of a sentence and plead guilty. The fear of getting 10-years (or more) and having to serve 80 per cent could play a big part in a defendant's decision to go to trial.

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576 Australian Law Reform Commission, *Family Violence – A National Legal Response* (Report No. 114, 2010) 1200.
577 Submission 2 (Australian Lawyers Alliance) 9–10.
578 Ibid.
579 Submission 4 (Fighters Against Child Abuse Australia) 16.
580 Submission 19 (Queensland Homicide Victims' Support Group) 2.
581 Submission 13 (Legal Aid Queensland) 56.
582 Ibid.
583 Subject-matter expert interview I10.
584 Subject-matter expert interview I53.

The 'magical number 10' could also come into play during plea negotiations.[585]

If a discretionary SVO was expected to be sought by the prosecution, it was considered defendants might be far less likely to be prepared to enter a plea of guilty because this does not offer the same recognition or discount it might ordinarily.[586]

A small number of legal stakeholders thought the SVO scheme had little to no impact on the decisions to plead guilty or go to trial. Each case is considered based on the facts and evidence; it is approached in the same way irrespective of the potential for an SVO declaration.

> I haven't noticed it have a significant impact, like I haven't had a client say, well because I'm going to get an SVO I'm just going to go to trial. Because our advice is always, your only way to possibly avoid one is to not go to trial.[587]

Legal stakeholders also discussed the impact of the SVO scheme on advice that could be given to defendants. It was consistently stated that it was important to ensure a defendant has an understanding of the potential impact of the scheme and what that means in practical terms. They also make sure defendants understand the likelihood of an SVO being declared, either in circumstances where this is discretionary or mandatory:

> It's always incorporated in our instructions if someone is looking at a 10-year or more sentence, or if someone – if we're getting to a serious violent offence, or a serious sex matter, that we always will tell the clients that's a warning that the Crown can actually make an application and give them an idea if we think they'll be, you know, successful or how we would argue against it.[588]

> A big part of our job is actually persuading people that their interests are not well served by going to trial but when SVOs are part of the mix then that is a much harder discussion to have.[589]

> Sometimes it's good in the sense that you can wave it as a big stick to a client and say, 'Well if you go to trial you're guaranteed to get more than 10 and you'll do an SVO, but we can cut a deal with the prosecution that will limit your criminality … if you accept it', and … that's a real incentive to people.[590]

14.3 Appeals

14.3.1 Council data findings

In Chapter 8, we discussed the impact the SVO scheme might be having on rates of appeals. An appeal was lodged in almost half the cases in which the MSO was declared to be an SVO (n=216/469, 46.1%). In 6.8 per cent of cases (n=32), the SVO declaration was removed on appeal (either because the sentence was varied on appeal, or because the conviction was overturned, including via a retrial that did not result in a subsequent SVO conviction). Retrials that were still in progress, as of 30 June 2020, were classified as 'SVO removed', as a new sentence had not yet been imposed. For retrials, the SVO is categorised as 'removed' until the matter is finally determined.

As the coding of appeal outcomes was undertaken manually and not all details were recorded, the Council is not able to report on appeal rates by appeal type (i.e. whether they involved an appeal against sentence, conviction or both).

It was also not possible to code non-SVO cases for the purposes of determining any differences in appeal rates based on whether an SVO declaration was made. Whether sentence appeals are therefore higher as a result of the operation of the SVO scheme is not known.

Appeals are unlikely to be initiated solely based on whether an SVO declaration either was or was not made independent of submissions that the sentence is either manifestly excessive or manifestly inadequate.[591] It is the impact of the decision whether to make an SVO declaration on the overall sentence imposed that is relevant.

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585 Subject-matter expert interview I56.
586 Subject-matter expert interview I38.
587 Subject-matter expert interview I7.
588 Subject-matter expert interview I46
589 Subject-matter expert interview I48.
590 Subject-matter expert interview I69.
591 There are many examples of this common practice of appealing both the appropriateness of the sentence and the making of an SVO declaration. See, for example, *R v Liddy; Ex parte Attorney-General (Qld)* [2018] QCA 254 — an Attorney-General appeal on grounds the sentencing judge erred in failing to declare an offence to be an SVO and on the basis the sentence imposed was manifestly inadequate; and *R v SDM* [2021] QCA 135 — an appeal against sentence by the offender on the basis the sentence was manifestly excessive — both because the sentencing judge did not reduce the sentence sufficiently for the applicant's plea of guilty and other mitigating factors, and that the making of the SVO declaration in this case rendered it excessive.

The Council reported that the most common offences among SVO cases subject to an appeal included trafficking in dangerous drugs, rape, attempted murder, manslaughter and robbery (see Part B, Figure 29).

Trafficking in dangerous drugs was the most likely to be subject to an appeal, with over two-thirds of cases appealed (68.8%). Rape was the second most likely offence to be appealed with half of cases appealed (53.0%). Cases that involved charges of malicious acts with intent, maintaining, GBH and torture were the least likely to be appealed at one-third of sentenced cases (see Figure 29).

Cases involving a mandatory SVO were more likely to be appealed than cases involving a discretionary SVO. Out of all cases with a mandatory declaration, almost half of cases were appealed (48.1%), whereas for cases with a discretionary declaration, one-third of cases were appealed (37.8%).

14.3.2 Stakeholder views

There was limited feedback from stakeholders in submissions on the impact of the scheme on rates of appeal.

Legal Aid Queensland raised potential impacts on appeals when considering particular reform options for the SVO scheme in the context of risks should the mandatory nature of the scheme be extended to sentences above 5 years (instead of 10 years) drawing on data published in the Council's Issues Paper. It submitted:

> The data accumulated on sentences for Schedule 1 offences suggests that the percentage rates of pleas of guilty for serious offending, such as attempted murder, were lower. This has been attributed to the possibility that the risk of a sentence of 10 years or more, as well as the seriousness of the offences, meant that offenders were less willing to plead guilty. There may also be a correlation with this logic in higher numbers of pleas of guilty for less serious offending to avoid the possibility of a sentence of 10 years or more. The risk this raises is whether the introduction of mandatory sentencing for sentences above 5 years, would result in offenders being less willing to plead guilty.

It acknowledged that a plea of guilty can be entered for a number of reasons: 'including an acceptance of guilt, an acceptance of the strength of the prosecution case, to avoid victims giving evidence and to preserve the mitigating effect of a plea of guilty'.[592] It further acknowledged that '[t]here are cases where offenders plead guilty out of convenience so as to avoid a mandatory sentencing regime if at all possible'.[593]

Placing an offender in a position where they face a mandatory sentence on a plea of guilty for less serious offending, it submitted 'may in fact pose a deterrent to taking that course'.[594] The effect would be an increase in the cost of additional criminal trials, the number of appeals, and victims and witnesses giving evidence unnecessarily.[595]

Increasing rates of appeal was also an issue raised as a concern in relation to a presumptive model, or alternative approach, such as the Victorian standard sentencing scheme which also carries presumptive non-parole periods.[596]

The Queensland Homicide Victims' Support Group suggested that concerns about a decision being appealed might be one reason declarations were not made.[597]

14.3.3 Views from expert interviews

Rates of appeal were not widely discussed by interviewed experts, however some legal stakeholders thought that an appeal was more likely when the sentence was 10 years and therefore only marginally met the requirements for a mandatory SVO. It was mentioned that it is common for it to be a separate ground for appeal that the judge erred in making an SVO declaration, often in addition to a claim that the sentence imposed was manifestly excessive.

Interviewees also discussed the factors considered when determining whether to lodge an appeal. Legal stakeholders often expressed the view that considerations for initiating an appeal were the same for all cases, regardless of whether an SVO declaration was made. Common reasons mentioned included that the sentence:

- was manifestly inadequate or unjust or, alternatively, manifestly excessive;
- did not reflect community expectations for that type of offending;
- did not reflect the overall seriousness of the offending.

Other relevant considerations mentioned as relevant were that:

- a balanced sentence had not been reached;

592 Submission 13 (Legal Aid Queensland) 40.
593 Ibid.
594 Ibid.
595 Ibid.
596 Ibid.
597 Submission 19 (Queensland Homicide Victims' Support Group) 2.

- all relevant features of the case had not been adequately considered;
- undue weight was given to an aggravating factor;
- insufficient weight was given to a mitigating factor; or
- a view that a factual error had been made.

A number of legal stakeholders said that they would almost always consider appealing a sentence where a discretionary SVO was made as it is an unusual occurrence and makes a considerable difference to the length of time to be served.

The Council was unable to directly test the views of offenders to the making of an SVO declaration and whether it might increase the likelihood of them initiating an appeal due to the limited time to complete the review and ethical considerations.

The decision of *SDM*[598] discussed in section 10.4.1, however, illustrates how the making of an SVO declaration and the deferral of parole eligibility might be viewed by offenders as increasing the punitiveness of the sentence imposed, and as a more important aspect of the sentence than the head sentence. The applicant in this case chose not to withdraw his appeal in circumstances where the Court substituted a sentence of 7.5 years' imprisonment, with no parole eligibility set (meaning he would have to serve half of his sentence before being eligible for release on parole) in lieu of the 7-year sentence with an SVO declaration originally imposed by the sentencing judge.[599] This meant he would be eligible for release on parole after having served 3 years and 9 months, instead of after 5 years and 7 months under the original sentence.

This case reinforces views expressed by legal stakeholders in expert interviews that an appeal will commonly be considered when an SVO is made on a discretionary basis given the considerable difference it makes to minimum time to be served.

14.4 Costs associated with the scheme

Another feature of the scheme commonly mentioned by stakeholders was the costs associated with deferring parole eligibility under the scheme to 80 per cent of the head sentence.[600] This is because by deferring parole eligibility, offenders must spend a much greater proportion of their sentence in custody than they might if eligible for parole at an earlier point in their sentence in circumstances where they apply for and are released on parole. As discussed in Part B, parole release is not automatic and some offenders chose not to apply for parole at all.

The ALA, for example, referred to mandatory sentencing provisions increasing the use of imprisonment as a sentencing option and the length of sentences served by offenders, thereby 'increasing the costs to the state for incarceration of convicted offenders'.[601]

Chapter 9 noted that information about the 1,037 prisoners who were sentenced for a declared SVO between July 1997 and June 2020 was analysed to determine how many were released on parole over this period. Over those who had reached their parole eligibility date as of 30 June 2020, close to three-quarters (72.5%) had been eligible for parole. Of these offenders, 135 prisoners did not make an application for parole (17.9%).

Parole application data was also examined for 2,576 prisoners who had been sentenced to 5 years or more, and less than 10 years for a Schedule 1 offence who had not been declared convicted of an SVO. Approximately one in 10 prisoners had not yet reached their parole eligibility date as of 30 June 2020 (n=268, 10.4%) and a further 3 per cent (n=74) had not made a parole application despite being eligible to do so.

Analysis of where parole eligibility dates fell for these non-declared Schedule 1 offences as a proportion of the head sentence showed that while there is a wide spread of the proportions set, there is a clear propensity for parole eligibility dates to fall around the one-third and half-way mark. There was only a comparatively small number of cases with a parole eligibility higher than 50 per cent. This was consistent across all offence categories examined.

In summary, this data shows that the proportion of the sentence served in custody prior to release on parole, in circumstances where a parole application had been made and granted, is significantly higher for declared-SVOs versus offences not declared to be serious violent offences.

598 *SDM* (n 86).
599 The applicant was provided with an opportunity to abandon the appeal in accordance with *Neal v The Queen* (1982) 149 CLR 305, 308, given its result was potentially more severe than the original sentence imposed, but chose not to do so.
600 For example, Submission 2 (Australian Lawyers Alliance), Submission 13 (Legal Aid Queensland).
601 Submission 2 (Australian Lawyers Alliance) 10–11.

The direct costs to the systems in terms of the additional costs of imprisonment are therefore likely to be substantial. The average cost of imprisonment in Queensland is $207.13 per prisoner per day.[602]

In addition to the direct costs of imprisonment, there are also other costs associated with the scheme due to the additional layer of complexity it adds. For example, views were expressed during expert interviews that the scheme makes all aspects of the process more complex for all parties involved, including plea negotiations, preparing for sentencing and the sentencing process itself. This means that more time may be involved at these key stages of the process at increased cost to the system.

The Council's consideration of the financial and practical implications of the reforms it has recommended is set out in section 19.5.3.

602 Australian Government Productivity Commission, *Report on Government Services 2022* (Report, 28 January 2022) Figure 8.11b.

PART D

Reforms to the SVO scheme

Chapter 15

Fundamental principles

Chapter 16

The case for reform

Chapter 17

Options and alternative models considered by the Council

Chapter 18

Recommended reforms to the SVO scheme

Chapter 19

Implications and impacts of proposed reforms

Chapter 20

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Chapter 15

Fundamental principles

15.1 Introduction

The Council's review was informed by fundamental principles developed early in the project. Together with feedback received in response to the Issues Paper,[1] these principles helped shape the Council's approach to the review and its advice and recommendations.

The Council drew these principles from a range of sources, including the Terms of Reference for this review,[2] principles that guided the Council in undertaking previous reviews,[3] the *Queensland Parole System Review: Final Report* ('QPSR')[4] and submissions made to that review, as well as views expressed by stakeholders in submissions to this review and during consultation.

This chapter sets out the principles and stakeholder views that have guided the Council's work on this review.

15.2 Principle 1: Reforms to sentencing and parole laws should be evidence-based with a view to promoting public confidence

The Council has a strong ongoing commitment to evidence-based reform. The Council drew on a range of sources of evidence to inform its work, including reports of other law reform bodies, analysis of relevant data, consultation with relevant stakeholders and academic research. The need for evidence-based reform to promote public confidence was highlighted by some stakeholders in their submissions, as well as the need to ensure that evidence relied upon should be trauma-informed and culturally appropriate.[5] As discussed in Chapter 1, the Council commissioned a separate review of the research literature to provide insights into the perceptions of seriousness, risk and harm, the effectiveness of mandatory or minimum non-parole period ('MNPP') schemes and approaches to achieving community protection, deterrence and rehabilitation. The Council also drew on other sources of evidence, including its own analysis of administrative courts data, a review of key Court of Appeal decisions and select

1 Queensland Sentencing Advisory Council, *The '80 per cent rule': The Serious Violent Offences Scheme in the Penalties and Sentences Act 1992 (Qld)* (Issues Paper, November 2021) ('*Issues Paper*').

2 Attorney-General and Minister for Justice, Minister for Women and Minister for the Prevention of Domestic and Family Violence, 'Terms of Reference — Serious Violent Offences Scheme in the *Penalties and Sentences Act 1992*' (9 April 2021) reproduced in Appendix 1.

3 See Queensland Sentencing Advisory Council, *Community-Based Sentencing, Imprisonment and Parole Options* (Final Report, July 2019) ('*Community-Based Sentencing, Imprisonment and Parole Options Report*').

4 Walter Sofronoff, *Queensland Parole System Review: Final Report* (Report, 2016) and submissions made to that review ('*Queensland Parole System Review: Final Report*').

5 Submission 7 (Full Stop Australia) 4.

sentencing remarks, views expressed in subject-matter expert interviews, and information provided in submissions and during the consultation process.

The evidence gathered allowed the Council to reach conclusions about how well the Serious Violent Offence ('SVO') scheme is operating and its potential impacts on sentencing and parole, as well as recommended areas for reform.

Where there are gaps in existing evidence, the Council endeavoured to acknowledge these limitations. For example, the Council was unable to determine whether offenders declared convicted of an SVO are less likely than those who are not declared convicted of an SVO to reoffend to assess the scheme's ability to achieve longer-term community safety. Determining the extent to which the scheme is having an impact on rates of reoffending would require complex statistical analysis based on propensity score matching[6] and drawing on data that is not available to the Council — including on offender risk. In addition, there may be other factors at play that might influence offenders' reoffending risks, independent of the required 80 per cent an offender convicted of a declared offences has to spend in custody (such as access to programs in custody and transitional support). Another limiting factor in analysis of reoffending is that most prisoners subject to an SVO declaration serve a very long time in custody. The Council's dataset for this project covered a 9-year period from 2011–12 to 2019–20, which means that most people sentenced with an SVO declaration during this period are still in custody and have not had an opportunity to reoffend.

Further, the Council drew on research evidence about what types of responses are most effective to respond to the complex and diverse needs of offenders who commit the types of serious offences captured under the SVO scheme.

To ensure any reforms made as a consequence of the Council's recommendations operate as intended, do not result in any unintended consequences, and promote public confidence, the Council recommends the reformed scheme be reviewed 5 years post-implementation. The scope of this proposed review is discussed in section 19.7.

The Council further acknowledges the importance of community understanding to enhancing public confidence in sentencing — as was highlighted by some stakeholders in their submissions.[7] This continues to be an important aspect of the Council's broader community education function.

15.3 Principle 2: Sentencing decisions should accord with the purposes of sentencing as outlined in section 9(1) of the *Penalties and Sentences Act 1992* (Qld)

It is important that the sentencing decisions under any Queensland sentencing scheme are consistent with the purposes of sentencing and provide sufficient scope to take these purposes into account.

The purposes of sentencing, set out in section 9 of the *Penalties and Sentences Act 1992* (Qld) ('PSA') are:

(a) **Punishment:** to punish the offender to an extent or in a way that is just in all the circumstances; or
(b) **Rehabilitation:** to provide conditions in the court's order that the court considers will help the offender to be rehabilitated; or
(c) **Deterrence (specific and general):** to deter the offender or other persons from committing the same or a similar offence; or
(d) **Denunciation:** to make it clear that the community, acting through the court, denounces the sort of conduct in which the offender was involved; or
(e) **Community protection:** to protect the Queensland community from the offender; or
(f) A **combination** of two or more of the purposes listed above.

All sentencing decisions must be made in accordance with the purposes of sentencing. The weight that will attach to these purposes will vary based on the circumstances of the offence and the offender. The sentencing purposes guide judicial officers in their determination of a just sentence and are critical to the application of the SVO scheme, in particular, in deciding to make an SVO declaration where this is discretionary.

During this review, the Council determined that there are categories of offences which cause serious harm to individuals and the wider community and may therefore require the courts to place greater weight on the principles of punishment, denunciation and community protection in order to deliver a just sentence. These offences include sexual violence and non-sexual violence offences, as well as serious drug offences sentenced at a specified level.

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6 Propensity score matching is used to enable a comparison between 'like' subjects. Offenders are matched on characteristics known to influence their penalty as well as their likelihood of reoffending. It is commonly used by research bodies such as the NSW Bureau of Crime Statistics and Research to determine the impact of certain penalty types on reoffending risk. See, for example, Judy Trevena and Don Weatherburn, 'Does the First Prison Sentence Reduce the Risk of Further Offending?' (NSW Bureau of Crime Statistics and Research, Crime and Justice Bulletin No 187, October 2015).

7 Submission 4 (Fighters Against Child Abuse Australia).

The Council recognises that the purposes of punishment, deterrence, denunciation and community protection take on special importance for victims and survivors of these offences committed in the context of domestic and family violence, as was pointed out by several stakeholders.

The Council's recommendations regarding the purposes of the reformed SVO scheme are discussed in section 18.3.

15.4 Principle 3: Sentencing outcomes arising from the operation of the SVO scheme should reflect the seriousness of these offences, including their impact on victims, while not resulting in unjust outcomes

Ensuring that sentences imposed on offenders properly reflect the seriousness of the offences committed and the harm caused to victims and survivors is a legitimate concern of any legal system. It is embedded within the common law principle of proportionality — which is reflected in the legislative sentencing purpose in Queensland of 'just punishment'. The assessment of offence seriousness includes not just an assessment of the person's culpability for the offence, but also the harm caused to a victim by their offending.[8]

Proportionality sets outer limits on the sentence to be imposed and requires that a sentence should not exceed a level which can be justified as appropriate or proportionate to the gravity of the offence assessed in light of its objective circumstances.[9] This principle operates as a general prohibition against increasing a sentence of imprisonment beyond a level which is proportionate to extend the period of protection of the community from the offender by way of preventative detention.[10]

The PSA requires a court to have regard to the nature of the offence and how serious it was, including any physical, mental or emotional harm done to a victim.[11] In the case of offences involving physical harm caused to another person, or that involved the use, or attempted use, of violence, the court must have primary regard to factors including 'the personal circumstances of any victim of the offence'.[12] The effect of the offence on a child victim is also a primary sentencing consideration for sexual violence offences committed in relation to a child under 16 years and for child exploitation material offences.[13]

The Council acknowledges the significant and long-lasting emotional, physical, psychological and financial trauma caused to victims, survivors and the wider community by the types of serious offences at which the scheme is targeted. Many victim and survivor support and advocacy stakeholders submitted that the scheme should be extended to other categories of offending and be applied in a presumptive or mandatory way to offences falling under the current 10-year threshold (at which point the making of an SVO declaration becomes mandatory).

It is important that the SVO scheme and its application provides sufficient recognition of the seriousness of this form of offending, while not resulting in unjust outcomes. This was a key focus of this review.

15.5 Principle 4: Parole serves an important purpose in helping prisoners successfully and safely reintegrate into the community and in minimising the likelihood of a person reoffending, thereby promoting community safety

As discussed in Chapter 2, concerns about community safety in relation to serious violent offences was one of the key drivers identified by the then Queensland National Liberal Coalition Government when committing to introducing the scheme. The objective of these and related reforms was to ensure the sentencing purpose of community protection would be treated as a primary consideration when sentencing offenders for serious violent offences.

The SVO scheme impacts on offenders' re-offending risk in the following two ways:

8 *Veen v The Queen* [No 2] (1988) 164 CLR 465 ('*Veen* [No 2]').
9 Ibid 472 (Mason CJ, Brennan, Dawson and Toohey JJ), 484–6 (Wilson J), 490–1 (Deane J), 496 (Gaudron J). See also *Hoare v The Queen* (1989) 167 CLR 348, 354.
10 *Veen* [No 2] (n 8) 472, 484–6, 490–1, 496.
11 *Penalties and Sentences Act 1992* (Qld) s 9(2)(c)(i) ('PSA'). This includes harm mentioned in information relating to the victim given to the court, such as in the form of a victim impact statement: see Part 10B.
12 Ibid s 9(3)(c).
13 Ibid s 9(6)(a).

1. It provides for an extended period of detention, thereby protecting the community during the time the person is in custody from the risk that they may commit further offences in the community (a form of incapacitation).[14]
2. It provides for the person who is subject to the declaration to apply for release under supervision on parole after they have served a minimum of 80 per cent of their sentence, or 15 years (whichever is less).

For these reasons, both the periods spent in custody and on parole are important when evaluating the extent to which the SVO scheme is meeting its objectives of enhancing community safety.

The QPSR recognised parole as being primarily a 'method that has been developed in an attempt to prevent reoffending',[15] and pointed to evidence suggesting that parole 'has a beneficial impact on recidivism, at least in the short term' and perhaps modestly.[16] Paroled prisoners are less likely to reoffend than prisoners released without parole.[17] The QPSR also found 'it is more risky to have a short period of parole' than a longer one.[18]

A literature review completed for the Council by the University of Melbourne reached a similar conclusion: 'More and not less time on parole would allow time to engage in rehabilitative programs' to reduce risk of reoffending, build strengths and take steps towards desistance.[19] Research published by the NSW Bureau of Crime Statistics and Research similarly found that parolees are substantially less likely to re-offend than prisoners released unconditionally — and this is particularly the case for higher-risk offenders.[20]

Consideration of the time required under supervision to successfully protect the community from the risk of future offending is of direct relevance to this review as the SVO scheme, by design, limits the time an offender is actively supervised in the community. This could potentially result in an increased risk of reoffending, rather than a reduction.

The Council's data analysis for parole outcomes over a 23-year period found the time prisoners with an SVO served in custody varied considerably based on the offence the prisoner was convicted of. Drug traffickers were the offender cohort most likely to be released as soon as they became eligible for parole. Drug traffickers, on average, were released on parole at or very close to their eligibility date. Comparatively, prisoners sentenced for rape served the longest period of time in custody beyond their parole eligibility date prior to their release (a median of 8.1 months). This means prisoners released on parole for rape with an SVO declaration were under supervision for a very short time, meaning they were potentially at higher risk of reoffending following lengthy incarceration.

While up to 20 per cent of an offender's sentence for an SVO-declared offence can be spent on parole, a number of those subject to an SVO declaration (between 12 to 29% for non-sexual violent offences, and up to 14% for sexual violent offences) did not apply for parole at all.

Many stakeholders recognised that parole is important to reducing re-offending and that supporting reintegration promotes community safety.[21] At the same time, there was concern that 'any focus on the benefits of parole should not be used as a substitute for, nor should it detract from, the need for substantial investment in rehabilitation programs while in custody'.[22]

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14 See generally Andrew Ashworth, *Sentencing and Criminal Justice* (Cambridge University Press, 5th ed, 2012) and Andrew von Hirsch, 'Incapacitation' in Andrew von Hirsch, Andrew Ashworth and Julian Roberts (eds), *Principled Sentencing: Readings on Theory and Policy* (Hart Publishing, 3rd ed, 2009) 75. Imprisonment is only one form of incapacitation, with other incapacitative methods including home detention and electronic monitoring.

15 *Queensland Parole System Review: Final Report* (n 3) 2 [8].

16 Ibid 38 [140], 2 [11], 38 [139].

17 Ibid 1 [7] citing Wan Wai-Yin et al, 'Parole Supervision and Reoffending' [2014] 485 *Trends and Issues in Crime and Criminal Justice* 1.

18 Ibid 7 [46]. The comment was made in the context of provisions requiring some offenders to serve 80 per cent of their prison term before being eligible for release on parole, such as in the case of offenders subject to an SVO declaration.

19 Andrew Day, Katherine McLachlan and Stuart Ross, *The Effectiveness of Minimum Non-Parole Period Schemes for Serious Violent, Sexual and Drug Offenders and Evidence-Based Approaches to Community Protection, Deterrence and Rehabilitation* (Summary Report, University of Melbourne, August 2021) ('*University of Melbourne Literature Review*') 13–14, 22.

20 Evarn J. Ooi and Joanna Wang, 'The Effect of Parole Supervision on Recidivism' (2022) 245 *Crime and Justice Bulletin* ('*The Effect of Parole Supervision on Recidivism*'). This research found that for the marginal parolee, being released to parole reduces the likelihood of re-conviction within 12 months of release by 10.0 percentage points (a decrease of 17.5 per cent); reduces the likelihood of committing a personal, property or serious drug offence within 12 months of release by 10.3 percentage points (a decrease of 24.0 per cent); and reduces the likelihood of being re-imprisoned within 12 months of release by 5.0 percentage points (a decrease of 18.2 per cent). These reductions in recidivism were statistically significant and generally persisted 24 months after release from prison.

21 For example, submission 19 (QHVSG) 2.

22 Submission 7 (Full Stop Australia) 4–5 — in particular, it suggested, Men's Behaviour Change programs. See also submission 19 (QHVSG) 2 which made a similar point.

The research evidence and submissions also pointed to the importance of programs being designed for and tailored to the needs of specific offender cohorts and, in the case of Aboriginal and Torres Strait Islander peoples, providing for healing and connection to culture. It also suggests that rehabilitation programs 'offer an important, but not sufficient, strategy to manage future risk',[23] with other factors such as the quality and intensity of supervision when released on parole also important for the successful completion of parole.[24]

The Council is required to consider any practical and financial implications resulting from its reforms, including the importance of programs and interventions for offenders, both in custody and on parole. This is discussed further in section 19.5.

15.6 Principle 5: Sentencing inconsistencies, anomalies and complexities should be minimised

The Terms of Reference ask the Council to 'identify any trends or anomalies that occur in the application of the SVO scheme that create inconsistency or constrain the sentencing process'.

The Council identified the benefits to be gained in removing anomalies and minimising the complexity of sentencing and parole laws in undertaking previous reviews, including promoting greater certainty and clarity about how the law is to be applied, reducing the risk of error (and any appeals required to correct such errors), and reducing the length of sentencing proceedings.[25] Such an approach also supports the fair and consistent application of the law, and ensures courts are not unnecessarily constrained by legislation in making orders that respond to the individual circumstances of the case.[26]

During the review, the Council identified a number of examples of potential inconsistencies, anomalies and complexities with the current operation of the SVO scheme. These include:

- Problems arising from the setting of 10 years as the cut-off point for a mandatory SVO declaration — which means that the only way a court can take factors such as a plea of guilty or other factors in mitigation into account, as required by law, is to reduce the head sentence. The effect of this is to provide for a shorter period of supervision on parole — contrary to research evidence which suggests that those who commit serious offences and are sentenced to longer period of imprisonment require longer periods of supervision rather than less in the interest of long-term community protection.
- Limited scope for the application of the principle of parity in circumstances where an SVO declaration is made in one case for an offender, but not made in another involving a co-offender — where this principle would, but for the existence of the SVO scheme, otherwise be more readily applied.[27] This may lead to very different outcomes where one offender is subject to a declaration, while another is not.
- The lack of clear rationale for the offences included and excluded from Schedule 1.
- The scheme's impact in adding an unnecessary additional layer of complexity to sentencing, such as when:
  - dealing with multiple offences, particularly when committed over different time periods and/or with different complainants in circumstances where only some of those convictions are serious enough to warrant, or can be subject, to a declaration. This may create confusion about which offence/s the declaration is intended to, or must, attach;
  - applying section 161C of the PSA to calculate the relevant periods that apply for the purposes of section 161B.[28] Uncertainty about its application has resulted in the need for a body of case law to settle areas of uncertainty and ambiguity.

The Council found the scheme is most likely exerting downward pressure on head sentences because a sentence that is 'just in all the circumstances' where an SVO declaration is enlivened may require reducing the head sentence to less than 10 years and/or to be set at the lower end of the range.

These issues are explored in more detail in Chapter 12 of Part C of this report.

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23 *University of Melbourne Literature Review* (n 19) 19.
24 Ibid 14.
25 *Community-Based Sentencing Orders, Imprisonment and Parole Options Report* (n 3).
26 Ibid.
27 See Queensland Sentencing Advisory Council, *Minimum Non-Parole Period Schemes for Serious Violent Offences in Australia and Select International Jurisdictions* (Background Paper 2, 2021) section 2.9 ('*Background Paper 2*'); *R v Crossley* (1999) 106 A Crim R 80.
28 As one example where a judge mistakenly thought the requirement to declare the offender convicted of an SVO did not apply, see *R v Dutton* [2005] QCA 17. See Chapter 12 for other examples of complexities in the sentencing process.

15.7 Principle 6: Any reforms should take into account likely impacts on the over-representation of Aboriginal and Torres Strait Islander peoples in the criminal justice system

The Terms of Reference ask the Council to advise on the impact of any recommendations on the over-representation of Aboriginal and Torres Strait Islander peoples in the criminal justice system.

The Council is committed to improving its awareness and understanding about the impact of sentencing on Aboriginal and Torres Strait Islander peoples, including identifying and addressing the drivers of over-representation. To support this aim, the Council established the Aboriginal and Torres Strait Islander Advisory Panel, consults with a range of stakeholders providing sentencing support to Aboriginal and Torres Strait Islander communities, ensures all of its research includes socio-demographic findings and publishes targeted research on over-representation.

In Queensland, Aboriginal and Torres Strait Islander peoples are over-represented in all areas of the criminal justice system. This is a result of a range of complex current and historical factors that continue to impact on the lives of Aboriginal and Torres Strait Islander peoples. Generally, Aboriginal and Torres Strait Islander peoples are more likely to be sentenced for offences involving acts intended to cause injury, unlawful entry, public order, and offences against justice and government.[29] The SVO scheme disproportionately affects Aboriginal and Torres Strait Islander peoples.

The Council's data analysis found that Aboriginal and Torres Strait Islander peoples comprise 3.8 per cent of the Queensland population aged 10 years or over.[30] However, data analysis for this review found Aboriginal and Torres Strait Islander offenders were over-represented across all offence categories commonly attracting an SVO declaration, except for drug trafficking. Over the 9-year data period, of the 437 SVO cases, 20.1 per cent of sentenced cases involved an Aboriginal and Torres Strait Islander offender (n=88). Of those cases, the highest proportion of over-representation was for non-sexual violence offences (24.6%), followed closely by sexual violence offences (20.7%).

The proportion of SVO cases in which an Aboriginal or Torres Strait Islander person was sentenced to imprisonment with an SVO declaration made, was higher for discretionary SVO declarations — 30.3 per cent compared to 16.4 per cent for mandatory SVO declarations.

Further analysis to determine whether these levels of over-representation were confined to cases involving an SVO declaration found that except for drug trafficking, Aboriginal and Torres Strait Islander peoples were over-represented for all cases, regardless of whether an SVO declaration was made.

Stakeholders strongly supported the need to reduce the over-representation of Aboriginal and Torres Strait Islander peoples in the criminal justice system.[31] Sisters Inside recommended this principle be given priority in the reform process to ensure the scheme's impacts on Aboriginal and Torres Strait Islander peoples were not lost during the Council's deliberations.[32]

One of the difficulties with using this review to examine drivers of over-representation are the small case numbers. As discussed further in section 19.3, of all the offences included in Schedule 1, most offences had a very small number of cases sentenced. While Aboriginal and Torres Strait Islander peoples were over-represented for all but one of the top 11 offences attracting a declaration (i.e. except drug trafficking), the level of over-representation varied between offences.

Analysis of the number of days Aboriginal and Torres Strait Islander peoples were sentenced to serve in custody shows that the vast majority of custody days are attributable to sentences of three years and less (see section 19.3.2 for more details). Sentences of 3 years or less accounted for 70 per cent of all days sentenced to serve in custody for Aboriginal and Torres Strait Islander peoples. Cases captured under the SVO scheme only accounted for 7 per cent of custody days sentenced to be served by Aboriginal and Torres Strait Islander peoples.

The existing case law provided commentary on the complexity of over-representation and serious offending. As recognised by the High Court in *Bugmy v The Queen*[33] and *Munda v Western Australia*,[34] factors such as extreme disadvantage must not overwhelm the proper consideration of what is a just sentence in the circumstances of the

29 Queensland Sentencing Advisory Council, *Connecting the Dots: the Sentencing of Aboriginal and Torres Strait Islander Peoples in Queensland* (Sentencing Profile 2021) 22–24.

30 Queensland Sentencing Advisory Council, *Baseline Report* (Sentencing Profile, May 2021) 15. See also Queensland Government Statistician's Office, *Population Estimates by Indigenous Status, LGAs, 2001 to 2015* (Data, 2015).

31 Submission 4 (Fighters Against Child Abuse Australia), Submission 5 (Aged and Disability Advocacy Australia), Submission 7 (Full Stop Australia), Submission 9 (Queensland Network of Alcohol and Other Drug Agencies), Submission 11 (Sisters Inside) and Submission 13 (Legal Aid Queensland).

32 Submission 11 (Sisters Inside) 4.

33 (2013) 249 CLR 571.

34 (2013) 249 CLR 600.

case by resulting in a penalty that is disproportionate to the gravity of the offence. The application of the scheme to Aboriginal and Torres Strait Islander offenders in some cases may be entirely appropriate despite the presence of a deprived background and other circumstances of disadvantage. Munda's case, for example, involved a violent assault leading to the death of the offender's de facto partner. These cases are further discussed in section 18.7.4.

The Council recognises that Aboriginal and Torres Strait Islander peoples are not only over-represented among those who receive an SVO declaration, but are also over-represented as the victims and survivors of serious offences. For example, Aboriginal and Torres Strait Islander women are 35 times more likely to experience domestic and family violence compared with non-Indigenous women.[35] In 2019-20, Aboriginal and Torres Strait Islander people accounted for 13.0 per cent of reported victims of offences against the person in Queensland.[36] Overall, Aboriginal and Torres Strait Islander female victims accounted for 71.0 per cent of Aboriginal and Torres Strait Islander victims, however some offences had a higher proportion of male victims to female victims.[37]

The Council recognises that the challenge of reducing over-representation is a far broader and more complex undertaking than recommending reforms to the SVO scheme given the comparatively small number of offenders subject to this scheme. In this context, the Council notes the recommendation made by the Women's Safety and Justice Taskforce to address over-representation through the development of a co-designed, whole-of-government and community strategy.[38] It also understands that broader work is underway to assist in meeting Queensland's Closing the Gap justice targets.[39]

15.8 Principle 7: The circumstances of each offender and offence are varied. Judicial discretion in the sentencing process is fundamentally important

The Terms of Reference explicitly recognise 'the importance of judicial discretion in the sentencing process'.

The Council recognises that the circumstances of each offender and offence are infinitely varied. For this reason, sentencing approaches that promote individualised justice applied within a framework of broad judicial discretion are generally more likely to support positive outcomes than a 'one size fits all' or 'one size fits most' approach.[40]

In previous reports, the Council raised concerns about the potential for mandatory sentences to constrain available sentencing options, lead to anomalies and unintended consequences in sentencing, and cause inconsistency in sentencing.[41] For this reason, the Council's position has been that, in accordance with the evidence, mandatory sentencing does not work either in achieving the purposes of sentencing in the Act, or in reducing recidivism.[42] This is because, as a matter of principle, it assumes that every offence and every offender are the same.

Stakeholders were supportive of this principle and advocated for an individualised approach to justice that recognises the different context of each offence and offender. For example, Aged and Disability Advocacy Australia said this is 'critical in the context of persons with disability, persons with acquired brain injury, psychosocial disability and those with other forms of cognitive disability or impairment'.[43] Legal support organisation, knowmore advocated

35 Liesl Mitchell, 'Domestic Violence in Australia —An Overview of the Issues' (Background Note, 22 November 2011).
36 Queensland Government Statistician's Office, *Crime report, Queensland 2019-20* (Report, 2021) 67.
37 Ibid. There were 138 Aboriginal and Torres Strait Islander male victims of grievous assault compared to 91 Aboriginal and Torres Strait Islander female victims.
38 Women's Safety and Justice Taskforce, *Hear Her Voice: Addressing Coercive Control and Domestic and Family Violence in Queensland* (Report vol. 1, 2021) Recommendation 1, xlvi ('*Hear Her Voice*').
39 This includes actions taken under the current Closing the Gap Implementation Plan released in 2021 <https://www.dsdsatsip.qld.gov.au/resources/dsdsatsip/work/atsip/reform-tracks-treaty/closing-gap/closing-gap-implementation-plan.pdf>. This includes work in response to an agreement in April 2021 by the Joint Council to accelerate critical work to establish a policy partnership on justice with the aim of reducing youth and adult incarceration.
40 See *University of Melbourne Literature Review* (n 19) 12–13.
41 See, for example, *Community-Based Sentencing Orders, Imprisonment and Parole Options Report* (n 3) 101–3.
42 See, for instance, Queensland Law Society, *Mandatory Sentencing Laws Policy Position* (4 April 2014): 'The evidence against mandatory sentencing shows there is a lack of cogent and persuasive data to demonstrate that mandatory sentences provide a deterrent effect. A review of empirical evidence by the Sentencing Advisory Council (Victoria) found that the threat of imprisonment generates a small general deterrent effect but increases in the severity of penalties, such as increasing the length of terms of imprisonment, do not produce a corresponding increase in deterrence. Research regarding specific deterrence shows that imprisonment has, at best, no effect on the rate of reoffending and often results in a greater rate of recidivism' at 3 citing Victorian Sentencing Advisory Council *Does Imprisonment Deter? A Review of the Evidence* (Sentencing Matters, April 2011) 2. See also Law Council of Australia, *Policy Discussion Paper on Mandatory Sentencing* (May 2014) 13–15.
43 Submission 5 (Aged and Disability Advocacy Australia) 2.

that unfettered judicial discretion was important where a survivor of child sexual abuse has been convicted of a sexual violence offence to ensure this can be given consideration in sentencing.[44]

While Fighters Against Child Abuse Australia ('FACAA') supported the principle generally, it was concerned that it may undermine recognition of the impact of serious offences on victims and survivors. The views of FACAA and others who supported the application of mandatory sentencing provisions in some cases is discussed in sections 12.2.1 and 17.3.4.

Sisters Inside considered it important that the Council 'affirm that judicial discretion remains a fundamental principle, even when the legal system does not meet victims' expectations'.[45]

The Council considers that providing scope for judicial discretion to be exercised under any reformed scheme is critical.

The Council sought to balance many competing interests and views in developing its recommendations. The importance of preserving judicial discretion to ensure sentences under the reformed scheme are just in all the circumstances[46] has been central to the Council's decision-making. At the same time, the Council has been concerned to ensure that the impact of serious offences on victims and survivors is given appropriate recognition and that the provisions governing parole eligibility in these cases acknowledge their particular seriousness, thereby promoting community confidence.

For reasons explained in Chapter 17, the Council supports the retention of the SVO scheme, but recommends that it be substantially reformed to apply in a presumptive way to all sentences for listed offences of greater than 5 years, except for serious drug offences, to which a threshold of 10 years or greater should apply.

While presumptive MNPP schemes limit a court's discretion, they are different to mandatory MNPPs as they allow for a court to set a shorter non-parole period if certain criteria are met. Under the Council's recommended option, a court will have the ability to decline to make a declaration and to set parole eligibility below the statutorily defined floor where it considers this is 'in the interests of justice'. This basis to depart from the presumptive scheme preserves the court's discretion to impose an appropriate and just sentence.

The Council also recommends other elements be included in the reformed scheme to enhance judicial discretion and to better allow for the application of individualised justice, including changing the current fixed 80 per cent non-parole period to allow eligibility to be set within a specified range of 50 and 80 per cent. Providing the courts with the ability to fix the non-parole period within a range promotes consideration of circumstances particular to each offence and offender.

15.9 Principle 8: Sentencing orders should be administered in a way that satisfies the intended purposes of the sentence. Services delivered under them, including programs and treatment, should be adequately funded and available across Queensland both in custody and in the community

The Terms of Reference recognise that sentencing orders of courts must be properly administered to satisfy the intended purposes of each order and facilitate a fair and just sentencing regime that protects community safety.[47]

Both the Queensland Productivity Commission in its inquiry into imprisonment and recidivism[48] and the QPSR[49] highlighted funding and resourcing challenges faced by the Queensland criminal justice system and made recommendations designed to improve the management of offenders. Recommendations made by the QPSR included several that are of relevance to this current review, including:

- The establishment of a body that is appropriately resourced to evaluate risk assessments, training and interventions used by Queensland Corrective Services ('QCS') (QPSR Recommendation 11).
- Independent evaluations of all rehabilitation programs offered by QCS to ensure they are effective in reducing reoffending, as well as regular re-evaluations of those programs (QPSR Recommendations 21 and 22).

44 Submission 10 (knowmore) 17.
45 Submission 11 (Sisters Inside) 4.
46 The Court of Appeal has recognised that this purpose is 'the paramount objective of sentencing': *R v Randall* [2019] QCA 25, [37] ('*Randall*').
47 See Terms of Reference (n 2) 1 (Appendix 1).
48 Queensland Productivity Commission, *Inquiry into Imprisonment* (Report, 2019).
49 *Queensland Parole System Review: Final Report* (n 4).

- The introduction of a dedicated case management system that begins assessing and preparing a prisoner for parole at the time of entry into custody, and the involvement of the person's future case manager in the management of the prisoner before he or she is released from custody (QPSR Recommendations 12 and 15).
- An increase in the number and diversity of rehabilitation programs and training and education opportunities available to prisoners, and a greater variety of rehabilitation programs to address the specific and complex needs of women and Aboriginal and Torres Strait Islander offenders, and increased availability of these programs (QPSR Recommendations 17 and 18).
- Partnerships with non-government service providers to develop and increase rehabilitation program delivery (Recommendation 19) and increased delivery of accredited programs to offenders supervised by Probation and Parole in light of issues associated with delivering programs in custody (QPSR Recommendation 20).
- A review of resourcing of prison and community forensic mental health services (QPSR Recommendation 24).
- The delivery and design of new rehabilitation programs specifically designed for Aboriginal and Torres Strait Islander people by Aboriginal and Torres Strait Islander people (QPSR Recommendation 27).
- Consideration by government of whether it would be appropriate to implement a brokerage model to address the significant treatment service gaps for offenders in the community (QPSR Recommendation 30).
- Expanded re-entry services to ensure that all prisoners have access to these services (QPSR Recommendation 33).
- The provision of funding and associated resources necessary to bring Queensland in line with Australian average offender-to-staff ratios to make workloads more manageable and increase the efficacy of case management (QPSR Recommendation 62).

The Commissioner of QCS, in the department's 2020–21 Annual Report, reported that during this financial year:

> Work has continued on implementing the recommendations from the Queensland Parole System Review (QPSR) that are centred around increasing rehabilitation opportunities for prisoners. This aims to address the underlying causes of offending behaviour and recidivism prior to release. These recommendations include launching the first Case Management Unit (CMU) at Townsville; better supporting the readiness of frontline community corrections officers through revised training; expanding rehabilitation programs in correctional centres and community corrections; and considering the rollout of phase 2 of the Opioid Substitution Treatment (OST) Program.[50]

The Commissioner also referred to measures implemented to address capacity issues, including re-entry services to aid the transition of prisoners back into the community to reduce their likelihood of reoffending and returning to custody.[51]

The Annual Report notes QCS's commitment to 'consolidate the government's position [in implementing the QPSR recommendations] and the community's expectations of a parole system that underpins community safety, by providing prisoners and offenders with opportunities for rehabilitation across the entire corrections system'.[52]

The management of offenders — both in custody and in the community — is highly relevant when assessing the extent to which the current SVO scheme is meeting its objectives.

A number of stakeholders highlighted the importance of investing in the development and delivery of high quality programs and interventions for high-risk offenders who might potentially be subject to the scheme.[53] The nature of parole supervision also was viewed as critical in terms of the intensity of services, the types of services delivered and the way in which they were delivered.[54] These aspects of sentence administration were viewed as particularly important to achieving the scheme's long-term objective of community protection.

The Council shares the views expressed by stakeholders that services and programs delivered to offenders under sentence — and particularly those convicted of the types of serious offences the SVO scheme is targeted at — should be:

- adequately funded and as far as is practicable, universally available across Queensland;
- regularly evaluated with adherence to best practice standards; and

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50 Queensland Corrective Services, *Annual Report 2020–21* (Report, 2021) 6.
51 Ibid.
52 Ibid 32.
53 Submission 12 (Queensland Law Society); Submission 11 (Sisters Inside) 5; Submission 14 (Parole Board Queensland); Submission 19 (Queensland Homicide Victims' Support Group) 2.
54 For example, Submission 19 (Queensland Homicide Victims' Support Group). This same point was made by the authors of the *University of Melbourne Literature Review* (n 19) 13.

- appropriately targeted and tailored to meet the individual needs of offenders taking into account factors such as the offender's age, gender, cultural background, mental health issues and any cognitive impairments they might have.

15.10 Principle 9: Sentencing decisions for serious violent offences should be informed by the best available evidence of a person's risk of reoffending

As identified in *R v Collins*,[55] and discussed in Chapter 2 and section 3.4.2, the paramount consideration of the legislature in enacting the SVO scheme appeared to have been the protection of the community from offenders who pose an ongoing risk to the community.

Underlying the SVO scheme is an assumption that a long period in custody is required, both to properly denounce and punish the offender for their offending, and for the purposes of community protection. This assumes that the sentencing judge is in a position to assess the future risk posed by an offender when deciding whether a longer period in custody is required to meet this purpose.

Some stakeholders raised concerns with the Council that there is often limited information available to a court at sentencing about the future risk level an offender poses to the community at the time of sentence. The court is typically reliant on expert reports being prepared and submitted by the defendant's legal representatives as to the level of risk an offender poses. Although a court may also order a pre-sentence report be prepared by QCS,[56] this is less common.[57] Pre-sentence reports (provided by the defence) were criticised by some as not providing sufficient information to aid decision-making.

The lack of a specific provision for independently obtained pre-sentence reports for the purposes of determining whether an SVO declaration should be made is in contrast, for example, to provisions which apply to indefinite sentences[58] — although the consequences for an offender of an indefinite sentence being imposed are far greater than having their parole eligibility date deferred.

During the QPSR, similar concerns were raised by multiple stakeholders about a court's ability to assess future risk.[59] It was suggested that the need for supervision for the purposes of rehabilitation cannot (or perhaps should not) be made at sentence. Instead, it was proposed that a better approach would be to set a parole eligibility date and enable the Parole Board Queensland ('Parole Board') to assess risk closer to the date of release.

The task faced by judicial officers when determining whether to make an SVO declaration in circumstances where this is discretionary is highlighted in the Court of Appeal's 2020 decision of *R v Free; Ex parte Attorney-General (Qld) ('Free')*.[60] In *Free*, the Court emphasised the exercise of this discretion involves:

> considering more broadly whether there are circumstances of the case which aggravate the offence in a way which suggests the protection of the public or adequate punishment required a longer period in actual custody before eligibility for parole than would otherwise be required.[61]

This case highlights the number of purposes and factors a court must consider when deciding whether to make an SVO declaration, demonstrating that the risk of reoffending is just one.

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55 [2000] 1 Qd R 45, 49 [20], 52 [29] ('*Collins*').

56 Section 15 of the PSA (n 11) provides for a court to receive any information that it considers appropriate to enable it to arrive at the appropriate sentence, including a pre-sentence report ordered by a court to be prepared by Corrective Services in accordance with section 344 of the *Corrective Services Act 2006* (Qld) ('CSA').

57 See Queensland Corrective Services, Submission No 11 to Queensland Sentencing Advisory Council, *Review of Community-Based Sentencing Orders and Parole Options* (2019) 10. QCS noted between July 2016 and June 2018, QCS conducted 1,446 PSRs (verbal and written reports) across the state. Over the same period 50,036 admissions for new community based orders were received by QCS, indicating only a small percentage of offenders (2.9%) have pre-sentence reports (PSRs) requested by the courts prior to sentencing to community based orders. This does not include the number of admissions to custody and on this basis, the proportion of offenders for whom a PSR is ordered can be assumed to be even smaller. In contrast to some other jurisdictions, such as Victoria, Queensland does not have a dedicated state-wide court advisory service.

58 See pt 10 of the PSA (n 11) ss 166A–166C, 167(4).

59 Unpublished submissions in response to the Walter Sofronoff, *Queensland Parole System Review: Issues Paper* (2016).

60 (2020) 4 QR 80 ('*Free*').

61 Ibid 98 [49]. A report from a psychologist informed the original sentence imposed at first instance. The report concluded: '[g]iven the unique nature of the offences, it is difficult to ascertain (with a high level of psychological certainty) the risk of recidivism'. However, some protective features were able to be identified being 'a lack of psychopathic tendencies and the absence of criminal versatility, personality disorders, previous violence-based convictions or extensive drug dependency treatment needs'. It was also 'regarded as encouraging that the respondent remained extremely remorseful and ashamed of his behaviour and eager to engage in interventions (treatment)': 90 [28].

Legal stakeholders commented on the benefits and risks of requiring pre-sentence reports in the making of declarations. The absence of expert advice about future risk was concerning for many, but there was also caution expressed about the likelihood of increased delays should they be mandatory, as well as quality and accessibility issues across the State.

The Council further notes concerns of stakeholders about the different risk levels posed by different types of offenders, most notably in relation to domestic and family violence. While the current and reformed scheme focuses primarily on the seriousness of the offence in relation to factors supporting the making of a declaration, as noted in *Free*, the history and antecedents of the offender are still relevant considerations. The Council is aware that a criminal history may not contain a complete history of offending, particularly in relation to sexual violence and domestic and family violence offences that are often subject to under-reporting.

The Council has not made any specific recommendations in relation to assessing an offender's risk of reoffending, but recognises the importance of specialist reports, such as those typically prepared by private psychiatrists and psychologists, in supporting the effective operation of the new scheme. Given the problematic nature of assessing risk,[62]one of the benefits of the presumptive model favoured by the Council is that specialist reports would be used primarily as a basis for identifying a person as being at low risk of offending, thereby supporting defence submissions that the making of a declaration would not be in the interests of justice. These assessments will therefore operate to an offender's benefit, rather than their detriment.

To ensure more equitable access to these types of reports, the Council recommends that as part of any implementation strategy, further consultation should be undertaken with legal stakeholders to consider the adequacy of existing funding both in support of defendants' legal representation and to fund the preparation of any required specialist reports (see section 19.4 and recommendation 25).

Provided that this information is available, it can be taken into account as part of the court's broader decision-making process, including in deciding whether a declaration should be made. The court can also determine the appropriate weight to be placed on information about the offender's assessed level of risk, acknowledging the significant limitations of any risk assessment process. Whether the offender is released on parole on reaching their parole eligibility date then properly becomes a decision made by the Parole Board.

15.11 Principle 10: Any reforms should aim to be compatible with the rights protected and promoted under the *Human Rights Act 2019* (Qld) or be reasonably and demonstrably justifiable as to limitations

Under the *Human Rights Act 2019* (Qld) ('HRA'), human rights limitations must be justified as a proportionate way of achieving the purpose of legislation, provided there is evidence that it is the least restrictive option.

The imposition of higher penalties based on an assessment of offence seriousness, and future risk of reoffending, engages several human rights protected in the HRA including:

- the right to equality;[63]
- the right to liberty and security;[64]
- the right to a fair hearing;[65] and
- protection from cruel, inhuman or degrading treatment.[66]

During consultation, additional rights protected under the HRA were identified by stakeholders as rights which may be impacted by the SVO scheme, including:

- the right to humane treatment when deprived of liberty;[67]
- the right to have one's sentence reviewed by a higher court (rights in criminal proceedings);[68]

62 For a discussion of these problems, see *University of Melbourne Literature Review* (n 19); Complex Adult Victim Sex Offender Management Review Panel, *Advice on the Legislative and Governance Models under the Serious Sex Offenders (Detention and Supervision) Act 2009 (Vic)* (2015) 15–16 [1.59]–[1.65].
63 *Human Rights Act 2019* (Qld) ('HRA') s 15.
64 Ibid s 29.
65 Ibid s 31.
66 Ibid s 17.
67 Ibid s 30.
68 Ibid s 32(4).

- protection of families and children;[69] and
- cultural rights of Aboriginal and Torres Strait Islander peoples.[70]

Some victim support stakeholders submitted that the Council's Issues Paper solely focused on the rights of offenders and did not sufficiently recognise that the rights protected under the HRA equally apply to victims and survivors. The Council fully acknowledges that the human rights listed above (in particular, the right to security of person and to be protected from cruel, inhuman or degrading treatment) apply to victims and survivors as well and has directly considered the relevance of these rights in developing its compatibility assessment and the development of its recommendations. The Council also notes the specific concerns expressed by victim support organisations about the rights of victims not currently being expressly reflected in the HRA.[71]

The SVO scheme was introduced prior to the operation of the HRA. Consequently, specific consideration was not given to whether any limitations the scheme placed on human rights were reasonable and justified. The review provided an opportunity to consider how the existing scheme could be improved to ensure it is structured to take into account the operation of the HRA.

Section 13(2) of the HRA sets out criteria for deciding whether a limit on a right is reasonable and justified including:

- the nature of the human right involved;
- the nature of the purpose of the limitation (including whether it is consistent with a free and democratic society based on human dignity, equality and freedom);
- the relationship between the proposed limitation and its purpose (including whether the limitation helps to achieve the purpose);
- whether there are any less restrictive and reasonably available ways to achieve the purpose;
- the importance of the purpose of the limitation;
- the importance of preserving the human right, taking into account the nature and extent of the limitation on the human right; and
- the balance between these matters.

The Council undertook a full assessment of compatibility of both the existing scheme and the new scheme. The findings are discussed further at sections 16.6 and 19.2 of this report.

69 Ibid s 26

70 Ibid s 28.

71 Submission 4 (Fighters Against Child Abuse Australia) 29; Submission 17 (Queensland Sexual Assault Network) 3–4; Submission 18 (Gold Coast Centre Against Sexual Violence) 3–4.

Chapter 16

The case for reform

16.1 Introduction

This chapter outlines the case for reform to the serious violent offences ('SVO') scheme under the *Penalties and Sentences Act 1992* (Qld) ('PSA').

This chapter sets out the case for reform in response to the request in the Terms of Reference that the Council:

- assess how the SVO scheme is being applied (including where the making of an SVO declaration is discretionary) and whether the scheme is meeting its objectives;
- assess how the SVO provisions are impacting on court sentencing practices;
- identify any trends or anomalies that occur in application of the SVO scheme that create inconsistency or constrain the sentencing process; and
- examine whether the SVO scheme is impacting victims' satisfaction with the sentencing process, and if so, in what way.

The Council's recommended reforms to the SVO scheme are set out in Chapter 18.

16.2 The SVO scheme's application may be impacting on its operation and efficacy

Part B and C provide more detailed information on the operation and efficacy of the SVO scheme based on quantitative data analysis, case analysis and stakeholder feedback.

16.2.1 Council findings

The Council's analysis of the application of the scheme found:

- the majority of eligible Schedule 1 offences did not receive a declaration during the data period, with declarations overwhelmingly made to 9 offences, suggesting many of the 60 offences in Schedule 1 may not be relevant, suitable or appropriate for declarations under the existing scheme;
- the majority of SVO declarations were made because the court was required to make a declaration (72.8% were mandatory SVO declarations);
- courts overwhelmingly made discretionary declarations for non-sexual violence offences (78.2%), indicating that accompanying acts of physical violence are often viewed as an essential criterion for the

making of a declaration for sexual violence offences, as well as for the very few drug offence cases that attracted a discretionary declaration; and

- the scheme was applied differently across the four offence categories.[72]

These issues were also raised in the expert interviews conducted by the Council. Participants in the expert interviews overwhelmingly were of the view that serious drug offences were not inherently 'violent' and that a 'serious violent offence' declaration is therefore not an appropriate designation for this form of offending.

The Council noted the dual purpose of Schedule 1 and that some of the listed offences may not be as relevant to its purpose under the SVO scheme. Legal stakeholders observed the dual purpose had led to confusion 'in the understanding of the purpose of the schedule and the underlying legislative schemes'[73] and that it might have resulted in offences being subject to the SVO scheme that ought not be.[74]

16.2.2 The level and type of violence required to justify a declaration

The Court of Appeal has recognised that 'seriousness of and violence in the course of the offence are not essential conditions in the making of a declaration'[75] and that the inclusion of offences in Schedule 1 which are often 'unaccompanied by "violence" in the ordinary acceptation of that term' means 'violence in that sense is not an ingredient of or a condition precedent to the making of a declaration under the statutory provisions referred to'.[76]

However, despite this recognition, there appears to be a widely held view that offending must involve the use, or threatened use, of additional physical violence to justify a declaration being made in addition to any threats of or acts of violence necessarily involved in the commission of the offence itself. This is likely due to the scheme's name and that it is a declaration made by the court in recognition that the offence involved 'serious violence'. These findings suggest that offence seriousness and whether an offence is 'seriously violent' enough for the purposes of the SVO scheme where the making of a declaration is discretionary is primarily viewed through a prism of the use of physical violence — particularly of a form resulting in physical harm to a victim.

Sexual violence and the element of physical force: A systemic problem

The Council's findings show legal practitioners and courts treat sexual violence offences differently from non-sexual violence offences for the purposes of the SVO scheme. The way legal practitioners and sentencing courts view these offences appears to be contributing to the differing application of the scheme regarding sexual violence offences identified by the Council's data analysis.

The scheme's name, which refers to 'convictions of serious violent offences', appears to place primary focus on whether the sexual offence was 'seriously violent' enough to warrant a declaration. This was demonstrated in the comments made by expert interview participants, which focused almost exclusively on physical violence or threats in addition to the sexual violence. One participant described sexual violence offences 'as not violence in themselves'.[77] The Council's sentencing remark analysis also identified that commonly sexual violence alone was not regarded as serious or violent enough to warrant a declaration.

The Council's analysis of discretionary SVO declarations for the two most common sexual offences, maintaining a sexual relationship with a child and rape, found that while offences of sexual violence are regarded as very serious by the courts, courts typically reserved the making of discretionary declarations for offences in which additional physical violence or threats were involved in the commission of the offending or, in the case of maintaining, where there is offending occurring over a long period involving repeated and very serious forms of sexual offending with additional violence, coercion or threats.

The Council in this context acknowledges Victorian Sentencing Advisory Council's ('VSAC') research into the offence of sexual penetration of a child under 12, which identified 'that sexual offending against children is often assessed by the courts as distinct from (and by implication less serious than) 'violent' offending'.[78] VSAC observed that 'this broader distinction between 'sexual' and 'violent' offending in the criminal law'[79] has historical origins and that:

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72 These are sexual violence offences, non-sexual violence offences, serious drug offences and other offences.
73 Submission 13 (Legal Aid Queensland) 28.
74 Submission 12 (Queensland Law Society) 4.
75 *R v Eveleigh* [2003] 1 Qd R 398, 430–1 [111] (Fryberg J) (emphasis added) ('*Eveleigh*'). See also: *McDougall and Collas* [2007] 2 Qd R 87 where the Court stated that when deciding whether to make a discretionary declaration in order to protect the community or punish the offender, the sentencing judge should determine whether 'the offence is a more than usually serious, or violent example of the offence in question and, so, outside 'the norm' for that type of offence': at 97 [21].
76 *R v BAX* [2005] QCA 365, 2 [3] (McPherson JA, Fryberg J agreeing at [27], Jerrard JA dissenting at [6]).
77 Subject-matter expert interview I13.
78 Victorian Sentencing Advisory Council, *Sentencing of Offenders: Sexual Penetration of a Child Under 12* (Report, 2016) 2.
79 Ibid 2.

> Despite an awareness of changing community attitudes, courts may be influenced by outdated characterisations of harms resulting from sexual offending against children. The courts are not assisted if, for example, submissions perpetuate historical norms by failing to identify, or by denying the inherently violent nature of the offending, or persist in distinguishing between 'sexual' offending and 'violent' offending.[80]

Queensland legislation and common law frames 'violent' and 'sexual' offending as very distinct. However, more recently the Court of Appeal has stated that changes in community attitudes and amendments since 2003 reflect the increased understanding of long-term harm of sexual violence to victims and that 'judges have a duty to give [statute law amendments] effect' when sentencing for these offences.[81]

The Victorian Court of Appeal has drawn on VSAC's findings when finding that arguments by offenders that there was 'no violence accompanying the offence', 'must be emphatically rejected, as must the associated implication that no harm was really done to the victim … [the] sexual penetration of a child [is] by its very nature, an act of violence'.[82] The Victorian Court of Appeal has also made strong statements recognising that the offence of rape is 'an act of violence, whether or not accompanied by other violent conduct. The violation is physical, emotional and psychological'.[83]

The Council's findings suggest that like VSAC found in Victoria, there is a broader, systemic issue impacting Queensland courts in relation to the framing of sexual violence. This issue has impacted on the discretionary application of the scheme for offences involving sexual violence with only 18 discretionary declarations over a period of 9 years with physical violence and/or threats to the victim a common feature. This issue is broader than the Council's review and warrants further scrutiny, analysis and research.

The long-lasting harms caused by other forms of violence, such as sexual, emotional and psychological violence are well-recognised.[84] The Council considers it important that any reform of the scheme contributes to the recognition of sexual violence as serious violence, potentially warranting an SVO declaration.

16.3 The SVO scheme delivers on its objectives only in part and to a limited extent

16.3.1 Objectives of the scheme

According to statements made by the then Government in 1997, the SVO scheme was primarily concerned with punishment, denunciation and community protection — see Part A, section 2.6 for more details. In the absence of statutory guidance in Part 9A of the PSA, the Queensland Court of Appeal has determined that when considering whether to make an SVO declaration, the paramount considerations should be 'the protection of the public, or adequate punishment'.[85] For the reasons discussed in this section (16.3), the Council does not consider the scheme fully achieves these objectives.

16.3.2 Purposes of punishment and denunciation: Postponement of parole eligibility and reductions in head sentences

As discussed in section 2.4, the SVO scheme, when applied, does result in offenders being detained in custody longer (by requiring them to serve 80 per cent of their term of imprisonment in custody before being eligible for parole) and, on this basis, could contribute to achieving the sentencing purposes of punishment and denunciation.

As discussed in Chapter 13 and in section 16.5, from the perspective of victims and survivors, the making of a declaration and the certainty it provides that an offender will serve 80 per cent of their sentence in custody can result in victims and survivors feeling 'much more positive about the legal system as a result of those who have committed crimes against them being given much more appropriate sentences'.[86]

At the same time, the Court of Appeal has recognised that denunciation in some cases may be better achieved through the setting of a higher head sentence rather than by postponing parole eligibility through the making of a declaration.[87] As observed by Homes CJ in *R v Williams; Ex parte Attorney-General (Qld)*:

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80 Ibid 3.
81 *R v Stable (a pseudonym)* (2020) 6 QR 617, 634–5 [45].
82 *DPP (Vic) v Dalgliesh (a pseudonym)* [2016] VSCA 148, [45]–[46] ('*Dalgliesh*').
83 *DPP (Vic) v Mokhtari* [2020] VSCA 161, [41] (Maxwell P, Beach and Weinberg JJA).
84 See *R v Kilic* (2016) 259 CLR 256, 267 [21] (Bell, Gageler, Keane, Nettle and Gordon JJ); *Dalgliesh* (n 82).
85 *Free* (n 60) 99 [52]–[53] (Philippides JA, Bowskill J, Callaghan J).
86 Submission 4 (Fighters Against Child Abuse Australia) 12–13.
87 *Free* (n 60) 106 [84].

> The eligibility date is no more than a recognition that after [reaching the parole eligibility date] the respondent may be a suitable candidate for release into the community; whether he is will depend on his conduct to that point, on the review of the parole board. Nor does his ultimate release date necessarily mark the end of imprisonment; plainly any breach of parole renders him subject to return to custody over the [period] of the sentence.[88]

The setting of the head sentence is as important as the non-parole period in ensuring the purposes of punishment and denunciation are met. This is because it represents the entirety of the period of imprisonment that the offender is liable to serve in custody, taking into account that there is no entitlement or right to parole.

The permitted practice of adjusting the head sentence down to take into account the making (or potential making) of an SVO declaration means that the true nature and seriousness of offenders' conduct may not be recognised by head sentences imposed for SVO-declared offences. While a court will always take the non-parole period into account as part of the integrated process of sentencing, the level under the SVO scheme is set so high — at 80 per cent of the head sentence — that a greater reduction is arguably needed when a declaration is made.

The impact of the scheme on the length of head sentences means that the scheme's intended purposes of punishment and denunciation cannot be recognised to the full extent they otherwise might have been through the setting of a lengthy head sentence, in conjunction with an earlier parole eligibility date.

16.3.3 Short-term protection through incapacitation at the expense of long term community safety

While the scheme arguably offers short-term protection of the community while the offender is in custody,[89] there is no evidence that it supports long-term community protection through rehabilitation. In practice, the scheme results in offenders subject to a declaration spending far less time under supervision than they otherwise might have — if released on parole at all.

The Council's analysis shows that while up to 20 per cent of an offender's sentence for an SVO-declared offence can be spent on parole, a proportion of those subject to an SVO declaration (between 12 to 29% for non-sexual violent offences, and up to 14% for sexual violent offences) over a 23-year data period did not apply for parole at all. This means that these offenders were released into the community upon reaching the end of their sentence with no form of parole supervision. In contrast, a much smaller proportion of non-SVO declared offenders over the same data period were recorded as not having applied for parole (between 2 to 10% for non-sexual violent offences, and between 4-6% for sexual offences).

Of those SVO-declared offenders who did apply for parole, the median time served before release on parole was as high as 86.0% for rape — leaving very little of the sentence to be served prior to the sentence end date.

There is evidence that parolees are substantially less likely to re-offend than prisoners released unconditionally, and that this is particularly the case for higher-risk offenders.[90] Evidence from the literature review undertaken by the University of Melbourne on behalf of the Council suggests that 'those who have been convicted of more serious offences and who have served longer sentences will require longer periods of supervision in the community'.[91]

Participants in expert interviews were also concerned that the short period of time an offender is supervised in the community as a result of the scheme negatively impacts on community safety. These participants referred to the positive impact that parole can have on an offender's chances of successful rehabilitation and noted that the mandatory nature of the scheme's application as well as the high level at which the MNPP is fixed may disincentivise some prisoners from participating in programs.

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88 [2014] QCA 346, [16]. Holmes CJ was in the minority in this case, finding the sentence of 8 years for assault with intent to commit rape, deprivation of liberty and rape, with eligibility after 3 years 'was lenient, but was imposed according to proper principles' at [17]. McMeekin and Henry JJ set the sentence below aside and sentenced the respondent to 8 years with no parole eligibility date set (meaning the usual statutory period of 50% would apply).

89 This may not always be the case. For example, the Parole Board in its submission referred to information provided to the Board in the case of domestic violence offenders often revealing that prisoners are continuing to commit domestic violence from prison (e.g. by using the prison telephone system to directly or indirectly threaten violence against the victim): Submission 14 (Parole Board Queensland) 3–18.

90 See, for example '*The Effect of Parole Supervision on Recidivism*' (n 20). This research found that for the marginal parolee, being released to parole reduces the likelihood of re-conviction within 12 months of release by 10.0 percentage points (a decrease of 17.5 per cent); reduces the likelihood of committing a personal, property or serious drug offence within 12 months of release by 10.3 percentage points (a decrease of 24.0 per cent); and reduces the likelihood of being re-imprisoned within 12 months of release by 5.0 percentage points (a decrease of 18.2 per cent). These reductions in recidivism were statistically significant and generally persisted 24 months after release from prison.

91 *University of Melbourne Literature Review* (n 19) 13.

16.3.4 Program and interventions in custody and in the community

Offenders declared convicted of an SVO spend longer in custody and may therefore have more time and opportunity to participate in programs and interventions targeting their offending needs and risk. However, several stakeholders submitted to the Council that they are concerned about the quality and availability of programs and interventions in Queensland, particularly those offered in custody.[92]

Stakeholders commented on the limited availability of some programs and/or that some programs are only available in certain locations across the State, and raised concerns that programs are not tailored to respond to the needs of specific offender groups. The Council also heard from victims and victim support services about their expectation that offenders participate in programs while in custody. Stakeholders were generally concerned about the lack of funding and availability of rehabilitation programs. Victim support organisations emphasised that as the types of offences the SVO scheme targets are so serious, they warrant a significant ongoing investment being made available to rehabilitate and reduce the risks of reoffending.

The Council notes that currently there is no general violence program available for offenders in custody, although QCS advised it is transitioning to a new program.[93] Stakeholders also expressed their concerns about the availability of programs and interventions regarding sexual violent offending and drug use. Sexual offender treatment programs[94] have been acknowledged in applications under the *Dangerous Prisoners (Sexual Offenders) Act 2003* (Qld) as not addressing all aspects relating to an offender's risk of reoffending,[95] in which case other forms of treatment interventions might be warranted.

While the Council had limited opportunity to explore this issue in detail, it recognises the importance of evidence-based programs and interventions designed to reduce the risks of serious and violent offending being made available in custody and in the community.

The Council further acknowledges recent projects initiated by Corrective Services to improve services provided to offenders and reduce reoffending. This includes the piloting of an End-to-End ('E2E') Case Management Framework as an improved way to manage and support prisoners. While the E2E framework is in its early stages and its trial in Townsville is being evaluated, SVO-declared offenders would fall within its general, violence or sexual offender management pathways. E2E management will provide opportunities to better support prisoners assessed at high risk of reoffending to address factors associated with their offending behaviour and coordinate their rehabilitation and release planning.

16.3.5 Council findings

The Council's findings bring into question the ability of the scheme to deliver on its objective of community protection beyond the immediate effects of incapacitating people in the short-term. Research evidence suggests that keeping offenders in custody for longer prior to the end of their sentence will not translate into a reduced risk of reoffending and that offenders of serious offences require a longer, not shorter period of time under supervision.

The ability of the scheme to deliver on its purposes of punishment and denunciation may also be compromised by the setting of the fixed non-parole period when a declaration is made at such a high level (80%). In applying the required integrated approach to sentencing, this may lead to what would otherwise have been an appropriate head sentence needing to be adjusted down to ensure the sentence imposed is just in all the circumstances.

Although not a stated objective of the scheme, there is no evidence that threat of a longer prison term acts as either a specific or general deterrent,[96] with the same principles applying to minimum non-parole periods.[97]

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92 Submission 12 (Queensland Law Society); Submission 11 (Sisters Inside) 5; Submission 14 (Parole Board Queensland); Submission 19 (Queensland Homicide Victims' Support Group) 2.

93 The Cognitive Self Change Program will be replaced with the Living Without Violence program.

94 For example, the Medium Intensity Sexual Offending Program ('MISOP').

95 See *A-G (Qld) v Donaldson* [2021] QSC 339 [70] (40)(regarding lack of treatment of the offender's paraphilia) and [71], point 3 (regarding sexual offender treatment programs not addressing deviancy); *A-G (Qld) v Fraser* [2022] QSC 7 [29] (deviant sexual interest being 'an area not dealt with in the MISOP program in custody').

96 *University of Melbourne Literature Review* (n 19) 14 citing Patricia Menendez and Donald James Weatherburn, 'Does the Threat of Longer Prison Terms Reduce the Incidence of Assault' (2016) 49(3) *Australian and New Zealand Journal of Criminology* 389.

97 Ibid 12. The literature review authors note: 'Despite their apparent influence in justifying sentencing decisions, legal scholars have critiqued attempts to invoke general and personal deterrence as lacking empirical support' referring to Mirko Bagaric and Theo Alexander, 'The Capacity of Criminal Sanctions to Shape the Behaviour of Offenders: Specific Deterrence Doesn't Work, Rehabilitation Might and the Implications for Sentencing' (2012) 35(3) *Criminal Law Journal* 159 and Kate Warner, Julia Davis and Helen Cockburn, 'The Purposes of Punishment: How Do Judges Apply a Legislative Statement of Sentencing Purposes' (2017) 41(2) *Criminal Law Journal* 69. See also Doriz MacKenzie and Pamela Lattimore, 'To Rehabilitate or Not to Rehabilitate: That is the Question for Corrections' (2018) 17(2) *Criminology and Public Policy* 355.

The Council endorses the view that community supervision on parole offers significant benefits that an extended period of custody cannot — an opportunity to demonstrate that a person is capable of slowly readjusting to life in the community.[98] It is therefore important that any benefits the current scheme might offer in delivering punishment, denunciation, and short-term community protection are balanced with meeting the scheme's long-term objectives of community safety.

16.4 The SVO scheme creates complexity and unintended consequences

The Council's review identified numerous ways the scheme is negatively impacting on sentencing practices for serious violent offences, including by creating unnecessary complexity, unintended consequences and anomalies.

Through extensive research of Court of Appeal and sentencing remarks analysis and stakeholder consultation, the Council identified several unintended impacts of the scheme, including:

- mandatory sentencing can lead to significant inconsistencies between parole eligibility dates for sentences of 10 years and more, compared to sentences of just under 10 years;
- courts are restricted in their ability to recognise relevant mitigating factors, such as a plea of guilty or cooperation with law enforcement as this cannot be reflected where a declaration is made by setting an earlier parole eligibility date;
- the head sentence may be reduced to less than 10 years or set at the lower end of the range to ensure the sentence is just in all circumstances, taking into account the making of a declaration;
- there is limited scope for the application of the principle of parity in circumstances where an SVO declaration is made for one offender, but not in relation to their co-offender; and
- the scheme adds unnecessary complexity and confusion to sentencing including when dealing with multiple offences, particularly when committed over different time periods or with different complainants, and only some of the offences may be subject to the SVO scheme.[99]

In addition, the mandatory aspects of the scheme operate in a way that can be regarded as arbitrary and artificial. As noted earlier in this report, it is unclear why the 10-year mark was chosen for the mandatory application of the scheme, or why the non-parole period was set at 80 per cent.

The Council found that the scheme is constraining sentencing practices in Queensland in a way that is not justified by its intended objectives. The Council is concerned about the scheme's impact on courts' instinctive synthesis approach to sentencing, which is essential to the delivery of individualised justice, and to make sentencing orders that are just in all circumstances.

Judicial officers who participated in the expert interview project viewed the SVO scheme as impacting on their approach to sentences primarily by making the sentencing process more complicated. While some judges viewed the scheme as one of many factors to be considered in a complex process, many explained that the scheme causes unnecessary complexity.

Stakeholders expressed diverse views on the merits of mandatory sentencing. Legal stakeholders overwhelmingly were opposed to the mandatory sentencing schemes on the basis that removing judicial discretion has a detrimental impact on achieving a just sentence. Examples provided in submissions included that mandatory sentencing laws:

- 'have the potential to lead to serious miscarriages of justice, are costly and there is a lack of evidence to support their effectiveness as a deterrent or their ability to reduce crime';[100]
- 'artificially lower the proper sentencing tariff by creating perverse incentives';[101]
- have potentially harmful effects on particularly vulnerable groups, such as people suffering from mental health conditions, psychosocial disability or other impairments,[102] victims and survivors who commit intimate partner homicides,[103] victims and survivors of child sexual abuse[104] and Aboriginal and Torres Strait Islander peoples;[105]

98 See comments to this effect in *A-G (Qld) v GHS* [2022] QSC 29, [33] (Applegarth J).
99 *R v Dutton* [2005] QCA 17 cf *R v Lee* [2021] QCA 233.
100 Submission 12 (Queensland Law Society) 2.
101 Ibid.
102 Submission 5 (Aged and Disability Advocacy Australia) 2–3.
103 Submission 7 (Full Stop Australia) 10.
104 Submission 10 (knowmore) 11–12.
105 Submission 11 (Sisters Inside) 10; Submission 10 (knowmore) 11–12.

- may reduce the incentive to plead guilty, thereby 'leading to matters progressing to trial and victims being subject to cross-examination and the court process';[106] and
- may result in the increased use of mechanisms in other parts of the criminal justice system, such as plea bargaining, to avoid the 'harsh and unjust effects' of such schemes.[107]

However, some victims and survivors and support and advocacy organisations regarded mandatory sentencing schemes as a means of ensuring that the seriousness of offences captured in the scheme was reflected in the sentences imposed, in particular for very serious offending, including manslaughter, 'serious sexual and violent offending committed in the context of sexual, domestic and family violence'[108] and repeated sexual offences against children. Full Stop Australia acknowledged that some discretion was required even 'in cases of serious violent offending given the overall complexity involved in the sentencing process and the need to ensure fair outcomes for marginalised populations'.[109]

The fixed nature of the non-parole period at 80 per cent is of particular concern to the Council, as offenders spend at most 20 per cent of their sentence under supervision in the community. Although some other jurisdictions have sentencing schemes where the non-parole period is set at 80 per cent,[110] they all provide some ability to depart. Many other mandatory or presumptive schemes have lower non-parole periods. For example, Victoria's standard sentencing scheme has a presumptive non-parole period of 60 per cent when the head sentence is less than 20 years.

In other Australian jurisdictions, the 'usual' ratio between the non-parole period and head sentence is commonly higher than in Queensland, often between 50 and 75 per cent. In contrast, while Queensland has no statutory ratio between the head sentence and non-parole period, parole eligibility dates are commonly set at or below 50 per cent, and most commonly at the one-third mark to reflect an offender's guilty plea. For Schedule 1 offences sentenced to 5 years or more but less than 10 years imprisonment and not declared to be an SVO, the Council found that the majority had a parole eligibility date at 50 per cent and lower, and more commonly at one-third or lower (see further section 9.3).

16.5 The SVO scheme contributes to victim dissatisfaction when a declaration is not made

From the perspective of victims and survivors, the primary benefit of the scheme is that it requires the offender to spend a substantial proportion of their sentence in custody prior to being eligible for release on parole. This provides victims and survivors with greater certainty that the offender will spend a long period in custody when a declaration is made, thereby better satisfying the purposes of most concern to them (punishment, denunciation and their own personal protection, as well as the protection of the broader community). Those who worked with victims spoke of people feeling a great sense of relief when they found out the offender would have to spend at least 80 per cent of their sentence in custody.

Victim and survivors and advocacy and support organisations were critical, however, of how the scheme is being interpreted and applied in practice. Their concerns included that:

- the scheme has the effect of reducing head sentences for what are very serious forms of offending, which can result in a sentence of 10 years or more being reduced to less than 10 years — at which point the making of a declaration becomes discretionary;
- once the decision to make a declaration becomes discretionary, only a small proportion of cases result in a declaration actually being made; and
- the grounds upon which an offence is determined to be 'seriously violent' enough to warrant a declaration while another is not appear unclear and appear to be applied inconsistently.

The scheme, in particular, can give rise to significant victim dissatisfaction in circumstances where, despite the seriousness of the offence, a declaration is not made — either because the prosecution has not actively advocated for one to be made, or the court has determined it is not appropriate to do so. Victims and survivors told the Council the prosecutor's decision to not ask for or the court's decision not to make a declaration is extremely upsetting to them. It signals that an objectively very serious offence is not considered 'seriously violent enough' to warrant a declaration. For some victims and survivors of offences that commonly straddle the 10-year mark, such as manslaughter, it can also raise concerns among victims and survivors that courts are deliberately 'avoiding' the scheme by setting sentences below the 10-year threshold. This results in a perception that neither the head

106 Submission 13 (Legal Aid Queensland) 24.
107 Submission 2 (Australian Lawyers Alliance) 8.
108 Submission 7 (Full Stop Australia) 10.
109 Ibid.
110 For example, South Australia's Mandatory minimum non-parole period for serious offences against the person scheme.

sentence, nor the parole eligibility date, reflect the true seriousness and wrongfulness of the offender's actions and culpability.

The Council acknowledges that the non-parole period is a critically important component of the sentence. The Council heard from a number of victims and survivors about the extreme anxiety they experience as the parole eligibility date approaches and they are notified that the offender is applying for parole. Victims and survivors the Council consulted with were most concerned about their own safety and the safety of others should the offender be released. The time an offender is incarcerated prior to their eligibility to apply for parole gives victims and survivors certainty to plan their lives and engage with the trauma they have experienced without fearing for their safety.

Several victims and survivors called for improved access for serious offenders to evidence-based rehabilitation programs and psychological support, both within prisons and in the community. This would help ensure there is close and intensive supervision of a serious offender upon their release from custody.

16.6 The SVO scheme may limit rights protected under the *Human Rights Act 2019* (Qld)

The Council undertook a detailed analysis of the scheme's compatibility with the *Human Rights Act 2019* (Qld) ('HRA'), which is presented in full in Appendix 15. A statutory provision is compatible with rights if it does not limit a right; or, if it does, where that limitation is reasonable and demonstrably justified in a free and democratic society based on human dignity, equality and freedom.[111] When the SVO scheme was introduced in 1997, a compatibility statement was not required as the requirements under the HRA 2019 were not yet in place.

During the course of the Council's consultation, stakeholders identified a number of rights protected under the HRA as rights which may be impacted by the current SVO scheme. This section provides a brief overview of some of the rights the SVO scheme limits or may limit as detailed in the Council's analysis. The Council's analysis considered the rights of both victims and survivors, and the rights of offenders.

The Council was primarily concerned with the SVO scheme's mandatory operation — see Chapter 12.

16.6.1 Recognition and equality before the law

Section 15 of the HRA recognises that every person is equal before the law and is entitled to the equal protection of the law without discrimination.[112] This right is based on the fundamental principle of equality, which concerns both formal equality (like cases are to be treated alike) and substantive equality (requiring the differential treatment of persons whose situations are significantly different).[113] This might require adjustments to standard rules or procedures to overcome past disadvantage and to achieve true equality for certain groups.[114] This right is modelled on Article 16(1) and Article 26 of the International Covenant on Civil and Political Rights ('ICCPR').

The Queensland Human Rights Commission notes that this right might be relevant to acts or decisions that:

- assist or recognise the interests of Aboriginal and Torres Strait Islander persons or members of other ethnic groups;
- have a disproportionate impact on people who have an attribute or characteristic (for example, sex, race, age, disability, location);
- establish eligibility requirements for access to services or support (such as legal aid).[115]

It has been widely acknowledged within this report and broader criminal justice literature that Aboriginal and Torres Strait Islander peoples are over-represented within the criminal justice system. As mentioned in section 7.1.2, this is a result of a range of complex current and historical factors that continue to impact on the lives of Aboriginal and Torres Strait Islander peoples. Data analysis for this review found that Aboriginal and Torres Strait islander peoples were over-represented for all cases, regardless of whether or not an SVO declaration was made. While the issue of over-representation is not unique to the SVO scheme, the mandatory operation of the scheme may result in courts being unable to recognise the past disadvantage faced by Aboriginal and Torres Strait Islander persons or other vulnerable groups, thereby affecting their right to recognition and equality before the law.

111 HRA (n 63) s 8.
112 HRA (n 63) s 15(3).
113 *Thilemmenos v Greece [2000] (Judgment) (European Court of Human Rights, App No 34369/97, 6 April 2000)*, [44].
114 *Victoria Police Toll Enforcement v Taha* (2013) 49 VR 1.
115 'Your right to recognition and equality before the law', *Queensland Human Rights Commission* (webpage) <www.qhrc.qld.gov.au/your-rights/human-rights-law/your-right-to-recognition-and-equality-before-the-law>.

16.6.2 Right to liberty and security of person

Section 29 of the HRA recognises that every person has the right to liberty and security, that a person must not be subjected to arbitrary arrest or detention,[116] and that a person must not be deprived of the person's liberty except on grounds, and in accordance with, procedures established by law.[117] These provisions are based on Article 9 of the ICCPR.

The right not to be subjected to arbitrary detention applies to all forms of detention, not just criminal justice processes.[118] The concept of 'arbitrary' 'includes elements of inappropriateness, injustice, lack of predictability and due process of the law'.[119] 'Not arbitrary' has also been described as being 'reasonable (or proportionate) in all the circumstances'.[120] In *PJB v Melbourne Health*,[121] the Court adopted the meaning present in international human rights law — that arbitrariness:

> extends to interferences which, in the particular circumstances applying to the individual, are capricious, unpredictable or unjust and also to interferences which, in those circumstances, are unreasonable in the sense of not being proportionate to a legitimate aim sought.[122]

Detention which is not initially arbitrary may become arbitrary.[123] A person may be detained for a specific purpose, however if that purpose no longer applies, there must be appropriate justification to continue detention, otherwise the detention will become arbitrary.[124] Subsection 3 means that someone can only be detained or have their liberty denied in accordance with the law.[125] Lawfully 'means that relevant statutory criteria must be satisfied as a prerequisite to the exercise of a power to detain'.[126]

The Council's view is that the mandatory component of the SVO scheme constrains sentencing and leads to inconsistencies between sentences that attract an SVO declaration and those that do not; it can therefore interfere with the court's capacity to maintain parity and consistency. As a result of the mandatory application of the scheme to sentences over 10 years and a mandatory minimum non-parole period of 80 per cent, courts are restricted in their ability to recognise relevant mitigating factors — such as a plea of guilty or cooperation with law enforcement. This has the potential to result in a sentence (and non-parole period as a component of this) which is not 'reasonable or proportionate in all the circumstances' and which does not have sufficient regard to the particular circumstances applying to the individual, limiting the right not to be arbitrarily detained. These impacts are to some extent moderated by the ability of the court to sentence an offender towards the lower end of the sentencing range when setting the head sentence.

Any limit the SVO scheme places on this right could be viewed as unreasonable and not justifiable in relation to its legitimate aims of punishment, denunciation and community protection from serious violent offences. As discussed earlier in this section,[127] evidence suggests the scheme delivers on these objectives only in part and to a limited extent — primarily due to the mandatory aspects of its operation. Other issues include the lack of a clear rationale or criteria surrounding how offences were selected for inclusion in the scheme. While the scheme includes an extensive number of offences, the Council's data analyses concluded that for the majority of offences listed in Schedule 1, an SVO declaration was never made.[128] The relatively low number of declarations made for some categories of offending where the making of a declaration is discretionary also risks eroding victim and public confidence in the scheme.

16.6.3 Rights in criminal proceedings

The right to a fair trial and the rights specific to criminal proceedings, including the minimum guarantees, are recognised in sections 31 and 32 of the HRA. These sections are based on Article 14 of the ICCPR.

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116 HRA (n 63) s 29(2).
117 Ibid s 29(3).
118 Ibid.
119 Explanatory Notes, Human Rights Bill 2018 (Qld) 24.
120 Alistair Pound and Kylie Evans, *An Annotated Guide to the Victorian Charter of Rights* (Lawbook, 2nd ed, 2019) 190.
121 (2011) 39 VR 373.
122 *PJB v Melbourne Health* (2011) 39 VR 373, 394–5 [82]–[85]. See also *Victoria Police Toll Enforcement v Taha* (2013) 49 VR 1; *WBM v Chief Commissioner of Police* (2010) 27 VR 469 in which this approach was also followed.
123 Human Rights Committee, *General Comment No 35: Article 9 (Liberty and Security of Person)*, UN Doc CCPR/C/GC/35 (16 December 2014), [43].
124 Human Rights Committee, *Spakmo v Norway*: *Communication No 631/1995*, 67th session, UN Doc CCPR/C/67/D/631/1995 (5 November 1999) [6.3].
125 HRA (n 63) s 29(3).
126 Judicial College of Victoria, *Charter of Human Rights Bench Book* (2016–2022) [6.15.3] citing *Antunovic v Dawson* (2010) 30 VR 355; [2010] VSC 377, [135].
127 See section 16.3.
128 Refer to Part B for more information on how the SVO declaration has been applied.

One of the relevant aspects of these rights in relation to the current SVO scheme is that under section 32(4) of the HRA, which outlines the defendant's right to have a sentence reviewed by a higher court. In *Reid v Jamaica*,[129] 'the UN HRC said that the equivalent ICCPR right imposes an obligation on the higher court to substantially review the conduction and sentence'. Mandatory sentencing has been criticised for interfering with a defendant's right to have a sentence reviewed by a higher court, under section 32(4) of the HRA. For example, the Law Council of Australia has commented that mandatory minimum penalties may prevent substantial review of the penalty and be incompatible with human rights.[130]

In contrast to some other schemes, the current SVO scheme does not impose mandatory minimum sentences and a court retains the ability to set a head sentence that takes the making of a declaration and its consequences into account. Sentences imposed for offences that carry SVO declarations are often appealed, and are capable of substantial review by the Court of Appeal, which can alter the head sentence or, in cases where a discretionary declaration has been made, remove that declaration if appropriate — see Part B, Section 8.1.3 for further information on the rate of appeals in SVO cases.

It is therefore the Council's view that cases subject to mandatory or discretionary SVO declarations are capable of being substantially reviewed and the current SVO scheme does not limit this right.

129 Human Rights Committee, *Reid v Jamaica: Communication No 355/1989*, 51st session, UN Doc CCPR/C/51/D/355/1989 (14 July 1994).

130 Law Council of Australia, *Mandatory Sentencing* (Policy Discussion Paper, May 2014) 23.

Chapter 17

Options and alternative models considered by the Council

17.1 Introduction

Chapter 17 sets out the different options and alternative models considered by the Council in relation to the SVO scheme under the PSA.

In this section, the Council outlines the main reform options considered and reasons why it recommends the introduction of a presumptive scheme.

The section includes a brief assessment of human rights implications consistent with the Terms of Reference which ask the Council to advise whether the current scheme and any recommendations, are compatible with rights protected under the HRA.

17.2 The options considered by the Council

The Council considered a number of different reform models to improve the current responses to serious offences to properly reflect the seriousness of these offences and the broader purposes of sentencing. These more detailed reform options, discussed in the Council's Issues Paper, fall under six broad options:

- Option 1: Leave the scheme unchanged (i.e. retain a split model that is mandatory and discretionary with a fixed 80% non-parole period).
- Option 2: Modify the scheme to be presumptive in some cases, and discretionary in others (i.e. a modified form of the split model).
- Option 3: Abolish the scheme entirely — with or without other reforms as to how parole eligibility dates are fixed.
- Option 4: Reform the scheme to be wholly mandatory (with or without changes to the current fixed 80% non-parole period).
- Option 5: Reform the scheme to be wholly discretionary (with or without changes to the current fixed 80% non-parole period).
- Option 6: Reform the scheme to be wholly presumptive (with or without changes to the current fixed 80% non-parole period) (**the recommended option** — see Chapter 18 of this report for the Council's recommendations).

17.3 Advantages and disadvantages of options

17.3.1 Option 1: Leave the SVO scheme unchanged

The first option considered by the Council was to leave the SVO scheme unchanged. Under this model, the scheme would continue to apply in a mandatory way to offences listed in Schedule 1 dealt with on indictment once the sentence or sentences for these offences reached the required threshold of 10 years or more. It would remain discretionary for offences sentenced to less than 10 years. The current 80 per cent non-parole period would also continue to apply, when a declaration is made on a mandatory or discretionary basis.

Advantages of Option 1

The advantages of retaining the current model include:

- It would not disturb settled case law in Queensland regarding how the scheme is to be applied.
- It would not require any changes in sentencing practices or procedures. Prosecutors would continue to decide if submissions should be made calling for a declaration based on the individual circumstances involved.
- Existing case comparators could continue to be relied upon as the basis for prosecution and defence submissions about the appropriate sentencing levels and ranges for offences that commonly fall within the scope of the scheme.
- It would not result in any additional costs of imprisonment — over and above those already associated with the current scheme or costs involved in implementation.
- To the extent to which the current scheme promotes community and victim confidence, it would continue to support this objective by providing certainty that for sentences of 10 years or more, an offender is required to serve 80 per cent of their sentence in custody before being eligible for parole.

Disadvantages of Option 1

The main disadvantage of this approach would be that by retaining the scheme unchanged, it would not address any of the issues with the current scheme identified through this review as detailed in Part C and Chapter 16 of this part. This includes issues with the scheme's capacity to operate in a way that is consistent with human rights.

Stakeholder views

Only one stakeholder — Fighters Against Child Abuse Australia advocated for the retention of the SVO scheme in its current form, although this stakeholder also supported reforms being made to the scheme consistent with Option 4. In particular, FACAA supported the scheme's extension to other offences, including child exploitation material offences, and its expansion to a sentence of any length dealt with on indictment for a relevant offence.[131]

While some victim and survivor advocacy and support services saw some merit in mandatory sentencing to ensure serious offences against the person were adequately punished, none supported retaining the scheme unchanged. Legal stakeholders were united in their criticisms of the scheme and advocated strongly for the scheme's repeal or reform.

The Queensland Law Society ('QLS') was concerned that if retained with no changes made, 'artificial sentences will continue to be imposed which emphasise punishment over rehabilitation, particularly in the case of drug offenders'.[132]

Legal Aid Queensland identified a number of problems with retaining the scheme unchanged:

- a lack of evidence to suggest the scheme is having a deterrent effect given that: 'In reality, people continue to commit very serious violent offences';[133]

131 Submission 4 (Fighters Against Child Abuse Australia) 30.
132 Submission 12 (Queensland Law Society) 6.
133 Submission 13 (Legal Aid Queensland) 36. It referenced data from 30 June 1996 that there were 338 defendants serving sentences in excess of 10 years imprisonment and compared this to the 318 mandatory declarations to suggest that the numbers were 'markedly less' given the time period involved. However, given factors including the very different measures involved, the different legislative and administrative contexts that governed sentencing and sentence management (including the existence of remissions at the time the scheme was introduced) and the impacts of the scheme itself on head sentence lengths, a direct comparison between these two sets of data cannot reliably be made.

- the current operation of the scheme, while not leading to unjust outcomes, gives 'the appearance of being artificial and unclear';[134]
- the 'stressor' or 'triggers' that might inhibit rehabilitation in the community 'do not apply to all prisoners and these triggers do exist in prison as well';[135]
- the 'risk the scheme is applying to a cohort of prisoners who do not require a substantial non-parole period to achieve community protection and just punishment … particularly in sentences for Schedule 1 offences where there is no inherent violence such as trafficking in dangerous drugs';[136]
- the scheme may not incentivise rehabilitation and engagement in programs;[137] and
- the legislated trigger for the making of a mandatory declaration and requirement to serve 80 per cent of that sentence in custody is not evidence-based.[138]

Council view

The Council does not support this option given that it would fail to address the many problems identified by the Council and by stakeholders. As discussed in Chapter 16, the Council's view is that there is a strong case for reform of the scheme to improve its efficacy and operation and to ensure that declarations are made in appropriate cases.

17.3.2 Option 2: Modify the scheme to be presumptive in some cases, and discretionary in others

Another option explored by the Council was to retain the SVO scheme but modify the mandatory component to be presumptive. This model would continue the existing split model but change the current mandatory application of the scheme to apply in a presumptive rather than a mandatory way.

Under this approach, it was envisaged, judges would be required to consider the making of a declaration when sentencing an offender for a Schedule 1 offence to imprisonment for 10 years or more, but would be provided with an ability to depart where this was required to ensure the imposition of a just and appropriate sentence.

An optional aspect of this approach also considered was removing the fixed 80 per cent non-parole period and replacing it with a sliding scale of 50–80 per cent. This could also be extended to the discretionary component applying to sentences of 5 years or more and less than 10.

Advantages of Option 2

The potential advantages of this option include:

- Introducing more discretion to better support individualised justice.
- If fewer declarations are made for sentences of 10 years or above, it might reduce the costs to the community of detaining low risk offenders in custody for extended periods, but without compromising community safety.
- If a sliding scale were to be introduced allowing a court, on making a declaration, to decide where the non-parole period is set within a range, it would allow head sentences both over and under 10 years to be set at a place that reflects the seriousness of the offence, and provide flexibility to recognise any mitigating factors in the setting of the non-parole period.
- This could also encourage more offenders to plead guilty to the extent that the likely making of an SVO declaration factors into this decision.
- Courts would retain discretion whether to make a declaration when imposing a sentence of less than 10 years.

134 Ibid.
135 Ibid 37.
136 Ibid.
137 Ibid 38.
138 Ibid 39.

Disadvantages of Option 2

Disadvantages of this reform model include that while it would address some problems with the scheme, it would fail to remedy a number of others. For example:

- It would continue to apply an arbitrary and artificial 10-year mark as a basis for either the discretionary or presumptive application of the scheme, thereby maintaining an artificial point of distinction between sentences of just under 10 years, and those at or above this level.
- It would fail to address issues identified by the Council relating to the making of discretionary declarations, including challenges in ensuring consistency of approach in the circumstances in which declarations are applied for and courts' assessments as to whether a declaration should be made.
- It would fail to respond to victim dissatisfaction with sentencing outcomes when a declaration is made in one case, but not in another, when both involved the use of serious violence and resulted in significant harm.
- There is no guarantee that other impacts on the justice system, such as the potentially higher rates of appeal when a court makes a discretionary declaration, or a sentence is imposed just over the 10-year limit at which point the making of a declaration becomes mandatory, would be any different under a split discretionary/presumptive model.

Stakeholder views

FACAA favoured an option more aligned with Option 4 (fully mandatory model) and was concerned that the risk of a discretionary/presumptive split model was that 'judges will not apply the scheme'. It submitted that if the option to impose longer sentences was provided to judges, 'they will not do so', drawing on evidence of sentencing practices for the rape of a child under the age of 10 years in NSW commonly attracting penalties well below the 25-year maximum penalty.

Full Stop Australia saw some potential benefits with this type of approach in that 'the scheme might be more widely used if it is more flexible to adapt to particular cases where the offending sits around the 10 year mark, so that head sentences do not need to be reduced'.[139] For this reason, it supported alternative options being proposed, such as 'introducing a range of minimum non-parole periods, or making the scheme presumptive in certain cases only so as to ameliorate some of the unintentional, negative side-effects of the current scheme'.[140]

Legal support organisation, knowmore, favoured a fully presumptive scheme, rather than a split model, on the basis this 'would better reflect survivor and community attitudes and expectations about the sentencing of perpetrators of child sexual abuse, while eliminating unintended consequences of a mandatory scheme'.[141]

Both the QLS and LAQ recognised that a presumptive model for sentences of 10 years or more would introduce more judicial discretion into the sentencing process.[142] LAQ also saw potential for a presumptive model to encourage more guilty pleas and provide greater scope to a court to 'properly consider parity' between co-offenders in circumstances where the scheme 'applies to one or more of them, but not all'.[143]

The main concern of the QLS, however, was that this approach 'would still remove some discretion as it would create a presumptive burden, and depending on what listed offences remain, this may lead to unjust outcomes and/or artificial sentences'.[144]

LAQ also suggested that changing the mandatory aspect of the scheme to a presumptive one might have the outcome of:

- undermining confidence in the criminal justice system as mandatory sentencing carries with it a 'clear message that the community will be protected from serious offenders';
- reducing the effectiveness of the scheme to act as a deterrent (although it noted there were inherent problems with assessing the effectiveness of this objective); and
- acting as 'a deterrent to entering a plea of guilty' as there might be 'less certainty of the outcome' in cases involving serious offending.[145] It submitted that '[t]his would need to be resolved by way of clearly defined sentencing ranges in order for plain advice to be given' to clients by legal representatives.[146]

139 Submission 7 (Full Stop Australia) 16.
140 Ibid.
141 Submission 10 (knowmore) 8.
142 Submission 12 (Queensland Law Society) and Submission 13 (Legal Aid Queensland).
143 Submission 13 (Legal Aid Queensland) 42.
144 Submission 12 (Queensland Law Society) 6.
145 Submission 13 (Legal Aid Queensland) 42.
146 Ibid.

Council view

While this option had some advantages over Option 1, the Council was concerned that the disadvantages of this option outweighed any potential benefits. In particular, it would continue to apply an arbitrary cut-off of 10 years at which point the scheme applied presumptively and would not deliver to victims and survivors the outcomes they are seeking in achieving a more consistent approach to the sentencing of offenders for serious offences.

While a split presumptive/discretionary scheme would be more compatible with the rights protected under the HRA, it would fail to properly meet the sentencing purposes of punishment and deterrence or the broader purpose of the scheme of promoting victim and community confidence in sentencing for serious offences. It ultimately was not supported by the Council.

17.3.3 Option 3: Abolish the scheme entirely

Another option presented in the Council's Issues Paper was whether the scheme should be abolished, either with or without other reforms being introduced to guide the setting of parole eligibility for serious offences. Under this option, courts would have discretion to fix the parole eligibility date at any point and would retain the power to defer parole eligibility beyond the statutory 50 per cent mark where there was a good reason to do so.

Advantages of Option 3

The advantages of abolishing the SVO scheme without replacing it include that:

- It would provide full discretion to courts to set an appropriate sentence and parole eligibility date and increase the ability of the court to deliver individualised justice.
- It would reduce the complexity of sentencing in Queensland, including when sentencing for multiple offences, thereby reducing costs across the justice system.
- It would avoid artificial distinctions being made between offences that are 'seriously violent enough' to justify a declaration being made, and those that are not.
- It may result in head sentences in Queensland increasing — particularly for serious offences that commonly receive a sentence of 10 years or more or just under this. This might better meet the sentencing purposes of punishment, denunciation and deterrence.
- More offenders might plead guilty as there would no longer be the risk of having a declaration made and being required to serve 80 per cent of the sentence before being eligible for parole. This would reduce costs and delays involved in the administration of justice and the potential trauma caused to victims and survivors who have to give evidence at trial.
- Fewer sentencing appeals might be initiated leading to cost savings.
- Greater flexibility in where the parole eligibility date is set would likely increase the potential period an offender is subject to parole and provide a stronger incentive for offenders to apply for parole — promoting long-term community safety.
- Earlier parole eligibility might provide a greater incentive for those offenders convicted of serious offences to actively participate in any programs offered in custody to demonstrate they are suitable for release on parole.
- It would avoid the disproportionate impact the scheme has on Aboriginal and Torres Strait Islander offenders — particularly as this currently applies to the making of discretionary declarations.
- Any cost savings to the system of reduced days in custody could be used to increase correctional system funding for program interventions offered in prison and in the community, enhancing the supervision provided to offenders on parole, as well as the provision of more support to victims and survivors.

Disadvantages of Option 3

The main disadvantage of this option is that it will not achieve the broader purpose of the scheme in clearly communicating to victims and survivors and the wider community the seriousness of these offences and that these forms of offending will not be tolerated. This is achieved under the other options discussed in this chapter by setting legislatively defined expectations about the minimum time an offender will be required to serve in custody before being eligible for release on parole when a declaration has been made, beyond the usual statutory non-parole period that applies to less serious forms of offending.

Evidence gathered by the Council shows only a small proportion of offences that fall under 10 years attract an SVO declaration of deferred parole eligibility. It is more usual for a non-parole period to be set below the statutory 50 per cent non-parole period that otherwise applies if no parole eligibility date is set in circumstances where a declaration is not made.

For these reasons, this option may:

- fail to promote community confidence that offenders who commit serious offences will be required to serve a significant proportion of their sentence in custody in support of the proper recognition of the seriousness of this form of offending and the impact on victims and survivors;
- not provide victims and survivors with the same level of certainty about where parole eligibility will be set. Many victims, survivors and their advocates spoke to the Council about the importance the non-parole period had on their level of satisfaction with the sentence (see section 13.7). When short non-parole periods are set, even when the head sentence is substantial, it can lead to victims and survivors feeling that the serious harm caused has not been properly acknowledged; and
- risk eroding public confidence in the criminal justice system, which could have impacts across the criminal justice system, including reducing the willingness of victims and other community members to report crime, or to act as witnesses or jurors,[147] potentially placing other community members at greater risk.

Stakeholder views

FACAA was concerned that this approach would serve 'absolutely no benefits whatsoever' and was strongly opposed to the abolition of the scheme being considered. It identified the risks of this approach as including 'the danger of releasing serious violent offenders back into the community far too soon' and a 'loss of faith in the legal system by the public' and the 'loss of satisfaction with the legal process by victim survivors'.[148]

Full Stop Australia was similarly strongly opposed to abolishing the scheme entirely, expressing the view that 'this would be taking a step backwards in acknowledging the extraordinary amounts of harm that flow from serious sexual and domestic violence offending'.[149]

Most victim and survivor advocacy and legal support organisations, while not responding directly to this question, also made clear their support of the retention of some form of scheme — whether this be fully mandatory,[150] presumptive,[151] or potentially some form of split model.[152]

In contrast, the majority of legal stakeholders, including LAQ, the QLS, Sisters Inside and the Australian Lawyers Alliance ('ALA'), were strongly supportive of consideration being given to the repeal of the scheme to provide courts with discretion to impose an appropriate parole eligibility date based on the individual circumstances of the case. These organisations argued that the SVO scheme is a form of mandatory sentencing which leads to unjust outcomes by applying a 'one size fits all' approach 'where, in reality, the circumstances surrounding offences and the individuals being sentenced differ greatly'.[153]

The QLS pointed to the scheme's failure in achieving its proposed policy intent as a reason to repeal it, as well as stating that the scheme 'risks unfair and unsatisfactory outcomes including those which may be contrary to community protection'.[154] It referred to the existence of the *Dangerous Prisoners (Sexual Offenders) Act 2003* (Qld) as evidence a separate scheme is not required to be retained for sexual offences and, in the case of other offences caught by the scheme, findings that those convicted of more serious offences require longer rather than shorter periods of supervision in the community.[155]

In addition to the benefits of restoring judicial discretion, the repeal of the scheme would provide other benefits according to LAQ:

- It would enhance transparency in the sentencing process as the court would have a duty to give reasons for deferring parole eligibility beyond the half-way point (this is currently not required when a declaration is made on an automatic basis).
- It would give the sentencing judge the ability to 'properly reflect an offender's plea of guilty' which may have the effect of encouraging offenders to plead guilty.
- It would provide increased incentive for offenders to participate in rehabilitation programs.

147 See Kathleen Daly and Rick Sarre, 'Criminal Justice System: Aims and Processes' 7 in Darren Palmer, Williem de Lint and Derek Dalton (eds) *Crime and Justice: A Guide to Criminology* (Lawbook Co, 5th ed, 2016) 355; David Indermaur and Lynne Roberts, 'Confidence in the Criminal Justice System' (2009) 387 *Trends and Issues in Crime and Criminal Justice* as cited in Australian Productivity Commission, *Australia's Prison Dilemma* (Research Paper, October 2021) 14.
148 Submission 4 (Fighters Against Child Abuse Australia) 32.
149 Submission 7 (Full Stop Australia) 17.
150 Submission 4 (Fighters Against Child Abuse Australia).
151 For example, Submission 10 (knowmore).
152 For example, Submission 7 (Full Stop Australia).
153 Submission 13 (Legal Aid Queensland) 24.
154 Submission 12 (Queensland Law Society) 1.
155 Ibid.

- Offenders who have an earlier parole eligibility date are more likely to participate in rehabilitative programs while in prison to strengthen their prospects of parole, thereby reducing the risks of reoffending once released back into the community.[156]

At the same time, LAQ acknowledged this approach carried some risks, including most significantly that: '[v]ictims and survivors may feel their interests are not being met by a scheme that allows for serious violent offenders to be released back into the community before they have served a significant portion of their sentence'.[157] It acknowledged that the setting of a parole date is important for victims, survivors and their families and 'the longer an offender is in custody, often the higher degree of victim and survivor satisfaction [with] the outcome'.[158] To the extent the scheme achieves a deterrent effect, it suggested this might also be reduced.[159]

Council view

As a general principle, the Council considers it reasonable for victims, survivors and their families, as well as the broader community, to expect that in the case of very serious offending, a substantial proportion of a sentence of imprisonment will be required to be served in custody. This assists in fulfilling both the purposes of punishment in recognition of the harm caused, and of denunciation, in communicating, through the minimum time an offender must serve before being eligible for parole, the wrongfulness of the offender's actions.

The Council therefore considers that it is appropriate to retain some form of scheme that provides legislative guidance to courts about the minimum time an offender should be required to serve in custody before being eligible for release on parole, when the offence is very serious, and a declaration has been made. This may provide greater certainty and transparency about how the decision about where an offender's parole eligibility date is fixed has been reached in the interests of promoting victim and public confidence.

While abolition of the scheme is the most compatible of all models considered with rights protected under the HRA, the scheme's repeal would be at the potential expense of meeting the scheme's broader purpose of punishment and denunciation, as well as the short-term community protection offered through the non-parole period set. Repeal of the scheme will also fail to promote victim and community confidence in sentencing for serious offences.

These serious offences are, by their very nature, the types of offences that result in the most serious harm to individual victims, survivors and their families as well as the broader community. In the Council's view, the formal recognition the scheme provides of the very serious harm caused by these types of offending is the most compelling reason for the scheme's retention.

Data published by the Council shows that where listed Schedule 1 offences fall outside the automatic operation of the scheme (if the sentence is under 10 years), and a declaration is not made, parole eligibility dates are commonly set below the 50 per cent statutory parole eligibility mark. Parole eligibility is deferred beyond this point only in a small minority of cases.

The Council considers it legitimate in this context for the legislature to provide statutory guidance to courts and the broader community about the minimum time an offender can expect to serve in custody when convicted of certain serious offences beyond the general statutory non-parole period that applies to all forms of offending, no matter their seriousness. This also ensures the sentencing purposes of punishment and denunciation can be better met.

At the same time, the Council considers it is important to ensure sentencing courts' discretion is not so constrained that it impacts on courts' ability to tailor the sentence, including where parole eligibility is set, based on the individual circumstances of the offence and offender to achieve a just sentence. As the Court of Appeal has acknowledged, in some cases, the strong denunciatory element 'can be achieved by a higher head sentence' rather than by the making of a declaration[160] — an assessment the Council considers is best made on an individualised basis.

Taking these considerations into account, the Council supports the reform of the SVO scheme over its abolition.

17.3.4 Option 4: Reform the scheme to be wholly mandatory

The final three options considered by the Council apply an integrated approach that removes the artificiality of the 10-year threshold for all offences other than serious drug offences. The reasons for retaining a 10-year threshold for serious drug offences and their continued inclusion in the reformed SVO scheme are discussed at sections 18.4 and 18.9.4 of this report.

156 Submission 13 (Legal Aid Queensland) 45–47.
157 Ibid 46.
158 Ibid.
159 Ibid.
160 *Free* (n 60) 106 [84].

The first of these integrated options is to apply the scheme in an automatic (mandatory) way to all listed offences — where dealt with on indictment in circumstances where an immediate sentence of imprisonment is imposed, or applied to sentences of greater than 5 years, at which point the only option available to a court is to impose a sentence of immediate imprisonment.[161]

The required proportion between the head sentence and parole eligibility date under this model could still be set within a range (e.g. 50–80%) to provide courts with greater flexibility to respond to individual circumstances.

Advantages of Option 4

The potential advantages of a mandatory model include:

- It would ensure consistency of non-parole periods for all sentences of imprisonment for listed offences at, or above a certain level.
- Victims, survivors and the broader community would have certainty about the proportion (or minimum proportion) of the sentence an offender convicted of a listed offence is required to serve. This may lead to greater satisfaction with sentencing outcomes and clear condemnation of the conduct involved in this form of offending.
- The setting of minimum or fixed non-parole periods for listed offences supports the sentence meeting the sentencing purposes of punishment, denunciation and short-term community protection through the offender's detention in custody.
- By deferring parole eligibility for all offenders convicted of listed serious offences, it would provide more time for offenders convicted of serious offences to access rehabilitation programs while in prison.
- Existing case law in Queensland regarding how the scheme is to be applied where this is mandatory, could be relied upon by courts for the purposes of the expanded mandatory scheme.
- The making of a declaration would no longer factor into plea negotiations and there would be no need for prosecutors to decide if a submission in favour of a declaration should be made.

Disadvantages of Option 4

A wholly mandatory SVO scheme, similar to other mandatory sentencing schemes, would have a number of potential disadvantages including:

- It would apply a 'one size fits all' approach potentially leading to injustice in individual cases.
- It is likely it would lead to lower head sentences being imposed for offences that are subject to the scheme to take the making of a declaration into account.
- It would result in additional costs of imprisonment, over and above those already associated with the current scheme.
- It would likely expose low-risk offenders to longer periods of detention, without any attendant benefits of making the community safer.
- It might reduce the transparency of the scheme and sentencing practices, as if the mandatory scheme applies to some offences but not others that can be charged in the alternative, it could give rise to charge negotiations.
- While it may achieve short-term community safety through the detention of the offender in custody for an extended period, it may reduce longer-term community safety by reducing the period the offender is under supervision in the community.
- It might reduce the incentive to apply for parole, meaning more offenders may choose to serve out their full sentence without supervision in the community.
- The effectiveness of serving an additional period in custody in support of rehabilitation and the long-term protection of the community assumes that effective and targeted rehabilitative programs are available to all offenders and that offenders are eligible, suitable and willing to participate.
- It arguably casts the net too wide by applying to some offenders who present a low risk of reoffending — such as offenders convicted of drug trafficking who are generally released at, or very close to, their parole eligibility date.
- It may reduce an offender's willingness to plead guilty which, in turn, may increase the costs to the justice system, contribute to delays in having matters finalised, and add to the trauma experienced by victims who are required to give evidence.

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161 This includes the power of a court to impose a life sentence, or a sentence of imprisonment for an indefinite term under pt 10 of the PSA (n 11).

As discussed in section 16.6, this option would exacerbate the compatibility problems of the mandatory component of the current scheme with rights protected under the HRA. The Council does not consider this additional limitation can be demonstrably justified given there are other less restrictive and reasonably available ways to achieve its purpose.

Stakeholder views

There was limited support for a wholly mandatory SVO scheme.

FACAA was supportive of maintaining the mandatory component and advocated for its extension to all offenders who take the life of a child under the age of 12 or are convicted of repeated sexual offences against children.[162] It advocated for the scheme to be applied automatically to sentences of any length where the listed offence is dealt with on indictment.[163] While strongly supportive of the SVO scheme being retained, it was concerned there was 'too much discretion to not apply the scheme' which would best be remedied by making its application mandatory.[164] Applying the scheme in a mandatory way was seen as 'not just appropriate' but 'absolutely necessary' to ensure the sentences imposed reflected the seriousness of these offences.[165] The offences FACAA submitted should be included in the new mandatory scheme are discussed in section 12.2.1 of this report.

Full Stop Australia supported a mixed approach for the sentencing of sexual and/or domestic violence offences with no power to depart from the scheme 'unless there were very exceptional circumstances (for example, in the case of victim-survivors offending against their primary abusers').[166]

Most legal stakeholders, however, were opposed to mandatory sentencing and concerned about the impacts of a mandatory SVO scheme.[167]

The ALA's submission, which reflected the views of many, submitted:

> it is not appropriate for the Parliament to prescribe mandatory minimum sentencing schemes for particular offences, such as the SVO scheme, as it does not enable consideration of individual circumstances or nuances for particular factual scenarios. Ultimately, it is only the courts that have access to the facts, circumstances and contexts in which a particular offence is committed. It is therefore appropriate … that courts have the ultimate discretion in determining the appropriate sentence for a particular offence that has been proved, subject to the principles and maximum sentence that has been determined by the legislature.[168]

The ALA noted the impacts of mandatory sentencing schemes, more generally, in shifting discretion from the judiciary to the prosecution and police, given that the type of charge might ultimately determine whether a mandatory sentence will be applied, potentially resulting in less transparent outcomes.[169] It was concerned that 'mandatory sentencing schemes undermine the role of the courts in determining sentencing outcomes' which 'serves to undermine community confidence in the criminal justice system'.[170]

A number of submissions referred to the injustices that could occur by applying a 'one size fits all' approach,[171] 'where, in reality, the circumstances surrounding offences and the individuals who are being sentenced, differ greatly'.[172]

The potential negative impacts of mandatory sentencing on offenders from marginalised and disadvantaged backgrounds, or with a disability, was also a key factor referred to by many in stating their opposition to a mandatory approach.

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162 Submission 4 (Fighters Against Child Abuse Australia). Note: Under pt 9B of the PSA (n 11), repeat serious child sex offences are subject to a separate sentencing regime. Offenders convicted of a repeat serious child sex offence are subject to mandatory life imprisonment, with a mandatory minimum non-parole period of 20 years (CSA (n 56) s 181A(2)). A 'serious child sex offence' is one listed in Schedule 1A or an offence of counselling or procuring such offence where committed: in relation to a child under 16 years; and in circumstances in which an offender convicted of the offence would be liable to imprisonment for life. Offences subject to the scheme include: maintaining a sexual relationship with a child; rape; incest; and carnal knowledge with or of children under 16 years.

163 Ibid 20.

164 Submission 4 (Fighters Against Child Abuse Australia) 18.

165 Ibid 19.

166 Submission 7 (Full Stop Australia) 10.

167 For example, Submission 2 (Australian Lawyers Alliance), Submission 5 (Aged and Disability Advocacy Australia), Submission 11 (Sisters Inside), Submission 12 (Queensland Law Society), Submission 13 (Legal Aid Queensland).

168 Submission 2 (Australian Lawyers Alliance) 8.

169 Ibid 8.

170 Ibid 9.

171 Submission 3 (Aged and Disability Advocacy Australia), Submission 12 (Queensland Law Society), Submission 13 (Legal Aid Queensland).

172 Submission 13 (Legal Aid Queensland) 24.

For example, Aged and Disability Advocacy Australia submitted retaining discretion:

> is particularly critical in the context of persons with disability, persons with acquired brain injury, psychosocial disability, and those with other forms of cognitive disability or impairment, whether that impairment is permanent, temporary or episodic.[173]

Full Stop Australia referred to 'the need to ensure fair outcomes for marginalised populations (for example, for victims-survivors who commit intimate partner homicides)',[174] although it suggested mandatory sentencing 'may be appropriate in certain limited cases of serious sexual offending and violent offending committed in the context of sexual, domestic and family violence'.[175]

Legal support organisation, knowmore made extensive reference to the findings of the Royal Commission, Australian Law Reform Commission and Law Council of Australia and problems with respect to the effectiveness and fairness of mandatory sentencing approaches in support of its position in opposing mandatory sentencing — including its 'disproportionate impact on already vulnerable groups'.[176] It pointed to the problems with the current mandatory application of the SVO scheme which were: 'particularly evident where offences straddle the 10-year mark and judges are navigating the possible enlivening of an SVO declaration'.[177] It raised concerns that: '[t]his can impact on the appropriateness of the sentence handed down thereby negatively affecting victim-survivors' satisfaction with sentencing decisions'.

Both LAQ and QLS were also strongly opposed to mandatory sentencing. As this applied to the SVO scheme, LAQ was concerned the mandatory nature of the provisions could result in sentencing outcomes that 'are not always transparent and can lead to inconsistencies'.[178] It submitted the scheme has a 'clear impact on the length of head sentences', which is particularly the case where case authorities placed the sentence for particular matters around the 10-year threshold.[179] As a consequence, it 'can provide distorted outcomes … which can undermine public confidence and truth in sentencing'[180] and 'do not reflect the criminality of the offence'.[181]

The Queensland Network of Alcohol and Other Drug Agencies ('QNADA') noted that the automatic (mandatory) application of the scheme for sentences of 10 years or more appeared to be 'a primary driver for the inclusion of people convicted for trafficking offences', who would 'benefit most from longer parole periods (particularly for those experiencing problematic substance use) and generally have a lower risk profile than other offences captured by the scheme'.[182]

Council view

The Council views a mandatory approach as too restrictive and is concerned it would operate in a way that would be likely to lead to injustice in individual cases. It would extend current issues with the scheme regarding its compatibility with the HRA, which cannot be justified given the existence of other reasonably available ways to achieve its purpose.

In Chapter 3 and section 18.7 of this report, the many factors that can impact on an offender's level of culpability for an offence are discussed. These factors include the offender's age, their prior criminal history (or absence of this), whether the offender had a mental illness or cognitive impairment which was a contributing factor in their offending behaviour, the offender's personal circumstances, including a background of social disadvantage, and the broader context of the offence (for example, whether the person sentenced was a victim of domestic and family violence perpetrated on them by the person they committed the offence against).

The problem with a mandatory scheme is that even if some discretion were to be provided as to where parole eligibility is set once a declaration is made, there would still be cases where it would be inappropriate to defer parole eligibility due to the particular circumstances involved. In some cases, there may be limited benefit to be gained in the person serving a long non-parole period in the interests of meeting the purposes of punishment, public protection and denunciation.

The Council is conscious that the purposes of sentencing are not just concerned with punishment and denunciation, but also with other objectives relevant to the offender such as personal deterrence and rehabilitation. The Council found no evidence that removing all discretion from courts to make a declaration and requiring all offenders to serve

173 Submission 5 (Aged and Disability Advocacy Australia) 2.
174 Submission 7 (Full Stop Australia) 10.
175 Ibid.
176 Submission 10 (knowmore) 11.
177 Ibid 18.
178 Submission 13 (Legal Aid Queensland) 4.
179 Ibid 13.
180 Ibid 4.
181 Ibid 24.
182 Submission 9 (Queensland Network of Alcohol and Other Drug Agencies) 7–8.

a minimum period regardless of their personal circumstances would meet these objectives or make the community safer.

17.3.5 Option 5: Reform the scheme to be wholly discretionary

Another option considered was to reform the scheme to be wholly discretionary. Additional legislative guidance could be provided to encourage declarations to be made under this model and setting parole eligibility within a range could also be permitted in support of prosecutors and courts being more likely to ask for and make declarations in appropriate cases.

In practice, the advantages and risks of this option are very similar to the abolition of the SVO scheme (Option 3).

Advantages of Option 5

The advantages of a discretionary scheme would include:

- It would give courts discretion to decide whether parole eligibility should be deferred in an individual case and increase the ability of the court to deliver individualised justice.
- It would better allow for courts to meet the purposes of sentencing set out under section 9(1) of the PSA of punishment, denunciation, deterrence, rehabilitation and community protection.
- It is consistent with the findings of the literature review commissioned by the Council and undertaken by the University of Melbourne which concluded that, taking into account the complex and varied needs of specific groups of offenders who have committed serious offences, high levels of discretion should be incorporated into judicial decision-making to allow for consideration of gender, age, cultural background, and disability to achieve effective sentencing.[183]
- It might encourage more offenders to plead guilty in the hope of an earlier parole eligibility being set.
- It could result in head sentences in Queensland increasing — particularly for serious offences that commonly receive a sentence of 10 years or more, or just under. This might better meet the sentencing purposes of punishment, denunciation and deterrence.
- Fewer sentencing appeals might be initiated, leading to cost savings across the justice system (although this might depend on how often discretionary declarations are made).
- Greater flexibility in where parole eligibility is set would likely increase the potential period an offender is subject to parole and provide a stronger incentive for offenders to apply for parole thereby promoting long-term community safety.
- Earlier parole eligibility might provide a greater incentive for offenders to actively participate in any programs offered in custody to demonstrate they are suitable for release on parole.
- Any cost savings to the system of reduced days in custody could be used to increase correctional system funding for program interventions offered in prison and in the community.

Disadvantages of Option 5

Similar to providing courts with full discretion to set parole eligibility dates, if the scheme were to be abolished, a fully discretionary model would have the following potential disadvantages:

- A discretionary model would essentially be no different from abolishing the scheme as courts already have the ability to delay parole eligibility beyond the statutory 50 per cent mark where there is a good reason to do so.[184]
- It would not address the concerns of victims and survivors. Victims and advocacy and support organisations strongly supported either a fully presumptive, or mandatory SVO model on the basis of concerns that:
  - a particular threshold of seriousness has to be reached under the current scheme to justify the making of a declaration on a discretionary basis for offences that involve a high level of violence and/or harm;
  - the basis upon which an offence is determined to be sufficiently serious enough to warrant a declaration is not clear or transparent;

183 *University of Melbourne Literature Review* (n 19) 19.

184 See *R v Assurson* (2007) 174 A Crim R 78, 82 [22] (Williams JA) and [27] (Keane JA) ('*Assurson*'); and *Randall* (n 46) in which the Court of Appeal concluded that this requirement: 'is nothing more than a restatement of the general proposition that a discretion to make an order must be exercised judicially. The term "judicially" in that context means that the discretion must be justified by a reason and that reason must be informed by the purpose for which the discretion has been conferred': at [37].

  - in circumstances where a declaration is not made, parole eligibility may be set at the half-way or one-third point in recognition of an offender's guilty plea. Victims view this as giving too much benefit to the offender for their plea and other factors in mitigation, thereby failing to adequately punish the offender for their actions and the harm caused, or to give them, their families and the broader community the protection that an extended period of imprisonment provides.
- It is uncertain how often declarations would be made, potentially eroding the confidence of victims in the justice system. Only a small number (n=119) of discretionary declarations were made over the 9-year data period, indicating the current discretion is rarely exercised.
- Only 18 discretionary SVO declarations were made for sexual violence in the data period, potentially indicating that sexual violence is commonly not viewed as warranting a declaration in the absence of accompanying acts of physical force.
- There is a lack of consensus amongst legal stakeholders about the circumstances in which an SVO declaration should be made. Expert interviews found different interpretations of offences/circumstances that would warrant a discretionary application.
- It is difficult to identify and set appropriate statutory criteria that would be applied in a consistent way.

Stakeholder views

The Queensland Law Society, which supported the scheme's abolition or a fully discretionary scheme should some form of scheme be retained, pointed to the benefit of this model being that it 'would allow for sentencing courts to take a wide variety of factors into account to arrive at a just sentence, and promote individualised justice which is more likely to support positive outcomes'.[185] It also suggested it would allow for sentencing anomalies that arise with a mandatory-based scheme to be corrected, and could reduce rates of over-represented offenders, including the over-representation of Aboriginal and Torres Strait Islander offenders.[186]

The Parole Board Queensland also supported a fully discretionary scheme.[187]

LAQ identified the potential benefits of a fully discretionary scheme being:

- It would retain judicial discretion and the capacity of a court to take all relevant factors into account, thereby ensuring that judicial discretion is able to be properly exercised (with support, however, provided for additional legislative guidance around what constitutes a 'serious violent offence and the circumstances in which an SVO declaration should be made').
- It would reduce anomalies and inconsistencies in sentencing by allowing a court to deliver individualised justice — a necessary precondition to achieving 'proper consistency in sentencing'. This approach, it was also submitted, would reduce issues associated between State and Commonwealth sentences and applying the principle of parity.
- By allowing a sentencing judge to 'properly reflect' an offender's plea of guilty, it may encourage offenders to plead guilty.
- It may provide increased incentive for offenders to participate in rehabilitation programs — with a longer-term benefit in reducing the risks of reoffending once the person is released back into the community. [188]

As with the option of abolishing the scheme, however, LAQ noted it might result in victim dissatisfaction with the sentences imposed, negative impacts on rates of guilty pleas due to the uncertainty of outcome, and impact the scheme's ability to deliver a deterrent benefit.[189] It favoured a split model (where there would be a presumption in favour of a declaration being made for sentences in excess of a specified term) as being the option that 'would most adequately balance community expectations of punishment with that of proportionate sentencing'.[190]

FACAA, who favoured a mandatory scheme, had similar concerns to those expressed regarding a discretionary or presumptive scheme that judges will not exercise their discretion to 'give longer sentences'.[191] Full Stop Australia similarly raised concerns that any changes should 'not adversely impact upon mandatory SVO declarations being made in the cases of serious sexual, domestic and family violence'.[192]

185 Submission 12 (Queensland Law Society) 7.
186 Ibid.
187 Submission 14 (Parole Board Queensland) 2.
188 Submission 13 (Legal Aid Queensland) 45–6.
189 Ibid.
190 Ibid.
191 Submission 4 (Fighters Against Child Abuse Australia) 31.
192 Submission 7 (Full Stop Australia) 18.

Preferred option by Council's Aboriginal and Torres Strait Islander Advisory Panel

The Council consulted with its Aboriginal and Torres Strait Islander Advisory Panel throughout this review. In particular, the Council sought the Panel's views on different options under consideration and the impact of these potential reforms on Aboriginal and Torres Strait Islander peoples.

The Council's Aboriginal and Torres Strait Islander Advisory Panel expressed a strong preference for the adoption of a fully discretionary model over a presumptive scheme for the reasons discussed in section 17.3.6. The Aboriginal and Torres Strait Islander Advisory Panel viewed providing judges with the highest level of discretion would potentially lessen the impact of the reformed scheme on Aboriginal and Torres Strait Islander offenders.

The Aboriginal and Torres Strait Islander Advisory Panel was also concerned about the inclusion of certain offences in the reformed scheme, including serious drug offences and domestic and family violence offences, and viewed a discretionary scheme as being better able to provide judges with discretion to take all relevant factors and circumstances into account.

If not fully discretionary, the Panel supported providing as much discretion as possible to the sentencing judge, amending the fixed mandatory non-parole period to a range, and only including serious drug offences for sentences over 10 years (though a strong preference was expressed to remove this offence from the scheme entirely).

The Panel also expressed concern about the importance of access to well-funded and high-quality legal representation to rebut a declaration (under a presumptive rather than discretionary model). The Panel raised concerns that disadvantaged defendants are unlikely to have access to high quality legal representation and specialist reports, making it more difficult to demonstrate that it is in the interests of justice to depart from the scheme, or that parole eligibility should be set towards the lower end of the recommended statutory range.

Council view

The Council views all offences that commonly attract a sentence of greater than 5 years' imprisonment as serious and does not consider that creating a separate sub-category of 'very serious offences' is beneficial.

As noted earlier in this section (17.3.5), the Council found significant issues with the current application of the discretionary scheme that would likely continue under a fully discretionary scheme. The continued infrequent and inconsistent application of a discretionary scheme may risk sending a message to victims, survivors and the broader community that these forms of serious offending are not 'serious enough' to be acknowledged as such. This risks compromising community confidence in sentencing and the broader justice system.

While this option would improve compatibility with the rights protected under the HRA, it would fail to meet the sentencing purposes of punishment and deterrence, as well as the broader purpose of the scheme of promoting victim and community confidence in sentencing for serious offences.

17.3.6 Option 6: Reform the scheme to be wholly presumptive (recommended option)

A presumptive model would require a court to make a declaration, unless there are good reasons to depart. This would operate as a form of structured sentencing discretion by setting a clear expectation about the range in which parole eligibility should be set, while allowing a court to depart where it considers this is 'in the interests of justice'.

Advantages of Option 6

Potential advantages of this option are:

- It would send a clear message to victims, survivors and the community that if offenders commit a serious offence, they must serve a significant proportion of that sentence in custody (unless this is not in the interests of justice).
- All offences captured under the scheme will be recognised as 'serious', without the arbitrary distinction of sentences below and above 10-years imprisonment.
- It would respond to concerns by victims, survivors and support organisations about sentences being set below 10 years as a result of the mandatory application of the scheme and very different outcomes in where non-parole periods are set on this basis. Under the Council's preferred approach, a presumption in favour of a declaration being made would apply to sentences for a listed offence of greater than 5 years.
- It may improve community confidence and promote consistency of approach in sentencing for serious offences.
- It would address many of the problems and issues identified by victims and survivors and by the legal profession with the current SVO scheme (see Part C).

- It would strike a better balance than the current scheme between recognising the seriousness of particular categories of offending, while allowing a court to depart where this in the interests of justice due to the individual circumstances of the offence and offender.
- It would require judges to consider the appropriateness of departing from a declaration for all offences of sexual violence captured in the scheme sentenced to more than 5 years, likely leading to a higher proportion of declarations for sexual violence offences (see 12.9.5 for further discussion on this issue).
- It would increase the discretion of the court to set an appropriate parole eligibility date, particularly for sentences of 10 years or more, in support of achieving a just sentencing outcome.
- A non-parole period range would allow courts to better deliver individualised justice and recognise that whether the community is better protected by a longer period of supervision in the community or imprisonment is an assessment that must be made based on both the offence and the circumstances of the offender.
- It will likely lead to more declarations being made for sentences between over 5 and under 10 years, thereby improving victim satisfaction with the sentencing outcome.
- It may ensure offenders who require this to have more time to engage with programs and interventions in custody to address their criminogenic needs — which is particularly important for sexual violent and non-sexual violent offences.
- It would remove potential for the making of a declaration to be used as a basis to secure a guilty plea as part of the plea-bargaining process.

Disadvantages of Option 6

- While there would be some discretion within the scheme to respond to individual circumstances, it would be less flexible than a fully discretionary model.
- Depending on how the scheme is applied, there is likely an increased cost to the criminal justice system due to keeping more prisoners in custody for longer (potentially somewhat balanced by removing mandatory application of the scheme to sentences over 10 years and the flexibility provided by a range of 50 to 80 per cent non-parole period). See 19.5 for a discussion of potential financial impacts of the proposed reformed scheme.
- It would shift the onus on to defence to argue the declaration should not be made — which may increase the burden on defendants. This could potentially disadvantage those who are already marginalised and experiencing disadvantage and who might not have access to specialist reports or high-quality legal representation.
- Even with a broad ability to depart, a presumptive scheme may impact on Aboriginal and Torres Strait Islander offenders more than non-Indigenous offenders.
- The scheme applying presumptively may impact on pleas of guilty — particularly for offences that are likely to attract a sentence of greater than 5 years, but less than 10 years.
- While supported by some victims and victim support and advocacy organisations, it is contrary to submissions made by the majority of legal stakeholders who supported either repeal of the scheme, or a fully discretionary model in the alternative.

Stakeholder views

A number of stakeholders and service providers representing the interests of victims were supportive of a presumptive model over a fully mandatory or discretionary model.[193] The Gold Coast Centre Against Sexual Violence noted that most sexual offences do not result in a term of 10 years or more and favoured making the scheme operate in a way that was 'more realistic'. It therefore supported a presumptive scheme for sentences of between 5 years and less than 10 years (but retaining the mandatory component for sentences of 10 years or more). It submitted that reasons should be required to be given if the court declined to make a declaration 'in order for justice to be more transparent'.[194]

Legal support organisation, knowmore referred to a parole eligibility date of one-third to one-half of the head sentence being commonly set for offenders convicted of child sexual abuse offences as inappropriate and as failing to meet victim and survivor expectations. They noted that the setting of parole eligibility at this level 'can be distressing to survivors as they do not reflect the seriousness of the offence, the abuse they have experienced, or the lifelong impact of the abuse'.[195]

193 See, for example, Submission 10 (knowmore), Submission 17 (Queensland Sexual Assault Network) and Submission 18 (Gold Coast Centre Against Sexual Violence).
194 Submission 18 (Gold Coast Centre Against Sexual Violence) 3.
195 Submission 10 (knowmore) 9.

It was also concerned that the need to reflect the seriousness of these offences by requiring offenders to serve a significant non-parole period, however, 'needs to be balanced with considerations of supervision and community safety upon release'.[196] The difficulty with the fixed 80 per cent parole period under the current SVO scheme was there was limited time for offenders convicted of child sexual abuse offences to be actively supervised in the community.

It preferred a presumptive scheme over a mandatory one on the basis that it retained some discretion.[197] It submitted this would avoid the human rights concerns associated with mandatory sentencing, address the unintended consequences of the SVO scheme's operation, and better meet the needs of victims and survivors of child sexual abuse who commit serious offences by allowing the experience of abuse to be given appropriate consideration during the sentencing process.[198]

Of all models presented in the Issues Paper, LAQ submitted a split presumptive/discretionary model 'would most adequately balance community expectations of punishment with that of proportionate sentencing'.[199] It identified the following examples of special circumstances that might warrant departure:

- cooperation with law enforcement, or an undertaking to do so; or
- mental illness 'of such severity that the moral culpability of an offender is reduced significantly, or imprisonment would be far more difficult than for an ordinary prisoner'; or
- the existence of 'other exceptional circumstances that justify imposing a sentence less than the statutory minimum'.[200]

It further suggested there should be a requirement for a statement of the special reasons for imposing a shorter non-parole period 'so that there is a clear and transparent explanation for doing so'.[201]

Potential benefits of this approach identified included that it would:

- represent 'the Parliament's intention that a sentence of imprisonment with a substantial non-parole period is to be fixed, unless displaced by special circumstances';
- assist 'in the proper identification of prisoners who require a substantial sentence of actual imprisonment in order to meet the purposes of sentencing', principally community protection; and
- preserve 'the integrity of the SVO scheme as a deterrent to persons within the community against engaging in serious criminal offending'.[202]

Council view

A presumptive model is the option preferred by the Council for the reasons set out in section 17.4.

The Council agrees with views that a presumptive model would best balance the interests of victims, survivors and the broader community in ensuring that offenders convicted of serious offences are required to serve a substantial proportion of their sentence in custody with the need for judicial discretion to ensure a just sentencing outcome is arrived at taking into account the individual circumstances of the offence and the offender. In the Council's view, this best balances the purposes of punishment, denunciation and community protection.

A presumptive model is also compatible with the HRA, as will be discussed in section 19.2. Of all the models considered, the Council is of the view that a presumptive model is best placed to protect and balance the rights set out in the HRA of both offenders and victims and to recognise the seriousness of these offences.

The Council, however, is conscious of the concerns raised regarding access to high quality legal advice and representation and specialist reports and the scheme's potential impact on those who might be already experiencing disadvantage. The Council considered how best to mitigate these risks in providing its advice on implementation issues (section 19.4).

196 Ibid 10.
197 Ibid 8, 10.
198 Ibid 18. knowmore further suggested this might improve National Redress Scheme outcomes for survivors who are themselves subject to an SVO declaration.
199 Submission 13 (Legal Aid Queensland) 54.
200 Ibid.
201 Ibid.
202 Ibid.

17.4 Council view

17.4.1 A minimum non-parole period scheme should be retained for offenders convicted of serious offences

The Council recognises there is a category of high-harm offences that is very serious and warrants a focus on the sentencing purposes of punishment, denunciation and community protection. These purposes are relevant not only to the fixing of an appropriate parole eligibility period in an individual case, but also in the setting of an appropriate head sentence.

Based on the Council's consultations and submissions received, it is clear that the current SVO scheme, in circumstances where a declaration is made, is well regarded by victims and survivors and helps support confidence in sentencing and the justice system. It achieves this in two ways:

1. First, the scheme, when applied, provides victims and survivors with certainty that the offender will spend a significant proportion of their sentence in custody before being eligible for release on parole. This is important to victims' feeling that the harm caused to them or their family members has been properly acknowledged through the sentence imposed.
2. Second, the making of a declaration provides victims with formal recognition that the crime committed against them or their family members was a 'serious offence' — which serves an important symbolic and censuring function.

As discussed in section 17.3.3, the Council considers it legitimate for the legislature to provide statutory guidance to courts and the broader community about the minimum time an offender can expect to serve in custody if convicted of certain serious offences beyond the general statutory non-parole period that applies to all forms of offending.[203] This is why it supports the retention of the scheme to be applied to those offences that cause the most harm to individual victims, survivors and their families and the broader community.

The Council found that most jurisdictions in Australia, and a number of overseas jurisdictions, have legislated some form of minimum non-parole period scheme. The introduction of these schemes suggests that they serve important instrumental and symbolic functions. These schemes generally set a presumptive, or minimum period, offenders convicted of certain serious offences are expected to serve in custody to guide courts in sentencing. These schemes signal that certain offences, due to their seriousness and the harm they cause, are deserving of a longer period of actual custody being served before eligibility for parole.

17.4.2 Advantages and risks of a discretionary vs a presumptive model

The Council gave serious consideration to whether the scheme should be either wholly discretionary or wholly presumptive. It favoured these models over a split model, which would risk perpetuating many of the same problems that exist with the current scheme. The Council's intention is that the reforms recommended ensure the scheme is appropriately targeted and promotes consistency and transparency in the scheme's application. For reasons discussed in the following chapter of this report, the Council recommends that the new scheme should apply to listed offences where the sentence imposed is greater than 5 years and the scheme would provide for parole eligibility to be fixed within a legislated range.

The Council did not support the extension of the scheme's current mandatory application for the reasons discussed in section 17.3.4 of this report, including that it would be too restrictive and would operate in a way that may lead to injustice in individual cases.

The main risk with a fully discretionary model is that it would rarely be applied. This would affect victim and community confidence. The Council's analysis shows that only a small number of discretionary declarations were made over the 9-year data period. There is no guarantee that by allowing courts to set parole eligibility within a range of 50 to 80 per cent that more declarations will be made. In practice, even if statutory criteria were to be developed to guide the making of a declaration, the scheme may be applied so infrequently that it may be little different to the scheme being abolished altogether.

Without a presumptive scheme, the Council's analysis of parole practices in Queensland suggests that parole eligibility would commonly fall well below the statutory half-way mark. This would mean that victims and survivors of serious offending would likely feel that the harm caused to them is not sufficiently acknowledged — even if higher head sentences were achieved. The high levels of anxiety and fear often experienced by victims and survivors (see Chapter 13) when an offender reaches their parole eligibility date would also potentially be triggered much earlier than is currently the case when parole eligibility is deferred.

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203 See CSA (n 56) s 184(2).

There is a substantial body of evidence that establishes that the trauma caused by offences involving serious violence is often profound and enduring and likely continues long after the offender has been convicted and sentenced. It is appropriate that the significant harm caused by these offences continues to be a key consideration for courts when arriving at an appropriate sentence,[204] of which the parole eligibility date is an important component.

While the non-parole period is important in support of meeting the objectives of just punishment and denunciation, this should not detract from the need to take an individualised approach to sentencing based on the personal circumstances of the offence and offender. As Gibbs CJ said in *Lowe v The Queen*, while 'there should be an appropriate relationship between the sentence imposed on an offender and the minimum term after which he becomes eligible to be released on parole', '[w]hat is appropriate must depend very much on the circumstances of the case, and the exact relationship between those two periods is something that has to be determined in the exercise of a wide discretion'.[205]

In this context, the Council notes the observations made by the authors of the University of Melbourne literature review to appropriately respond to the complex range of needs of the diverse range of offenders who commit these types of serious offences; requiring high levels of discretion in judicial decision-making to achieve effective sentencing responses.[206]

The short-term benefits that might be achieved through the offender's detention in custody in protecting the community need to be balanced with the longer-term benefits of reducing the person's risks of reoffending on their release. Providing a reasonable balance between the head sentence and non-parole period is more likely to encourage offenders to participate in programs while in custody in support of their release on parole, than requiring almost all of the sentence to be served in custody. It might also increase the likelihood of offenders applying for parole and provide for longer periods of parole supervision in the interests of community safety.

17.4.3 Presumptive scheme balances competing interests and objectives

Taking the considerations in this section (17.4) into account, the Council has concluded that a presumptive scheme applied to sentences of more than 5 years (or 10 years or more for serious drug offences) is best able to balance the competing interests and objectives sought to be achieved under the current SVO scheme.

Under this model, Parliament would signal its clear intention that where a sentence of imprisonment of greater than 5 years is imposed, a substantial non-parole period is to be fixed for the purposes of just punishment and denunciation unless there are specific circumstances justifying departure. This will clearly communicate that this form of offending is considered to be of such a high level of objective seriousness that a significant proportion of the sentence must be served in custody. This same outcome is unlikely to be achieved under a discretionary scheme that is less certain in its application.

At the same time, a presumptive scheme recognises the importance of judicial discretion to achieving a just and fair sentencing outcome in support of individualised justice.[207] Under the presumptive model recommended by the Council, courts will be able to set parole eligibility within a range when a declaration is made (50–80%) and depart from the scheme if this is in the interests of justice. The preservation of judicial discretion further recognises that, as the High Court has acknowledged, the various purposes of sentencing 'overlap and none of them can be considered in isolation': 'They are guideposts to the appropriate sentence but sometimes they point in different directions'.[208]

The presumptive model can overcome or significantly moderate the impact of many of the problems identified in Part C with the current scheme and its application. In particular, it will:

- remove the artificial distinctions between sentences of 10 years and above, and those falling just below this level, which creates potential for significant disparities in parole eligibility for what might be similar types of conduct. Courts will instead apply a consistent sentencing approach when setting parole eligibility for all serious offences included in the scheme once a sentence exceeds 5 years (the reasons this level has been selected are discussed in section 18.4);
- better recognise that most offences eligible under the scheme attracting a sentence of greater than 5 years are serious and commonly deserving of a declaration, while giving a court discretion to depart if this is in the interests of justice. This will also shift the onus from the prosecution to make submissions showing

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204 See, for example, the High Court's discussion of this as it applies to improved understanding of long-term harm done to victims of sexual offences and its proper impact on court sentencing practices in *R v Kilic* (2016) 259 CLR 256, 267 [21].

205 (1984) 154 CLR 606, 610.

206 *University of Melbourne Literature Review* (n 19) 19, 23.

207 As to the role of the criminal law in promoting individualised justice. see *Elias v The Queen* (2013) 248 CLR 483, 494–495 [27] (French CJ, Hayne, Kiefel, Bell and Keane JJ).

208 *Veen [No 2]* (n 8) 476.

why a declaration is warranted in the circumstances of the case to the defendant's legal representatives to show why it is in the interests of justice for a declaration not to be made;

- enable sentences to be better tailored to the individual circumstances of the offender, including their rehabilitative needs and risks of reoffending, while providing reassurance to victims and the broader community that a minimum period will be required to be served in custody unless it is in the interests of justice to depart;
- allow courts to take factors personal to the offender and their guilty plea into account by setting an earlier parole eligibility date within a set range, thereby potentially reducing some impacts of the scheme on head sentences;
- allow courts to balance the various purposes of sentencing, including by recognising that in some cases, setting a shorter non-parole period with a potentially longer head sentence may better achieve the scheme's intended purposes; and
- provide an opportunity for a court to set an earlier parole release date for lower risk offenders who are subject to a mandatory declaration under the current scheme solely because of the length of their sentence, as has been suggested is the case for many offenders convicted of a serious drug offence.

A presumptive model will also improve compatibility with the rights protected under the HRA, while meeting the broader purpose of the scheme of promoting victim and community confidence in sentencing for serious offences.

17.4.4 Potential impacts on defendants who are marginalised and experiencing disadvantage

In the Council's view, there is a risk that the presumptive application of the model proposed may operate in a way that disadvantages defendants who do not have access to high quality legal representation or funds to access specialist reports.

This concern extends beyond the current review and applies to all sentencing orders that might be applied differently based on an offender's personal circumstances and background, their ability to demonstrate their rehabilitation prospects, and the financial resources available to them to fund their defence.

The Council recommends that further consideration be given to identify any additional legal funding or support required to minimise any unintended impacts of the scheme prior to implementation (recommendation 25). The Council also recommends that the impact of these reforms, if adopted, should be monitored to identify any impacts on Aboriginal and Torres Strait Islander offenders and other groups from a background of disadvantage (recommendation 26).

Recommendation: Retention and reform of the SVO scheme

1.	Based on the Council's findings, the serious violent offences scheme under Part 9A of the *Penalties and Sentences Act 1992* (Qld) should be retained and reformed.
2.	A wholly presumptive model should replace the current split mandatory/discretionary SVO scheme.

Chapter 18

Recommended reforms to the SVO scheme

18.1 Introduction

This chapter sets out the Council's recommended reforms to the SVO scheme under the *Penalties and Sentences Act 1992* (Qld) ('PSA').

It includes consideration of reforms to the scheme's name, the threshold for the scheme's application, the level at which parole eligibility may be set, and grounds for departure from its presumptive application. It also discusses the Council's views about offences the reformed scheme should apply to and necessary transitional provisions to ensure it applies fairly to those who may potentially be sentenced under the existing or new scheme.

Some specific matters fell outside the scope of this review. For this reason, they are not considered in this chapter. This includes the impact of mandatory provisions applying to prescribed offences committed with a serious organised crime circumstance of aggravation,[209] and the requirement that a sentence imposed for an offence listed in Schedule 1 (or of counselling or procuring the commission of, or attempting or conspiring to commit such an offence) be served cumulatively with any other term of imprisonment the offender is liable to serve if committed in certain circumstances, in accordance with section 156A.[210] The changes to the SVO scheme proposed by the Council will increase judicial discretion in sentencing, thereby potentially moderating any unintended impacts of these mandatory provisions.

18.2 Name of the reformed scheme

18.2.1 Issues

The primary concern identified with the name of the serious violent offences scheme is that it gives rise to consideration of whether the offence was 'seriously violent' enough to warrant a declaration. As discussed in section 12.9.2 in Part C, there is no definition of 'serious violence offence' in Part 9A of the PSA. Schedule 1 includes a wide range of offences, a number of which are regarded as not inherently violent. The common law has developed to fill this gap, with Court of Appeal decisions clarifying that 'seriousness of and violence in the course of the offence are not essential conditions in the making of a declaration'.[211] The Courts have also provided additional clarity in relation

209 See PSA (n 11) s 161Q as to the meaning of a 'serious organised crime circumstance of aggravation'.
210 This applies in circumstances including if the offender committed the offence while a prisoner serving a term of imprisonment, or while released on parole: s 156A(1)(b).
211 *Eveleigh* (n 75) 430–1 [111] (Fryberg J).

to making discretionary declarations for sexual violence offences and serious drug offences. In *R v BAX*,[212] McPherson JA said:

> Under s 161A of [the *Penalties and Sentences*] Act, an offender is convicted of such an offence if convicted on indictment of an offence against a provision mentioned in the schedule to the Act: s 161A(a)(i)(A). The schedule lists a number of offences that may, and in practice often are, unaccompanied by "violence" in the ordinary acceptation of that term. In those and other instances, violence in that sense is not an ingredient of or a condition precedent to the making of a declaration under the statutory provisions referred to. Among those offences are that of maintaining a relationship of a sexual nature with a child: s 229B of the Code.

In the leading decision of *McDougall and Collas*,[213] the Court similarly said, 'by definition, some of the offences in the Schedule to the Act will not necessarily — but may — involve violence as a feature, such as trafficking in dangerous drugs or maintaining a sexual relationship with a child'.[214]

Despite Court of Appeal recognition that 'violence' is not a necessary pre-condition for the making of a declaration, it appears to have remained a central determinant of whether a discretionary declaration is made under the scheme. This is evidenced by the high proportion of discretionary declarations made for offences involving non-sexual violence offences (78.2% of all discretionary declarations) relative to those imposed for sexual violence offences. This finding is consistent with the Council's analysis of select sentencing remarks, and views expressed in expert interviews that some level of additional violence (other than that inherent in the commission of the offence itself) or other aggravating features need to be present to justify a declaration being made.

The majority of stakeholders identified that offences not featuring any form of violence (or serious violence) as a necessary element of the offence should be removed from the scheme.[215] This view was overwhelmingly expressed for serious drug offences, but also extended to the recommended exclusion of a number of other offences within the current Schedule 1 on the basis that offences included in the scheme should be both 'serious' and 'violent'.[216]

The Council recognises that the naming of the scheme is not just about providing a convenient way of referring to the scheme. The scheme's name communicates what type of offending the scheme is targeted at in the interests of promoting community understanding and guiding courts and legal practitioners on its proper application.

Due to the way the Queensland scheme operates, it is important that the aspect of the making of a declaration also factors into the consideration of how the scheme is to be referred to.

18.2.2 Approaches in other jurisdictions

Chapter 5 in Part A of the report sets out the approach other jurisdictions take to sentencing serious violent offences. With the exception of the Australian Capital Territory ('ACT') and Tasmania, all jurisdictions in Australia have minimum and standard non-parole period ('NPP') provisions that apply to certain types of serious offences. Most jurisdictions have assigned a specific title to their scheme — for example, the 'standard non-parole period scheme' in New South Wales ('NSW').[217] However, some have adopted unofficial shorthand ways of referring to these schemes based on their intended impact — such as the Commonwealth's 'three quarters rule'[218] for national security offences.

Generally, the way that MNPP provisions are described fall into two broad categories: high level names intended to describe the nature of the offences to which they apply, or names focused on the practical consequences of the sentencing provisions being applied — see Appendix 16.

For example, the provisions that apply in the Northern Territory ('NT'), which require a court to set parole eligibility at not less than 70 per cent of the sentence of imprisonment, are described in the relevant section headings as:

- 'minimum non-parole period for certain sexual offences and drug offences';[219] and
- 'fixed non-parole periods for offences against persons under 16 years'.[220]

Other provisions or schemes have broad descriptive names not dissimilar to Queensland's SVO scheme.

While the majority of provisions are applied based on the nature of the offending, a few refer to the type of offender they are intended to target, such as South Australia's 'serious repeat offender scheme'.[221]

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212 [2005] QCA 365 (McPherson JA and Fryberg J agreeing, Jerrard JA dissenting.
213 *McDougall & Collas* (n 75).
214 Ibid 96 [19] (citations omitted).
215 For example, Submission 12 (Queensland Law Society) and Submission 13 (Legal Aid Queensland).
216 For example, Submission 13 (Legal Aid Queensland) 30.
217 *Crimes (Sentencing Procedure) Act 1999* (NSW) Division 1A, ss 54A-54D.
218 *Crimes Act 1914* (Cth) s 19AG(2).
219 *Sentencing Act 1995* (NT) s 55.
220 Ibid s 55A.
221 *Sentencing Act 2017* (SA) s 54(1).

The Council also reviewed schemes in Canada, England and Wales, and New Zealand. As with the Australian schemes, the names typically adopted can be classed under these two broad categories. Examples include:

- Canada — delayed parole scheme which applies to listed serious violent, drug and sexual offences and allows a court to delay a person's parole eligibility date from the one-third mark to one-half of the sentence or 10 years (whichever is less).[222]
- England and Wales — sentences for offenders of particular concern.[223]
- New Zealand — the 'three strike' sentencing scheme for 'repeated serious offending'.[224]

18.2.3 Stakeholder views

The Council invited suggestions from stakeholders in response to its Issues Paper, as well as during consultation.

In its submission to the Council, Fighters Against Child Abuse Australia supported the current name being retained, but submitted 'it may be confusing by using the word violent'.[225] FACAA suggested 'a slight name change to something like "serious criminal offences scheme"' on that basis.[226] Full Stop Australia supported the scheme being renamed, 'if the new name resulted in a better understanding of the scheme by victim-survivors and the broader community'.[227]

Stakeholders also made a number of suggestions during consultation. Some legal stakeholders suggested the consequences of the declaration might form the basis of naming the scheme, similar to the approach taken in some other jurisdictions. One suggestion was that the scheme could be called the 'delayed parole eligibility scheme' as this would be a more accurate description of what the scheme is intending to achieve. This might avoid or reduce the potential for victim dissatisfaction when a clearly very serious offence was not recognised as such.

Some considered it important to retain a focus on the nature of the offences, given the meaning assigned to the designation of offences as being 'serious offences' by victims. A suggested alternative to the reference to 'serious violent offences' was to focus on the aspect of 'serious harm' instead.

18.2.4 Options considered and Council view

Based on victim and stakeholder views and other issues already identified, the Council explored a number of options when considering a new name for the reformed scheme. The Council considers that communicating the scheme's objectives to the broader community through its name is important.

The Council gave serious consideration to the following options:

- Option 1: Leave the name of the scheme unchanged.
- Option 2: Make minor modifications only — such as by removing the current reference to 'violence'.
- Option 3: Include separate reference to serious sexual offences and/or serious drug offences.
- Option 4: Rename the scheme to focus on the concept of serious harm.
- Option 5: Include a reference in the scheme's title to the practical consequences of the making of a declaration, being the delay or deferment of parole eligibility.

The retention of the current name of the scheme or its amendment to include reference to both 'serious violence' and 'sexual violence' would have the benefit of reinforcing that serious sexual offences are inherently violent, given the new scheme would apply to these offences presumptively. Alternatively, a more generic descriptor might be used, such as 'serious offences against the person'.

As serious drug offences are recommended to be retained in the reformed scheme (see sections 18.4 and 18.9.4 for more detail), the Council also considered whether to rename it the 'serious violent and drug offences' scheme.

However, under these options, there would still be a risk that some offences included in the reformed presumptive scheme may not commonly be subject to a declaration being made on the basis that they do not involve the use of 'serious violence', even if serious harm has been caused (for instance, serious drug offences). The same issues might arise if the term 'harm' or 'serious harm' substituted the current reference to 'violence' as it might give rise to questions about what conduct is sufficiently harmful to justify a declaration. The Council heard from victims,

222 *Corrections and Conditional Release Act* (S.C 1992) Schedule 1.
223 *Sentencing Act 2020* (UK) (Parts 2 to 13 are referred to as the 'Sentencing Code': s 1) ss 265, 278.
224 Sentencing Act 2002 (NZ) ss 86A–90. The New Zealand Government introduced the Three Strikes Legislation Repeal Bill on 11 November 2021 which, if passed, would repeal these provisions.
225 Submission 4 (Fighters Against Child Abuse Australia) 26.
226 Ibid 26.
227 Submission 7 (Full Stop Australia) 13.

survivors and their families that hearing these types of arguments made in open court about whether an offence was 'seriously violent enough' to justify a declaration can be very distressing.

Referring to the scheme as one that is to be applied to serious offences against the person carries the same risks and would fail to include appropriate acknowledgement of offences that cause serious harm but are not properly characterised as offences against the person — such as drug offences.

The Council also gave serious consideration to whether the scheme should be called 'delayed parole eligibility scheme' (or similar). This option has some merit in promoting a better understanding of the purposes of the scheme amongst victims, survivors and the broader community. However, the difficulty with this approach is that, if it does include any reference to the types of offences the scheme applies to, it is no longer meaningful for victims and survivors. If a declaration is made, reference to the types of offences included in the name of the scheme and resultant declaration recognises their seriousness and the significant harm they cause. This serves an important symbolic purpose.

The option ultimately preferred by the Council was to rename the reformed scheme the 'serious offences scheme', thereby removing the word 'violent' from its name but otherwise leaving it unchanged. This will result in a less divisive description and will carry fewer risks of limiting the scheme's application in the way the current focus on serious 'violent' offences has.

The Council further acknowledges that failure to recognise an offence that has clearly involved a high level of violence as being a very serious form of offending through the making of a declaration, may add to the trauma experienced by victims and survivors.

Recommendation: Name of reformed scheme

3. The scheme should be renamed the 'serious offences scheme'. The term 'violent' should no longer be used in recognition that not all offences included in the scheme are inherently violent, but all are serious given they cause, or carry a significant risk of causing, a high level of harm.

18.3 Objectives of the reformed scheme

18.3.1 Issues

As discussed in Chapter 3, Part 9A provides very limited guidance to judges on making a declaration and the purposes of the scheme.[228] Although the purposes of making a declaration are not legislated, they appear to be reasonably well understood and settled based on Court of Appeal guidance.[229]

The Council's Issues Paper asked if the purposes of the SVO were clear and if any additional legislative guidance was required.[230]

18.3.2 Approaches in other jurisdictions

As is the case in Queensland under the SVO scheme, it is more usual for MNPP schemes and standard non-parole period ('SNPP') schemes to rely on the general purposes and principles of sentencing than to legislate specific purposes a court must have regard to when sentencing offenders under these schemes. There are, however, some notable exceptions. For example:

- In Victoria, under the serious offenders' scheme,[231] a court is required when sentencing a serious offender for an offence subject to the scheme for which a sentence of imprisonment is justified, to regard the

228 See comments in *Collins* (n 55) noting that the Act 'gives no specific guidance as to what factors should be considered by a sentencing judge exercising the discretion pursuant to s 161B(3) of the Act': at 48 [14]. This decision was handed down prior to the introduction of s 161B(5) which requires a sentencing court to treat the use or attempted use of violence against a child under 12, or that caused the death of a child under 12, as an aggravating factor when deciding whether to declare an offence of which an offender is convicted to be a conviction of a serious violent offence.

229 See, for example, *Free* (n 60) 98–9 [49], [53] restating observations made in *McDougall & Collas* (n 75) 97 [21].

230 *Issues Paper* (n 1) section 7.1, Question 2.

231 *Sentencing Act 1991* (Vic) pt 2A ('*Sentencing Act* (Vic)'). The main impact of this scheme is that every term of imprisonment imposed by a court on a serious offender for a relevant offence must, unless otherwise directed by the court, be served cumulatively on any uncompleted sentence or sentences of imprisonment imposed on that offender, whether before or at the same time as that term. In this respect, it is similar to the operation of s 156A of the PSA (n 11).

protection of the community from the offender as the principal purpose for which the sentence is imposed.[232]

- In Canada, in order for a court to displace the usual 'one-third/7-year' non-parole period rule under the serious violent, drug and sexual offences scheme, which allows the court to set an offender's non-parole at one half of the sentence, or 10 years (whichever is less), specific considerations are listed. These require the court to be 'satisfied, having regard to the circumstances of the commission of the offence and the character and circumstances of the offender, that the expression of society's denunciation of the offence or the objective of specific or general deterrence so requires'.[233] This section of the Criminal Code further provides that:

  > For greater certainty, the paramount principles which are to guide the court under this section are denunciation and specific or general deterrence, with rehabilitation of the offender, in all cases, being subordinate to these paramount principles.[234]

- In New Zealand, a court may impose a minimum non-parole period that is greater than the usual one-third period that applies under the *Parole Act 2002* (provided this does not exceed the lesser of two-thirds of the sentence or 10 years) if satisfied the period is insufficient to meet all or any of the following purposes:

  > (a) holding the offender accountable for the harm done to the victim and the community by the offending;
  >
  > (b) denouncing the conduct in which the offender was involved;
  >
  > (c) deterring the offender or other persons from committing the same or a similar offence;
  >
  > (d) protecting the community from the offender.[235]

The intended purposes of MNPP schemes are also sometimes articulated in the legislative grounds for departure. For example:

- In Victoria, a court must regard general deterrence and denunciation of the offender's conduct as having greater importance than the other general purposes of sentencing when determining if there are 'substantial and compelling circumstances' justifying setting the non-parole period below what would otherwise be required under MNPPs that apply to certain offences.[236]
- In South Australia, a basis for deciding that a 'serious repeat offender' should not be subject to the requirement for the non-parole period to be fixed at a minimum of 80 per cent ('at least four-fifths') of the sentence is that — (a) the person's personal circumstances are so exceptional that they outweigh the paramount consideration of protecting the safety of the community (whether as individuals or in general) and personal and general deterrence; and it is, in all the circumstances, not appropriate that the person be sentenced as a serious repeat offender.[237]

18.3.3 Stakeholder views

FACAA was of the view that the primary objective of the scheme was clear — 'protection of the public'. It expressed support for particular emphasis to be placed on the protection of children.[238]

Full Stop Australia noted the principles of punishment, deterrence, community safety and denunciation were 'extremely important to victim-survivors'.[239] It emphasised the importance of 'the purpose and intent behind a sentencing scheme' being 'principled, evidenced based and supported by victim-survivors and the wider community.' It expressed its continued support for 'sentencing schemes for sexual and domestic violence offences which uphold these principles'.

Legal Aid Queensland pointed to judicial commentary suggesting that 'the purposes of the scheme are clear in its legislative form' being: '1. Ensuring condign punishments are imposed with respect to serious offences, and 2.

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232 Ibid (n 231) s 6D. Further, the court may, in order to achieve that purpose, impose a sentence that is longer than that which is proportionate to the gravity of the offence in light of its objective circumstances: ibid.

233 Criminal Code R.S.C., 1985, c. C-46 s 743.6(1) ('Criminal Code (Canada)'). The same 'test' applies to terrorism offences, but in the reverse (as to whether the purposes would be 'adequately served' by the usual parole eligibility period under the *Corrections and Conditional Release Act*), as the setting of parole eligibility at one half or 10 years in this case is presumptive: at s 746(1.2). These provisions only apply to sentences of imprisonment of 2 years or more prosecuted on indictment, other than to a sentence imposed as a minimum punishment.

234 Ibid s 743.6(2).

235 *Sentencing Act 2002* (NZ) s 86(2).

236 Ibid s 10A(2B)(a).

237 *Sentencing Act 2017* (SA) s 54(2).

238 Submission 4 (Fighters Against Child Abuse Australia) 12.

239 Submission 7 (Full Stop Australia) 6–7.

Increasing community safety'.[240] In doing so, LAQ referred to comments made by Fryberg J in the 2002 Court of Appeal decision of *R v Eveleigh* criticising the scheme's capacity to meet is objective of community protection.[241]

Participants in expert interviews also recognised the purposes of the scheme as being primarily punishment, denunciation and community protection.

Most participants agreed that the scheme is meetings its objective of punishment only. Many participants expressed their view that the scheme, in its current form, was unlikely to meet the longer-term objective of community protection (see discussion in Chapter 11). While the majority of participants felt the scheme did not meet its intended objectives, a few referred to the scheme having capacity to serve as a general deterrent by 'sending a message out to the community' about the seriousness of this form of offending.

18.3.4 Options considered and Council view

The two main options considered by the Council were:

- Option 1: Not to legislate the specific purposes of the scheme on the basis that the current Court of Appeal guidance and guidance provided in section 9 of the PSA are sufficient to guide courts in applying the scheme.
- Option 2: To introduce a general form of guidance — such as is provided under section 151C of the PSA that sets out the purposes of drug and alcohol treatment orders.

The Council concluded that it was unnecessary, and potentially unhelpful, to set out the scheme's purpose in a legislative way. As discussed in Part A of this report, there is already significant guidance provided to courts in sentencing under the general principles a court must apply under the PSA. This includes specific principles and factors to which a court must have regard when sentencing an offender for an offence that involved violence or that resulted in physical harm, is of a sexual nature committed in relation to a child under 16 years, and for child exploitation material offences[242] — to which the Council recommends the scheme should also apply (see further section 18.9.5). To include additional guidance within Part 9A of the PSA that applies solely for the purposes of the new scheme would add an unnecessary additional layer of complexity and risk creating inconsistencies with existing provisions that then need to be resolved.

The purposes of the scheme — being punishment, denunciation, and the protection delayed parole eligibility can provide to the community — are also now well understood by courts based on existing case law. This includes recognition by the Court of Appeal that:

> The considerations which may lead a sentencing judge to conclude that there is good reason to postpone the date of eligibility for parole will usually be concerned with circumstances which aggravate the offence in a way which suggest that the protection of the public or adequate punishment requires a longer period in actual custody before eligibility for parole than would otherwise be required by the Act having regard to the term of imprisonment imposed.[243]

Retaining some flexibility is important so that while the principal purposes of the scheme are clear, the application of the provisions do not operate in a way that is inconsistent with the court's general discretion to postpone parole eligibility under section 160C(5) of the PSA.[244]

It therefore is the Council's view that the statement of purposes should be left as a matter to be articulated in the extrinsic materials supporting the introduction of the reforms to the scheme.

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240 Submission 13 (Legal Aid Queensland) 2–3.

241 Ibid citing *Eveleigh* (n 75) 408 [39]. Fryberg J, in considering the purposes of the scheme, commented: 'It is not difficult to infer that these provisions were included for the purpose of ensuring the protection of the community by their use. The most likely and direct mechanism for such protection is increasing the total period spent in prison for the offences covered, not restructuring sentences of imprisonment without increasing their burden' at 408.

242 PSA (n 11) ss 9(2A)–(7AA).

243 *McDougall & Collas* (n 75) 97 [21], cited with approval in a number of subsequent decisions of the Court, including *Free* (n 60) 98 [48]–[49], [53].

244 See statements made by the Court in *Randall* (n 46) in which it concluded the overarching purpose for which discretion has been conferred under s 160C(5): 'is to empower a sentencing judge to achieve a just sentence in all the circumstances' and that 'Because of the many different kinds of offences, the infinite kinds of circumstances surrounding the commission of offences and the limitless kinds of offenders, both the discretion as to length of imprisonment and as to the fixing of a parole date cannot possibly be circumscribed by judge-made rules so as to preclude consideration of whatever relevant factors might arise in a particular case': at [37]–[38].

Deterrence as a potentially relevant consideration[245] might also be referred to among the scheme's purposes, alongside punishment, denunciation and community protection.[246] It is possible, for example, that the postponement of parole eligibility might be viewed as important for the purposes of specific (personal) deterrence[247] as well as general deterrence.

Recommendation: Objectives of the reformed scheme

4. The purposes of the new serious offences scheme should not be legislated. Instead:

a. the general principles and factors to which a court must have regard in sentencing, including those set out in section 9 of the *Penalties and Sentences Act 1992* (Qld), should continue to be applied; and

b. the extrinsic materials supporting the introduction of the proposed reforms should make clear the intention of the scheme to ensure the minimum period to be served in custody reflects the seriousness of these offences with reference to the sentencing purposes of punishment, denunciation, deterrence and community protection.

18.4 New sentencing threshold for the presumptive model

18.4.1 Issues

As with the 80 per cent fixed parole eligibility date, there was wide criticism by stakeholders of the 10-year mark for mandatory declarations under the current scheme during consultation. Many stakeholders were critical of its arbitrariness, with legal stakeholders referring to disparities between co-offenders where one offender receives a 10-year sentence with a mandatory 80 per cent non-parole period, while another receives a 9.5-year sentence with a non-parole period, possibly as low as one-third.

Equally, victims and survivors and victim support services were critical of the discretionary declaration range of 5 to less than 10 years due to the differences in the treatment of sentences straddling the 9 to 10-year mark and the significant difference in the minimum time required to be served in custody between those sentences. They were also critical of the low numbers of discretionary declarations made for sexual violence offences and manslaughter, which many reported did not reflect the seriousness of the offences or the significant harm their clients had experienced.

In its Issues Paper, the Council asked if the existing thresholds of 5 and 10 years should be removed or amended, as well as what reform options were most appropriate.

18.4.2 Approaches in other jurisdictions

Reviewing Australian and select international jurisdictions shows there are commonly two approaches taken when a sentencing scheme becomes enlivened — see Table 21. These are either applied when:

- a threshold level of imprisonment is reached (as is the case for the current Queensland SVO scheme); or

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245 This is often the case for the types of serious offences captured within the scheme, including serious drug offending. See, for example, *R v Hilton* [2021] QCA 286 in which the seriousness of the drug trafficking involved was viewed as 'warranting a sentence where general deterrence is paramount': at [67] (Boddice J, McMurdo JA and Daubney J agreeing). The Court also referred to the sentencing judge's acceptance that the applicant had undertaken positive rehabilitative programs with a number of negative drug tests supporting his cessation of drug use and an acknowledgment of responsibility for his offending behaviour — which reduced the relevance of specific deterrence: [19].

246 Although the Council notes the difficulty of determining any impacts of deterrence and the lack of research evidence indicating its effectiveness, it nevertheless recognises this is an existing purpose of sentencing that is often applied by courts in sentencing. As to the problems with deterrence, see Andrew Ashworth, 'The Common Sense and Complications of General Deterrent Sentencing' (2019) 7 *Criminal Law Review* 564; and *University of Melbourne Literature Review*.

247 See, for example, views expressed to this effect by Keane JA in *Assurson* (n 184) on the basis that possession of dangerous drugs while on bail for drug trafficking and other drug charges, in circumstances where this had involved some personal violence, was: 'a matter of aggravation which is suggestive of a need for a sentence reflecting the special importance in this case of personal deterrence' and one of the 'good reasons' for postponing parole eligibility: at [29]. In this case an SVO declaration had been made, which was set aside on appeal. A non-parole period of 5.5 years was substituted, equating to about 60 per cent of his 9-year sentence.

- a number of other criteria are met, such as being convicted of a certain type of offence and the offender being aged over 18.

Generally, Australian sentencing schemes for serious offences favour the second approach, where criteria have been met by the offending. The primary criterion in all the schemes is that the person has been convicted of a listed offence. These criteria are also required in jurisdictions with a threshold of imprisonment.

For those schemes that set a sentencing threshold, the most common approach is for this only to be applied to an individual offence being sentenced, rather than calculated on the basis of all eligible offences or other offences being sentenced, some which might have attracted cumulative terms. For example:

- In the Northern Territory, the requirement for a court to fix a non-parole period of not less than 70 per cent applies when sentencing an offender 'for a specified [sexual or drug] offence' to imprisonment 'for 12 months or longer' that is not suspended in whole or in part.[248]
- In New Zealand, the ability to set a longer non-parole period applies to a determinate sentence of more than 2 years 'for a particular offence'.[249]

However in some cases, the MNPP specified is applied based on the total effective sentence provided at least one of the offences for which the person is being sentenced is a relevant offence.[250]

Table 21: Circumstances that enliven MNPP schemes in Australian and select international jurisdictions

Schemes with a threshold level of imprisonment	Schemes which require specific criteria to be met before being enlivened
Northern Territory: Minimum non-parole period for certain sexual and drug offences • The offender has been convicted of a specified offence; and • Is sentenced to 12 months or more for the offence.[251]	**Victoria: Statutory mandatory minimum sentences and minimum NPP for category 1 and 2 offences** • A certain schedule 1 and 2 offence is committed; • By an offender aged 18 years; and • No special reason exists.[252]
Canada: Special provisions for serious violent, drug and sexual offences • The offender is prosecuted on indictment of a Schedule I or II offence; and • Received a sentence of imprisonment of 2 years or more.[253]	**Victoria: Standard minimum sentences and NPPs for 12 prescribed offences** For category 1 offences: court must impose a term of imprisonment unless special reasons exist. For category 2 offences: court must impose a sentence of imprisonment unless; • The offender was aged under 18 years at the time of the offence; or • A special reason exists.[254]
New Zealand: Discretionary minimum period for determinate sentence of imprisonment The court has imposed a 'long-term sentence' (more than 2 years).[255]	**NSW: Standard non parole period scheme** • The offender is aged 18 or over at the time of the offence; • The offence is dealt with on indictment; • Is not sentenced to life imprisonment/or any other; indeterminate period (i.e. where the offender is ineligible for parole); and • The offender is not being sentenced to detention under the *Mental Health and Cognitive Impairment Forensic Provisions Act 2020* (NSW).[256]

Table continued over page.

248 *Sentencing Act 1995* (NT) s 55.
249 *Sentencing Act 2002* (NZ) s 86(1).
250 See, for example, *Sentencing Act* (Vic) (n 231) s 11A, especially the definition of 'relevant term' in s 11A(5).
251 *Sentencing Act 1995* (NT) s 55. Section 55A does not have this same requirement and applies if a court sentences an offender to be imprisoned for one of a number of listed offences committed against a person under the age of 16 years provided the offender was an adult at the time and the sentence is not suspended in whole or in part: s 55A.
252 *Sentencing Act* (Vic) (n 231) s 10A.
253 Criminal Code (Canada) (n 233) s 743.6(1).
254 *Sentencing Act* (Vic) (n 231) s 10A.
255 *Sentencing Act 2002* (NZ) s 86(4).
256 *Crimes (Sentencing Procedure) Act 1999* (NSW), Div 1A.

Schemes with a threshold level of imprisonment	Schemes which require specific criteria to be met before being enlivened
England and Wales: Extended determinate sentence scheme • The offence for which the person is being sentenced is a 'specified offence' (being a specified violent offence, a specified sexual offence, or a specified terrorism offence) listed in Schedule 18 of the Sentencing Code; • the offender is aged 18 years or over when convicted of the offence; • the court is of the opinion there is a significant risk to members of the public of serious harm occasioned by the commission by the offender of further specified offences (with a requirement for a pre-sentence report, unless the court considers this unnecessary); • the court is not required to impose a sentence of imprisonment for life; and • either: o when the offence was committed, the offender had been convicted of an offence listed in Parts 1, 2 or 3 of Schedule 14; or o if the court were to impose an extended sentence of imprisonment, the term it would specify as the appropriate custodial term would be at least 4 years.[257]	**SA: Serious repeat offenders scheme** If (whether as an adult or as a child) the offender has committed and been convicted of: • At least 3 'serious offences' committed on separate occasions; or • At least 2 'serious sexual offences' committed on separate occasions.[258]
	SA: Serious offences against the person Where person is convicted of a 'serious offence against the person'.[259]
	WA: Mandatory minimum terms with minimum NPPs and minimum NPPs for prescribed offences When convicted of an offence subject to the scheme.[260]
	New Zealand: 'Three strike' sentencing scheme for repeat serious violent offending • Aged over 18 at the time of the offence; and • Convicted of one or more serious violent offence.[261]
	England and Wales: Offences of Particular Concern • The offence is listed in Schedule 13 of the Sentencing Code; and • the court does not impose an extended sentence, a life sentence and/or a serious terrorism sentence.[262]

18.4.3 Options considered and stakeholder views

No stakeholders supported retaining a demarcation at the 10-year mark. Generally, stakeholders advocated for its removal as a form of mandatory sentencing and that the 'miscalculations of applying a "one size fits all" approach under a mandatory sentencing scheme is well-evidenced'.[263] The QLS noted that its practical effect has been to create 'a ceiling approach to sentencing practices' and referred to the Council's previous finding that it may be exerting downward pressure on head sentences.[264]

LAQ was similarly critical of the impact the 10-year mark has on sentences, observing that it 'can lead to artificial sentencing outcomes, which do not reflect the criminality of the offence'[265] and that it was 'not evidence based'.[266] LAQ supported the retention of the 5-year mark, 'given that it is at the 5-year mark that an offender is no longer able to be released on a suspended sentence and parole eligibility automatically applies'.[267]

QNADA supported its removal and noted the Council's findings that the mandatory application of the scheme appeared to be 'the primary driver' for drug traffickers receiving declarations.[268] QNADA suggested that drug traffickers, particularly those with substance misuse problems would benefit from longer parole supervision and 'generally have a lower risk profile than other offences captured in the scheme'.[269]

Full Stop Australia was concerned that criticism of the arbitrary 10-year mark for the existing scheme may 'undermine the system as a whole and undermine community confidence in the sentencing process'.[270] The organisation did not see why the 10-year mark should be retained in a reformed scheme, however was of the view that 'mandatory SVOs are, in general, being appropriately made in grievous cases of sexual, domestic and family

257 *Criminal Justice Act 2003* (c 44) UK s 280.
258 *Sentencing Act 2017* (SA) s 53.
259 *Sentencing Act 2017* (SA) s 47(5)(d).
260 *Sentencing Act 1995* (WA) s 95A.
261 *Sentencing Act 2002* (NZ) s 86B.
262 Sentencing Code (UK) s 278(1).
263 Submission 3 (Aged and Disability Advocacy Australia) 1.
264 Submission 12 (Queensland Law Society) 6.
265 Submission 13 (Legal Aid Queensland) 24.
266 Ibid 39.
267 Ibid 25.
268 Submission 9 (Queensland Network of Alcohol and Other Drug Agencies) 7.
269 Ibid 8.
270 Submission 7 (Full Stop Australia) 11.

violence' and suggested that if it were removed, 'detailed guidance be provided so that prosecutors are supported in seeking SVO declarations in similar circumstances'.[271]

FACAA supported this change and recommended there be no sentencing threshold. It advocated that the scheme should apply to any offence that 'fits the SVO scheme no matter what sentence the judge is considering' and there should be 'no limit as to how many years to be served' when qualifying for the scheme.[272] FACAA thought this change would 'remove any barriers to the scheme not being implemented'.[273]

The automatic application of the scheme at 10 years was identified as creating special difficulties by a number of expert interview participants. One participant reflected:

> what should be an integrated process that involves the exercise of a very broad discretion can resolve into a very narrow argument about whether something is worth nine and a-half or 10 and a-half, and that focus has just got more and more intense as time's gone on and it lends an artificiality and a distortion to the whole process .... that focus has become more intense. That's the change is that, as the precedent is developed and the full significance of the legislation was appreciated, we had these interminable arguments about those numbers rather than about the broader issues that might be involved in the case.[274]

Expert interview participants commented on the sentencing complexities caused by section 161C of the PSA, noting that despite efforts by the Court of Appeal to clarify the approach, some thought it was 'still very confusing'.[275] Participants suggested the cumulative effect and whether it applies when there are two Schedule 1 offences is misunderstood and 'people get a bit confused by whether it has to be applied or not'.[276]

18.4.4 Council view

There were two issues that the Council needed to determine in relation to the setting of a new threshold for the presumptive scheme:

1. To determine where to set the threshold for the new presumptive scheme and how the specified number of years should be calculated.
2. To determine where to set the threshold for serious drug offences under a new presumptive scheme, and why these offences required a different approach.

Although the current scheme has two thresholds at 5 years and 10 years, SVO declarations can be made for any offence in the Criminal Code and for any sentence of imprisonment under section 161B(4) of the PSA. However, the Council found this was extremely rare.[277] The Council determined that for greater clarity and consistency, a new single threshold was required to provide guidance.

The Council considered keeping the 10-year mark in the new presumptive scheme, as this would retain broad consistency with the current approach, while the reformed scheme would enable courts greater discretion to depart. However, as noted by the Council in its Issues Paper and referred to by numerous stakeholders above, the 10-year mark was arbitrary. The Council was also concerned that the existing thresholds result in a justifiable sense of grievance by both victims and offenders where one offence is sentenced to 10 years and receives an automatic declaration, while in another case, the sentence falls just below 10 years thereby avoiding the automatic application of the scheme.

The Council was mindful that the two thresholds in the current scheme have resulted in difficulties for the courts in balancing the purposes of sentencing to take into account the individual facts of each case, including relevant mitigating factors. The Council believes a consistent approach should be taken for offences attracting a sentence of 10 years or more, and those falling below this.

Ultimately, the Council concluded that the 10-year mark in the current scheme should not be retained in the new presumptive scheme, and a new sentencing threshold at over 5 years should be applied. The Council believes a sentence of more than 5 years for offences that will be captured under the new scheme is a more accurate measure of offence seriousness — particularly given that sentences for many serious sexual violence offences and non-sexual violence offences fall under 10 years — see Figure 27 in Part B. Setting the scheme to apply presumptively to sentences of greater than 5 years for offences under the new schedule captures those sentences where immediate imprisonment is the only sentencing option available to a court. Setting the threshold higher than the 5-year mark was particularly important, as the Council did not want to risk creating a displacement effect to partially suspended sentences.

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271 Ibid.
272 Submission 4 (Fighters Against Child Abuse Australia) 20, 16.
273 Ibid 20.
274 Subject-matter expert interview I35.
275 Subject-matter expert interview I22.
276 Subject-matter expert interview I2.
277 During the 9-year data period, only 7 were made, and only one was for a non-Schedule 1 offence.

How the specified number of years should be calculated under the new scheme

Discussed in Chapter 12, the operation of section 161C of the PSA has resulted in unnecessary complexity in sentencing when the SVO scheme is engaged.[278] This provision has led to considerable uncertainty regarding its intended application, and differing perspectives by the Court of Appeal in cases involving the cumulation of multiple Schedule 1 offences.[279]

Under the new presumptive model, the Council recommends section 161C be repealed or amended to ensure there is simple, clear and transparent application of the new scheme.

Serious drug offences should have a threshold of 10 years and higher

Regarding serious drug offences, the Council determined these offences were in a different category to the other offences proposed for the reformed scheme and warranted a different sentencing threshold.

As discussed in section 18.3, the proposed scheme will not focus on violence as a necessary element, but rather offence seriousness. Given serious drug offences cause, or carry a significant risk of causing, a high level of harm, the Council determined serious drug offences should be included in the reformed scheme. The Council recommends the scheme apply in a presumptive way to serious drug offences only if the sentence is one of 10 years or more.

Ultimately the Council concluded that under the reformed scheme, a sentence of 10 years or more for serious drug offences under the new scheme is a more accurate measure of offence seriousness for these offences that warrant a declaration and more time in custody. Although there was strong support by a range of stakeholders for the removal of these offences from the scheme, the significant societal harm these offences cause was also acknowledged by many stakeholders. The main reason stakeholders argued for drug offences to be excluded was that these offences do not fit comfortably within a scheme targeted at serious violence, given that violence is not an element of this offending (although it may be involved).

Further, these offenders do not pose the same level of risk to the community of reoffending compared to offenders convicted of non-sexual violence and sexual violence offences. Evidence gathered by the Council shows that serious drug offenders are different in their risk profile to violent and sexual offenders. Data analysis showed only 5 discretionary declarations were made over the 9-year period,[280] suggesting that few cases met the requisite threshold for a declaration. Setting the presumption at 10 years would recognise the differences in offending at this level. For offences attracting sentences of 10 years and above, the offending is typically conducted over an extended period for mercantile gain, methods to avoid detection are employed, large/commercial quantities of drugs are involved and multiple drug types are trafficked or supplied. While drug dependency may be present, this does not operate in the same way as for less serious offending as it has not impaired the offender's capacity to run a significant and highly profitable business.

Recommendation: Sentencing threshold

5. The current distinction between sentences of 10 years or more, and those falling under 10 years for the purposes of the making of a serious offence declaration should be removed. The new scheme instead should apply in a presumptive way to sentences of imprisonment of greater than 5 years on conviction of an offender for a listed offence — with the exception of serious drug offences, to which a 10-year threshold should apply (see Recommendation 8).

6. Section 161C of the *Penalties and Sentences Act 1992* (Qld) should be repealed or amended to provide that:

For the purposes of calculating the specified years of imprisonment for the new scheme for an offence

a. against a provision mentioned in schedule 1 (current schedule) or the new schedule (under the new scheme); or

b. of counselling or procuring the commission of, or attempting or conspiring to commit, an offence against a provision mentioned in schedule 1 or the new schedule;

278 This provision sets out how the 'specified years' of imprisonment is to be calculated with respect to making either a mandatory or discretionary declaration.

279 *R v Dutton* [2005] QCA 17 cf with *R v Lee* [2021] QCA 233.

280 As discussed in section 6.1.2, only 4 of the discretionary SVO declarations applied to drug trafficking. The remaining case had an MSO of drug trafficking, however the SVO declaration was made on a robbery offence.

	an offender is sentenced to the specified years of imprisonment only if the offender is sentenced to a term of imprisonment of the specified years for that offence. Note: See Recommendation 24 regarding proposed transitional provisions.
7.	A court should be required to declare an offender convicted of a serious offence on imposing a sentence of imprisonment of greater than 5 years for a single charge for a listed offence, other than for a serious drug offence — to which a 10-year threshold should apply.
8.	For serious drug offences, a court should be required to declare an offender convicted of a serious offence on imposing a sentence of imprisonment of 10 years or greater for a single charge for a listed drug offence.

18.5 The new parole eligibility date range

18.5.1 Issues

The 80 per cent fixed nature of parole eligibility under the current SVO scheme has been widely criticised. There are two main criticisms:

- the percentage required to be served in custody prior to being eligible for release on parole is arbitrarily fixed at 80 per cent; and
- because the proportion of the sentence that must be served prior to being eligible for parole is set so high, the period of the sentence remaining during which an offender may potentially be released under supervision in the community may not be sufficient given the risks of reoffending. The University of Melbourne literature review highlighted that for serious offenders who spend long periods of time in custody, a longer, rather than a shorter parole period is likely of benefit.

In *R v Assurson*, Keane JA, reflecting the views of many the Council interviewed over the course of this reference, referred to the declaration under s 161B(3) of the *Penalties and Sentences Act 1992* (Qld) as a 'blunt instrument'.[281]

The approach is in distinct contrast to the usual approach taken to the setting of parole eligibility, which gives courts the discretion to fix the parole eligibility at any point in the sentence — with the statutory requirement to serve half of the sentence under s 184(2) of the *Corrective Services Act 2006* (Qld) ('CSA') only applying if no date has been set. The Court of Appeal has recognised: 'The discretion to fix a parole eligibility date is unfettered; and there can be no mathematical approach to fixing that date, including on the basis of convention'.[282]

18.5.2 Approaches in other jurisdictions

While there is a mixture of both standard percentage schemes and defined term schemes, percentages are used more frequently to establish parole eligibility in other jurisdictions.

The Council found that the level at which minimum NPP percentage schemes were set differ across jurisdictions.

- In South Australia, a minimum NPP of four-fifths (80%) applies to serious repeat offenders and those convicted of a 'serious offence against the person' (a major indictable offence resulting in the victim's death, or total incapacity, other than murder), unless there are exceptional circumstances.
- Under Commonwealth law, a minimum NPP of 75 per cent applies to offenders convicted of listed national security offences.[283]
- In NSW, an effective minimum NPP of 75 per cent applies to a court when sentencing an offender for any offence — whether falling within a particular category of 'seriousness' or not (the balance of the sentence is not to exceed 'one-third of the non-parole period for the sentence') unless there are special circumstances.[284]

281 *Assurson* (n 184) [26].
282 *Free* (n 60) 99 [55] citing *Randall* (n 46) [43], referring to the original statement of principle in *R v Amato* [2013] QCA 158, [20].
283 Criminal Code (Cth) s 19AG(3)(a).
284 *Crimes (Sentencing Procedure) Act 1999* (NSW) ss 44, 46.

- In the Northern Territory, offenders sentenced for specified sexual offences, drug offences and offences of violence committed against persons aged under 16 must be ordered to serve a minimum of 70 per cent of the sentence before being eligible for release on parole.[285]
- In Victoria, the minimum NPP for a 'standard sentence offence' (other than for a life sentence) must be a period of at least 70 per cent of the relevant term if it is 20 years or more, or 60 per cent if the sentence is for less than 20 years (unless the court considers it is not in the interests of justice).[286]
- In Western Australia, a general parole provision applies to sentences of 4 years or more, which means a prisoner is eligible for parole when they have served all but 2 years of their term of imprisonment in custody — which, in practice, may result in parole eligibility at 50 per cent of the head sentence (for a 4 year sentence) to, for example, 90 per cent for a 20 year sentence.[287]
- In England and Wales, offenders subject to extended sentences, which can be imposed on offenders convicted of specified violent offences, sexual offences and terrorism offences, are eligible for parole at two-thirds of their custodial term.[288]
- In New Zealand, a court may impose an NPP of up to two-thirds of the sentence, or 10 years (whichever is less) if satisfied that parole eligibility after one-third is insufficient to hold the offender accountable for the harm caused to the victim and community, to denounce their conduct, to deter them or other people from committing the same or a similar offence, and/or to protect the community.[289]
- In Canada, there is a discretion to set parole eligibility at 50 per cent of the head sentence (instead of the usual one-third, or 7 years — whichever is less) when sentencing an offender convicted on indictment of certain serious offences, including violent, sexual and weapons offences - provided that this period does not exceed 10 years.[290]

18.5.3 Options considered and stakeholder views

In its Issues Paper, the Council put forward a number of potential options for the setting of parole eligibility as an alternative to the current fixed 80 per cent non-parole period. These were to:

a. Fix a standard percentage of the head sentence to be served (e.g. parole eligibility at two-thirds, 70%, 75% or other defined percentage of the head sentence).[291]
b. Set a minimum standard percentage non-parole period (e.g. a minimum of two-thirds, 70%, 75% or other defined percentage of the head sentence).
c. Specify a fixed set range (e.g. between 50–80% of the head sentence).

There was a range of views expressed by stakeholders about whether the current fixed 80 per cent non-parole period should remain — although most stakeholders supported greater flexibility be given to sentencing judges.

FACAA was among those supporting the retention of an 80/20 split on the basis that: 'The 20% of the sentence gives the system enough time for re-integration such as post custody monitoring but doesn't significantly reduce the time spent behind bars for the perpetrators of serious crimes'.[292] This reflected the views of some victims consulted who, taking a 10-year sentence as an example, considered 2 years as being a substantial period of time during which the offender could be reintegrated back into the community with appropriate levels of supervision and support.

DV Connect was most concerned with what approach would provide the best opportunities and incentives for offenders to engage in programs. It noted the potential reduced incentive longer prison sentences might provide to participate in these programs, although shorter periods of time post-sentence before parole eligibility might also be problematic if this excludes offenders from being able to participate in more intensive programs.[293] The relevance of this issue to sentencing and what information the Council considers a court should have access to is discussed at section 18.8 of this report.

Full Stop Australia expressed some support for the scheme to operate with additional levels of flexibility, but did not support any reduction of an 80/20 split for 'the most grievous cases of offending in the context of sexual, domestic

285 *Sentencing Act 1995* (NT) ss 55, 55A.
286 *Sentencing Act* (Vic) (n 231) s 11A.
287 *Sentencing Act 1995* (WA) s 93.
288 *Criminal Justice Act 2003* (c 44) (UK) s 246A.
289 *Parole Act 2002* (NZ) s 86(4).
290 Criminal Code (Canada) (n 233) s 743.6(1).
291 A variation of this option would be to set a legislative default non-parole period in s 182 of the CSA (n 56) similar to that which applies under s 184(2) that applies only if the court declines to fix a parole eligibility date on declaring an offender convicted of a serious offence. This is different to the current scheme as the 80% non-parole period is applied in all cases without an ability to depart.
292 Submission 4 (Fighters Against Child Abuse Australia) 21.
293 Submission 6 (DV Connect) 6.

and family violence (for example, when there is sexual offending against children)'.[294] For these reasons, they suggested that a range could be provided for under the reformed scheme, but that the non-parole period should remain fixed at 80 per cent for these 'very serious cases' providing the following examples of the types of cases this should apply to:

> a) Multiple counts of sexual offending against a child/children accompanied by physical violence
>
> b) Multiple counts of sexual offending against a child/children over a long period of time
>
> c) Serious violence and sexual offending in the context of domestic violence
>
> d) Serious violence in the context of domestic violence (including a history of coercive and controlling behaviour)
>
> e) Sexual offending accompanied by severe physical violence in other contexts.[295]

Legal support organisation, knowmore, supported a presumptive model with some flexibility to balance the importance of ensuring that perpetrators of sexual offences against children 'serve a significant non-parole period' with 'considerations of supervision and community safety upon release'.[296] It submitted:

> This is an area where the SVO scheme falls short, because the 80 per cent rule means that the time an offender is actively supervised in the community is limited. This could potentially result in an increased risk of reoffending, rather than a reduction.[297]

For many legal stakeholders, the main concern was increasing the level of discretion available to a court in setting a parole eligibility date. For example, Sisters Inside, which supported the scheme's abolition, submitted: 'If any range was to be legislated, it must be discretionary and allow for departures from the range in the interests of justice'.[298] LAQ similarly supported a model that would promote judicial discretion and considered a set range of 50 to 80 per cent, of the models presented, would best be able to achieve this.[299] This was because: 'It would allow a sentencing court to, on an individualised basis, balance the seriousness of the offending and the need to protect the community with the need for an offender to be rehabilitated' when fixing the parole eligibility date.[300] LAQ's concerns about setting a minimum non-parole period rather than a range was that 'with no cap or upper threshold', '[t]his could lead to even more severe and/or unintended consequences'.[301] It may also increase the risk of offenders spending no time on parole and being released back into the community 'totally unsupported and unsupervised'.[302]

Some expert interview participants also identified the 80 per cent level at which parole eligibility was currently fixed under the scheme as problematic — with suggestions to remedy this including to reduce the fixed percentage to 60 or 70 per cent, or to introduce a sliding scale from 40 or 50 percent up. There was a general acknowledgment that whatever the percentage, it remains somewhat arbitrary. The predominant view was that a revised scheme needs to be more flexible to accommodate specific circumstances.

The Centre Against Sexual Violence suggested that the Council might wish to consider specifying a 'minimum period of parole'.[303] This would be similar to some forms of sentences in England and Wales which require an offender's release after they have served out their full custodial term (if not released on parole earlier) to ensure offenders who require this type of support spend a minimum period under supervision while still under sentence.

While the approach of setting a minimum period of parole supervision has some merit, the Council's reasons for deferring consideration of this option are discussed in section 20.2 of this report.

18.5.4 Council view

The approach of setting a fixed non-parole period for serious violent offences, while more common in overseas jurisdictions, is not a widely adopted approach in Australia. MNPP schemes usually provide for a minimum non-parole period that must be served — either on a mandatory or presumptive basis — with the court, at a minimum, able to set a higher non-parole period (or in some cases, not to set a non-parole period at all, meaning an offender has to serve the entirety of their sentence in prison).

As discussed in section 16.3, to meet its objectives of promoting community safety, it is important that the scheme achieves an appropriate balance between the time spent in custody, and the time spent under supervision in the community. This is because a scheme that results in offenders not applying for parole or receiving only a limited

294 Submission 7 (Full Stop Australia) 12.
295 Ibid.
296 Submission 10 (knowmore) 10.
297 Ibid.
298 Submission 11 (Sisters Inside) 11.
299 Submission 13 (Legal Aid Queensland) 25.
300 Ibid 26.
301 Ibid.
302 Ibid.
303 Submission 3 (Centre Against Sexual Violence) 1.

period of supervision in the community is contrary to evidence that parolees are substantially less likely to re-offend than prisoners released unconditionally. This is particularly the case for higher-risk offenders.[304] To be most effective, the balance required between the minimum time to be spent in custody and the period of time during which an offender might be supervised on parole needs to be assessed on an individualised basis.

The current fixed 80 per cent model does not allow individualised assessments to be made and may, in fact, actively discourage offenders from engaging in programs to promote their rehabilitation and to reduce the long-term risks they pose to the community. If an offender does not perceive participating in programs as beneficial for their application for parole, they may be less likely to participate in these programs or to apply for parole at all. For example, an offender who receives a 9-year sentence and is required to serve 7 years and 2.5 months of that sentence (approximately 80%) prior to being eligible for release on parole, might be far less motivated to engage in programs than a person who is eligible for parole after 5 years.

It is not in the interest of the community for offenders convicted of serious offences to be released to freedom without any form of parole supervision. Incentives for offenders to participate in programs and to apply for parole are required to ensure that the short-term benefits of protecting the community from the offender during the period of their incarceration are not achieved at the expense of ensuring long-term community safety.

Taking these issues into account, the Council supports providing sentencing judges with flexibility to set the non-parole period between 50 to 80 per cent. This will ensure offenders are required to serve a minimum period in custody of at least 50 per cent of the sentence, but no more than 80 per cent to balance the various purposes the scheme is endeavouring to meet.

The Council considers the approach recommended will allow some degree of certainty for victims and survivors and the broader community that offenders who commit serious offences will be required to serve a significant proportion of their sentence in custody, while avoiding some of the problems of the current fixed approach. In particular, providing for a parole eligibility range of 50 to 80 per cent might:

- reduce the need for courts to depart from making a declaration under the presumptive scheme to achieve a just sentence, meaning that more declarations are made;
- lessen the impact of the fixed nature of the non-parole period in reducing head sentences as an offender's plea and other mitigating factors will be able to be taken into account by setting parole eligibility towards the lower end of the parole eligibility period range, rather than a reduction in the head sentence being the only available option. This may result in longer head sentences providing for longer potential periods of parole supervision;
- better enable courts to deliver individualised justice and to take the individual circumstances of the offence and offender into account;
- better allow for the principle of parity to be applied when setting parole eligibility dates for co-offenders in circumstances where one might be declared convicted of a serious offence while others might not;
- reduce problems that sometimes arise in applying the scheme in conjunction with mandatory sentencing provisions, such as apply under section 156A, as it provides courts with greater flexibility in the setting of the parole eligibility date, and to depart by setting an earlier parole eligibility date where this is in the interests of justice (see discussion at section 18.6).

The Council does not think it necessary to retain a 'default' non-parole period to provide for circumstances where a court fails to fix parole eligibility once a declaration is made. Requiring courts to fix parole eligibility within a set range of 50 to 80 per cent in the Council's view is preferred as it will require courts in all cases where a declaration is made to turn their minds to what an appropriate period is relative to the head sentence and provide reasons, rather than this being pre-determined by statute.

To avoid the potential for offenders subject to a declaration being ordered to serve a longer non-parole period than they would if sentenced to life imprisonment, it is recommended that it be made clear in the amended provisions that the parole eligibility date which is fixed within the specified range must not exceed 15 years. This is consistent with the current position at law which caps the non-parole period where a declaration is made at this level.[305] It also aligns with the current mandatory non-parole period that applies to life sentences, [306] in circumstances where this is imposed other than for murder[307] or for a repeat serious child sex offence.[308]

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304 See, for example, *The Effect of Parole Supervision on Recidivism* (n 20). This research found that for the marginal parolee, being released to parole reduces the likelihood of re-conviction within 12 months of release by 10.0 percentage points (a decrease of 17.5 per cent); reduces the likelihood of committing a personal, property or serious drug offence within 12 months of release by 10.3 percentage points (a decrease of 24.0 per cent); and reduces the likelihood of being re-imprisoned within 12 months of release by 5.0 percentage points (a decrease of 18.2 per cent). These reductions in recidivism were statistically significant and generally persisted 24 months after release from prison.

305 CSA (n 56) s 182(2).

306 Ibid s 181(2)(d).

307 Ibid ss 181(2)(a)–(c). These periods range from 20 years to 30 years, depending on the circumstances involved.

308 In this case, a non-parole period of 20 years applies: s 181A(2).

The Council does not make any recommendations regarding the application of special provisions that apply when determining a prisoner's parole eligibility date in circumstances where a declared conviction for a serious offence is also one to which a serious organised crime circumstance of aggravation applies.[309] This scheme operates independently of the SVO scheme and, for this reason, is considered to fall outside scope of this review.

Recommendation: Parole eligibility date range

9. On making a serious offence declaration, a court should be required to fix a parole eligibility date within a specified range of 50 to 80 per cent of the head sentence, provided that the non-parole period fixed does not exceed 15 years.

18.6 Departing from scheme where this is 'in the interests of justice'

18.6.1 Issues

One of the main criticisms of the current scheme is its mandatory nature. Discussed extensively in Chapter 10 to 12 and Chapter 16, the mandatory aspects of the scheme, including the '80 per cent rule' and 10-year threshold lead to numerous issues. The Council identified the following problems with the scheme's mandatory application:

- The current scheme restricts the maximum period an offender can be subject to supervision in the community and may discourage offenders from applying for parole.
- The courts' ability to take into account relevant mitigating factors required under law is restricted, likely causing downward pressure on head sentences and/or distorting sentencing outcomes.
- The scheme impacts on sentencing practices by creating unnecessary complexity and confusion.

The Council acknowledges the importance of judicial discretion to achieve just sentencing outcomes and individualised justice. For the reasons discussed in this section (18.6), while it recommends that the reformed scheme should apply presumptively, it supports courts being provided with the ability to depart from the scheme where it is 'in the interests of justice' not to make a declaration.

18.6.2 Approaches in other jurisdictions

The ability of a court to depart from statutory MNPPs or minimum sentences varies by jurisdiction (discussed in Chapter 5). Under some schemes, courts have no discretion and are limited to a 'one size fits all' approach, as is the case with the SVO scheme in Queensland. However, in others, courts have broad discretion to decide the sentence and appropriate non-parole period, while acting in accordance with relevant legislation and legal principles.

Grounds for departure are framed in a variety of ways, including where 'exceptional circumstances' are shown, where 'special reasons' exist, unless 'in the interests of justice' or 'unjust to do so' or where the setting of the MNPP is 'inappropriate'. Each test for departure varies significantly.

The most stringent test is 'exceptional circumstances' as it has the highest threshold to meet. For example:

- In South Australia under the mandatory minimum non-parole period for serious offences against the person scheme,[310] a court may set a shorter non-parole period where there are exceptional circumstances. There is a non-exhaustive list of exceptional circumstances, which may allow a court to depart, including that 'the offence was committed in circumstances in which the victim's conduct or condition substantially mitigated the offender's conduct'.[311] The existence of one or more circumstances does not require the court to set a shorter NPP, rather it is a decision made according to the individual circumstances of the case and factors personal to the defendant.[312]

Other tests include 'special reasons' and 'special circumstances'. For example:

309 Ibid ss 182(2A)–(2B).
310 *Sentencing Act 2017* (SA) s 48(3).
311 Ibid s 48(3)(a).
312 *R v Frencken* (2012) 61 MVR 195, [14]–20] (Vanstone J, Nyland and David JJ agreeing).

- In Victoria under the statutory minimum sentences scheme, a court may depart where there are 'special reasons'.[313] If a court finds a 'special reason' exists, it may decline to impose an NPP below the statutory minimum. 'Special reasons' include that: the offender has assisted or had offered to assist law enforcement authorities in the investigation or prosecution of an offence; the offender at the time of the offence had impaired mental functioning that is causally linked to the offence which 'substantially and materially' reduced their culpability;[314] or there are 'substantial and compelling circumstances that are exceptional and rare' that justify the court departing.[315] A court in considering whether 'substantial and compelling circumstances' exist is not permitted to have regard to an offender's previous good character, an early plea of guilty, prospects of rehabilitation or parity with other sentences.[316]
- In NSW under the SNPP scheme, a court may depart from the fixed NPP of 75 per cent if there is a finding of 'special circumstances'.[317] Special circumstances are not defined in the NSW Sentencing Act, however they have been interpreted very widely in case law.[318]

Lastly, there are tests that allow a court to depart if it is 'in the interests of justice' to do so, or which require a court to apply the statutorily defined minimum sentence or NPP 'unless unjust to do so'. For example:

- In Victoria under the standard sentences scheme, a court may depart from the legislated MNPP where it is in the 'interests of justice to do so'. [319] Where the court fixes an NPP shorter than that specified, adequate reasons must be given for departing from the scheme.[320]
- In New Zealand's stage 3 of the 'three strike' sentencing regime, a court must sentence an offender to the maximum term of imprisonment prescribed for the offence/s and order the offender serve the sentence without parole, unless it would be 'manifestly unjust to do so'.[321] New Zealand caselaw has identified a non-exclusive list of factors that may be relevant to this assessment.[322]

There are some common themes across the jurisdictions about factors which might satisfy those criteria, some of which are developed through case law, and others which are provided for in legislation. Almost all of these factors relate to the offenders themselves, rather than the offending. Factors include:

- the offender's likelihood of re-offending and prospects of rehabilitation;[323]
- the offender's previous good character;[324]
- whether the victim's conduct, or conduct and condition, substantially mitigated the conduct of the offender;[325]
- the offender had impaired mental functioning at the time of the offence (that was not a result of self-intoxication);[326]

313 *Sentencing Act* (Vic) (n 231) s 10A.

314 This cannot be primarily caused by self-induced intoxication and it is proved by the offender on the balance of probabilities.

315 *Sentencing Act* (Vic) (n 231) s 10A.

316 Ibid.

317 *Crimes (Sentencing Procedure) Act 1999* (NSW) s 44(2).

318 *R v Moffitt* (1990) 20 NSWLR 114.

319 *Sentencing Act* (Vic) (n 231) s 11A(4).

320 Ibid s 5B (4)–(5). The Victorian Court of Appeal has provided clear guidance to judges on how to provide adequate reasons: *Brown v The Queen* (2019) 59 VR 462, 475 [45] and *DPP (Vic) v Drake* [2019] VSCA 293, [14]–[17].

321 *Sentencing Act 2002* (NZ) ss 86D(2)–(3).

322 *R v Harrison* [2016] 3 NZLR 602.

323 See for example *Sentencing Act 1995* (NT) s 53A as consideration for an exceptional circumstance with respect to departing from the NPP for murder. In New South Wales, rehabilitation has developed as a 'special reason' to depart from the standard NPP through case law: *R v Russell* (1993) PD [274], *R v McDonald* (1998) 5 Crim LN [920], *R v Ma* (1999) 107 A Crim R 252. If there are prospects of rehabilitation, special circumstances can be found: *R v Lulham* [2016] 263 A Crim R 287 especially at [7], [11], and [65]. In New Zealand, case law has developed around what may be considered as making a sentence unjust, and includes an offender's likelihood of re-offending, so that there is no/reduced need for community protection: *R v Harrison* [2016] 3 NZLR 602. In some cases, this factor is expressly excluded from the court's consideration: *Sentencing Act* (Vic) (n 231) s 10A.

324 See, for example, *Sentencing Act 1995* (NT) s 53A as consideration for an exceptional circumstance with respect to departing from the NPP for murder. In some jurisdictions, this factor is expressly excluded from the court's consideration: *Sentencing Act* (Vic) (n 231) s 10A.

325 See, for example, *Sentencing Act 2017* (SA) s 48(2)(b) where there are 'exceptional circumstances' to depart from the SA 'serious offences scheme'.

326 See, for example, *Sentencing Act* (Vic) (n 231) s 10A in considering whether there are 'substantial and compelling reasons' to depart from the Victorian MNPP scheme; in New Zealand, the court may depart from the mandatory NPP for a 'three strike offence' where the offender had limited or no understanding of the first or final warning: *R v Harrison* [2016] 3 NZLR 602. Case law has also developed for offenders with illness or disability: *R v Sellen* (1991) 57 A Crim R 313*; R v Dwyer* (Supreme Court of New South Wales, McInerney J, Sully J, Ireland J, 23 February 1994), [157] or psychiatric illness; *R v B* (1993) 68 A Crim R 547 to support 'special reasons' to depart from the NSW MNPP scheme.

- the offender's cooperation with authorities;[327]
- other exceptional personal circumstances.[328]

The NSW Court of Criminal Appeal has said that: '[i]t will be a very rare case in which there is no fact capable as a matter of law, of constituting a "special circumstance"'.[329] It has noted that this decision is both one of fact and of judgment.[330]

18.6.3 Stakeholder views

The Council invited submissions on whether a reformed scheme should enable courts to depart by setting a different parole eligibility date than legislated and if so, whether any legislative guidance is required and what form this guidance should take. The Council also discussed this matter at consultations.

FACAA strongly advocated that the scheme should continue to be 'entirely mandatory' and 'there should be no ability for the court to depart'.[331] FACAA acknowledged that 'adequate time for post release monitoring' was needed but advocated that courts should only have the ability to set a higher, not a lower, non-parole period.[332]

Legal stakeholders and one victim support service supported enhancing judicial discretion and recommended that any reformed scheme should provide judges with the means to depart. However, there were differing views on whether it was necessary to legislate departure criteria.

For example, QLS submitted that it was not 'necessary to impose statutory criteria' on the basis that 'the interests of justice are best served by enabling wide judicial discretion' and there are 'well established' sentencing principles 'from the PSA and case law in the higher courts'.[333]

Similarly, in principle, LAQ was not supportive of any threshold tests 'such as "exceptional circumstances" or "special circumstances" or "in the interests of justice"' as this would limit the Court's discretion'.[334] LAQ argued that 'any test would require the Court to justify the exercise of their discretion or to meet a certain threshold test before they could impose a certain penalty'.[335] However, LAQ was of the view that should a threshold test be recommended, it supported 'in the interests of justice', on the basis that it would enable the court to take into account 'all relevant factors' including 'cultural or mental health aspects pertinent to the sentencing of an offender'.[336] LAQ noted that the exceptional circumstances rule is 'rigid' and the 'interests of justice' or 'unjust to do so' were preferable tests.[337] However, LAQ argued there was no need to legislate but simply allow for the broadest discretion of the court'.[338]

Sisters Inside suggested that should a parole eligibility date range be legislated, a reformed scheme 'must … allow for departures from the range in the interests of justice'.[339]

Full Stop Australia was of the view that such a list should be legislated 'so that the court is obliged to take this into account in applying a lower or higher non-parole period'.[340]

In terms of what factors or considerations the court should take into account in relation to departing from the scheme, stakeholders were supportive of a non-exhaustive list comprising broad criteria.

LAQ recommended that 'the sentencing principles contained in section 9 of the PSA, factors in mitigation and aspects relevant to each individual case' were sufficient.[341] Examples cited included 'the offender's personal circumstances, the nature of the offending and prospects of rehabilitation'.[342] Full Stop Australia suggested that a list should not be exhaustive and 'the views of the victim-survivor be considered' in its development.[343] Some concerns were expressed to the Council that any criteria relating to rehabilitation may be impacted by the limited

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327 See for example *Sentencing Act* (Vic) (n 231) s 10A in considering whether there are 'substantial and compelling reasons' to depart from the Victorian MNPP scheme; in NSW, case law has developed surrounding 'assistance' as a special reason: *R v McLear* (Court of Criminal Appeal, New South Wales, Sheller JA, Mathews J, Sharpe J, 1 September 1992).
328 *Sentencing Act 2017* (SA) s 54(2) as in considering whether to depart from the 'serious repeat offenders' scheme.
329 *R v Simpson* (2001) 53 NSWLR 704, especially at [73].
330 Ibid.
331 Submission 4 (Fighters Against Child Abuse Australia) 22.
332 Ibid.
333 Submission 12 (Queensland Law Society) 3.
334 Submission 13 (Legal Aid Queensland) 27.
335 Ibid.
336 Ibid.
337 Ibid.
338 Ibid 28.
339 Submission 11 (Sisters Inside) 11.
340 Submission 7 (Full Stop Australia) 12.
341 Submission 13 (Legal Aid Queensland) 28.
342 Ibid 27.
343 Submission 7 (Full Stop Australia) 12.

range and availability of programs in custody. It was noted that there are challenges in accessing programs and interventions in remote locations, particularly for Aboriginal and Torres Strait Islander offenders.

Stakeholders noted that the criteria for departure would be very similar to the criteria applied by the courts to determine where to set the parole eligibility date (discussed in section 18.5). Some stakeholders queried whether the departure criteria would also apply to the setting of parole eligibility if set within a range or whether separate criteria were required for these two different aspects of the reformed scheme.

While victims and victim support services did not comment directly on this issue, they did share with the Council the trauma experienced when a court declined to make a declaration but does not clearly articulate reasons.

18.6.4 Options considered and Council view

Options considered and preferred option

To address some of the ways the current SVO scheme has been negatively impacting sentencing practices, and given the Council's recommendation that the scheme operate presumptively, the Council came to the to the view there should be discretion to depart. Enhanced discretion will address many of the issues the Council identified with the current SVO scheme, such as the difficulties faced by courts in giving appropriate recognition to mitigating factors to ensure a just sentence once a declaration is required to be made.

Based on models operating elsewhere, potential options include:

- Option 1: To limit departure from the scheme to where 'exceptional circumstances' or 'special circumstances' can be shown.
- Option 2: To allow courts to depart where this is considered to be 'in the interests of justice'.

The Council also discussed the merits of requiring a declaration to be made 'unless the court orders otherwise', which would provide sentencing courts with a very high level of discretion.

The Council determined that the most appropriate threshold test for departure from the new scheme which would meet the objectives of the new scheme is to allow a court to decide not to make a declaration if it would be 'in the interests of justice'. This will preserve courts' discretion and ensure the new scheme operates consistently with existing case law regarding the postponement of parole eligibility. As recognised by the Court of Appeal:

> the purpose of the discretion to vary a parole date from the default halfway mark that the Act otherwise imposes, is to empower a sentencing judge to achieve a just sentence in all the circumstances. That purpose is, in our view, the paramount objective of sentencing.[344]

The concept of decisions needing to be made in accordance with 'the interests of justice' is well known to the criminal justice system,[345] and there is a body of existing jurisprudence on the application of this approach.[346]

The alternative approaches were considered by the Council to be either too narrow or too wide, and to not adequately address concerns raised by stakeholders.

An 'interests of justice' test, in the Council's view, strikes the right balance between a presumption in favour of a declaration being made for serious offences to recognise the harm inflicted, and judicial discretion to take circumstances of the offence and factors personal to the offender into account to arrive at a just sentence. It positions what is 'in the interests of justice' as the paramount consideration, while making clear the expectation that when a serious offence is committed justifying a sentence of greater than 5 years, a substantial proportion of it should be ordered to be served in custody.

It is also consistent with the research evidence that suggests that to appropriately respond to the complex range of needs of the diverse range of offenders who commit these types of serious offences, high levels of discretion in judicial decision-making are required to achieve effective sentencing responses.[347]

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344 *Randall* (n 46) [37] (Sofronoff P, Morrison JA and Burns J agreeing) referring with approval to comments made by Davis J in *Assurson* (n 184).

345 For example, PSA (n 11) s 146(2A) applies this test as the basis for a court of higher jurisdiction making a decision that the breach should be dealt with by the court that made the order. Section 147(2) requires a court on breach of a suspended sentence to order the offender to serve the whole of the suspended sentence 'unless of the opinion that it would be unjust to do so'.

346 For example, in *R v Tait* [1999] 2 Qd R 667, 668 [5] the Court of Appeal determined that when determining an application for an extension of time, it will 'examine whether there is any good reason shown to account for the delay and whether it is in the interests of justice to grant the extension'. In *R v Riddler* [2010] QCA 202, 2–3 the Court of Appeal determined that in the interests of justice the Court was required to recognise time served in custody while pending the determination of an appeal (as per Criminal Code s 671G(2)).

347 *University of Melbourne Literature Review* (n 19) 19, 23.

The statutory criteria recommended to guide this determination and the reasons for preferring this approach are discussed in section 18.7.

Why an 'exceptional circumstances' or 'special circumstances' test was not supported

As discussed in this section (18.6.4), many jurisdictions with some form of MNPP scheme appear to favour 'exceptional circumstances' and 'special reasons' or 'special circumstances' as the basis for departure. These criteria, in some cases, are relatively rigid due to the provision of additional legislative guidance intended to limit their application, and therefore set a high bar for departure.

The Council was also mindful that the term 'exceptional circumstances' is not defined in the PSA and the Court of Appeal in *R v Schenk; Ex parte Attorney-General (Qld)*[348] observed that 'nor is it a term of art with its own ascertained meaning within a legal context'.[349] The Court of Appeal, with reference to earlier appeal and High Court caselaw, said that there is 'no one clear prescription for what circumstances are capable of being regarded as exceptional'.[350] Instead, a sentencing judge must give consideration 'not only to the unusualness of individual factors but to their weight; and factors which taken alone may not be out of the ordinary may in combination constitute an exceptional case'.[351]

The Council also took into account the exceptional circumstances examples provided in the PSA under sections 9(4) and (10A), although each is unique as to its purpose and consequences. For example, section 9(10A) provides the following examples of what might satisfy a court that it is not reasonable to treat the fact an offence is a domestic violence offence as an aggravating factor because of the exceptional circumstances of the case.

Examples of exceptional circumstances —

1. the victim of the offence has previously committed an act of serious domestic violence, or several acts of domestic violence, against the offender
2. the offence is manslaughter under the Criminal Code, section 304B.[352]

Requirement to give reasons for departure

The Council also gave considerable thought to legislating a requirement to provide reasons for departing from the scheme. This would be in addition to the requirement for a court to give reasons when imposing a sentence of imprisonment.[353]

Ultimately, the Council concluded this is unnecessary given that the model preferred is presumptive and courts will be required to find grounds to depart in circumstances where they decline to make a declaration. Where a sentencing judge does not state their reasons for departing, in the Council's view, this would be an appealable error.

Recommendation: Grounds for departure

10. A court should be permitted to decline to make a declaration where the court is satisfied this is 'in the interests of justice'.

18.7 Why statutory guidance is required

18.7.1 Issues

As discussed in Chapter 3, there is currently limited statutory guidance in Part 9A of the PSA regarding when an SVO declaration should be made in circumstances where this is discretionary.

348 [2016] QCA 131.
349 Ibid [43].
350 *R v Tootell; Ex parte A-G (Qld)* [2012] QCA 273, [24] (Holmes and Fraser JJA and Henry J agreeing), referring to *R v Quick; Ex parte A-G (Qld)* (2006) 166 A Crim R 588; [2006] QCA 477; *Griffiths v The Queen* (1989) 167 CLR 372; *R v Simpson* (2001) 53 NSWLRC 704; *Baker v The Queen* (2004) 223 CLR 513.
351 Ibid [24].
352 PSA (n 11) s 9(10A).
353 Ibid s 10. This section further states that a sentence is not invalid merely because of the failure of the court to state its reasons; but a failure to do so may be considered by an appeal court if the sentence is appealed.

Pursuant to section 161B(4) of the PSA a declaration can be made for any offence if it features 'serious violence against another person' or 'resulted in serious harm to another person'. This provision has formed part of the scheme since its commencement in 2007.

In 2010, additional guidance was introduced into section 161B(5) of the PSA which requires a sentencing court to treat the use or attempted use of violence against a child under 12, or that caused the death of a child under 12, as an aggravating factor when deciding whether to declare an offence of which an offender is convicted to be a conviction of a serious violent offence. The primary objective of this change was 'to strengthen the penalties imposed upon … offenders who commit violence upon a young child and/or who cause the death of a young child' and to 'ensure that genuine regard is had to the special vulnerability of these young victims'.[354]

In section 3.4.3, the reasons commonly referred to for making a discretionary declaration and those used as a basis for declining to do so based on the Council's analysis of select sentencing remarks over a 2-year period (1 January 2019 to 28 February 2021) were compared. Factors referred to in support of making a declaration included:

- the protracted nature of the violence, and degree of violence used;
- the involvement of a vulnerable victim;
- the use of a weapon;
- the offence was premediated and/or pre-planned;
- the nature and extent of the injuries caused;
- the offender had a serious and relevant criminal history;
- the absence of genuine evidence of rehabilitative prospects;
- the offending occurred while the offender was on parole and/or a suspended sentence;
- the need for protection of the public and/or adequate punishment.

Conversely, reasons given for declining to make a declaration when this was suggested as open by the prosecution included:

- the one-off or limited nature of the violence used;
- the offence was not 'outside the norm';
- the offender's youth;
- the attack was opportunistic and unplanned;
- it would be disproportionate to the offender's overall offending/to avoid a 'crushing' sentence;
- the limited or absence of a relevant criminal history;
- the presence of mental health issue;
- admissions made and cooperation with the investigation;
- the need for supervision and to promote rehabilitation in the interests of community safety.

It is clear that sentencing courts, in the proper exercise of their discretion, take a range of relevant considerations into account when determining if a declaration should be made under the current scheme. This involves consideration of a range of factors relevant both to the offence and offender.

The presumptive model supported by the Council will require a court to consider both:

- Whether it is in the interests of justice for a declaration not to be made (thereby no longer requiring the prosecution to make submissions regarding the making of a discretionary declaration); and
- If a declaration is made, where within the specified range (50–80%) parole eligibility should be set.

These two key decisions will likely benefit from the provision of statutory guidance to a court in exercising its discretion.

18.7.2 Approach in other jurisdictions

As discussed in section 18.5.2, different jurisdictions approach departure from MNPP schemes differently, with some embedding the requirements within the legislation, and others within case law.

Table 22 provides a summary of whether jurisdictions have adopted statutory criteria when allowing for departure from the relevant sentencing schemes.

354 Queensland, *Parliamentary Debates*, Legislative Assembly, 3 August 2010, 2308–9.

Table 22: Table comparing jurisdictions' statutory guidance

Statutory criteria	No statutory criteria
Victoria — statutory mandatory minimum sentences and minimum NPP for category 1 and 2 offences	Northern Territory — minimum non-parole period for certain sexual and drug offences and offences against persons under 16 years of age
SA — Serious repeat offenders provisions	Victoria — standard sentences and MNPPs for 12 prescribed offences
SA — Serious offences against the person	NSW — standard non parole period scheme
SA — Mandatory minimum non-parole periods	New Zealand — Three Strike sentencing scheme

For example, in South Australia, a court, in fixing a non-parole period in respect of an offence for which a mandatory minimum non-parole period applies, may fix a shorter non-parole period if there are exceptional circumstances. Section 48(3) of the *Sentencing Act 2017* (SA) identifies examples of exceptional circumstances as including:

> (a) the offence was committed in circumstances in which the victim's conduct or condition substantially mitigated the offender's conduct;
>
> (ab) the offence was committed in circumstances of family violence (being circumstances in which the offender, or a member of the offender's family, was a victim of family violence committed by the victim of the offence);
>
> (b) if the offender pleaded guilty to the charge of the offence — that fact and the circumstances surrounding the plea;
>
> (c) the degree to which the offender has cooperated in the investigation or prosecution of that or any other offence and the circumstances surrounding, and likely consequences of, any such cooperation.

This is presented in the form of a non-exhaustive list.[355]

In comparison, in Victoria, there is no statutory guidance provided under section 11A of the *Sentencing Act 1992* (Vic) for the purposes of a court determining if it is in the interest of justice to depart from the minimum non-parole periods specified under the standard sentence offence scheme.

18.7.3 Stakeholder views

Stakeholders expressed a range of views about whether the current guidance provided under Part 9A of the PSA and through case law was sufficient.

FACAA, for example, favoured there being 'clear guidance as to what a Serious Violent Offence is' in addition to a 'clear list of offences'.[356] As discussed in Chapter 13, the need for clearer guidance for courts in applying the scheme was also raised by some victims during consultation sessions.

In contrast, LAQ pointed to the developed body of case law on the scheme's application as being 'sufficient to provide guidance to the Courts and legal practitioners as to when a declaration ought to be made'.[357] In supporting retention of a broad discretion, it pointed to the integrated approach to sentencing endorsed by the High Court in *Markarian v The Queen*,[358] as this applied to the making of an SVO declaration, and guidance provided in several Court of Appeal cases since the scheme's commencement.[359]

Legal Aid Queensland concluded that based on this existing case law and the importance of judicial discretion 'to allow courts to impose sentences which are appropriate and take into account the unique facts, aggravating and mitigating features which apply to each case':

> The discretion to make an SVO declaration is an inherent part of the integrated approach to sentencing, and the provisions contained in s 9 PSA (and more broadly Part 2 PSA) provide a comprehensive source of considerations.[360]

Participants in expert interviews also expressed varied views on whether more statutory guidance was required. Some interviewees considered the guidance currently provided was sufficient and were concerned that anything

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355 The words used in this section are 'without limiting subsection (2)(b) [which allows for departure if there are exceptional circumstances, or in the circumstances (if any) prescribed by regulation], exceptional circumstances may include the following': *Sentencing Act 2017* (SA) s 48(3).

356 Submission 4 (Fighters Against Child Abuse Australia) 15–16.

357 Submission 13 (Legal Aid Queensland) 10.

358 (2005) 228 CLR 357.

359 This included statements made by Justice Fryberg in *Eveleigh* (n 75) 430–1 [111] and by the Court of Appeal in the subsequent cases of *McDougall & Collas* (n 75) 96–7 [19], [21]; *R v Riseley; ex parte A-G (Qld)* [2009] QCA 285; *R v Murray* [2012] QCA 68; and *Free* (n 60).

360 Submission 13 (Legal Aid Queensland) 12.

further would make the scheme operate too rigidly and discretion would be lost.[361] Continued reliance on case law was also seen as preferable because every case is different.[362]

Others saw some benefit in having access to additional assistance and guidance, such as by specifying the circumstances when an SVO should be made with examples provided including that the offence involved violence causing grievous bodily harm or other serious injury to a victim, involved cruelty or sadistic elements, or was committed in pursuit of a vendetta or vigilante action or with a terrorist or political aim. Participants also raised that if guidance is provided, it should not be too prescriptive.

During consultation, legal stakeholders identified other concerns, including that legal practitioners and courts might tend to just focus on the factors listed rather than giving broader consideration to all the circumstances of the case. The provisions of the *Youth Justice Act 1992* (Qld) regarding a child's release from detention were referenced in this regard as they are quite broadly framed. Section 227 of that Act provides:

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

Stakeholders referred to many of the factors recommended by the Council (see section 18.7.4).

Another suggestion made was that if criteria were adopted, the factors listed might usefully include reference to the availability of programs in custody and in the community. It was noted that Queensland is a geographically large State with a dispersed population and programs, where available, are not accessible in all correctional facilities or in all communities. In this context, it is useful for submissions to be tailored around an offender's individual circumstances. The Council's views are discussed in section 18.7.4.

18.7.4 Options considered and Council view

Need for additional legislative guidance

The Council considered three options for reform:

- Option 1: Not to legislate further additional guidance on the making of a declaration on the basis that Court of Appeal decisions such as *Free*[363] and *McDougall and Collas*[364] provide sufficient guidance to courts as to when to make a discretionary SVO declaration that could be applied, in a modified way, to the new presumptive scheme.
- Option 2: To legislate a broad non-exhaustive list of statutory criteria to direct courts to specific matters listed in section 9 that are of particular relevance in applying the scheme.
- Option 3: To legislate a more narrowly framed non-exhaustive list of criteria that particularises specific examples of cases in which it might be appropriate to set parole eligibility at the lower end of the prescribed range, or to depart on the basis this is in the interests of justice.

The Council supports Option 2 to legislate a broad non-exhaustive list of statutory criteria on the basis that:

- It will promote consistency of approach by courts when exercising their discretion as to where parole eligibility should be set and determining if it is in the interests of just to depart, while recognising the relevance of these factors and the weight placed on them will vary depending on the individual circumstances of the case.
- It will provide greater transparency to victims and the broader community about the types of factors courts will be required to consider when applying the scheme or deciding to depart from it, thereby serving an important symbolic and communicative function.
- By listing some factors that are personal to the offender, it will promote a better understanding by victims and the broader community that a decision made by a sentencing judge not to declare an offence as being a 'serious offence' may be for reasons other than that the objective seriousness of the offence did not warrant a declaration being made.

361 For example, subject-matter expert interview I15.
362 For example, subject-matter expert interview I38.
363 *Free* (n 60).
364 *McDougall and Collas* (n 75).

- It will preserve the existing statutory guidance contained in section 9 and other provisions of the PSA, while directing courts to take into account specific factors considered to be of most relevance when applying the scheme.[365]

A set of broadly framed and non-exhaustive considerations listed to guide the court's determination has the benefit of still allowing for the development of case law and for circumstances not otherwise identified forming a basis to depart or set parole eligibility towards the lower end of the identified range. This acknowledges that the circumstances in which offences are committed are infinitely various, as are factors personal to the offender.

Factors to be considered by a court under the scheme

The Council recommends that factors to be considered by a court under the scheme include:

(a) the nature and seriousness of the offence, including any harm done to a victim, and circumstances in which the offence was committed, including any aggravating factors;
(b) the culpability of the offender;
(c) whether the offender has good prospects of rehabilitation, whether by reason of the offender's age or otherwise;
(d) the nature and extent of any cooperation with the investigation or prosecution of that or any other offence and the circumstances surrounding, and likely consequences of such cooperation;
(e) if the offender pleaded guilty to the charge of the offence or offences — that fact and the circumstances of the plea;
(f) the risk of serious harm to members of the community and the need to protect members of the community from that risk;
(g) any other relevant circumstance.

The Council recommends these factors should serve a dual purpose:

1. To guide the court in deciding if it is in the interests of justice to decline to make a declaration (meaning a court can set parole eligibility below the statutorily prescribed lower limit of 50%).
2. On making a declaration, in deciding where parole eligibility should be set within the prescribed range of 50–80 per cent.

Given the importance of community protection as a primary objective of the scheme, the Council recommends the inclusion of a specific factor regarding the assessed risk of serious harm to members of the community and the need to protect members of the community from that risk as a relevant consideration. The suggested wording to be adopted is based on similar considerations listed in section 163(4) of the PSA as relevant to the assessment of whether an offender is a 'serious danger to the community' for the purposes of making an indefinite sentence.

The inclusion of a broad 'any other relevant circumstance' factor will allow for any other matters that are not anticipated in advance, including because they are novel or arise infrequently, to be taken into account.

The Council also considered including a specific criterion regarding an offender's drug dependency, which would only apply in cases of serious drug offences. However, as the Council decided that the reformed scheme would only apply to offenders convicted of the listed serious drug offences sentenced to 10 years or above (see Recommendation 8), adopting this criterion is not recommended.

The Council does not recommend that the availability of programs in custody and in the community be expressly referenced as a factor a court must consider as was suggested by some stakeholders. The Council's concern is that by listing this as a consideration separate to an offender's rehabilitative prospects, it might place some offenders at a disadvantage, including those living in regional areas of the state, and cause delays in having matters finalised if a view is taken that eligibility and suitability assessments need to be conducted prior to sentence. The Council further acknowledges the question of what programs might benefit an offender might not necessarily be able to be assessed at the time of sentence and programs offered might change over time. However, the Council considers it important that courts have access to information of a general nature on the types of programs and interventions available, as discussed in section 18.8, to inform their decision-making.

Specific legislative examples not recommended for inclusion in statutory guidance

The Council considered whether some factors — particularly those relevant to the assessment of an offender's culpability or factors in personal mitigation — should be set out in further detail given the potential for a presumptive scheme to unfairly disadvantage Aboriginal and Torres Strait Islander defendants, other offenders from a

365 For example, the relevance of a guilty plea and any cooperation given to law enforcement authorities: PSA (n 11) ss 13, 13A–13B.

background of disadvantage or offenders who have been the victim of domestic and family violence perpetrated by the person they committed the offence against.

The impacts of a background of social deprivation have been discussed in a number of High Court decisions, including *Bugmy v The Queen*[366] and *Munda v Western Australia*,[367] as having potential to mitigate the sentence imposed because of their relevance to the assessment of an offender's moral culpability. However, it has been recognised such factors must not overwhelm the proper consideration of what is a just sentence in the circumstances of the case by resulting in a penalty that is disproportionate to the gravity of the offence. Munda's case, for example, involved a violent assault leading to the death of the offender's de facto partner.

The Council recognises that a background of deprivation and disadvantage, or other mitigating circumstances personal to the offender, may not be sufficient on their own to displace the presumption in light of the seriousness of the offending. This assessment is best made on a case-by-case basis taking into account all the circumstances of the offence and of the offender.

Another example drawn from section 9(10A) the PSA is that the victim of the offence previously committed an act of serious domestic violence, or several acts of domestic violence, against the offender. This circumstance is relevant in the context of this provision as it reduces an offender's moral culpability and provides a reason that a court may find it is not reasonable to treat domestic violence as an aggravating factor for the purposes of sentencing.

However, there is a myriad of factors relevant to culpability that may impact directly on a court's assessment of how serious a particular example of a 'serious offence' might be in a given case. Some of these factors are aggravating (meaning they indicate a higher level of culpability and offence seriousness), while others are mitigating (meaning they tend to reduce an offender's culpability).[368]

Listing only some examples of these factors, in the Council's view, would be unhelpful in limiting the circumstances that might be found relevant to assess whether it is in the interests of justice to depart and the court's consideration of where parole eligibility should be set. There is a risk that too much weight will be placed on the examples provided rather than relying on the application of the existing common law to identify mitigating circumstances and factors relevant to an offender's culpability in support of departure. For these reasons, the Council considers it would not be useful to provide further examples within legislation to particularise this or other relevant factors.

Retention of existing aggravating factor under s 161B(5)

The Council recommends the retention of section 161B(5) in recognition that children are in a position of particular vulnerability and offences of violence or resulting in their death committed against them warrant special condemnation. While rarely applied, the Council considers this an important factor to retain in recognition of children's defencelessness and special vulnerability.

This special level of defencelessness and vulnerability was the basis for the Council similarly recommending that children's vulnerability and defencelessness be treated as an aggravating factor by a court in determining the appropriate sentence for offences resulting in the death of a child in its 2018 report on *Sentencing for Criminal Offences Arising from the Death of a Child*.[369]

Recommendation: Guidance to courts on making of a declaration and setting of parole eligibility

11. Section 161B(5) of the *Penalties and Sentences Act 1992* should be retained under the new scheme with any necessary changes to reflect the new form of declaration. This section provides that in deciding whether to make a discretionary declaration under sections 161B(3) or (4) of the Act, if an offender is convicted on indictment of an offence —

a. that involved the use, counselling or procuring the use, or conspiring or attempting to use, violence against a child under 12 years; or

b. that caused the death of a child under 12 years;

366 (2013) 249 CLR 571.
367 (2013) 249 CLR 600.
368 In some cases, although the presence of a factor such as an offender's mental illness might lower an offender's culpability, it may also suggest a stronger need for community protection due to the risk posed by the offender of reoffending: *Veen* [No 2] (n 8) 476–7 (Mason CJ, Brennan, Dawson and Toohey JJ). As to the relevance of an offender's mental illness for the purposes of sentencing, see *R v Goodger* [2007] QCA 377; *R v Yarwood* [2011] 220 A Crim R 497 (adopting the principles set out in *R v Verdins* (2007) 16 VR 269); and *R v Stephens* [2017] QCA 173.
369 Queensland Sentencing Advisory Council, *Sentencing for Criminal Offences Arising from the Death of Child* (Final Report, 2018) Recommendation 1.

the sentencing court must treat the age of the child as an aggravating factor in deciding whether to declare the offender to be convicted of a serious violent offence.

12.1. Additional statutory guidance should be provided to courts to guide whether a declaration should be made and, on a court determining it appropriate to make such a declaration, where the parole eligibility date should be fixed.

12.2. The guidance provided to courts should be cast in broad terms in the form of a non-exhaustive list of matters to be considered, including:

a. the nature and seriousness of the offence, including any harm done to a victim, and circumstances in which the offence was committed, including any aggravating factors;

b. the culpability of the offender;

c. whether the offender has good prospects of rehabilitation, whether by reason of the offender's age or otherwise;

d. the nature and extent of any cooperation with the investigation or prosecution of that or any other offence and the circumstances surrounding, and likely consequences of such cooperation;

e. if the offender pleaded guilty to the charge of the offence or offences — that fact and the circumstances of the plea;

f. the risk of serious harm to members of the community and the need to protect members of the community from that risk;

g. any other relevant circumstance.

18.8 Information available to courts to inform decision-making

18.8.1 Issues

In Queensland, there is no general requirement for a pre-sentence report (PSR) to be prepared when a court is sentencing an offender.

Pre-sentence reports ('PSRs') are documents prepared for a court, normally at the court's request, to provide information about an offender and to assist the court in determining the most appropriate form of sentence or other disposition for an offender.[370] They may be either mandatory or discretionary, but are generally sought to supplement other information before the court about an offender's background or the circumstances of the offence.[371] They are additional to any reports that may be obtained by the defence in support of a plea in mitigation[372] (which are also sometimes referred to in Queensland by legal practitioners as 'pre-sentence reports').

Section 344 of the CSA provides that a court may request a PSR to inform sentencing. Section 15 of the PSA states that a court may receive any information that it considers appropriate to enable it to arrive at the appropriate sentence, including a PSR.

Queensland Corrective Services ('QCS') is required to give the report to the court within 28 days and provide copies that the court must then provide to the prosecution and the person's lawyers.[373] A PSR is taken to be evidence of the matters contained in it and cannot be objected to on the basis that the evidence contained in it is hearsay.[374]

These reports are not commonly requested or prepared with respect to offenders who are sentenced to imprisonment in the higher courts.

Specialist medical or psychological reports commissioned by the defence are more commonly submitted. These reports commonly report on an offender's personal background as well as any medical or psychological conditions

370 Arie Freiberg, *Fox and Freiberg's Sentencing: State and Federal Law in Victoria* (Lawbook Co, 3rd ed, 2014) 173 [2.190].
371 Ibid.
372 Ibid.
373 CSA (n 56) ss 344(4)–(5).
374 Ibid s 344(10).

the defendant suffers from. In some cases, they may also express a view about the defendant's assessed risk of reoffending.

Different provisions apply to indefinite sentences made under Part 10 of the PSA. In this case, there is a requirement under section 166A of the Act that a court order QCS to prepare a report about the offender to be provided within a stated period. The court may also order that QCS provide or obtain any other report that the court considers appropriate to impose the proper sentence.[375]

The making of an indefinite sentence, in contrast to the SVO scheme, is focused on whether the offender is 'a serious danger to the community' because of:

(i) the offender's antecedents, character, age, health or mental condition; and

(ii) the severity of the qualifying offence; and

(iii) any special circumstances.[376]

While an offender's prior criminal history and any risk that might pose is a relevant consideration,[377] the SVO declaration is specific to the offence committed, rather than to the offender.[378]

18.8.2 Approach in other jurisdictions

There are a number of circumstances in which pre-sentence reports must be ordered by a court in other jurisdictions. These are not unique to MNPP and SNPP schemes, but most usually apply to the making of specific types of orders. For example:

- Western Australia — a court considering imposing a pre-sentence order or intensive supervision order, must order a pre-sentence report.[379]
- NSW — a court must order a 'Sentence Assessment Report' prior to ordering an intensive correction order, or before imposing a home detention order or community service work condition.[380]
- Tasmania — a court must order a pre-sentence report if it is considering making a home detention order.
- Northern Territory — a court must receive a pre-sentence report if it wishes to make a community-based order,[381] or a community custody order.[382]
- ACT — a court must order a pre-sentence report before sentencing an offender to community service work or a rehabilitation program under a good behaviour order.[383]
- Victoria — a court must order a pre-sentence report if it is considering making a community correction order.[384]

18.8.3 Stakeholder views

There were mixed views about what information should be provided to inform the making of a declaration, as well as what form this should take.

The Queensland Sexual Assault Network was concerned about the limited information available to a court at the time of sentence about the level of risk an offender poses and the lack of independence of the reports typically prepared and submitted by the defence lawyers.[385] On this basis, it recommended that amendments be made to the scheme to provide for the provision of independent pre-sentence reports to assist the court in determining risk and whether an SVO declaration should be made.[386]

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375 PSA (n 11) s 166A(3). A 'report' is defined to include an assessment of, or information about, the prisoner: s 166A(4).
376 Ibid s 163(3)(b). The court must further be satisfied that the *Mental Health Act 2016* (Qld) Chapter 5, Part 3, does not apply: s 163(3)(a).
377 See *R v Kampf* [2021] QCA 47 and discussion of the relevance of criminal history in Queensland Sentencing Advisory Council, *Analysis of Key Queensland Court of Appeal Decisions and Select Sentencing Remarks* (Background Paper 3, 2021) sections 2.2 and 2.3 ('*Background Paper 3*').
378 This point was made by Legal Aid Queensland in its submission.
379 *Sentencing Act 1995* (WA) s 20.
380 *Crimes (Sentencing Procedure) Act 1999* (NSW) s 17B.
381 *Sentencing Act 1995* (NT) s 39B.
382 Ibid s 48B.
383 *Crimes (Sentencing) Act 2005* (ACT) s 41.
384 *Sentencing Act* (Vic) (n 231) s 8A.
385 Submission 17 (Queensland Sexual Assault Network) 2.
386 Ibid 3.

FACAA submitted that the 'best indicator of a person's future behaviour is their past behaviour so if an offender has any criminal history it needs to be assumed that they will re-offend' for the purposes of the scheme.[387]

Full Stop Australia noted that: 'in circumstances of domestic and family violence … lack of known offending does not necessarily mean that there is no history of domestic violence'. It expressed similar concerns about the use of 'good character' evidence being misused to minimise the accountability of perpetrators who have committed serious sexual, domestic and family violence offences'.[388]

The Parole Board Queensland also submitted that there was an opportunity for better information to be made available to courts to inform sentencing.[389] To facilitate this, it recommended that QCS provide regular updates to the courts about the availability of programs and interventions in custody. It considered this would be beneficial for multiple reasons:

> In addition to being relevant to the formulation of sentence, this information would permit Judges, should they consider it appropriate, to make comments about the desirability of a prisoner completing a specific program or intervention prior to being released on parole. These comments would be informative, not only for the prisoner, but also for the Board.[390]

The Board raised concerns about the availability of programs noting the 'Board's perception is that demand for places on programs currently far outstrips available places'.[391] It raised specific concerns about 'the very limited offering of programs focused on domestic and family violence offending' as well as 'the current absence of a moderate or high intensity program targeting other offences of personal violence'.[392] Participation in group programs, it further commented, 'is often problematic for prisoners who are victims of child sexual abuse'.[393]

ATSILS expressed support for pre-sentence reports to be prepared to inform the sentencing court about the programs realistically available to the prisoner while in the prison system as opposed to those programs and supervision available post-release.[394] It submitted this would have the benefit that 'decisions made whether or not … a much longer term of imprisonment would serve the purposes of personal deterrence, denunciation or rehabilitation would be evidence based'.[395]

During consultation, there was a general view that program availability was often difficult to ascertain at the time of sentence. However, equally there were concerns that if individual assessments were required to be obtained prior to sentence about an offender's eligibility and suitability for a specific program, it might lead to delays in having matters finalised. Endeavouring to predict offender risk years in advance of the person potentially being eligible for parole was also viewed as problematic, with the view being risk is best assessed at the time the offender is reaching their parole eligibility date.

In commenting on the legislated 'trigger' for a mandatory declaration, LAQ raised issues regarding the assessment of reoffending risks with risk assessment tools 'because the seriousness of offending and risks of re-offending are often mutually exclusive concepts subject to the nature of the offending'.[396] In the context of sexual offending, it noted that prisoners' risk profile and danger to the community can be high in circumstances where they refuse to engage in treatment or to admit responsibility for their offending, despite receiving a sentence of less than 10 years and therefore not being subject to mandatory declaration.[397]

During expert interviews, a number of participants echoed these concerns, in particular regarding the availability of programs and other interventions to address non-sexual violent offending, as well as offending behaviour in the context of domestic and family violence. Further issues were raised about completion rates of available sexual offending programs due to long waitlists, as well as the limited availability of programs and interventions in regional areas. Some participants considered that it would be useful for sentencing courts to have more information about the availability of programs and interventions offered so this could inform sentencing.

There was general support by all stakeholders, including those representing the views of victims, survivors and their families, for suitable programs and interventions being made available to offenders in custody and in the community. A number commented on the importance of addressing factors associated with offenders' risk of reoffending given the scheme's primary objective of community protection.

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387 Submission 4 (Fighters Against Child Abuse Australia)11.
388 Submission 7 (Full Stop Australia) 10.
389 Submission 14 (Parole Board Queensland) 2.
390 Ibid.
391 Ibid 3.
392 Ibid.
393 Ibid.
394 Submission 20 (Aboriginal and Torres Strait Islander Legal Service) 4.
395 Ibid.
396 Submission 13 (Legal Aid Queensland) 39.
397 Ibid.

18.8.4 Council view

The Council acknowledges that predicting the level of risk an offender might pose to the community on their release from custody and identifying programs that may assist in reducing that risk at time of sentence is fraught with difficulty. Risk factors are both static and dynamic, and even when undertaken with validated tools, the assessment of an individual's risk of committing further serious offences is an imperfect exercise.

While specialist reports in sentencing fulfill an important role, this information should only be one of many factors considered by a court in determining the appropriate sentence and, under the reformed scheme, whether it is in the interests of justice to depart.

From time of sentence to the parole eligibility date, a number of factors may change, including the offender's willingness to acknowledge responsibility for their offending and engage with treatment and support services.

In the Council's view, for the purposes of an offender's ongoing management, their risk to the community is best assessed at the time they become eligible for release on parole. For the reasons stated above and the potential to lead to court delays, the Council does not support the introduction of a mandatory requirement for a court to order a pre-sentence report prior to a declaration being made.

However, the availability of programs and support in custody and in the community is a highly relevant consideration to courts in sentencing. As an example, the unavailability of programs or other required services or interventions offered in custody aimed at reducing an offender's risks of reoffending may mean that sentencing the offender to a long period of detention before being eligible for parole may be unlikely to achieve community protection in the long-term.

The Council acknowledges that the availability of programs will change over time. For this reason, consistent with its views about risk assessments, program and intervention availability should only ever be one of many factors for a court to consider.

The Council recommends that Queensland Corrective Services should consider how the information made available to legal practitioners and sentencing courts about available programs and other forms of interventions and support might be enhanced to better inform sentencing decisions. This should include information about programs and interventions typically offered to offenders with specific risk and needs profiles similar to those targeted under the new scheme as well as the availability of culturally safe programs and interventions for Aboriginal and Torres Strait Islander offenders.

Recommendation: Information available to courts to inform decision-making

13. Queensland Corrective Services should consider how the information made available to legal practitioners and sentencing courts about available programs and other forms of interventions and support might be enhanced to better inform sentencing decisions, including:

a. the suite of programs and other interventions currently available to offenders both in custody and in the community and what types of issues and needs these are targeted at;

b. what programs and interventions are typically offered to offenders with specific risk and needs profiles that might be similar to those targeted under the new scheme, including the availability of culturally safe programs and interventions for Aboriginal and Torres Strait Islander offenders.

18.9 A new schedule of offences

18.9.1 Retention of a separate schedule of offences and repeal of discretionary criteria

As discussed in Part A of this report, Schedule 1 currently serves a dual purpose:

1. To guide the court when determining if an SVO declaration can, or must be made in accordance with sections 161A–161C of the Act.
2. As a basis under s 156A of the Act for requiring courts to order a prison sentence imposed for an offence to be served cumulatively with any other term of imprisonment the person is liable to serve where certain

> criteria are met (including where the person committed a Schedule 1 offence while serving a prison sentence or while on parole).[398]

This dual purpose means that a number of offences are included in the schedule that do not involve violence. Further, the schedule includes a number of offences with low maximum penalties. The Council's data analysis found that only 15 offences in Schedule 1 received an SVO declaration during the data period. This finding is due, in part, to the dual purpose of Schedule 1 and that some listed offences are likely to have been included for the purposes of the operation of section 156A. However, as noted in Chapter 16, this finding also suggests that many offences currently in Schedule 1 may not be relevant, suitable or appropriate to be included in the reformed scheme.

The SVO scheme can also be applied in a discretionary way in circumstances where a court is sentencing an offender for a non-scheduled offence or sets the sentence below 5 years for a scheduled offence. The criteria that guide the making of a declaration in these circumstances are that the offender has been:

> (a) convicted on indictment of an offence —
>
> > (i) that involved the use, counselling or procuring the use, or conspiring or attempting to use, serious violence against another person; or
> >
> > (ii) that resulted in serious harm to another person; and
>
> (b) sentenced to a term of imprisonment for the offence.[399]

This allows a court to make a declaration both in respect of a conviction for a Schedule 1 offence where the sentence of imprisonment falls under the 5-year threshold, as well as for a non-scheduled offence of any length where a sentence of imprisonment is imposed.

As discussed in Part B of this report and in section 18.10, this provision has been very rarely used as a basis for making a declaration and even less frequently applied to an offence not listed in Schedule 1. The Council found only one case in which this provision was relied on to make a declaration for a non-scheduled offence.

Approach in other jurisdictions

Most other jurisdictions that have some form of SNPP or MNPP scheme apply these provisions to offences either listed in definitional provisions established for the purposes of their application to these schemes, or in a separate schedule of offences.

Examples from other jurisdictions are as follows:

- Commonwealth — defines a 'minimum non-parole period offence' for the purposes of national security offences in s 19AG of the *Crimes Act 1914* (Cth). 'Child sexual abuse offences' are defined in section 3 of the *Crimes Act*, and the minimum penalties for those offences are listed in a Table in section 16AAA of the Act.
- NSW — the offences carrying an SNPP (and the SNPP that applies) are set out in a Table to Part 4, Division 1A of the *Crimes (Sentencing Procedure) Act 1999* (NSW).
- Northern Territory — 'specified offences' subject to minimum non-parole periods are defined in s 55(3) of the *Sentencing Act 1995* (NT) and offence provisions in the Criminal Code and *Misuse of Drugs Act 1990* (NT) to which the scheme applies are listed. Section 55A of the same Act also clearly sets out the offences to which fixed non-parole periods for offences against persons under 16 years are to apply.
- South Australia — definitions of a 'serious offence' or a 'serious sexual offence' for the purposes of the serious repeat offenders provisions are set out in s 52 of the *Sentencing Act 2017* (SA). A separate minimum non-parole period scheme applies to a 'serious offence against the person' but in this case, specific offences are not listed. Instead, a 'serious offence against the person' is defined as 'a major indictable offence (other than an offence of murder) that results in the death of the victim or the victim suffering total incapacity, a conspiracy to commit such an offence or aiding, abetting, counselling or procuring the commission of such offence.[400] The term 'major indictable offence' is further defined in s 5 of the *Criminal Procedure Act 1921* (SA) to mean 'any indictable offence except a minor indictable offence'. Minor indictable offences include offences for which the maximum term of imprisonment does not exceed 5 years, as well as some listed offences for which the maximum penalty exceeds 5 years, including recklessly causing harm to another.
- Western Australia — mandatory minimum sentences are provided for within each relevant offence provision to which they apply in the Criminal Code (WA), *Misuse of Drugs Act 1981* (WA) and the

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398 PSA (n 11) s 156A. The other circumstances are where the offence is committed while the person was at large after escaping from lawful custody under a sentence of imprisonment, or while on a leave of absence granted under the *Corrective Services Act 2000* (Qld) or the *Corrective Services Act 2006* (Qld).

399 PSA (n 11) s 161B(4).

400 *Sentencing Act 2017* (SA) s 47(12)(e).

Restraining Orders Act 1997 (WA). Offences subject to the post-sentence supervision order scheme are listed in a schedule to the *High Risk Offenders Act 2020* (WA).

- Canada — sets out the offences for which a court may delay release on full parole to offences set out in two schedules to the *Corrections and Conditional Release Act SC 1992,* which include long lists of Code offences, non-sexual violent offences, sexual violence offences, weapons offending and drug offences.
- United Kingdom — the most common approach in the United Kingdom to special sentencing schemes is to list the offences to which the various parole and sentencing schemes it has introduced apply in separate schedules. For example, a special type of sentence that applies to 'offenders of particular concern' applies to offenders convicted of an offence listed in Schedule 13 of the Sentencing Code (UK)[401] sentenced to imprisonment (excluding a life sentence or an extended determinate sentence). Provisions that govern the release on licence (parole) of certain violent or sexual offences are listed in Parts 1 and 2 of Schedule 15 of the *Criminal Justice Act 2003* (UK) — although their application is limited to offences for which a life sentence may be imposed.
- New Zealand — offences subject to the 'three strike' sentencing scheme are defined in s 86A 'definition of serious violent offence' in the *Sentencing Act 2002* (NZ), which lists 40 different offences against specific provisions of the *Crimes Act 1961*.

Stakeholder views

There were mixed views about whether a separate schedule of offences should be retained.

FACAA and Full Stop Australia supported there being a 'clearly defined list of offences' to promote consistency and transparency in the scheme's application.[402] LAQ also viewed the retention of a schedule as important to ensure the scheme 'remains within the scope and intent of the legislation'.[403]

The QLS's primary position was to abolish the scheme, submitting that there should not be a list of fixed offences and the court should instead have discretion to make a declaration where certain criteria were satisfied. However, should a separate schedule of offences be retained, it supported these being listed in a stand-alone schedule 'to provide clarity to the sentencing court, reduce the possibility of misinterpretation of the scheme's purpose, and so as not to unduly fetter the discretion of the sentencing court'.[404] LAQ supported this approach for similar reasons.[405] The SVO schedule, it submitted, 'should be for the sole purpose of identifying SVOs to preserve and clarify the purpose of the legislation'.[406]

Council view

The Council supports the establishment of a separate schedule that operates solely for the purposes of the new serious offences scheme. Under this proposal, the existing Schedule 1 would continue to apply for the purposes of section 156A.

In the Council's view, the dual purpose served by Schedule 1 is unhelpful and means offences are included in the schedule carrying very low maximum penalties and, in some cases, do not involve the use or threatened use of violence or result in serious harm. The Council's recommendations will ensure that the separate schedules exist only for a single purpose, and that the purposes of these separate schedules and the schemes to which they apply are clear.

By providing for a separate schedule to be created, it also allows a more targeted list of offences to be identified to apply to the new scheme, which will better align with its purposes and objectives.

The alternative approach of setting out broad criteria a court must apply when considering if an offence either meets the definition of being a 'serious offence' is not supported on the basis that it is too uncertain how these criteria would be applied and it would not promote transparency or consistency of approach. A clearly defined list of offences to which the new scheme is to be applied will also promote broader community understanding of the types of offences the scheme targets.

The Council also took into account the fundamental legislative principles that apply to the drafting of legislation in Queensland, which require that legislation has sufficient regard to the rights and liberties of individuals, including by reference to whether legislation 'is unambiguous and drafted in a sufficiently clear and precise way'.[407] The

401 *Sentencing Act 2020* (UK) — Parts 2 to 13 together are referred to as the 'Sentencing Code': s 1.
402 Submission 4 (Fighters Against Child Abuse Australia) and Submission 7 (Full Stop Australia).
403 Submission 13 (Legal Aid Queensland) 28.
404 Submission 12 (Queensland Law Society) 4.
405 Submission 13 (Legal Aid Queensland) 28.
406 Ibid.
407 *Legislative Standards Act 1992* (Qld) ss 4(1), (2) and (3)(k).

approach recommended by the Council will promote better consistency with this principle than setting broad criteria that may well be interpreted by courts differently.

Where an offender is convicted of a particularly serious offence not included in the schedule, a court will retain the ability to fix an appropriate non-parole period and defer parole eligibility if this is warranted under the general provisions that apply to parole. For this reason, and taking into account the issues outlined above, the Council can see no benefit in retaining section 161B(4) of the PSA, or introducing a similarly drafted provision for the purposes of the new scheme. This issue is discussed further in section 18.10.

Recommendation: Separate stand-alone schedule of offences

14. A new, stand-alone schedule of offences to which the new scheme applies should be introduced. This schedule should be separate to that which exists and is applied for the purposes of section 156A of the *Penalties and Sentences Act 1992* (Qld) (Cumulative sentences of imprisonment must be made in particular circumstances).

18.9.2 Criteria for the reformed scheme

As discussed in Chapter 2 of this report, offences were originally included in the SVO scheme without any criteria guiding their inclusion. Establishing a more targeted list that applies for the purposes of the reformed scheme will contribute to greater certainty about the scheme's objectives, intended focus and application.

The Council suggests that the offences captured under the reformed scheme should be more targeted, with a focus on offences:

- carrying significant maximum penalties (most commonly carrying a maximum penalty of 14 years or more, including life imprisonment);
- which are triable only on or most commonly tried on indictment;
- which involve the use of serious non-sexual and sexual violence against the person or create conditions in which serious harm may be caused to another;
- which can involve a circumstance of aggravation and/or be committed against a vulnerable victim, and involve a special risk of serious consequences to the victim or the community (see Table 23 which lists these).

The criteria adopted are based on those used by the NSW Sentencing Council for the purposes of determining which offences should be subject to a standard non-parole period — with required modifications taking into account the different nature and purposes of these schemes.[408]

Further, the Council took into account other methodologies that have been applied to rank offences or set baseline or standard sentences for offences based on their assessed seriousness. This included work undertaken by the Victorian Sentencing Council[409] and an earlier study by Fox and Freiberg that took into account factors, including degrees of harm, culpability, whether an offence was ancillary, preparatory or an endangerment offence, whether an offence was an attempt offence, prior convictions and other aggravating circumstances, and court sentencing practices as relevant to considering what maximum penalties should apply to Victorian offences.[410]

As with the approach taken by many of these researchers and other advisory bodies,[411] the Council's view is that no criterion on its own should be determinative as to whether an offence is either included or excluded. The Council considered, however, that the involvement of serious non-sexual and sexual violence against the person or an offence creating conditions in which serious harm may be caused to another to be a paramount criterion in the assessment. In reaching a determination about an offence, a combination of most, but not all of the criteria will usually need to be taken into account. The assessment of which offences should be included or excluded therefore involved balancing the identified factors taking into account the Council's own views about the types of offences that should be captured under the scheme based on the type of conduct involved and the assessed seriousness of these offences.

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408 NSW Sentencing Council, *Standard Non-Parole Periods* (Final Report, December 2013) ('*NSW Sentencing Council SNPP Report*').

409 Victorian Sentencing Advisory Council, *Sentencing Severity for 'Serious' and 'Significant' Offences: A Statistical Report* (September 2011); Victorian Sentencing Advisory Council, *Baseline Sentencing* (Report, May 2012); Victorian Sentencing Advisory Council, *Sentencing Guidance in Victoria* (Report, June 2016).

410 Richard Fox and Arie Freiberg, 'Ranking Offence Seriousness in Reviewing Statutory Minimum Penalties' (1990) 23 *Australian and New Zealand Journal of Criminology* 165, 184.

411 See ibid 184–5; and *NSW Sentencing Council SNPP Report* (n 408) 10.

For example, an offence with a maximum penalty of 7 years should not be excluded solely on the basis that it is close to the bottom threshold of the presumptive operation of the reformed scheme, if it satisfies all or most of the other criteria. This approach recognises that the most serious examples of these types of offences will still potentially be subject to the scheme and the potential for changes to current sentencing practices over time.

Table 23: Criteria considered for offences to be included or excluded from a reformed scheme

Criteria	Reason for its inclusion
Criteria recommended by the Council	
The offence has a significant maximum penalty	A high maximum penalty is an indication of parliament's view of the seriousness of an offence. As views will vary about what will constitute a sufficiently high maximum penalty to justify an offence's inclusion in the scheme, and this is only one indicator of offence seriousness, the Council considers it is not helpful to adopt a fixed threshold of what will satisfy this criterion. This criterion should be considered alongside other factors, which will assist in determining seriousness.
The offence is triable only on indictment — or is most commonly dealt with in this way	Given that the scheme is only to be applied to sentences imposed in the District and Supreme Court that reach a certain threshold of seriousness (sentences of imprisonment of greater than 5 years), including offences in the new schedule that are most commonly dealt with summarily is not appropriate. The scheme should only apply to offences which are triable only on indictment, or are most commonly dealt with in this way.
Involve the use, or threatened use, of serious non-sexual and sexual violence against the person, and/or are offences that can result in, or create conditions in which, serious harm of a sexual or non-sexual nature can be caused to another person	The reformed scheme should target certain serious offences which involve the use or threatened use of serious violence against the person or that can result in significant harm being caused to victims and the broader community. This criterion ensures that only offences which involve violence against the person or create conditions in which serious harm can be caused are included in the scheme. It aligns with the current criteria that apply for the purposes of the making of a discretionary declaration under s 161B(4) that the offence of which the person is convicted: (i) involved the use, counselling or procuring the use, or conspiring or attempting to use, serious violence against another person; or (ii) resulted in serious harm to another person.
The offence can involve a circumstance of aggravation (e.g. victim age, use of weapons, injury to victim)	Some offences are aggravated by elements legislated within the offence (called 'aggravating circumstances') — for example, the offence of indecent treatment of a child is aggravated by the fact that a victim is under the age of 12, which is subject to a higher maximum penalty. Aggravating circumstances are an indication by parliament of what specific types of offending behaviour is to considered to be more serious and therefore subject to harsher penalties. Offences which have an aggravating circumstance may be suitable for inclusion, even in the 'simpliciter' form — for instance, indecent treatment of a child under 16. However, some offences may only be suitable for inclusion in their aggravated forms of offending — for example dangerous operation of a vehicle (simpliciter) would not be appropriate, however dangerous operation of a vehicle causing grievous bodily harm or death would be due to the serious harm caused to the victim. This criterion is also a reflection of the factors commonly present in discretionary declarations (see section 3.4.3), such as the use of a weapon. Targeting the aggravated form of an offence recognises that there are degrees of seriousness within offence categories and that only the most serious offences are appropriate for inclusion in the scheme. Another circumstance of aggravation which is indicative of a higher level of seriousness is a 'serious organised crime circumstance of aggravation' aimed at serious organised crime in Queensland and making offenders subject to a harsher penalty regime. Offences subject to this scheme include those that may be related to the illicit drug market and online child sex offending (including child exploitation material) which have been identified as organised crime threats in Queensland. The Council considers that offences which are capable of such an aggravation will typically be capable of the level of seriousness which is to be targeted by the reformed scheme.[412]
The offence may involve a vulnerable victim (e.g. a child, a person with a disability, or an elderly person)	The young or advanced age or disability of a victim may give rise to an aggravating circumstance in the way an offence is framed. In the context of the current SVO scheme, a court must treat the fact that an offence involved violence against a child under 12 years, or caused their death, as an aggravating factor when deciding whether a declaration should be made. This recognises that young children are in a special position of vulnerability. The inclusion of victim vulnerability as a separate stand-alone criterion, however, recognises that victim vulnerability is not always reflected in the establishment of separate aggravating circumstances or factors. It is appropriate in this circumstance that it be separately considered to ensure that offences committed against the community's most vulnerable are captured within the scheme and to denounce this form of offending. This criterion also aligns with the type of factors sentencing courts commonly have regard to when deciding whether to make a discretionary SVO declaration (see 3.4.3).

Table continued over page.

412 Offences capable of being charged as a 'serious organised crime' are listed in Schedule 1C of the *Penalties and Sentences Act 1992* (Qld) and are marked with a * throughout this section.

Criteria	Reason for its inclusion
Criteria recommended by the Council	
The offence involves special risk of serious consequence to the victim and/or the community	Whether an offence fulfils this category will depend on the context in which an offence is committed and the nature of the offence. For example, sexual offences committed against children have been recognised by other sentencing bodies as being 'offences of particular gravity and harm in both the short and long term' and '[t]he significant and long lasting harms' caused to victims of such offending are a matter 'of particular concern'.[413] Courts have developed 'an awareness of the violence necessarily involved in the sexual penetration of a child, and of the devastating consequences of this kind of crime for its victims', which has led to sentencing practices changing over time.[414] This criterion also applies to other types of offences which involve significant harm being caused to the broader community, including drug trafficking[415] and domestic violence-related offending.
Criteria considered by the Council but not recommended	
The offence is prevalent	While the NSW Sentencing Council considered prevalence an important factor in determining whether an offence should be included in the NSW SNPP scheme,[416] the Council's view is that past prevalence of an offence is not necessarily an indication of future prevalence. The application of this criterion might lead to objectively serious offences being excluded on the basis that they are rarely prosecuted. While the NSW's SNPP scheme features deterrence as a key purpose, making prevalence an important consideration, the Council's reformed scheme prioritises other purposes — primarily just punishment and denunciation. The University of Melbourne Literature Review found that 'there is evidence to suggest that the setting of non-parole periods does not achieve deterrence'.[417]
The offence is subject to a pattern of inadequate sentencing The offence is subject to a pattern of inconsistent sentences	A pattern of inadequate sentencing was a factor identified by the NSW Sentencing Council as being appropriate to include when considering offences that should be included in the SNPP scheme. The Council did not consider these criteria were appropriate for a reformed scheme as they are not consistent with the purpose of the reformed scheme (which is to ensure that the seriousness of the offences included in the scheme is recognised and a substantial minimum period of imprisonment is served in custody by an offender).
The offence has a significant 'fault' threshold	The Council considered whether there should be a threshold fault requirement, e.g. the intentional infliction of harm, rather than recklessness or negligence leading to this outcome. Generally, 'crimes committed intentionally are treated as graver in nature than those committed negligently, even though the physical effects are the same'.[418] Whether an offender intended, foresaw or was negligent as to the harm that might be caused by his or her actions, together with the harm actually caused, are relevant to the assessment of an offender's culpability. However, this assessment of culpability is unique to each case and excluding offences which have recklessness or negligence fault thresholds on this basis alone may exclude offences that cause a high level of harm committed by highly culpable offenders. The Council's view is that offences which cause serious injury or death should be included, regardless of the fault element, and it be left to judicial discretion to decide if the scheme should be departed from if it is not 'in the interests of justice' to make a declaration.
Current sentencing practices	Other states such as Victoria and NSW have undertaken separate research projects for the purposes of ranking offences based on their seriousness applying some of the factors listed above, as well as current sentencing practices.[419] The Council was unable to undertake a similar exercise due to the scale of such an undertaking and its complexity. One of the challenges in considering current sentencing practices as an indicator of assessed offence seriousness is that offences in Queensland are often quite broad in their scope compared to Victorian and NSW law, and capture a much wider range of conduct and offending. For example, while the offence of trafficking in a dangerous drug is a single offence in Queensland, in NSW, this is broken into different categories based on commerciality. The calculation of median sentences for Queensland-based offences therefore is unlikely to allow for gradations of seriousness to be reflected and could result in the seriousness of some types of offending within these broad offence categories being underestimated. This is because less serious forms of conduct for which offenders receive shorter sentences are typically the most common, impacting on the calculation of the median sentences for these offences. The Council, instead, has taken into account work undertaken by other sentencing bodies and academics to rank offences based on this and other criteria as a point of reference in determining the list of offences to which the reformed scheme should be applied.

413 Ibid 30.
414 *Dalgliesh* (n 84) 447 [57] (Kiefel CJ, Bell and Keane JJ).
415 See Russell Smith, Penny Jorna, Josh Sweeney and Georgina Fuller, *Counting the Costs of Crime in Australia: A 2011 Estimate* (Research and Public Policy Series No 129, Australian Institute of Criminology, November 2014).
416 Ibid 32.
417 *University of Melbourne Literature Review* (n 19).
418 Fox Freiberg (n 410) 169.
419 See, for example: Fox and Freiberg (n 410); Geoff Fisher, 'Sentencing Severity for 'Serious' and 'Significant' Offences: A Statistical Report' (Victorian Sentencing Advisory Council, September 2011).

18.9.3 Stakeholder submissions

The targeting of specific non-sexual violent, sexual violent and serious drug offences also responds to feedback received from stakeholders. As discussed in section 12.9.3, many stakeholders commented on the arbitrariness of certain offences being included in a 'serious violent offences' scheme when some offences do not include violence as a necessary element of the offence.

Only a few submissions addressed specific criteria that could be developed to guide which offences should be included in the scheme. The Queensland Law Society submitted that there should not be a list of fixed offences and the court should have the discretion to make a declaration if the following criteria are satisfied:

- An offender is convicted on indictment of an offence:
  - that involved the use, counselling or procuring the use, or conspiring or attempting to use, serious violence against another person; or
  - that resulted in serious harm to another person; and
- Sentenced to a term of imprisonment for the offence.[420]

These criteria suggested by the Queensland Law Society are reflected in the Council's recommended criteria.

Current sentencing practices and judicial views of offence seriousness were also taken into account.[421] As discussed in Chapter 6, acts intended to cause grievous bodily harm and other malicious acts, torture, rape and GBH were the most common offences to carry discretionary SVO declarations. This suggests that these offences were deemed the most 'serious' by sentencing judges and as justifying an offender's parole eligibility being delayed.

The Council also considered Australian and international Crime Harm Indexes, which assess seriousness, severity and harm. For a summary of relevant Crime Harm Indexes, refer to Appendix 17.

For a complete analysis of the offences considered by the Council, refer to Appendix 18.

18.9.4 Offences to retain

It is worth noting that in all of the categories of offences mentioned in this section, there are some instances where only the aggravated form of the offence has been selected to be retained in the scheme (for example, aggravated procuring engagement in prostitution, aggravated sexual assault and aggravated dangerous operation of a vehicle). This is contrary to the approach taken under the current scheme based on the offence inclusions in Schedule 1. The Council deemed this appropriate in cases where the "simpliciter" form of the offending represents the least serious type of offending behaviour involving offences commonly dealt with summarily. These simpliciter offences carry the lowest maximum penalty for that offence and will, in the Council's view, rarely meet the threshold for the presumptive operation of the scheme by attracting a sentence of greater than 5 years imprisonment. This is consistent with the Council's criteria in how to select offences to include in the scheme. Where such a division in the offence occurs, the relevant sections of the offence have been included in the lists under this section, and in 18.9.6 'Offences to exclude'.

Sexual offences against children

Sexual offences against children are proposed to be retained in the reformed scheme. The offences fulfil the criteria proposed by the Council. They have high maximum penalties, are offences committed against vulnerable victims, involve circumstances of aggravation, and are usually triable only on indictment. As the court recognised in *Dalgleish*,[422] there is 'an awareness of the violence necessarily involved in the sexual penetration of a child, and of the devastating consequences of this kind of crime for its victims'.[423] These offences involve the use of sexual violence against a person, create long-lasting harm and are of special risk to both the victim and the wider community:

- Indecent treatment of children under 16 (Criminal Code, s 210)*
- Owner etc. permitting abuse of children on premises (Criminal Code, s 213)*
- Carnal knowledge with or of children under 16 (Criminal Code, s 215)*
- Procuring young person etc. for carnal knowledge (Criminal Code, s 217(1))*
- Taking child for immoral purposes (Criminal Code, s 219(1))*
- Incest (Criminal Code, s 222)*

420 Submission 12 (Queensland Law Society) 5.
421 As to the relevance of these factors in ranking offence seriousness, see Fox and Freiberg (n 410) 170.
422 *Dalgliesh* (n 84).
423 Ibid 447 [57] (Kiefel CJ, Bell and Keane JJ).

- Maintaining a sexual relationship with a child (Criminal Code, s 229B)*
- Procuring engagement in prostitution, if the person is not an adult or is a person with an impairment of the mind (Criminal Code, s 229G(2))*

Note: Offences capable of being charged as a 'serious organised crime' are listed in Schedule 1C of the *Penalties and Sentences Act 1992* (Qld) and are marked with a *.

Approaches in other jurisdictions

Several Australian and international sentencing schemes target child sex offences:

- Commonwealth — offenders convicted under Commonwealth jurisdiction of child sex offences and the child sexual abuse offences scheme are subject to mandatory minimum sentences or mandatory sentences of imprisonment.[424]
- Northern Territory — minimum non-parole period specifically targets drug and sexual offences committed by adults on persons under the age of 16, and certain violence offences, fixing non-parole periods for these offences of not less than 70 per cent.[425]
- Victoria — the standard sentence scheme targets a number of sexual offences committed against children.[426]
- NSW — the standard-non parole period scheme includes serious sexual violence offences against children, setting guideposts for sentencing judges when sentencing.[427]
- South Australia — child sexual offences are also eligible for sentencing under the South Australian 'serious repeat offenders' scheme which requires, if the court is satisfied of the criteria being fulfilled, the non-parole period to be at least 80 per cent of the sentence.[428]
- United Kingdom — 'sentences for offenders of particular concern' comprises of a custodial term, and in addition, a mandatory year of licence to be served at the end of that custodial term and can be made for a number of offences including two serious child sexual offences — the rape of a child under 13, and assault of a child under 13 by penetration.[429] Extended sentences are available to a court when sentencing offenders for offences including 26 sexual offences, which include a number of sexual offences against children.[430]
- Canada — serious violent, drug and sexual offences scheme also includes child sexual offences. A person subject to this scheme will have their parole eligibility deferred from one-third to one-half of their sentence.[431]
- New Zealand — NZ's 'three strike' scheme also applies to child sexual offences.[432]

Stakeholder submissions

Fighters Against Child Abuse Australia strongly supported the inclusion of these offences in any reformed scheme.[433]

Sexual offences against children/adults

These offences are serious sexual violent offences, committed against adults and children. They involve high maximum penalties, include circumstances of aggravation, may involve vulnerable victims, involve the use of sexual violence, and are a special risk to victims (including ongoing psychological harm):

- Abuse of persons with an impairment of the mind (Criminal Code, s 216)*
- Procuring sexual acts by coercion etc (Criminal Code s 218(1))*
- Rape (Criminal Code, s 349)*
- Attempt to commit rape (Criminal Code, s 350)*
- Assault with intent to commit rape (Criminal Code, s 351)*
- Sexual assault, with a circumstances of aggravation (Criminal Code, (ss 352(2) and 352(3))*

424 *Crimes Act 1914* (Cth) ss 16AAA, 16AAB.
425 *Sentencing Act 1995* (NT) ss 78F(1), 55. A 'sexual offence' to which this section applies means an offence specified in sch 3: s 3. A court can also impose a partially suspended sentence.
426 *Sentencing Act* (Vic) (n 231) ss 5A and 5B.
427 *Crimes (Sentencing Procedure) Act 1999* (NSW) Division 1A, ss 54A-54D.
428 *Sentencing Act 2017* (SA), Pt 3, Div 4.
429 *Sentencing Act 2020* (UK) s 278(1).
430 Ibid sch 18 (specified offences for the purposes of s 306, which defines what is a 'specified offence' for the purposes of sentencing what are classed as 'dangerous offenders').
431 Criminal Code (Canada) (n 233) s 743.6(1).
432 *Sentencing Act 2002* (NZ) s 86A.
433 Submission 4 (Fighters Against Child Abuse Australia) 15–16.

Note: Offences capable of being charged as a 'serious organised crime' are listed in Schedule 1C of the *Penalties and Sentences Act 1992* (Qld) and are marked with a *.

Cross-jurisdictional comparison

Sexual violence offences are included in sentencing schemes in most jurisdictions within Australia, as well as Canada, the United Kingdom and New Zealand:

- Victoria — the standard sentence scheme applies to the offence of rape, setting a standard sentence of 10 years.[434]
- South Australia — the 'serious repeat offenders' provisions apply to 'serious sexual offences', where a non-parole period of at least 80 per cent applies.[435]
- NSW — the standard non-parole period scheme also applies to serious sexual violent offences, which operates as a 'legislative guidepost' for included offences.[436]
- United Kingdom — 'extended sentences' are available to a court when sentencing offenders for offences including 26 sexual offences, which include a number of sexual offences against children.[437]
- Canada — the serious violent, drug and sexual offences scheme applies to a range of sexual offences.[438]
- New Zealand — the 'three strike ' scheme also applies to sexual offences.[439]

Stakeholder submissions

Full Stop Australia supported the inclusion of serious sexual offending and violent offending conducted in the context of domestic and family violence in any reformed scheme.[440]

Non-sexual violence offences

These offences represent the most serious violence offences — they have high maximum penalties, are triable only on indictment, involve the use or threatened use of violence or serious harm, can involve a circumstance of aggravation and involve special risk to victims (including secondary victims) and the community:

- Manslaughter (Criminal Code, ss 303(1) and 310)*
- Attempted murder (Criminal Code, s 306)*
- Conspiring to murder (Criminal Code, s 309)*
- Killing unborn child (Criminal Code, s 313)
- Disabling in order to commit indictable offences (Criminal Code, s 315)
- Stupefying in order to commit indictable offence (Criminal Code, s 316)
- Acts intended to cause GBH and other malicious acts (Criminal Code, s 317)*
- Grievous bodily harm (Criminal Code, s 320)*
- Torture (Criminal Code, s 320A)*
- Administering poison with intent to harm, if the poison or noxious thing endangers the life of, or does grievous bodily harm to, the person to whom it is administered or by whom it is taken (Criminal Code, s 322(a))
- Wounding (Criminal Code, s 323)
- Dangerous operation of a vehicle, which causes death or grievous bodily harm, including in circumstances of aggravation (while adversely intoxicated or excessively speeding or taking part in an unlawful race or if the offender leaves the scene of the incident knowing or ought to have reasonably known the other person has been killed or injured) (Criminal Code, s 328A(4))
- Kidnapping (Criminal Code, s 354(1))*
- Kidnapping for ransom (Criminal Code, s 354A)*
- Robbery (Criminal Code, ss 409 and 411)*
- Attempted robbery (Criminal Code, s 412)*
- Burglary, with circumstance of aggravation (Criminal Code, ss 419(3)(b)(i) and s 419(3)(b)(ii))*

434 *Sentencing Act* (Vic) (n 231) ss 5A and 5B.
435 *Sentencing Act 2017* (SA), Pt 3, Div 4.
436 *Crimes (Sentencing Procedure) Act 1999* (NSW) Division 1A, ss 54A-54D.
437 Sentencing Code (UK) sch 18 (specified offences for the purposes of s 306, which defines what is a 'specified offence' for the purposes of sentencing what are classed as 'dangerous offenders').
438 Criminal Code (Canada) (n 233) s 743.6(1).
439 *Sentencing Act 2002* (NZ) s 86A.
440 Submission 7 (Full Stop Australia) 17.

Note: Offences capable of being charged as a 'serious organised crime' are listed in Schedule 1C of the *Penalties and Sentences Act 1992* (Qld) and are marked with a *.

Cross-jurisdictional comparison

Every Australian jurisdiction reviewed as well as the United Kingdom, Canada and New Zealand have a sentencing scheme which target violent offences.

Stakeholder submissions

Apart from stakeholders who called for the abolition of the scheme, no stakeholders or interviewees sought the removal of these violent offences from the scheme. Fighters Against Child Abuse Australia expressly supported the offence of murder, serious domestic violence offences, manslaughter, and offences involving serious assaults against children being included in the scheme.[441]

Serious drug offences

The proposed drug offences have high maximum penalties and are triable only on indictment. They are offences which contribute to significant harm to individuals, families and communities by facilitating the supply of drugs to end users. Delaying parole eligibility for these offenders reflects the seriousness of these offences based on this high level of harm and might contribute to disrupting drug trafficking networks. By applying a higher minimum threshold of 10 years for these offences (for the reformed scheme to apply), only the most serious instances of these offences will be captured by the scheme:

- Trafficking in dangerous drugs (*Drugs Misuse Act 1986* (Qld) ('*Drugs Misuse Act*'), s 5)*
- Supplying dangerous drugs (*Drugs Misuse Act*, s 6)*
- Producing dangerous drugs (*Drugs Misuse Act*, s 8)*

Note: Offences capable of being charged as a 'serious organised crime' are listed in Schedule 1C of the *Penalties and Sentences Act 1992* (Qld) and are marked with a *.

Cross-jurisdictional comparison

Several Australian jurisdictions have sentencing schemes which include serious drug offences and restrict the court's discretion:

- South Australia and Victoria have similar 'serious offender schemes' which enable departure from the principle of proportionality for serious offenders (including drug offenders). However, these schemes focus primarily on the offender, rather than the offence, and legislative exceptions allow for the exercise of judicial discretion.[442]
- The Northern Territory has mandatory MNPPs of 70 per cent for offenders convicted of drug offences and sentenced to 12 months' imprisonment or more, however the court can decline to set that non-parole period if it considers it inappropriate.[443]
- Victoria's sentencing legislation creates category 1[444] and category 2 offences,[445] whereby an offender convicted of an offence listed in those categories must be sentenced to imprisonment (unless, with respect to category 2 offences, there exist special reasons).[446]

See Background Paper 2 for more detailed information on sentencing schemes in other jurisdictions.

Stakeholder submissions and expert interviews

QNADA, the Queensland Law Society and LAQ sought the complete removal of drug offences. QNADA submitted:

> In the absence of their full removal their automatic inclusion (for sentences above ten years) should be removed, with judicial discretion to apply it dependent upon the circumstances of the individual offending (as opposed to the offence as currently occurs).[447]

There were multiple suggestions for drug trafficking to be removed from the SVO scheme by those who participated in expert interviews. Arguments for removing drug trafficking included:

441 Submission 4 (Fighters Against Child Abuse Australia) 15–16.
442 *Sentencing Act 2017* (SA), Pt 3, Div 4; *Sentencing Act* (Vic) (n 231) ss 6B(2)-(3).
443 *Sentencing Act 1995* (NT) s 55.
444 *Sentencing Act* (Vic) (n 231) s 3. Includes trafficking in a drug (large commercial quantity) or trafficking in a drug (for the benefit of, or at the direction of, a criminal organisation - commercial quantity).
445 Ibid. Includes trafficking a drug of commercial quantity.
446 Ibid s 5. See also Victorian Sentencing Advisory Council, *Sentencing Sex Offences in Victoria* (Report, June 2021): 'the legislation does not, though, specify a minimum period of imprisonment. It is therefore possible for a very short prison sentence, which may even be a time served prison sentence, to meet the requirement of Category 1 offence classification' at 8.
447 Submission 9 (Queensland Network of Alcohol and Other Drug Agencies) 8–9.

- drug trafficking offences are often non-violent and classifying them as 'serious violent offences' is not appropriate;
- people convicted of drug trafficking are commonly drug users who would benefit from additional time of supervision in the community (if subject to an SVO declaration, offenders charged with drug trafficking will only spend a small proportion of their sentence in the community); and
- the limited risk posed to the community by people convicted of drug trafficking (in comparison to, for example, offenders of sexual or non-sexual violence).[448]

18.9.5 New offences to include

Child exploitation material offences

The following sexual offences against children are proposed to be included in the new scheme. As discussed in section 18.9.4, sexual offences against children fulfil the criteria adopted. The inclusion of these offences was also suggested by multiple stakeholders.

- Involving a child in making child exploitation material (Criminal Code, s 228A)*
- Making child exploitation material (Criminal Code, s 228B)*
- Distributing child exploitation material (Criminal Code, s 229C)*
- Possessing child exploitation material (Criminal Code, s 228D)*

Note: Offences capable of being charged as a 'serious organised crime' are listed in Schedule 1C of the *Penalties and Sentences Act 1992* (Qld) and are marked with a *.

While there were different views expressed by those who made submissions and participated in expert interviews, these offences satisfy the recommended criteria by having high maximum penalties, being triable only on indictment, are of a sexually violent nature and create a special risk to the community. The threshold of 5 years ensures that only offending which is of a certain level of seriousness will be captured.

Cross-jurisdictional comparison

The Commonwealth, South Australia and Western Australia have sentencing regimes which include child exploitation offences.

When the Commonwealth introduced their mandatory minimum sentences for persons convicted of specific Commonwealth child sex offences or child sexual abuse in 2020, the then Commonwealth Attorney-General said that the 'mandatory minimum provisions provided for in schedule 6 are critical and necessary to achieve this bill's overall intent of ensuring sentencing for child sex offences are drawn into line with community expectations'.[449]

The South Australian 'serious repeat offenders' scheme also includes the offences of disseminating child exploitation material and possessing child exploitation material, which imposes a non-parole period of 80% on a person sentenced under the scheme.[450]

In Western Australia, child exploitation material can be declared as a 'serious offence' under the *High Risk Offenders Act 2020* (WA). The making of a declaration means that the person who committed the offence or offences to which it applies can be subject to a post-sentence supervision order ('PSSO') made by the Parole Board. Even if a court has not declared the offence to be a 'serious offence', the Parole Board must consider whether a PSSO should be made if it is otherwise a 'serious offence' within the meaning used in that Act.[451]

Canada's serious violent, drug and sexual offences scheme includes child pornography. A person subject to this scheme will have their parole eligibility deferred from one-third to one-half of their sentence.[452]

See Background Paper 2 for more detailed information on sentencing schemes in other jurisdictions.

448 Subject-matter expert interview I7.
449 Commonwealth, Parliamentary Debates, House of Representatives, 16 June 2020, 4552 (Christian Porter, Attorney-General, Minister for Industrial Relations).
450 *Criminal Law (Sentencing Act) 1988* (SA) ss 53, 54.
451 *Sentencing Act 1995* (WA) s 74A (definition of 'serious offence', adopting the definition in s 5 of the High Risk Serious Offenders Act 2020 (WA)).
452 Criminal Code (Canada) (n 233) s 743.6(1).

Stakeholder submissions and expert interview views

Full Stop Australia and Fighters Against Child Abuse Australia both submitted that child exploitation material offences should be included in the scheme.[453] LAQ submitted that child exploitation material is already subject to sentencing guidance[454] and does not need to be included in the scheme.

There was limited comment made on this issue by expert interview participants. One participant raised that child exploitation material offences should be included in the scheme,[455] while another was concerned that the range of offending for these types of offences is too broad for the scheme to be usefully applied.[456]

Choking, suffocation or strangulation in a domestic setting (Criminal Code, s 315A)

The offence of choking, suffocation or strangulation in a domestic setting was recommended by a number of stakeholders for inclusion. While the maximum penalty is 7 years, the offence is triable only on indictment, involves violence against the person, involves a vulnerable victim (being a victim of family and domestic violence), and creates a special risk of harm to the victim. There is strong research evidence regarding non-fatal strangulation as a risk factor for homicide.[457]

The Council supports its inclusion in the new schedule on the basis that the conduct involved has potential to lead to serious long-term harm. Non-fatal strangulation is a common form of coercive control in violent relationships and is dangerous both because of the immediate and serious injuries it can cause, and the risk of future violence associated with it.[458] While few offences are likely to meet the recommended 5-year threshold based on the Council's analysis of sentencing data, it is important to ensure that the most serious examples of this form of offending are formally recognised as serious offences under the new scheme to send a clear message to the community about the seriousness of this conduct.

Cross-jurisdictional comparison

A number of jurisdictions have introduced a stand-alone offence of non-fatal strangulation, choking and/or suffocation.[459] However, of the jurisdictions reviewed, the Northern Territory is the only Australian jurisdiction to include the offence of choking, strangulation or suffocation in a domestic setting in a mandatory or presumptive MNPP or SNPP sentencing regime.[460]

In the Northern Territory, the offence carries mandatory imprisonment, making it consistent with the offence of assault. The effect of its inclusion in the mandatory imprisonment scheme that applies to violent offences was explained during the introduction of the amendment Bill:

> The bill also amends the *Sentencing Act 1995* to make the new offence subject to mandatory sentencing for violent offences at the same level as assault with aggravating features in section 188(2) of the Criminal Code. The proposed new choking offence is a level 5 offence for the purposes of mandatory sentencing if it involves an offensive weapon or the victim suffers physical harm as a result of the offence. Level 5 offences have a mandatory minimum sentence of three months actual imprisonment for the first offence and 12 months actual imprisonment for second or subsequent offences. Otherwise the new offence is a level 3 offence and a term of actual imprisonment must be imposed for a first offence and there is a three-month mandatory minimum sentence of imprisonment for a second or subsequent offence.[461]

See Background Paper 2 for more detailed information on sentencing schemes in other jurisdictions.

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453 Submission 7 (Full Stop Australia) 12–13; Submission 4 (Fighters Against Child Abuse Australia) 15–16.

454 The offender must serve a period of actual custody unless there are exceptional circumstances per the *Penalties and Sentences Act 1992* (Qld) s 9(4).

455 Subject-matter expert interview I49.

456 Subject-matter expert interview I28.

457 See Leah Sharman, Heather Douglas, and Robin Fitzgerald, 'Review of Domestic Violence Deaths Involving Fatal and Non-Fatal Strangulation in Queensland' (University of Melbourne, University of Queensland, 2021) 4.

458 See Heather Douglas and Robin Fitzgerald, 'Proving Non-Fatal Strangulation in Family Violence Cases: A Case Study on the Criminalisation of Family Violence' (2021) 25(4) *The International Journal of Evidence & Proof* 350.

459 See, for example, *Crimes Act 1900* (ACT) s 28; *Crimes Act 1900* (NSW) s 37; *Criminal Law Consolidation Act 1935* (SA) s 20A; Criminal Code (NT) s 186AA; Criminal Code (WA) s 298; *Crimes Act 1961* (NZ) s 189A; *Serious Crime Act 2015* (c 9) (UK) ss 75A and 75B. Tasmania is also proposing to introduce a new Criminal Code offence that applies to unlawful choking, suffocation or strangulation: see Criminal Code Amendment Bill 2022 (Tas) cl 4.

460 *Sentencing Act 1995* (NT) s 76CA. The offence is defined as being a 'level 5 offence' if it involves the actual or threatened use of an offensive weapon and the victim suffers physical harm as a result of the offence: s 76CA(1)(b). If it is not a level 5 offence, it is a level 3 offence by operation of s 76CA(3)(a). The UK also has included the offence of strangulation or suffocation under s 75A of the *Serious Crime Act 2015* (c 9) (UK) in Part 1 of Schedule 18 of the Sentencing Code that applies for the purposes of determining those violent offences for which an extended sentence of imprisonment is available.

461 Northern Territory, *Parliamentary Debates,* Legislative Assembly, 28 November 2019, 7692 (Nicole Manison, Deputy Chief Minister).

Stakeholder submissions and expert interview views

As with other offences proposed to be included in the SVO scheme, there were mixed views expressed by stakeholders about whether section 315A should be included in a reformed scheme, although few submissions addressed this issue directly. Full Stop Australia supported its inclusion,[462] while LAQ did not. In particular, LAQ was concerned that there may be unintended consequences of adding this offence to the scheme as it 'can be established in the absence of medical evidence and based on self-reporting alone'.[463] For this reason, it submitted, it was better suited to a penalty which enabled greater supervision and rehabilitation.[464]

A number of those who participated in expert interviews, including some legal practitioners and Parole Board members, considered it was an offence which should be included in the scheme.

Aiding suicide (Criminal Code, s 311)

The offence of aiding suicide fulfils a number of the criteria recommended by the Council; it has a high maximum penalty (life imprisonment); is triable only on indictment; creates conditions in which serious of harm can be caused to a vulnerable victim (i.e. individuals who are particularly vulnerable to coercion or suggestion and who may be suffering from a mental illness) and has a special risk of serious consequence to the victim.

Queensland has recently passed the *Voluntary Assisted Dying Act 2021* (Qld).[465] The conduct which is criminalised by the offence of aiding suicide is distinct from voluntary assisted dying. Behaviour captured by the term voluntary assisted dying is very unlikely to be captured by the reformed scheme due to the threshold of the sentence having to be longer than 5 years. For this reason, only the most serious examples of offending committed against vulnerable victims are likely to be captured.

The Council considered the relevant case law in Queensland relating to aiding suicide when deciding whether to include this offence. There were only 2 cases sentenced within the 9-year data period: *R v Nielsen*[466] and *R v Morant.*[467] The case of *Nielsen* resulted in a 3-year sentence being imposed as this was a euthanasia-type aiding suicide case in circumstances where the deceased gave the defendant money to obtain Nembutal (a barbiturate drug generally used short-term to treat insomnia) overseas on his behalf, which the deceased then took contributing to his death.

In the case of *Morant*, the defendant was convicted of counselling and aiding suicide. The charge of counselling was found to be the more serious charge and the defendant was sentenced to 10 years' imprisonment. The victim in this case was his wife who the defendant had actively encouraged and assisted to commit suicide telling her what he would do with the insurance money after she killed herself. He helped her purchase a generator and position it in her car boot. She suffered from significant mental health issues for which she was taking anti-depressants and from a serious back condition which caused her extreme pain. The offence was acknowledged by the Court of Appeal to have been committed against a woman who was 'vulnerable to the [offender's] inducements' in circumstances where his actions were 'premeditated, calculated and were done for financial gain'.[468]

The Council's view is that the reformed scheme's threshold of 5 years, alongside the introduction of voluntary assisted dying legislation, will ensure that only the most serious and abusive behaviour which amounts to the criminal offence of 'aiding suicide' will be captured by the scheme.

Cross-jurisdictional comparison

The offence of aiding suicide is eligible to be sentenced under the South Australian 'serious offence against the person' scheme, which applies presumptively to an offence which is a 'major indictable offence (other than an offence of murder) resulting in the death of the victim, or the victim suffering total incapacity'.[469] A person convicted of such an offence would be subject to a minimum non-parole period of 80%.[470]

Stakeholder submissions and expert interview views

This offence did not attract significant comment by stakeholders in submissions or during expert interviews. LAQ, however, included this offence in a list of those it did not consider appropriate to include in the scheme on the basis

462 Submission 7 (Full Stop Australia) 12–13.
463 Submission 13 (Legal Aid Queensland) 29.
464 Ibid.
465 Voluntary assisted dying is not available until 1 January 2023, which is when the scheme commences.
466 [2012] QSC 29.
467 [2018] QSC 251.
468 *R v Morant* (2020) 5 QR 1 (Sofronoff P).
469 *Sentencing Act 2017* (SA) s 47(12)(e). It also includes a conspiracy to commit such an offence, or aiding, abetting, counselling or procuring the commission of such an offence.
470 *Sentencing Act 2017* (SA) s 47(5)(d).

that the current sentencing legislation allows the appropriate penalties to be imposed without the requirement of mandatory sentencing.[471]

Female genital mutilation (Criminal Code, s 323A)

The offence of female genital mutilation fulfils a number of the criteria recommended by the Council; it has a significant maximum penalty of 14 years; is triable only on indictment; involves the use of serious sexual violence against the person and can result in serious harm to another person. The offence involves a special risk of serious consequence to the victim, such as long-term health consequences, including mental health problems or serious issues during childbirth.[472]

Cross-jurisdictional comparison

The offence of female genital mutilation is subject to significant maximum penalties in many jurisdictions across Australia. However, of the jurisdictions reviewed, it only appeared in the Northern Territory's 'fixed non-parole periods for offences against persons under 16 years' scheme, making the offender subject to a minimum non-parole period of 70% of the head sentence.[473]

Stakeholder submissions and expert interview views

This offence was not directly commented on by stakeholders through submissions or during expert interviews.

Knowingly participating in the provision of prostitution by a person who is not an adult or is a person with an impairment of the mind (Criminal Code, s 229H(2))

This specific provision of section 229H fulfils the criteria recommended by the Council — it has a significant maximum penalty of 14 years imprisonment, may create conditions in which serious harm of a sexual nature can be caused to another person, involves the circumstance of aggravation, being an offence involving a child or a person with an impairment of the mind (thereby involving vulnerable victims) and involves a special risk of serious consequence to the victim and community.

Knowingly participating in the provision of prostitution by a person who is not an adult or is a person with an impairment of the mind is subject to summary prosecution, unless the defendant elects for jury trial.[474] However, the Council's view is that the inclusion of this offence is consistent with retaining the offence of procuring engagement in prostitution of a person who is not an adult or is a person with an impairment of the mind which is currently in Schedule 1 for the purposes of the SVO scheme.

Cross-jurisdictional comparison

Similar offences appeared in sentencing schemes in international jurisdictions, including:

- United Kingdom — the 'extended sentence' scheme where the person is subject to a custodial term and an 'extension period' where the person is subject to a licence;[475] and
- Canada — the delayed parole scheme which applies to listed serious violent, drug and sexual offences and allows a court to delay a person's parole eligibility date from the one-third mark to one-half of the sentence or 10 years (whichever is less).[476]

Stakeholder submissions and expert interview views

LAQ submitted that offences that are not objectively serious or violent should be removed from the scheme, including the offence of procuring engagement in prostitution.[477] In the Council's view, restricting the offence to the most serious category (i.e. offences committed involving children or persons with an impairment of the mind) ensures that only the most serious offending behaviour is captured under the reformed scheme.

Kidnapping-like offences

The offences of child stealing and abduction of a child under 16 are similar to that of kidnapping, which is currently included in Schedule 1. The Council views these offences as being sufficiently serious to be included in the reformed scheme on the basis that they fulfil a number of the recommended criteria; they are triable only on indictment, may involve the use of violence on vulnerable victims, and may be of special risk to the victim and community, especially

471 Submission 13 (Legal Aid Queensland) 29.
472 'Female Genital Mutilation' *World Health Organisation* (Fact Sheet, 21 January 2022) <https://www.who.int/news-room/fact-sheets/detail/female-genital-mutilation>.
473 *Sentencing Act 1995* (NT) s 55A.
474 Criminal Code 1899 (Qld) s552B(1)(j).
475 *Sentencing Code* (UK) s 279.
476 *Corrections and Conditional Release Act* (S.C 1992) Schedule 1.
477 Submission 13 (Legal Aid Queensland) 28.

if committed in the context of domestic violence. The Council's view is that the inclusion of these offences is consistent with retaining the offence of kidnapping in the reformed scheme:

- Child stealing (Criminal Code, s 363)#
- Abduction of a child under 16 (Criminal Code, s 363A)#

Note: Offences marked with a # were not present within any other Australian sentencing scheme.

Cross-jurisdictional comparison

Kidnapping, child stealing and abduction offences are included in a number of other sentencing schemes:

- The offence of kidnapping is a 'violent offence' for the purposes of Victoria's 'serious offender scheme'.
- The offences of kidnapping and abduction are included in the United Kingdom's 'extended sentence' scheme where the person is subject to a custodial term and an 'extension period' where the person is subject to a licence.[478]
- The offence of kidnapping is included in Canada's 'special provisions for serious violent, drug and sexual offences' where a person's parole eligibility is delayed from the one-third mark to one-half.[479]
- The offence of kidnapping is subject to New Zealand's 'three strike' rule.[480]

Stakeholder submissions and expert interview views

This offence was not directly commented on by stakeholders through submissions or during expert interviews.

Counselling and procuring the commission of and attempting to commit offences

When the SVO scheme was introduced, inchoate offences were included on the basis that:

> A conspiracy to murder is as serious a "violent" crime as any other, as is an attempted abduction which renders the victim afraid to go anywhere alone.
>
> Therefore attempts and conspiracies to use violence are included in the definition of a serious violent offence, as are the counselling or procuring of such offences.[481]

Conspiracies to commit or attempts to commit are included in the sentencing schemes in other jurisdictions:

- South Australia — serious repeat offender scheme.
- Canada — 'special provisions for serious violent, drug and sexual offences', 'dangerous offenders' and 'long term offenders' sentencing scheme.

The Council recommends the scheme should also apply to offences of counselling or procuring the commission of, or attempting or conspiring to commit, an offence against a provision mentioned in the new schedule — consistent with the operation of the current SVO scheme. The Council considers this appropriate on the basis that counselling and procuring the commission of and attempting to commit offences are as serious as an offence which is actually committed.

18.9.6 Offences to exclude

A number of offences currently included in Schedule 1 are recommended not to be included in the new schedule that will apply for the purposes of the reformed scheme.

The reason for proposing their exclusion is based primarily on the offences not fulfilling the criteria on one or more grounds and/or rarely meeting the level of seriousness that will attract a sentence exceeding the 5-year threshold necessary to engage the presumptive scheme (see Appendix 18). These include offences with a low maximum penalty, that are most commonly dealt with summarily rather than on indictment, that do not involve the use or threatened use of serious violence (sexual or otherwise), that are not typically committed against a vulnerable victim, and/or that are simpliciter forms of an offence where the aggravated form has been included in the scheme due to its higher level of objective seriousness.

Given that a court will retain the ability to set parole eligibility dates for these offences, including to delay parole eligibility where there is good reason, the Council's position is that the exclusion of these offences to achieve a more targeted scheme is beneficial:

- Riot (Criminal Code, s 61)#*

478 *Sentencing Code* (UK) s 279.
479 *Corrections and Conditional Release Act* (S.C 1992) Schedule 1.
480 *Sentencing Act 2002* (NZ) s 86A.
481 Queensland, Parliamentary Debates, Legislative Assembly, 19 March 1997, 596 (Denver Beanland, Attorney- General and Minister for Justice).

- Threatening violence (Criminal Code, s 75)#
- Escape by persons in lawful custody (Criminal Code, s 142)#
- Misconduct with regard to corpses (Criminal Code, s 236(2))#
- Carrying or sending dangerous goods in vehicle (Criminal Code, s 317A(1))#*
- Obstructing rescue or escape from unsafe premises (Criminal Code, s 318)#
- Endangering the safety of person in a vehicle with intent (Criminal Code, s 319)#
- Attempting to injure by explosive or noxious substances (Criminal Code, s 321)#*
- Bomb hoaxes (Criminal Code, s 321A)#
- Failure to supply necessaries (Criminal Code, s 324)#
- Endangering life of children by exposure (Criminal Code, s 326)#
- Dangerous operation of a vehicle (except if charged under s 328A(4)) (Criminal Code, s 328A)#
- Assaults occasioning bodily harm (Criminal Code, s 339)*[482]
- Serious assaults (Criminal Code, s 340)*[483]
- Sexual assaults (except if charged under ss 352(2)-(3)) (Criminal Code, s 352(1) only)*
- Cruelty to children under 16 years (Criminal Code, s 364)
- Taking control of aircraft (Criminal Code, s 417A)#
- (Repealed) Preventing escape from wreck (Criminal Code, s 318)
- Unlawful assembly, riot and mutiny (CSA, s 122 and repealed equivalent)#
- Other offences (CSA, s 124(a) and repealed equivalent).

Note: Offences capable of being charged as a 'serious organised crime' are listed in Schedule 1C of the *Penalties and Sentences Act 1992* (Qld) and are marked with a *. Offences marked with a # were not present within any other Australian sentencing scheme.

Cross-jurisdictional comparison

A number of the offences proposed to be removed are not included in any Australian MNPP or mandatory minimum sentencing schemes. However, they appear to be analogous to offences listed in Canada in one of two schedules that apply for the purposes of its delayed parole eligibility sentencing provision.[484] The first schedule is quite extensive and includes a wide range of offences including not only offences of violence (including sexual violence), but also arson, firearm offences, offences relating to aircraft, prison breach and less serious forms of driving-related offences, such as failure to stop after an accident.

Stakeholder submissions

There was broad support by stakeholders to remove forms of non-violent offending from the scheme. The QLS and LAQ submitted that non-violent offending should be excluded. The QLS submitted that including 'offences of which violence is not a feature confuses the purpose of the regime's implementation and creates the prospect of miscarriages of justice'. [485] It further submitted:

> Should parliament deem it necessary to introduce a statutory regime for the sentencing of drug trafficking offenders which reflects the 'damage done in the community by drug trafficking', a separate and distinct regime should be introduced for that purpose. Of course, any such regime should also retain judicial discretion in sentencing.[486]

Repealed sexual offences

The following repealed offences should not be part of a reformed scheme:

- (Repealed) Unlawful anal intercourse (Criminal Code, s 208)
- (Repealed) Unlawful sodomy (Criminal Code, ss 208(1)-(2))
- (Repealed) Conspiracy to defile (Criminal Code, s 221)
- (Repealed) Incest by man (Criminal Code, s 222)
- (Repealed) Incest by adult female (Criminal Code, s 223)

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482 Only subject to the serious organised crime aggravation, if the offence is committed in circumstances where the offender is liable to imprisonment for 10 years, see PSA (n 11) sch 1C.

483 Only subject to the serious organised crime aggravation, if the offence is committed in circumstances where the offender is liable to imprisonment for 14 years, see PSA (n 11) sch 1C.

484 Criminal Code (Canada) (n 233) s 743.6 referring to offences listed in Schedule I or II of the *Corrections and Conditional Release Act*.

485 Submission 12 (Queensland Law Society) 4.

486 Ibid.

A number of these offences were repealed by the *Criminal Law Amendment Act 1997* (Qld) and *Health and Other Legislation Amendment Act 2016* (Qld), meaning only some existed post-commencement of the SVO scheme. The offences, given these have now been repealed, cannot be committed post-commencement of the reformed scheme and their retention is therefore unnecessary. Removing these offences from the schedule would mean these offences if charged and sentenced would be subject to no scheme at all. The Council considered whether a transitional provision may be appropriate to ensure these offences are sentenced in accordance with current sentencing expectations. However, the Council considered that such a provision would be unnecessarily complicated given the courts residual ability to set parole eligibility at any point. The Council's view is that they should not be included in the new schedule on this basis.

18.9.7 Offences subject to other schemes

Fighters Against Child Abuse Australia sought the inclusion of murder in the SVO scheme. The Council notes that the offence of murder is already subject to mandatory sentencing schemes in Queensland. Section 305 of the Criminal Code states that a person who commits the offence of murder is liable to imprisonment for life, which cannot be mitigated or varied under the Code or any other law. If a person is sentenced on more than one conviction of murder or has previously been convicted of murder, the person is subject to a minimum non-parole period of 30 years imprisonment.

Unlawful striking causing death is another offence that is already subject to a separate sentencing scheme and therefore not suitable for inclusion in the reformed scheme. The offence carries a maximum penalty of life imprisonment, and if the court sentences a person to a term of imprisonment, the person must not be released from imprisonment until the person has served the lesser of 80 per cent of the person's term of imprisonment or 15 years.[487] The Council has not been asked to consider whether this provision is appropriate.

18.9.8 Recommendations of the Women's Safety and Justice Taskforce to include a new offence of 'coercive control'

The Council notes that the Women's Safety and Justice Taskforce recommended the inclusion of the proposed new offence of coercive control be included in Schedule 1 for the purposes of the SVO scheme.[488] The Taskforce has suggested this would:

> enable a court to make an SVO declaration where necessary, as part of the integrated sentencing process for perpetrators who need to spend longer in actual custody for the protection of the community and/or to be adequately punished for their offending.[489]

The new offence is proposed to carry a 14-year maximum penalty — the elements of which are proposed to include that:

- a person has undertaken a course of conduct of two or more incidents that constitute domestic violence as outlined in the amended definition in section 8 within a relevant relationship as prescribed in the *Domestic and Family Violence Protection Act 2012* (Qld);
- a reasonable person would consider the course of domestic violence to be likely to cause one person in the relationship (the first person) to suffer physical or psychological or emotional or financial harm; and
- the domestic violence behaviour is directed by the second person towards the first person.[490]

The recommendations made by the Taskforce, including this recommendation, have now been accepted by the Queensland Government.[491] However, given this offence is yet to be introduced in Queensland, the Council does not consider it appropriate to comment on its possible inclusion in the new scheme. Rather, this matter will need to be considered at such time as this offence is introduced with reference to the identified criteria.

487 Criminal Code, s 314A.
488 *Hear Her Voice* (n 38) 749.
489 Ibid.
490 Ibid 741, Recommendation 78.
491 Queensland Government, *Queensland Government Response to the Report of the Queensland Women's Safety and Justice Taskforce, 'Hear Her Voice – Report One: Addressing Coercive Control and Domestic and Family Violence in Queensland'* (2022) ('*Queensland Government Response to Hear Her Voice*').

18.9.9 Recommendations

Recommendation: Offences under the reformed scheme

15. The following offences listed in Schedule 1 should be included in the new schedule that applies for the purposes of the reformed scheme:

- Indecent treatment of children under 16 (Criminal Code, s 210)
- Owner etc. permitting abuse of children on premises (Criminal Code, s 213)
- Carnal knowledge with or of children under 16 (Criminal Code, s 215)
- Abuse of persons with an impairment of the mind (Criminal Code, s 216)
- Procuring young person etc. for carnal knowledge (Criminal Code, s 217(1))
- Procuring sexual acts by coercion etc (Criminal Code s 218(1))
- Taking child for immoral purposes (Criminal Code, s 219(1))
- Incest (Criminal Code, s 222)
- Maintaining a sexual relationship with a child (Criminal Code, s 229B)
- Procuring engagement in prostitution of a person who is not an adult or who is a person with an impairment of the mind (Criminal Code, s 229G(2))
- Manslaughter (Criminal Code, ss 303(1) and 310)
- Attempted murder (Criminal Code, s 306)
- Conspiring to murder (Criminal Code, s 309)
- Killing unborn child (Criminal Code, s 313)
- Disabling in order to commit indictable offences (Criminal Code, s 315)
- Stupefying in order to commit indictable offence (Criminal Code, s 316)
- Acts intended to cause GBH and other malicious acts (Criminal Code, s 317)
- Grievous bodily harm (Criminal Code, s 320)
- Torture (Criminal Code, s 320A)
- Administering poison with intent to harm, if the poison or noxious thing endangers the life of, or does grievous bodily harm to, the person to whom it is administered or by whom it is taken (Criminal Code, s 322(a))
- Wounding (Criminal Code, s 323)
- Dangerous operation of a vehicle in circumstances of aggravation under s 328A(4) (causing death or grievous bodily harm, including while adversely intoxicated or excessively speeding or taking part in an unlawful race, or if the offender leaves the scene of the incident knowing or ought to have reasonably known the other person has been killed or injured) (Criminal Code, s 328A(4))
- Rape (Criminal Code, s 349)
- Attempt to commit rape (Criminal Code, s 350)
- Assault with intent to commit rape (Criminal Code, s 351)
- Sexual assault, with a circumstance of aggravation (Criminal Code, (ss 352(2) and 352(3))
- Kidnapping (Criminal Code, s 354(1))
- Kidnapping for ransom (Criminal Code, s 354A)
- Robbery (Criminal Code, ss 409 and 411)
- Attempted robbery (Criminal Code s 412)
- Burglary, with circumstance of aggravation (Criminal Code, ss 419(3)(b)(i) and s 419(3)(b)(ii))
- Trafficking in dangerous drugs (*Drugs Misuse Act 1986* (Qld), s 5)
- Supplying dangerous drugs (*Drugs Misuse Act 1986* (Qld), s 6)
- Producing dangerous drugs (*Drugs Misuse Act 1986* (Qld), s 8).

16. The following offences listed in Schedule 1 should not be included in the new schedule that applies for the purposes of the reformed scheme:

- Riot (Criminal Code, s 61)
- Threatening violence (Criminal Code, s 75)
- Escape by persons in lawful custody (Criminal Code, s 142)
- Misconduct with regard to corpses (Criminal Code, s 236(2))
- Carrying or sending dangerous goods in vehicle (Criminal Code, s 317A (1))
- Obstructing rescue or escape from unsafe premises (Criminal Code, s 318)
- Endangering the safety of person in a vehicle with intent (Criminal Code, s 319)

- Attempting to injure by explosive or noxious substances (Criminal Code, s 321)
- Bomb hoaxes (Criminal Code, s 321A)
- Failure to supply necessaries (Criminal Code, s 324)
- Endangering life of children by exposure (Criminal Code, s 326)
- Dangerous operation of a vehicle (except if charged under s 328A(4)) (Criminal Code, s 328A)
- Assaults occasioning bodily harm (Criminal Code, s 339)
- Serious assaults (Criminal Code, s 340)
- Sexual assaults (except if charged under ss 352(2) and 352(3)) (Criminal Code, s 352(1))
- Cruelty to children under 16 years (Criminal Code, s 364)
- Taking control of aircraft (Criminal Code, s 417A)
- Unlawful assembly, riot and mutiny (*Corrective Services Act 2006*, s 122 and repealed equivalent (*Corrective Services Act 2000*, s 92(2))
- Other offences (*Corrective Services Act 2006*, s 124(a) and repealed equivalent (*Corrective Services Act 2000*, s 94(a))
- (Repealed) Unlawful anal intercourse (Criminal Code, s 208)
- (Repealed) Unlawful sodomy (Criminal Code, ss 208(1)–(2))
- (Repealed) Conspiracy to defile (Criminal Code, s 221)
- (Repealed) Incest by man (Criminal Code, s 222)
- (Repealed) Incest by adult female (Criminal Code, s 223)
- (Repealed) Preventing escape from wreck (Criminal Code, s 318).

17. The following offences not currently listed in Schedule 1 should be included in the new schedule that applies for the purposes of the reformed scheme:

- Involving child in making child exploitation material (Criminal Code, s 228A)
- Making child exploitation material (Criminal Code, s 228B)
- Distributing child exploitation material (Criminal Code, s 229C)
- Possessing child exploitation material (Criminal Code, s 228D)
- Knowingly participating in the provision of prostitution with a circumstance of aggravation (where the person involved in the provision of prostitution is not an adult or is a person with an impairment of the mind) (Criminal Code, s 229H(2)
- Aiding suicide (Criminal Code, s 311)
- Choking, suffocation or strangulation in a domestic setting (Criminal Code, s 315A)
- Female genital mutilation (Criminal Code, s 323A)
- Child-stealing (Criminal Code, s 363)
- Abduction of a child under 16 (Criminal Code, s 363A).

18. The scheme should also apply to offences of counselling or procuring the commission of, or attempting or conspiring to commit, an offence against a provision mentioned in the new schedule — consistent with the operation of the current SVO scheme.

18.10 Repeal of discretionary power to make a declaration

18.10.1 Issues

The Council's proposal that declarations be presumptively made once a sentence for a listed offence reaches the lower threshold of being for a term of greater than 5 years still leaves open the question of whether courts should have a residual discretionary power to make a declaration in other circumstances.

Under section 161B(4) of the PSA, a court has the power to make a declaration if an offender is convicted on indictment of an offence:

(i) that involved the use, counselling or procuring the use, or conspiring or attempting to use, serious violence against another person; or

(ii) that resulted in serious harm to another person; and

(iii) is sentenced to a term of imprisonment for that offence.

In practice, this means a court can make a declaration:

- for an offence not listed in Schedule 1 (and which would not otherwise qualify for a declaration on the basis it is an offence of counselling or procuring the commission of, or attempting or conspiring to commit a Schedule 1 offence) for a sentence of any length;
- for an offence listed in Schedule 1 that is for a period of less than 5 years.

As discussed in Chapter 6, this power has been very rarely used — and in the few cases it has been applied, it was used almost exclusively for Schedule 1 offences where the sentence fell below 5 years (only 1 non-Schedule 1 offence received an SVO during the 9-year data period).[492]

18.10.2 Approach in other jurisdictions

As discussed in section 18.9.1, the most usual approach taken for the purposes of MNPP schemes is to list offences to which these schemes apply either in definitional provisions accompanying the schemes, within the provisions themselves or in separate schedules.

There are limited examples of where broad criteria are preferred over identifying specific offences to which these schemes apply. One example is the South Australian MNPP provisions that apply under the *Sentencing Act 2017* (SA) when a court is sentencing an offender for a 'serious offence against the person'. A 'serious offence against the person' is defined as 'a major indictable offence (other than an offence of murder) that results in the death of the victim or the victim suffering total incapacity, a conspiracy to commit such an offence or aiding, abetting, counselling or procuring the commission of such offence'.[493] The term 'major indictable offence' is further defined in section 5 of the *Criminal Procedure Act 1921* (SA) to mean 'any indictable offence except a minor indictable offence'. Minor indictable offences include offences for which the maximum term of imprisonment does not exceed 5 years, as well as some listed offences for which the maximum penalty exceeds 5 years, including recklessly causing harm to another.

The definitional provisions, therefore, provide greater clarity on the South Australian scheme's intended application than the comparatively broad criteria that apply under section 161B(4) of the SVO scheme.

18.10.3 Stakeholder views

Both Full Stop Australia and FACAA supported courts retaining a power to make a declaration for an offence not listed in the schedule to promote flexibility in sentencing.[494] FACAA favoured the mandatory application of the scheme and also referred to its view that the current sentencing thresholds that apply to distinguish when a declaration can be made on a discretionary or mandatory basis (5 years or more but less than 10 years, and 10 years or more) should be removed so that it would apply mandatorily to all sentences of imprisonment.[495]

The QLS noted information presented in the Issues Paper suggested 'this section has not been the subject of significant use' and for this reason, its comments on the provision's effectiveness and issues were limited.[496] Ultimately it concluded that whether or not the section should be retained would depend upon whether the SVO scheme as a whole was reviewed to facilitate an increase in judicial discretion — although maintaining the section 'in some form would be appropriate'.[497] From the perspective of its members, it reported that 'the primary issue with s 161B(4) as it stands, is that it provides little guidance to sentencing courts in deciding whether to make a discretionary SVO declaration'. On this basis it supported adoption of 'a clearer framework … as to when the discretion should be applied and the relevant criteria', including the circumstances in which the discretion should be exercised.[498]

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492 The non-Schedule 1 offence sentence related to a 7-year sentence imposed for an offence charged under s 419(4) of the Criminal Code (Qld) — Burglary with intent to commit an indictable offence where an indictable offence is committed (in this case, grievous bodily harm), which is not an offence listed in Schedule 1: see *R v Smith* [2018] QCA 136. Some declarations made for Schedule 1 offences appear to have been made on the erroneous basis that a sentence for a Schedule 1 offence imposed cumulatively on an earlier-imposed sentence for a Schedule 1 offence, once the sentence exceeds 10 years, must be declared to be a serious violent offence.

493 *Sentencing Act 2017* (SA) s 47(12)(e).

494 Submission 4 (Fighters Against Child Abuse Australia) 25; Submission 7 (Full Stop Australia) 13.

495 Submission 4 (Fighters Against Child Abuse Australia) 25.

496 Submission 12 (Queensland Law Society) 5.

497 Ibid.

498 Ibid.

In contrast, LAQ, favoured a split model (presumptive for sentences over a certain level, and discretionary under this) and submitted that:

> If the SVO scheme is amended to allow for increased discretion by the sentencing court, the schedule of prescribed offences is updated to include only relevant offences and the schedule is reviewed regularly then there would be no need to have a catchall legislative provision such as s. 161B(4).[499]

This was because under this model, courts would have discretion to either make an SVO declaration or to postpone the statutory parole eligibility date provided there is good reason to do so.[500]

LAQ further commented that as the current provision was cast in broad terms, 'there may be a risk of unintended consequences'.[501]

18.10.4 Options considered and Council view

The options considered by the Council were:

- Option 1: To retain the current position at law under s 161B(4) to enable a court to declare an offender convicted of a serious violent offence for an offence not listed in the new schedule, or for scheduled offences in circumstances where the sentence imposed is for 5 years or less, provided the offence has been dealt with on indictment.
- Option 2: To rely on the discretionary power of courts to postpone parole eligibility as provided for by section 160C(5) of the PSA and section 184(3) of the CSA to enable a court to postpone eligibility without making a declaration where this is warranted.

The Council views the inclusion of sentences greater than 5 years as a useful indicator of offence seriousness for offences included in the reformed presumptive scheme. This is because once a sentence reaches this level, the only option available to a court is to impose a sentence of immediate imprisonment.

However, the Council acknowledges that in some cases, a court may need to moderate the head sentence to avoid a crushing sentence. Examples may be where a sentence must be ordered to be served cumulatively on an earlier imposed sentence pursuant to section 156A of the PSA, or where the offender has served time in custody that cannot be declared as time served under the sentence.[502]

The moderation of head sentences to give effect to the principle of totality or to avoid the imposing of a 'crushing sentence'[503] could mean that more serious examples of offences may on occasion avoid the presumptive application of the scheme due to the length of the sentence being set at or below 5 years.

The Council considers it is preferable to rely on courts' existing power to postpone parole eligibility under the general provisions that apply to parole, rather than make specific provision for this scenario under the reformed scheme.

Ensuring there is clarity and transparency in the scheme's application, in the Council's view, is more important than providing for every potential circumstance and eventuality that might arise. This can best be achieved by limiting the scheme's application to offences listed in the new schedule that attract a sentence of greater than 5 years.

The Council found that very few discretionary declarations were made under section 161B(4) over the 9-year data period. This provides further evidence that retaining this section is unnecessary and it should be repealed.

Recommendation: Repeal power to make discretionary declaration

19. Section 161B(4) of the *Penalties and Sentences Act 1992* (Qld), which permits a court to make a declaration for offences not listed in Schedule 1, or a Schedule 1 offence for a sentence of less than 5 years, provided certain criteria apply, should be repealed.

499 Submission 13 (Legal Aid Queensland) 31.
500 Ibid citing *McDougall & Collas* (n 75) 94 [14], 97 [21] as to the general power of sentencing courts to postpone parole eligibility.
501 Ibid.
502 See PSA (n 11) s 159A for the circumstances in which this applies. This section was amended in 2020 with the intention of providing courts with greater flexibility. See discussion in Chapter 3 for further detail.
503 As to the totality principle and the power under the common law to ameliorate a sentence to avoid the imposition of a 'crushing sentence', and their proper application, see *R v Symss* (2020) 3 QR 336 and consideration of relevant case law. In this case while the Queensland-based offences were potentially subject to the SVO scheme, they did not apply as they were committed before these provisions were enacted: at [12].

18.11 Transitional provisions

18.11.1 Issues

One of the complexities with reforming the existing SVO scheme concerns the application of the scheme to offences committed prior to the new scheme coming into operation.

The transitional provision that applies to the current scheme relates solely to the operation of section 161C. It states:

> For subsection 161C(2)(b), sentences of imprisonment imposed on the offender for offences mentioned in section 161C(1)(c) or (d) must be taken into account even if the sentences were imposed before the commencement of part 9A.

As discussed in Background Paper 3,[504] when the scheme was first introduced, there was uncertainty regarding the application of the scheme to offences committed prior to its commencement. The developed case law established:

- An offender who commits an offence pre-1 July 1997 (the date when the SVO scheme commenced) cannot be declared convicted of a serious violent offence.[505]
- Where there is a continuing offence which commenced prior to 1 July 1997 and continued after 1 July 1997, the SVO scheme may apply to the entirety of the offending conduct.[506]
- If offending pre- and post- 1 July 1997 is sentenced at the same time and a cumulative sentence of imprisonment is imposed, resulting in a sentence of 10 years or more, an SVO declaration must be made for the post-1 July 1997 offending in accordance with the transitional provision.[507]

There is a general presumption under Queensland law that legislation will operate prospectively.[508] The retrospective operation of a provision is expressly permitted under the *Statutory Instruments Act 1992* (Qld)[509] in circumstances where the provision does not operate to the disadvantage of the person by decreasing their rights or imposing liability on them.

Section 11(2) of the Criminal Code (Qld) provides:

> If the law in force when the act or omission occurred differs from that in force at the time of the conviction, the offender cannot be punished to any greater extent than was authorised by the former law, or to any greater extent than is authorised by the latter law.

Section 35 of the *Human Rights Act 2019* (Qld) ('HRA') recognises rights with respect to the operation of retrospective criminal laws. The intention of this provision is to protect people from being liable to a punishment that is more severe than that which existed at the time of the offence. Conversely, if a penalty for an offence is reduced after the offence is committed, but before the person is sentenced for the offence, the person is eligible for the reduced penalty.

These provisions are relevant to the Council's consideration of how the reformed scheme should apply post its commencement. While the new reformed scheme may place some offenders at a disadvantage through its presumptive application to sentences of greater than 5 years, but less than 10 years, other offenders benefit from the presumptive (rather than mandatory) application and the recommended parole eligibility range of 50-80 per cent. Similarly, changes to the list of included offences may benefit some offenders, while disadvantaging others.

The Council was concerned with ensuring compliance with the HRA and Criminal Code, and in its view, the recommendations are consistent with these legislative requirements.

18.11.2 Council view

The Council's primary concern was to ensure that offenders who commit offences prior to the new scheme coming into operation are not placed at a potential disadvantage — thereby potentially operating inconsistently with the human rights principle against retrospective punishment. Whether something is considered to be a 'penalty' is determined by reference to whether it is considered to be 'punitive' in nature. The reformed scheme could well be interpreted as such given this is one of its intended purposes.

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504 *Background Paper 3* (n 377) Chapter 6 'Practical questions of the application of the scheme'.
505 *R v Inkerman & A-G (Qld)* [1997] QCA 316; *R v Mason and Saunders* [1998] 2 Qd R 186.
506 *R v Ianculescu* [2000] 2 Qd R 521; *R v H* [2001] QCA 167; *R v P; Ex parte A-G (Qld)* [2001] QCA 188.
507 *R v Robinson; Ex parte A-G* [1999] 1 Qd R 670; *R v Gilchrist* [1998] 103 A Crim R 410.
508 Queensland Government, Department of the Premier and Cabinet, *Legislation Handbook* (2019) 28 '6.5 — General presumption that legislation will be prospective'.
509 Ibid 28 '6.6 Retrospective operation of a beneficial provision'.

The Council has provided examples as to the reformed scheme's intended application taking into account whether it operates as a beneficial provision, or one that places offenders at a potential disadvantage. The Council considers the court should have some discretion if an offence is listed both in the new schedule and the existing Schedule 1 and was committed after the existing SVO scheme came into operation, but pre-commencement of the new scheme. The key principle the Council has adopted is that an offender should not be placed at a disadvantage due to the recommended reforms.

As discussed in section 18.10, the Council considers there is no need for the discretionary power to make an SVO declaration in the circumstances provided for under section 161B(4) to be retained given the court's existing power to postpone parole eligibility. For this reason, the Council recommends that the section's repeal comes into effect on the date of commencement of the amendment Act and applies to offences whenever committed.

The repeal or reform of section 161C is recommended to be applied to offences committed both pre- and post-commencement of the new scheme as it will have a beneficial impact.

Recommendation: Transitional provisions

20. The new scheme should apply to offenders sentenced for an offence included in the new schedule but not listed in Schedule 1 only if the act or omission constituting the offence occurred on or after the commencement of the new provisions.

> Example: An offender commits the offence of choking prior to the commencement of the new scheme. The offender is not subject to be sentenced under the new scheme. A court can set parole eligibility applying the usual approach.

21. If a court sentences an offender post-commencement of the new scheme for an offence listed in Schedule 1 that is not included in the new schedule, the offender should not be subject to either the existing SVO scheme or the new scheme regardless of whether the offence or conviction happened before or after the commencement of the new scheme. Instead, the offender should be sentenced in accordance with general provisions applying to parole.

> Example: An offender commits the offence of assault occasioning bodily harm prior to the commencement of the new scheme but is sentenced after commencement. The offender is not subject to the SVO scheme. A court can set parole eligibility applying the usual approach.

22. If a court is sentencing an offender post-commencement of the new scheme for an offence listed in both the new schedule and the currently applying Schedule 1, the following should apply:

a. If the act or omission constituting the offence occurred on or after the commencement of the new scheme, the new scheme should apply;

b. If the act or omission constituting the offence occurred prior to the commencement of the new scheme, but post commencement of the existing SVO scheme, the court should decide whether the person is to be sentenced under the current SVO scheme or under the new scheme. The court should be required to ensure that the offender is not placed at a disadvantage as to where the parole eligibility date is fixed, consistent with the principle against retrospective punishment.

> Example 1: An offender commits the offence of grievous bodily harm after the commencement of the new scheme and is sentenced to imprisonment for 5 years and 6 months. The offender must be sentenced in accordance with the provisions of the new scheme.
>
> Example 2: An offender commits the offence of drug trafficking prior to the commencement of the new scheme and is sentenced after its commencement to 11 years. The court must decide which scheme to apply — but the court is likely to decide to sentence the person under the new scheme given it provides the ability to depart, and parole eligibility can be set within a range of 50-80 per cent.
>
> Example 3: An offender commits the offence of rape prior to the commencement of the new scheme and is sentenced to 7 years' imprisonment after the scheme commences. As for example 2, the court must decide which scheme to apply in order to avoid the offender being disadvantaged. If, due to the nature and circumstances of the rape, the offender would be more likely to receive a declaration under the new scheme, a court may decide to sentence the person under the existing SVO scheme, in which case a declaration is discretionary. If the making of a declaration is more likely under the existing SVO scheme, the court might decide to sentence the person under the new scheme, which allows a court to fix the parole eligibility date within a range of 50–80 per cent when a declaration is made.

23. The repeal of section 161B(4) of the *Penalties and Sentences Act 1992* (Qld) should come into effect from the date of commencement and apply whether the offence or conviction for the offence or offences happened before or after its repeal.

24. The repeal of, or amendments to, section 161C of the *Penalties and Sentences Act 1992* (Qld) should come into effect from the date of commencement and apply whether the offence or conviction for the offence or offences happened before or after its repeal and whether a person is sentenced under the current scheme (if still in operation) or under the new scheme.

Chapter 19

Implications and impacts of proposed reforms

19.1 Introduction

The Council was asked that any recommendations and reforms address the following considerations:

- Identify broadly, if possible, any potential financial and practical implications associated with any recommendations.
- Advise whether the legislative provisions that the Queensland Sentencing Advisory Council reviews, and any recommendations, are compatible with rights protected under the *Human Rights Act 2019* (Qld).
- Advise on the impact of any recommendation on the over-representation of Aboriginal and Torres Strait Islander peoples in the criminal justice system.

19.2 Human Rights assessment — reformed scheme

In accordance with the Terms of Reference, the Council has been asked to 'advise whether the legislative provisions that the [Council] reviews and any recommendations, are compatible with rights protected under the *Human Rights Act 2019*'. As discussed in section 16.6, the Council undertook a detailed analysis of the compatibility of both the SVO scheme and the Council's recommendations with the HRA which is in Appendix 15.

This section provides a brief overview of the rights that may be engaged or limited by the Council's recommendations. The Council's analysis considered both the rights of victims and survivors, and offenders.

A statutory provision is compatible with rights if it does not limit a right; or, if it does, the limitation is reasonable and demonstrably justified in a free and democratic society based on human dignity, equality and freedom.[510]

Each right is assessed in accordance with the human rights framework provided for under section 13(2) of the HRA. This requires consideration of:

1. **Rights**: Which rights are relevant? What is the scope of those rights? The scope of the rights is what each right covers and protects — its meaning and content.[511]

510 HRA (n 63) s 8.
511 *McDonald v Legal Services Commissioner (No 2)* [2017] VSC 89.

2. **Proper Purpose:** The nature of the purpose of the limitation, including whether it is consistent with a free and democratic society based on human dignity, equality and freedom.[512]
3. **Rational Connection:** The relationship between the limitation and its purpose, including whether the limitation helps to achieve the purpose.[513]
4. **Necessity:** Is there an alternative which still achieves the purpose but has a lesser impact on human rights? Are there any less restrictive and reasonably available ways to achieve the purpose?[514]
5. **Fair Balance — Rights v Purpose:** The balance between the importance of achieving the purpose, and the importance of preserving the human rights, taking into account the nature and extent of the limitation on the human right.[515]

The rights most engaged by the reformed scheme are:

- Recognition and equality before the law,
- Right to liberty and security, and
- A fair hearing and rights specific to criminal proceedings.

These rights were briefly discussed in section 16.6. The Council determined that the mandatory operation of the SVO scheme is potentially incompatible with the rights to recognition and equality before the law and the right to liberty and security of person, specifically the right not to be arbitrarily detained.

19.2.1 Recognition and equality before the law

Section 15 of the HRA recognises that every person is equal before the law and is entitled to the equal protection of the law without discrimination.[516] This right is based on the fundamental principle of equality, which concerns both formal equality (that like cases be treated alike) and substantive equality (which requires the differential treatment of persons whose situations are significantly different).[517] This might require adjustments to standard rules or procedures to overcome past disadvantage and to achieve true equality for certain groups.[518] This right is modelled on Article 16(1) and Article 26 of the ICCPR.

The Queensland Human Rights Commission notes that this right might be relevant to acts or decisions that:

- assist or recognise the interests of Aboriginal and Torres Strait Islander persons or members of other ethnic groups;
- have a disproportionate impact on people who have an attribute or characteristic (for example, sex, race, age, disability, location);
- establish eligibility requirements for access to services or support (such as legal aid).[519]

The Council's recommendations protect this right. The ability to depart from the presumptive scheme, where this is 'in the interests of justice' taking into consideration a range of factors relevant to the offence and personal to the offender, will enable the court to take a relevant background of disadvantage into account in support of achieving substantive equality between cases. This right is further promoted by the flexibility provided to a sentencing court to set parole eligibility within a range (50–80%) in circumstances where a declaration is made. Under the reformed scheme, the sentencing court therefore will be able to properly recognise any considerations referred to in *Bugmy*[520] that might apply in sentencing an Aboriginal or Torres Strait Islander person, or other offenders who may come from a background of social disadvantage.

512 HRA (n 63) s 13(2)(b).
513 Ibid s 13(2)(c).
514 Ibid s 13(2)(d).
515 Ibid ss 13(2)(e)-(g).
516 HRA (n 63) s 15(3).
517 *Thilimmenos v Greece* [2000] (Judgment) (European Court of Human Rights, App No 34369/97, 6 April 2000) [44].
518 *Victoria Police Toll Enforcement v Taha* (2013) 49 VR 1.
519 'Your right to recognition and equality before the law', *Queensland Human Rights Commission* (Webpage) <www.qhrc.qld.gov.au/your-rights/human-rights-law/your-right-to-recognition-and-equality-before-the-law>.
520 *Bugmy v The Queen* (2013) 249 CLR 571.

19.2.2 Right to liberty and security

As discussed earlier, Section 29 of the HRA recognises that every person has the right to liberty and security, must not be subjected to arbitrary arrest or detention,[521] and must not be deprived of their liberty except on grounds, and in accordance with procedures, established by law.[522] These provisions are based on Article 9 of the ICCPR.

The right not to be subjected to arbitrary detention applies to all forms of detention, not just detention arising from criminal justice processes. [523] However, the focus of this discussion is on criminal justice processes related to the SVO scheme.

The concept of 'arbitrary' as this applies to arrest and detention 'includes elements of inappropriateness, injustice, lack of predictability and due process of the law'.[524] Conversely, arrest and detention that is 'not arbitrary' has been described as that which is 'reasonable (or proportionate) in all the circumstances'.[525] In *PJB v Melbourne Health*,[526] the Victorian Supreme Court adopted the meaning present in international human rights law — that arbitrariness:

> extends to interferences which, in the particular circumstances applying to the individual, are capricious, unpredictable or unjust and also to interferences which, in those circumstances, are unreasonable in the sense of not being proportionate to a legitimate aim sought.[527]

Detention, which is not initially arbitrary, may become arbitrary.[528] A person may be detained for a specific purpose, however if that purpose no longer applies, there must be appropriate justification to continue detention, otherwise the detention will become arbitrary.[529] If there is no longer a causal link between the detention and the objectives of the sentence, detention may be arbitrary.

Section 29(3) of the HRA 'means that someone can only be detained or have their liberty denied in accordance with the law'.[530] Lawfully 'means that relevant statutory criteria must be satisfied as a prerequisite to the exercise of a power to detain'.[531]

The Council was concerned with this section as it had earlier identified that the mandatory aspects of the SVO scheme, and lack of clear rationale regarding included offences may lead to disproportionate sentences and the scheme's operation not being justified by its legitimate aim.

The Council undertook a compatibility assessment of its proposed reforms consistent with the requirements under the HRA and determined that its recommendations to provide a broad ability to depart where it is 'in the interests of justice', and the ability for the court to set parole eligibility within a range of 50–80 per cent are consistent with this right. The detention proposed by the reformed scheme is lawful and parole eligibility is delayed only in circumstances where it is warranted (taking into account a number of broad considerations, such as offender culpability). This flexibility ensures that detention under the reformed scheme does not risk becoming arbitrary.

In any event, if the Council's recommendations are found to limit this right, the Council's view is that they are reasonable and justifiable as they are restricted to the degree required to reach the legitimate legislative purposes of punishment, denunciation and community protection.

Further, preserving the rights of victims and survivors and promoting victim and community confidence in the justice system's ability to respond to serious offending through the imposition of appropriate non-parole periods, in the Council's view, is best achieved through the adoption of a presumptive scheme. While other less restrictive ways of achieving these objectives are available, the Council considered them inappropriate and unlikely to achieve the purposes of the proposed reforms for the reasons discussed in this section.

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521 HRA (n 63) s 29(2).
522 Ibid s 29(3).
523 Ibid.
524 Explanatory Note, Human Rights Bill 2018 (Qld) 24.
525 Alistair Pound and Kylie Evans, *An Annotated Guide to the Victorian Charter of Rights* (Lawbook, 2nd ed, 2019) 190.
526 (2011) 39 VR 373.
527 *PJB v Melbourne Health* (2011) 39 VR 373, 394–5 [82]–[85]. See also *Victoria Police Toll Enforcement v Taha* (2013) 49 VR 1; *WBM v Chief Commissioner of Police* (2010) 27 VR 469 in which this approach was also followed .
528 Human Rights Committee, *General Comment No 35: Article 9 (Liberty and Security of Person)*, UN Doc CCPR/C/GC/35 (16 December 2014) [43].
529 Human Rights Committee, *Spakmo v Norway*: *Communication No 631/1995*, 67th session, UN Doc CCPR/C/67/D/631/1995 (5 November 1999) [6.3].
530 Right to liberty and security of person' *Queensland Human Rights Commission* (webpage) <https://www.qhrc.qld.gov.au/your-rights/human-rights-law/right-to-liberty-and-security-of-person>.
531 Judicial College of Victoria, *Charter of Human Rights Bench Book* [6.15.3] citing *Antunovic v Dawson* (2010) 30 VR 355; [2010] VSC 377 [135].

19.2.3 Right to a fair hearing and rights specific to criminal proceedings

Section 31 of the HRA provides that 'a person charged with a criminal offence or a party to a civil proceeding has the right to have the charge or proceeding decided by a competent, independent and impartial court or tribunal after a fair and public hearing'.[532] This right is very similar to the common law obligation to ensure a fair hearing.[533] This right applies to procedural fairness, rather than substantive fairness (i.e. it does not apply to the fairness of a decision made in court). In Victoria, a number of factors have been identified as relevant to assessing whether a court is 'competent, independent and impartial', such as independence and being free to decide factual and legal issues without interference.[534] What will constitute a fair hearing in a case will depend on all the circumstances.[535]

Section 32(1) of the HRA provides that 'a person charged with a criminal offence has the right to be presumed innocent until proved guilty according to law'. Section 32(2) further outlines a number of minimum guarantees. The presumption of innocence applies to the whole of the criminal process.[536] It is not an absolute right, and it can be 'justifiably qualified by statute'.[537] This right can be impacted, but not necessarily undermined by a reversal of the onus of proof.

Under the Council's recommendations, the scheme applies presumptively to specified offences and the defence will need to make submissions to support a finding by the court that it is 'in the interests of justice' to depart from the scheme. This is in contrast to the current scheme under which the making of declarations on a discretionary basis relies on submissions being made by the prosecution. The purpose of the recommended change to a presumptive model is to ensure that all offences which meet a certain threshold level of seriousness receive a parole eligibility date proportionate to their seriousness, unless there are factors which warrant a parole eligibility being set at less than 50 per cent of the head sentence. Promoting a level of consistency in application will further enhance victim and community confidence in sentencing.

The Council recognises that by adopting a presumption in favour of a declaration being made, it may be more difficult for certain defendants, such as those from lower socio-economic or disadvantaged backgrounds, including Aboriginal and Torres Strait Islander peoples, to satisfy this burden. While departure from the scheme is envisioned in a range of diverse circumstances, the Council considers factors relevant to an assessment of an offender's culpability to be of central importance in making this determination given its impact on the assessment of offence seriousness. This may increase the need for specialist reports to be presented to the court to provide evidence of certain factors, such as an offender's mental illness or cognitive impairment, relevant to sentencing. The Council recognises obtaining specialist reports might be more difficult for certain defendants based on their personal circumstances. However, this fact does not breach a person's right to a fair hearing as the court will still be in a position to reach a 'just decision'[538] based on the information put before it. Where the court considers it would be unable to reach a 'just decision' without a pre-sentence report, there exists the power for a court to order a pre-sentence report provided for under section 344 of the *Corrective Services Act 2006* (Qld) ('CSA'), though the Council acknowledges this power is rarely exercised.

Even should the rights be considered to be limited, any limitations are reasonable and justifiable taking into account the legitimate interests of promoting victim and community confidence in sentencing. While preserving the right to a fair hearing and the minimum guarantees in the criminal process are integral to protecting a defendant's rights, the Council's view is that any engagement on the right to a fair hearing through the adoption of a presumptive scheme is minimal. A number of safeguards exist to ensure the presumption is applied in a fair way, including the ability of defendants to rebut the presumption through the making of sentencing submissions, allowing specific mitigating factors to be highlighted through the preparation of specialist reports,[539] and the court's ability to consider a range of evidence in support of departure. The Council has deliberately avoided recommending that specific evidentiary requirements must be met with respect to evidence which can be used to support the identified factors.

A less restrictive way to achieve the purpose of the reforms would be to make the scheme discretionary. However, such a model would fail to meet the intended purposes of the reformed scheme to promote victim and community confidence in the justice system's ability to respond to serious offending through the imposition of appropriate non-parole periods.

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532 HRA (n 63) s 31.
533 Judicial College of Victoria, *Charter of Human Rights Bench Book* [6.18.1].
534 'Right to a fair hearing', *Queensland Human Rights Commission* (webpage) <www,qhrc.qld.gov.au/your-rights/human-rights-law/right-to-a-fair-hearing>.
535 *Victoria Police Toll Enforcement v Taha* (2013) 49 VR 1, 69 [205].
536 *X7 v Australian Crime Commission* (2013) 248 CLR 92, 153 [160].
537 Pound and Evans (n 525) 229.
538 See also *Slaveski v Smith* (2012) 34 VR 206, 221 [55].
539 Refer to section 19.4 for further discussion about legal aid funding.

19.3 Impacts of reforms on Aboriginal and Torres Strait Islander peoples and marginalised groups

19.3.1 Assessing the impacts of the reforms based on current sentencing practices

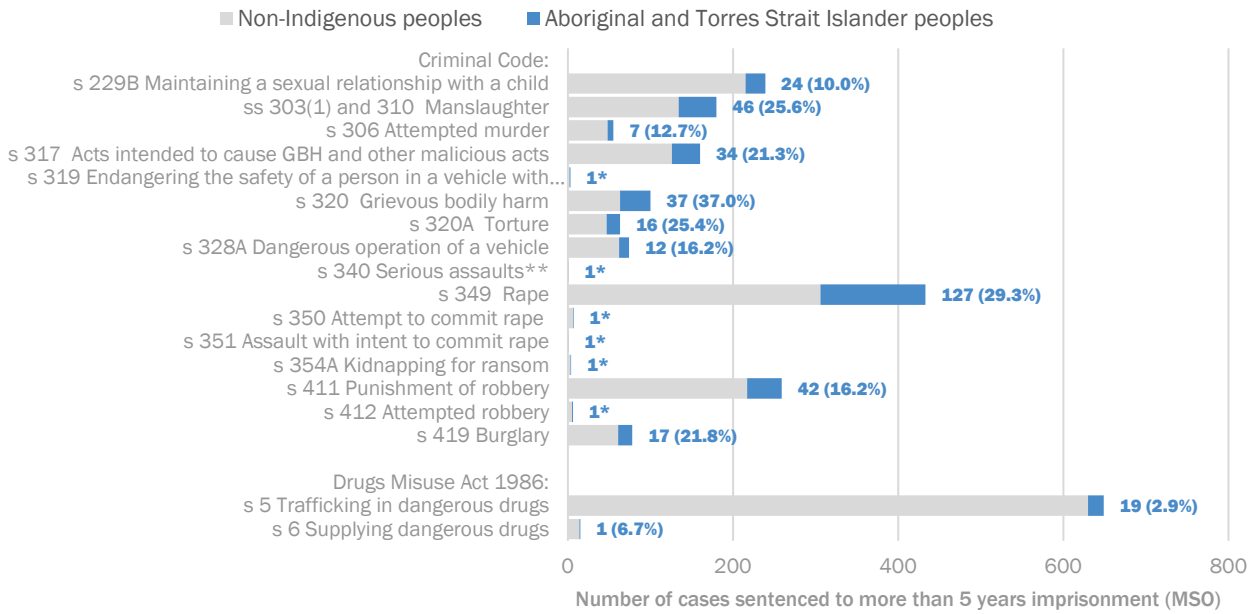
Aboriginal and Torres Strait Islander peoples are considerably over-represented in the criminal justice system in Queensland and Australia in general. Any statistics on the over-representation of Aboriginal and Torres Strait Islander peoples needs to be interpreted in the context of the chronic social, economic and cultural disadvantage and marginalisation experienced by Aboriginal and Torres Strait Islander peoples. Aboriginal and Torres Strait Islander peoples are impacted by mental health conditions, alcohol and substance abuse, and cognitive and neurological impairments (including foetal alcohol syndrome disorder) at a much higher rate. These factors, amongst others, contribute to the over-representation of Aboriginal and Torres Strait Islander peoples in the criminal justice system.[540]

Figure 39 shows the level of over-representation of Aboriginal and Torres Strait Islander peoples for Schedule 1 offences that received imprisonment of more than 5 years. This figure shows offences currently included in Schedule 1, as well as offences proposed to be added. For exact numbers for all offences in this chart, please see Appendix 5.

As illustrated by Figure 39, out of all the offences included in Schedule 1 (both current and proposed offences), most offences had a very small number of cases sentenced. The top 11 offences accounted for 96.7% of all Schedule 1 offences (current and proposed) sentenced to more than 5 years imprisonment. The remaining offences displayed in the chart accounted for only 3.3 per cent of these cases.

Focusing on the 11 most common offences, Aboriginal and Torres Strait Islander peoples were over-represented for each of these offences, with the exception of drug trafficking. The level of over-representation varied between offences. The highest levels of over-representation included GBH (37.0%, n=37), rape (29.3%, n=127), manslaughter (25.6%, n=46), and torture (25.4%, n=16). Other offences had lower levels of over-representation including maintaining (10.0%, n=24/239), attempted murder (12.7%, n=7/55), and dangerous operation of a vehicle (16.2%, n=12/74).

Figure 39: Over-representation of Aboriginal and Torres Strait Islander peoples for Schedule 1 offences that received imprisonment of more than 5 years, current and proposed offences



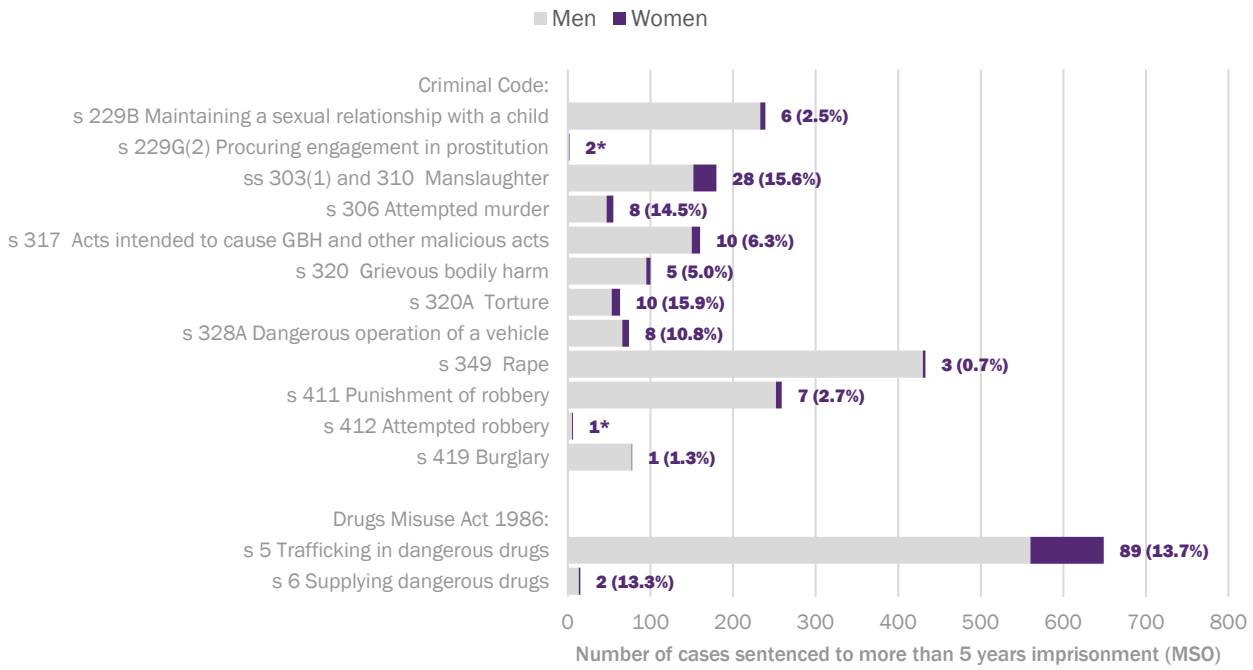
Source: QGSO, Queensland Treasury – Courts Database, extracted August 2020.
Data includes cases (MSO) sentenced 2011–12 to 2019–20. Source: QGSO, Queensland Treasury — Courts Database, extracted August 2020. Note: This chart only includes offences with cases sentenced for Aboriginal and Torres Strait Islander peoples – see Figure A1 and Table A2 in Appendix 5 for a full list of Schedule 1 offences.
*Percentages are not displayed for cases with less than 10 cases sentenced.
** The offence of serious assaults was amended in 2012 and 2014, introducing circumstances of aggravation that increased the maximum penalty from 7 to 14 years.

540 Please see Queensland Sentencing Advisory Council, *Connecting the Dots: The Sentencing of Aboriginal and Torres Strait Islander Peoples in Queensland* (Sentencing Profile, 2021) for further context on over-representation.

Very few women are sentenced for offences that are declared to be an SVO — see Part B, Figure 13 for more detail. Figure 40 shows the number of women sentenced for a Schedule 1 offence (both current and proposed offences) irrespective of whether an SVO declaration was made, for cases that received more than 5 years imprisonment.

For most offences, the percentage of women offenders was relatively low. The offences with the highest proportion of women were torture (15.9%, n=10) and manslaughter (15.6%, n=28). The offence with the highest number of women sentenced was drug trafficking (n=89, 13.7%).

Figure 40: Proportion of women sentenced for Schedule 1 offences that received imprisonment of more than 5 years, current and proposed offences



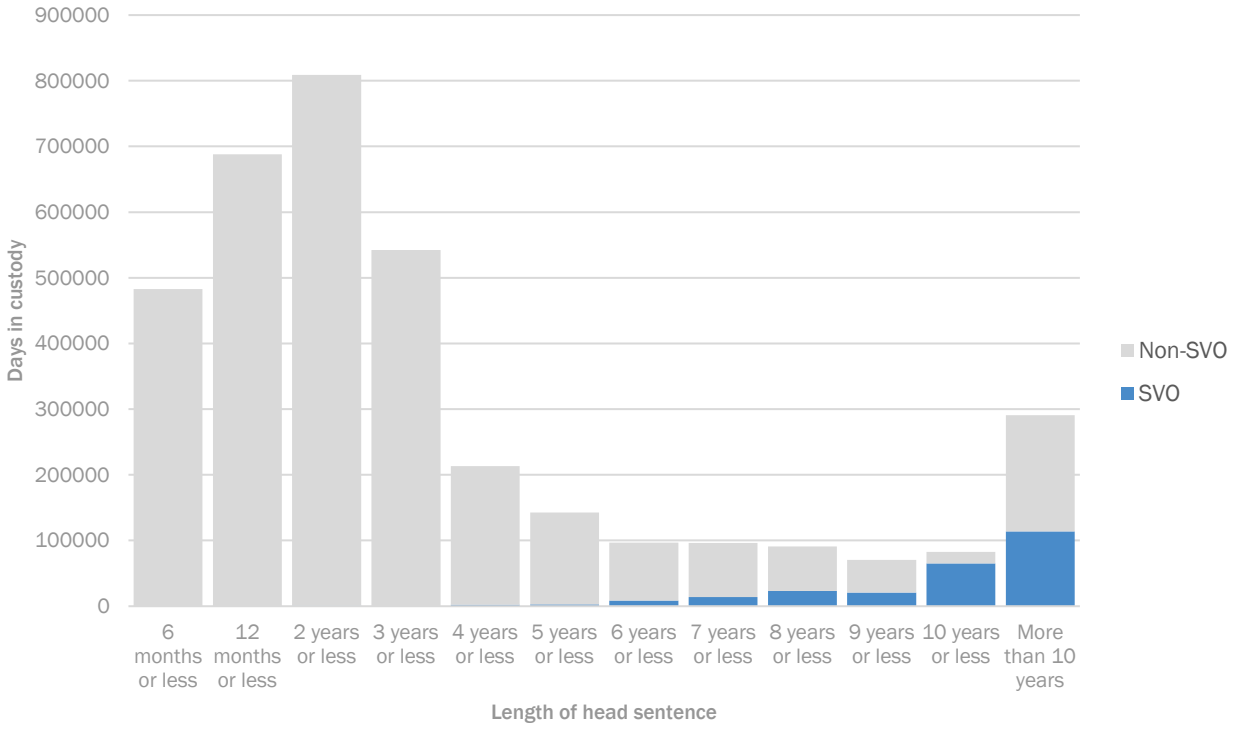
Source: QGSO, Queensland Treasury – Courts Database, extracted August 2020.
Data includes cases (MSO) sentenced 2011–12 to 2019–20. Source: QGSO, Queensland Treasury — Courts Database, extracted August 2020.
Note: This chart only includes offences with cases sentenced for women — see Figure A2 and Table A3 in Appendix 5 for a full list of schedule 1 offences.
*Percentages are not displayed for cases with less than 10 cases sentenced.

19.3.2 Contribution of the SVO scheme and reformed scheme to over-representation

The analysis was undertaken to explore the impact of over-representation of Aboriginal and Torres Strait Islander offenders convicted of a declared offence in the broader context of all offences sentenced across all courts in Queensland.

Figure 41 shows the number of days Aboriginal and Torres Strait Islander peoples were sentenced to serve in custody. This clearly shows that the vast majority of custody days are attributable to sentences of 3 years and less. Sentences of 3 years or less accounted for 70.0 per cent of all custody days sentenced to be served by Aboriginal and Torres Strait Islander peoples — see Table 24). Cases covered by the SVO scheme only accounted for 7 per cent of custody days sentenced to be served by Aboriginal and Torres Strait Islander peoples (highlighted in Figure 41).

Figure 41: Number of custody days sentenced for Aboriginal and Torres Strait Islander offenders by SVO declaration, all courts, all offences (MSO)



Data includes cases sentenced (MSO), all courts, all offences, 2011–12 to 2019–20.
Source: QGSO, Queensland Treasury – Courts Database, extracted August 2020.
Notes: Includes sentences of imprisonment, including suspended sentences, where at least one day of actual imprisonment was sentenced to be served, including days declared as pre-sentence custody.

Table 24 contains numbers representing the data displayed in Figure 41.

Table 24: Percentage of custody days sentenced for Aboriginal and Torres Strait Islander peoples by SVO declaration

	Percentage of total custody days	
Length of Head Sentence	**SVO**	**Non-SVO**
6 months or less	0.0%	13.4%
12 months or less	0.0%	19.1%
2 years or less	0.0%	22.4%
3 years or less	0.0%	15.0%
4 years or less	0.1%	5.9%
5 years or less	0.1%	3.9%
6 years or less	0.2%	2.4%
7 years or less	0.4%	2.3%
8 years or less	0.6%	1.9%
9 years or less	0.6%	1.4%
10 years or less	1.8%	0.5%
More than 10 years	3.2%	4.9%

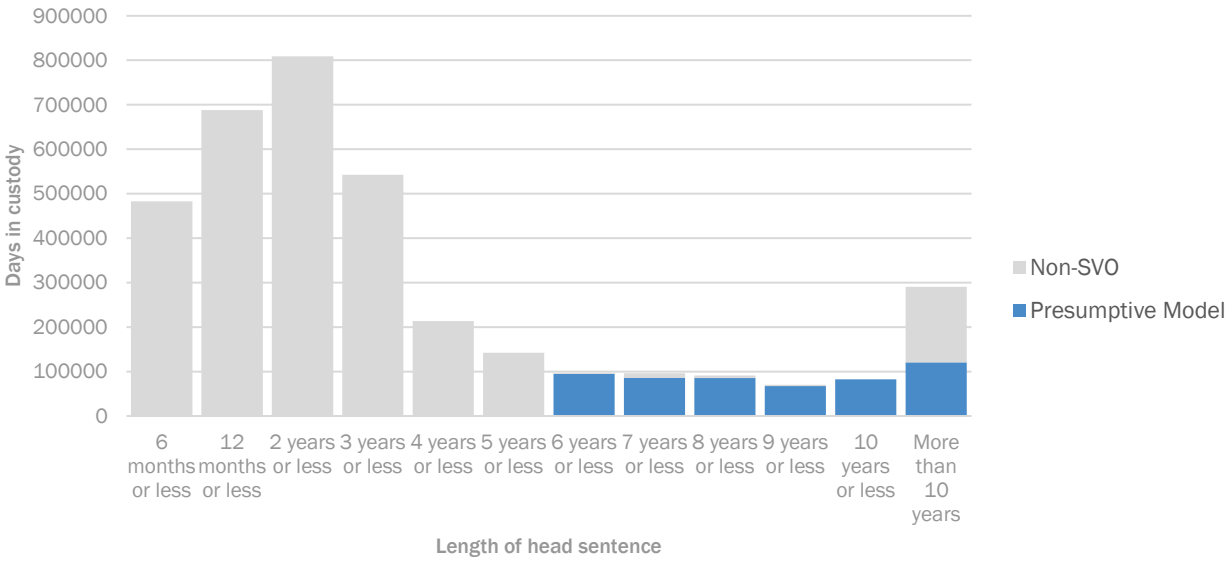
Data includes cases sentenced (MSO), all courts, all offences, 2011–12 to 2019–20.
Source: QGSO, Queensland Treasury – Courts Database, extracted August 2020.
Note: This table provides the percentages behind Figure 41.

Figure 42 shows the impact of the proposed presumptive model on Aboriginal and Torres Strait Islander offenders. Overall, the vast majority of cases shown would not be captured by the presumptive model. That is, 79.8 per cent of the custody days were for cases that fell below the 5-year threshold and would not be subject to the presumptive model.

Examining all sentenced days in custody, 14.9 per cent would have been eligible for inclusion in the presumptive model. This means that under a presumptive model these offences would likely have resulted in a higher number of days in custody prior to reaching parole eligibility. This is higher than the 7.0 per cent of cases that were covered by the existing SVO scheme (see Figure 41).

However, these two figures cannot be compared directly, as under the presumptive model the court has the ability not to make a declaration if it is 'in the interests of justice' to depart. This means that the 14.9 per cent refers to a scenario in the event judicial officers never depart from the scheme.

Figure 42: Number of custody days sentenced for Aboriginal and Torres Strait Islander peoples by the proposed presumptive model (if never departed from), all courts, all offences (MSO)



Data includes cases sentenced (MSO), all courts, all offences, 2011–12 to 2019–20.
Source: QGSO, Queensland Treasury – Courts Database, extracted August 2020.
Notes: Includes sentences of imprisonment, including suspended sentences, where at least one day of actual imprisonment was sentenced to be served, including days declared as pre-sentence custody.

Table 25 contains numbers representing the data displayed in Figure 42.

Table 25: Percentage of custody days sentenced for Aboriginal and Torres Strait Islander peoples by the proposed presumptive model

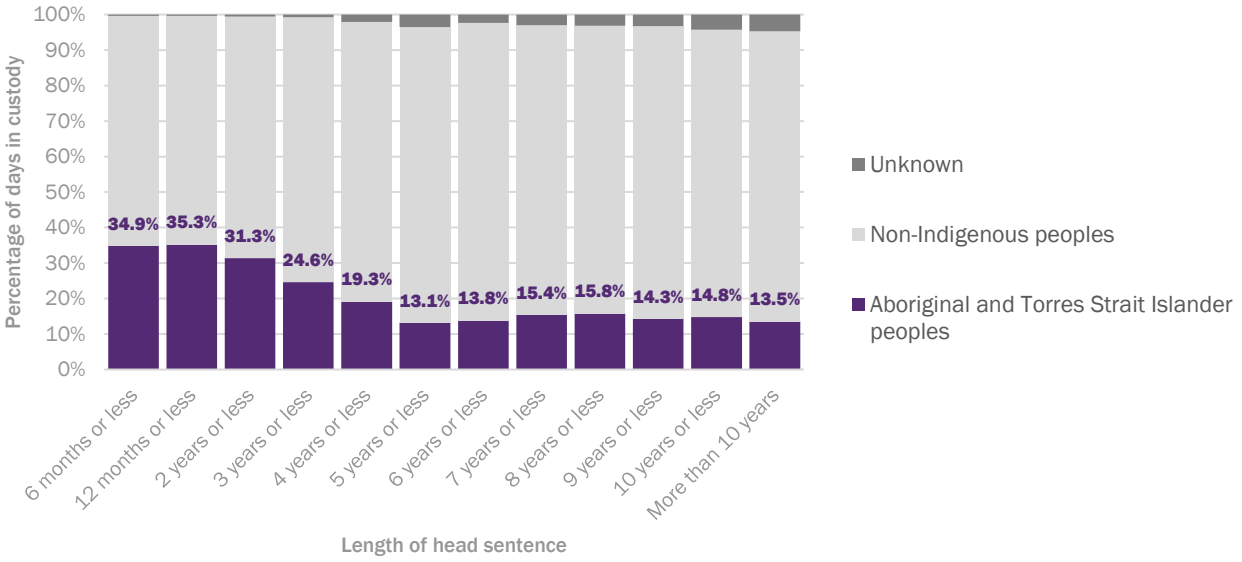
	Percentage of total custody days	
Length of Head Sentence	**Presumptive model**	**Non-SVO**
6 months or less	0.0%	13.4%
12 months or less	0.0%	19.1%
2 years or less	0.0%	22.4%
3 years or less	0.0%	15.0%
4 years or less	0.0%	5.9%
5 years or less	0.0%	4.0%
6 years or less	2.6%	0.1%
7 years or less	2.4%	0.3%
8 years or less	2.4%	0.1%
9 years or less	1.9%	0.1%
10 years or less	2.3%	0.0%
More than 10 years	3.4%	4.7%

Data includes cases sentenced (MSO), all courts, all offences, 2011–12 to 2019–20.
Source: QGSO, Queensland Treasury – Courts Database, extracted August 2020.
Note: This table provides the percentages behind Figure 42.

Figure 43 shows the percentage of over-representation for Aboriginal and Torres Strait Islander peoples as a ratio of the number of sentenced days in custody. This shows that short sentences of 2 years or less have the highest rates of over-representation, with over 30 per cent of sentenced days in custody attributable to Aboriginal and Torres Strait Islander peoples. This over-representation is compounded by the findings in Figure 41, which shows that these short sentences account for the bulk of sentenced days in custody for Aboriginal and Torres Strait Islander offenders.

Over-representation is considerably lower for sentences with a longer head sentence. Sentences greater than 4 years have rates of over-representation from 13.1 per cent.

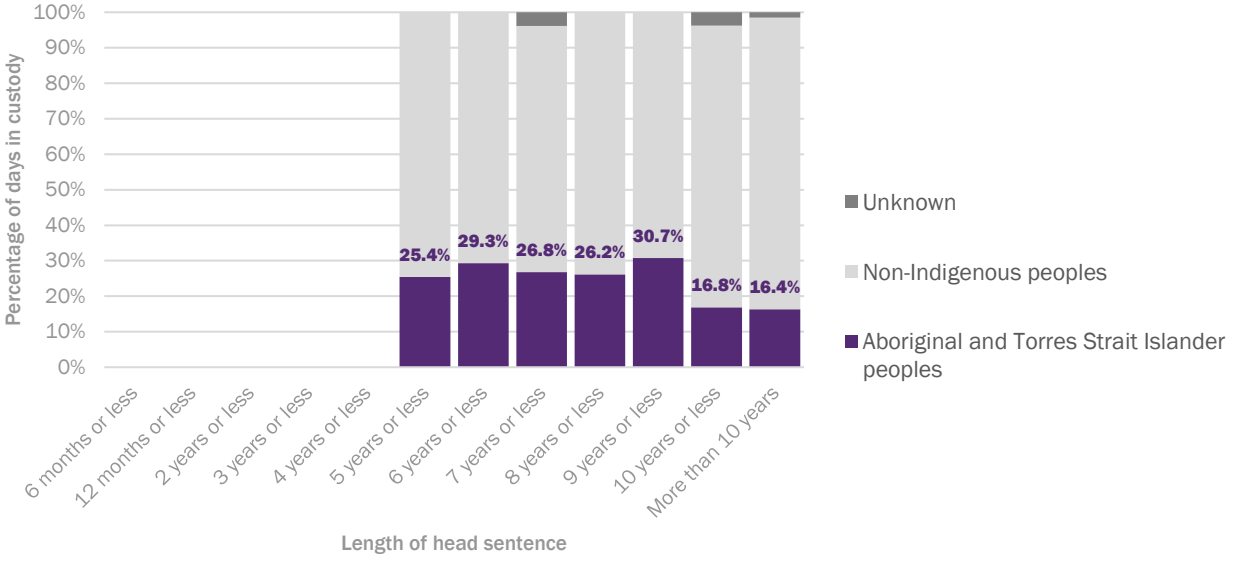
Figure 43: Over-representation by number of custody days sentenced, all courts, all offences (MSO)



Data includes cases sentenced (MSO), all courts, all offences, 2011–12 to 2019–20.
Source: QGSO, Queensland Treasury – Courts Database, extracted August 2020.

Figure 44 only includes cases that were subject to an SVO declaration. This shows that the rate of over-representation was much higher for SVO cases, compared to non-SVO cases with a similar sentence length (compare Figure 43).

Figure 44: Over-representation by number of custody days sentenced cases with an SVO declaration (MSO)



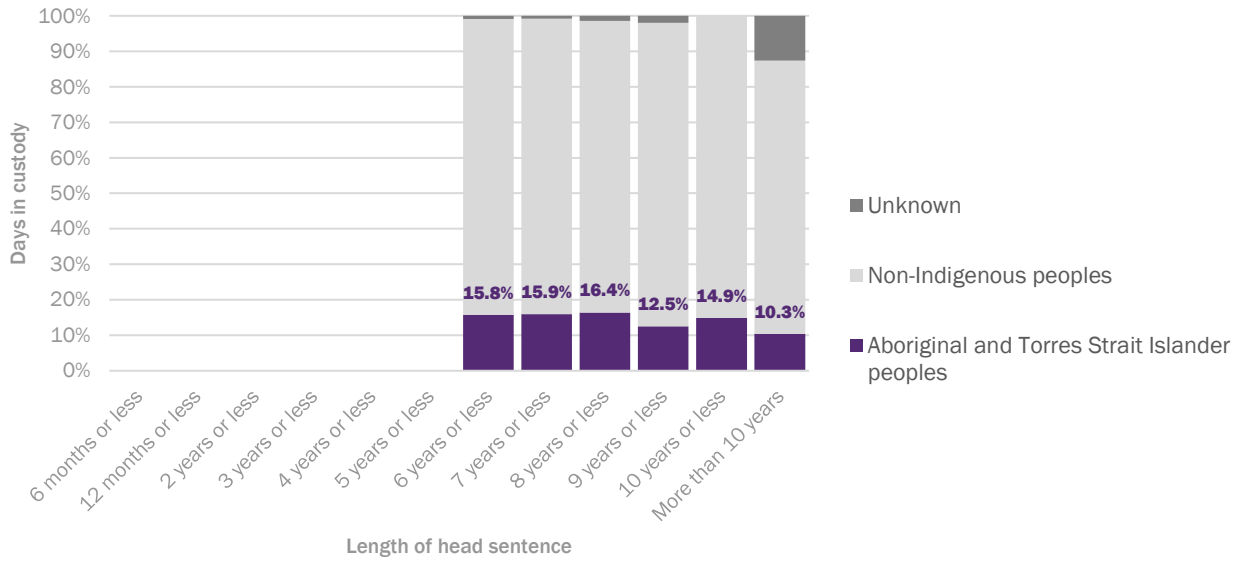
Data includes cases sentenced with an SVO declaration (MSO), 2011–12 to 2019–20.

Source: QGSO, Queensland Treasury – Courts Database, extracted August 2020.

Figure 45 only includes cases that would have been covered by the presumptive model but does not include cases that did receive an SVO declaration under the current model. Figure 44 includes the new cases that might have been covered by a presumptive model (if never departed from).

The level of over-representation for these offences reaches 16.4 per cent at the highest point. This is considerably lower than the level of over-representation for offences that are currently included in the SVO scheme (compare Figure 44).

Figure 45: Over-representation by number of custody days sentenced under the proposed presumptive model (MSO)



Data includes cases sentenced that would have been covered by the presumptive model but excludes cases that did obtain an SVO under the current model (MSO), 2011–12 to 2019–20.
Source: QGSO, Queensland Treasury – Courts Database, extracted August 2020.

It is important to note that the analysis within this section that pertains to the presumptive model assumes a scenario in the event judicial officers never depart from the scheme. It is expected that the number of cases actually sentenced under the presumptive model will be considerably less than the number included in the analysis above.

19.4 Other impacts of presumptive scheme on defendants who are marginalised or experiencing disadvantage

During consultation, legal stakeholders raised the potential for a presumptive scheme to further disadvantage defendants who are marginalised or experiencing disadvantage, including Aboriginal and Torres Strait Islander peoples, women, people with a mental illness or cognitive impairment, people from a culturally or linguistically diverse background and other disadvantaged groups.

Under the reformed scheme, defendants will be required to make submissions to show why a declaration should not be made. Defendants who have access to high quality legal representation and are able to fund the preparation of specialist reports might be better able to establish that a declaration should not be made than those who have limited access to the same resources.

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

Recommendation: Assessment of legal support needs for disadvantaged defendants

25. As part of any implementation strategy developed by the Department of Justice and Attorney-General for the new serious offences scheme, further consultation should be undertaken to assess the legal support needs of disadvantaged defendants and identify any additional legal funding or support required to minimise potential unintended impacts of the reformed scheme. This consultation should include legal stakeholders providing direct representation for Aboriginal and Torres Strait Islander defendants and other defendants who are marginalised or are experiencing disadvantage. The consultation process should include consideration of the adequacy of existing funding both in support of defendants' legal representation and to fund the preparation of any required specialist reports.

19.5 Financial and practical implications

19.5.1 Introduction

In responding to the Terms of Reference, the Council was asked to 'identify, if possible, broadly any potential financial and practical implications associated with any recommendations'. This section of the report discusses the potential implications of the Council's recommendations, including:

- an increase in the number of cases captured under the reformed scheme;
- an increase in the number of appeals against sentence;
- changes to the amount of time that must be served in custody for prisoners convicted of a declared offence, and therefore the maximum time prisoners convicted of a declared offence may serve under supervision in the community on parole;
- implications for legal assistance and funding; and
- an increase in court delays.

The Council notes that these are potential implications only, as the financial and practical implications of the reformed scheme will depend on its application. For example, the Council cannot predict how often, and under which circumstances a court may find it is in the interests of justice to depart from the scheme.

19.5.2 Consideration of financial implications of the scheme when first introduced

When the SVO scheme was introduced in July 1997, the Explanatory Notes to the amendment Bill included an estimate of what it would cost to incarcerate prisoners for 80 per cent of their head sentence.[541] These estimates were derived by counting the number of prisoners currently in custody (as at 30 June 1996) who could potentially meet the criteria for an SVO declaration. For each prisoner, an assumption was made that instead of being released on parole after serving 30 per cent of their sentence in custody, they would now be released after serving 80 per cent under the new scheme. In total, this was estimated to cost $5.0m annually and result in an increase in the daily number of prisoners by about 130 prisoners. It was estimated to take approximately 10 years for the increase in costs to reach the predicted level.

These costings are based on generalised assumptions and would therefore not have provided an accurate estimate of the cost of introducing the scheme. These estimates would have further suffered from uncertainty around how judges might exercise their discretion in setting a head sentence or determining whether to make an SVO declaration in a particular case in circumstances where this was discretionary.

The Explanatory Notes acknowledged limitations of these costings, including:

- problems with the way offences were classified in administrative datasets (that is, data recorded against statistical classifications that could not be directly matched to specific Queensland offences) that would likely have resulted in an over-estimate in the number of potential SVO declarations; and

541 Explanatory Notes, Penalties and Sentences (Serious Violent Offences) Amendment Bill 1997 (Qld) 1–3.

- the assumption that prisoners would be released on parole after serving 30 per cent of their sentence was acknowledged as being a conservative estimate as it was more likely that most of these prisoners would become eligible for parole at 50 per cent (when prisoners generally became eligible for release on parole).

19.5.3 Potential financial and practical implications of the recommended reforms

Under the Council's proposed presumptive model, it is not possible to predict how often the presumption to make a declaration will be displaced in practice. While the Council expects a larger number of cases to be captured by the presumptive model than under the current scheme, it is not possible to estimate the extent to which additional declarations will be made.

This means that while the reformed presumptive scheme will very likely lead to additional costs and pressures on the criminal justice and custodial system, the extent of these impacts is yet unknown and depends on how the scheme is applied in practice.

Under the Council's recommendations, not only will courts have discretion to depart from the scheme if this is 'in the interests of justice', they will also have the ability to set parole eligibility within a specified range of 50–80 per cent. In practice, this may result in:

- parole eligibility for sentences of 10 years or more for scheduled offences being set earlier than the current fixed 80 per cent point — with the possibility this might also result in some marginal increases in head sentences; and
- parole eligibility for sentences of greater than 5 years but less than 10 years for scheduled offences being set later in the sentence than at the one-third, or one-half mark — with the possibility that head sentences might be slightly reduced overall to take this into account.

While the Council acknowledges the number of limitations with predicting the impacts of the reformed scheme prior to its introduction, this section highlights what it views as some of the key potential impacts of the recommended reformed scheme, many of which would have associated financial implications.

Increase in declared cases

- The scheme currently applies to 60 offences. The Council's recommendations include a schedule which contains 44 offences. While there are fewer offences included in the scheme, one of the impacts of a presumptive model that applies to offences receiving a sentence greater than 5 years, is that a wider range of cases will be captured by the reformed scheme.
- The expansion of the operation of the scheme will likely increase the total number of cases that are subject to the presumptive scheme. While there will be an ability to depart from the scheme, the Council is unable to estimate the number of cases in which a court would be likely to depart given the number of factors that might influence this. A table listing the number of offences potentially captured under the recommended presumptive scheme (by offence type drawing on 9 years of sentencing outcomes data over the period 2011–12 and 2019–20) can be found in Appendix 11.
- Several offences are recommended to be removed from the scheme, however, very few of those resulted in a mandatory or discretionary SVO declaration being made under the current scheme over the data period. The removal of these offences from the proposed schedule is not expected to have a significant impact on the total number of declarations made.

Number of appeals against sentence may increase

- Overall, the extent to which the scheme increases the likelihood of a sentence being appealed is unknown.[542] Based on the Council's analysis, appeals relating to SVO declarations are often based on submissions that the sentence is either manifestly excessive or manifestly inadequate. The decision regarding the making of a declaration often forms only part of these appeal grounds.
- Under the current scheme, mandatory declarations, in particular, may be contributing to a higher number of appealed cases.[543] The Council's recommendation to reform the scheme and replace it with a wholly presumptive model would remove the requirement of a court to make a declaration for sentences of 10 years or more, thereby potentially reducing the number of cases being appealed.

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542 The Council was also unable to report on appeal rates by appeal type (whether they involved an appeal against sentence, conviction or both) as the coding of appeal outcomes was undertaken manually and not all details were recorded.

543 Out of all cases with a mandatory declaration, almost half of cases were appealed (48.1%), whereas one-third of cases with a discretionary declaration were appealed (37.8%) — see Figure 30 in pt B.

- The introduction of a new scheme will result in some uncertainty as to how the new provisions are to be interpreted by the courts. This may result in novel cases being appealed in an attempt to test the Court's interpretation of the provisions. This is to be expected as the courts develop case law regarding when 'it is in the interests of justice' to depart.
- It is not expected that the scheme will result in a significant increase in the number of appeals in the long term, as a wholly presumptive model gives courts a wide discretion to impose a sentence that is just in all the circumstances. [544]

Increase in time served in custody for offenders sentenced to greater than 5 years, but less than 10 years

- In Part B, the Council's analysis showed that the majority of non-SVO cases sentenced to a period of imprisonment between 5 and 10 years had a parole eligibility date requiring the offender to serve 50 per cent or less of the head sentence. As discussed above, the presumptive model will likely increase the number of cases subject to the reformed scheme. This would have the impact of lifting non-parole periods to between 50–80 per cent of a prisoner's head sentence for declared offences.
- It is possible there will be some adjustments down to head sentences to take the making of a declaration into account, although the extent to which this might occur is unknown.
- Data on the average time served past an offender's parole eligibility date prior to being released on parole also showed that, on average, offenders who applied for and were granted parole served 50 per cent of their sentence or less.[545]
- It is likely that the recommended presumptive scheme will result in an increase in the number of days prisoners who commit a serious offence and are sentenced to greater than 5 years spend in custody. This will have financial implications on Queensland Corrective Services, increase pressure on the custodial system and may also have practical implications on the type of programs that will be available to prisoners who are now serving longer periods in custody.

Decrease in head sentences for offenders sentenced to greater than 5 years, but less than 10 years

- As courts take an integrated approach to sentencing, it is possible that a legislative requirement to set parole eligibility at a later point in the sentence than might otherwise apply will result in a reduction in head sentences. This is because in achieving a sentence that is just and proportionate in all the circumstances, the court will need to take into account that a greater proportion of the sentence will be required to be served in custody.
- To some extent, this may moderate any financial implications of making a greater number of offenders subject to the scheme. This is because, while offenders may be required to spend a greater proportion of their sentence in custody, if their head sentences are reduced, the additional time required to be served will not be as long as if there was no reduction factored in at all. For example, a 9-year sentence with parole eligibility fixed at one-third of the sentence, taking into account an offender's guilty plea, might be reduced to an 8-year sentence with parole eligibility set at 50 per cent. If this type of reduction occurred, it would mean that the person would spend an additional 12 months in custody under the new scheme, rather than an additional 18 months if no reduction in the head sentence was made.

Decrease in time on parole

- Any increase in the percentage of time that a prisoner spends in custody will result in a decrease in the amount of time that a prisoner serves on parole. This may have practical implications on the number and type of programs that will be available to prisoners serving shorter periods on parole.

Increase in offenders subject to an intensive level of service while on parole

- If more declarations are made, and QCS retains its current approach of requiring offenders declared convicted of an SVO to be managed under an intensive level of service, more offenders may be subject to an increased frequency of reporting and substance testing, and a lower-threshold for dynamic risk and

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544 The Victorian Court of Appeal has noted, with reference to a similar 'interests of justice' test which applies to standard sentence offences, that to successfully establish this ground of appeal where the minimum non-parole period has not been departed from, requires an applicant to demonstrate that it was not open to the judge to do otherwise than conclude that it was in the interests of justice to set a non-parole period less than the period specified: see *Tobin v The Queen* [2021] VSCA 180. Where the sentencing judge has set a shorter non-parole period than that specified, the Court similarly has noted its intervention 'could only be justified if the sentence imposed was wholly outside the range of those open in the sound exercise of discretion': *DPP (Vic) v Spottiswood* [2021] VSCA 146, [57].

545 See Figure 37 in Part B. The median percentage of sentence served prior to being granted release on parole varies from 33.2 per cent for deal or traffic in illicit drugs and 37.4 per cent for robbery, to 50.5 per cent for rape.

non-compliance. This could result in increased costs and workload for QCS and the Parole Board Queensland.

Decrease in time served in custody for offenders sentenced to 10 years or more

- For offenders sentenced to 10 years or more who are subject to a mandatory declaration under the current operation of the scheme, there will be a potential benefit in a court having an ability to set parole eligibility within a range of 50–80 per cent, or not to make a declaration at all where this is determined to be in the interests of justice.
- Setting an earlier parole eligibility date for these offenders will mean they potentially will spend less time in custody, and more time on parole. For example, if an offender receives a sentence of 12 years with parole eligibility set at 60 per cent instead of 80 per cent, this would translate to the person serving close to 7 years 2.5 months before being eligible for release on parole, instead of over 9 years and 7 months under the current scheme — a reduction of 2 years and 4.5 months assuming that the person receives the same head sentence.

Increase in head sentences

- The Council found that the current application of the SVO scheme may be exerting downward pressure on head sentences. By allowing judicial officers the discretion to set parole eligibility between 50–80 per cent, more flexibility is provided to set sentences with higher head sentences and shorter or longer periods served on parole.
- This might result in increased costs to the criminal justice system as, if a shorter non-parole period is set at the same time as the head sentence is increased, it means that the person will be under sentence overall for a longer period of time. If the person is released on parole but has their parole suspended or cancelled, this means that they might end up serving a longer period in custody than they would if sentenced under the current SVO scheme.

Implications for legal assistance

- Adoption of a presumptive model means that a defendant's legal representative will be required to make submissions in support of a finding by the court that it is in the interests of justice for a declaration not to be made. This may result in increased costs of legal representation, because there may be an increased need to obtain pre-sentence reports or psychiatric reports. This might lead to an increase in Legal Aid funding requests for such reports.
- However, given factors in mitigation are commonly raised in sentencing in the absence of such reports, the extent to which this might occur is unclear.

Increase in court delays

- As mentioned above, there may be an increase in demand for pre-sentence reports, especially in cases where a report might not have otherwise been obtained by defence. This may lead to adjournments of sentencing proceedings for reports to be obtained.
- The Council has recommended that the court should have access to information about the types of programs and other forms of intervention that might be available to an offender to inform sentencing — including the decision to make a declaration. The Council recommended this advice provided by Queensland Corrective Services should be general in nature rather than provided in the form of pre-sentence reports to avoid any potential for court delays.

19.6 Costs associated with the reformed scheme

Overall, the reformed scheme will likely be considerably more costly compared to the existing scheme by virtue of it being presumptive rather than discretionary for sentences between over 5 and under 10 years. As discussed in section 19.5, the Council expects that this will lead to a higher number of declarations being made (subject to the scheme's application by the courts).

In terms of **direct costs** to the criminal justice system, there are two main impacts to consider:

1. Potentially increased costs as part of the court process as declarations will potentially need to be considered in a higher number of cases.
2. Increased costs to the correctional system as a higher number of offenders will likely have their parole eligibility deferred overall leading to more days in custody.

As discussed above, the extent of this increase in cost is unknown and dependent on how often courts find that it is 'in the interests of justice' not to make a declaration, as well as where parole eligibility is commonly set by the court within the recommended range of 50–80 per cent. For this reason, the Council recommends a monitoring review of the application and impact of the reformed scheme 5 years after its commencement to ensure that the reformed scheme is operating as intended (see recommendation 26).

While the direct costs of the reformed scheme will likely be higher than under the current SVO scheme, in the Council's view, the seriousness of the offending justifies the additional cost.

In addition to direct costs implications, there are several indirect impacts on the overall costs of the scheme, including potential net benefits arising from the cost of avoided offending.

There are several important **indirect cost implications** to consider, including:

- the overall effectiveness of the SVO scheme compared to the ability of the reformed scheme to meet its objectives;
- the costs of delivering programs and interventions in custody and on parole;
- community protection from serious offending through incapacitation and deterrence; and
- victim and public confidence in the criminal justice system.

This section will briefly address the direct and indirect costs implications. Due to the uncertainty regarding the reformed scheme's application discussed above, the Council is unable to provide an estimate of the extent to which costs to the criminal justice system will likely increase.

19.6.1 Direct cost implications

Impact of the reformed scheme on court process costs

As outlined in this section (19.6), the reformed scheme may impact on the costs associated with the court process through:

- a potential short-term increase of appeals associated with the introduction of new legislation;
- sentence hearings taking longer (in the immediate aftermath of the scheme's introduction);
- potential court delays associated with adjournments and therefore appearances to obtain reports or other evidence to support departure from the scheme;
- cost implications associated with obtaining expert material, if sought by defence;
- meeting legal assistance needs to ensure that the impact of the reformed scheme on defendants who are marginalised or from a background of disadvantage is mitigated (see recommendation 25).

Impact of the reformed scheme on days spent in custody

The Council's analysis (see Part B, Figure 35) of where parole eligibility dates fell for non-declared Schedule 1 offences as a proportion of the head sentence showed that while there is a wide spread of non-parole periods set, parole eligibility dates tended to fall around the one-third and half-way mark. This is consistent with the 'usual' sentencing practice in Queensland to acknowledge a plea of guilty and other mitigating factors by setting parole eligibility at one-third and the statutory provision of parole eligibility at 50 per cent where there is no date set. There was only a comparatively small number of cases (which were not SVO-declared) with a parole eligibility higher than 50 per cent. This was consistent across all offence categories examined.

Under the reformed model, listed offences resulting in sentences of over 5 years, but less than 10 years, would be included in the presumptive scheme, meaning that (unless departed from), these offences would have their parole eligibility deferred to between 50–80 per cent. It is therefore likely that considerably more cases will attract a declaration under the reformed scheme compared to the number of discretionary declarations that were made under the current scheme. As only 112 declarations were made in the 9-year data period (for cases with a term of imprisonment between 5 and 10 years), the reformed scheme will likely lead to an increase in declared cases, even if the courts have the ability to depart from the scheme, where this is 'in the interests of justice'.

Further, changing the mandatory application of the scheme to apply presumptively will likely reduce the days spent in custody for sentences of 10 years and above, including because courts will have the ability to depart from the scheme if this is 'in the interests of justice'.

19.6.2 Indirect cost implications

While some costs to the criminal justice system are more tangible, other aspects of criminal justice reform are indirect and difficult to measure.

Effectiveness of the scheme to achieve objectives

When evaluating any policy or sentencing scheme, emphasis should be placed on the relationship between costs and public benefits derived from its operation. As discussed earlier in section 16.3, the current SVO scheme is not able to meet all of its objectives, or only meets these objectives to a limited extent. In the Council's view, the reformed scheme will be able to better meet the purposes of punishment, denunciation and community protection and will operate more effectively with fewer unintended consequences. While the overall costs associated with the reformed scheme may increase, this public expenditure will likely provide better value for money.

The costs of programs and interventions in custody and on parole

To support the effective operation of a delayed parole eligibility scheme, it is important that offenders convicted of a declared offence have access to evidence-based programs and interventions while in custody. This contributes to the reduction of re-offending once released back into the community to promote long-term community safety.

The potential costs of a scheme like the SVO scheme or the reformed presumptive scheme cannot be viewed in isolation of intersecting systems and processes required to ensure its effective operation. Hence, potential costs to allow the scheme to operate as intended are not constrained to the court process and cost of incarceration alone, but also include required funding for high-quality and evidence-based programs and interventions made available in custody and in the community.

Incapacitation and deterrence: the net benefit of avoided crime

The Queensland Productivity Commission ('QPC') most recently considered the benefits of imprisonment as part of its 2018–19 inquiry into imprisonment and recidivism.[546] It noted that:

> The community benefits from imprisonment in that it reduces crime mainly through two effects — incapacitation and deterrence:
>
> - The *incapacitation effect* — while in prison, an offender cannot cause harm to the public. Accordingly, imprisonment results in less crime because offenders are physically prevented from breaking the law while they are incarcerated.
> - The *deterrence effect* — the threat or experience of imprisonment can prevent crime. This effect presumes that individuals are aware of the consequences of breaking the law, and that this knowledge is accounted for in all decisions to commit a crime. Deterrence occurs when the cost of punishment (accounting for the probability of being caught) is perceived to be greater than the benefits of offending, such that the individual chooses to not offend.[547]

In reviewing the evidence, it is noted that the 'crime rate reductions [of incapacitation] are significant, but this effect diminishes as the rate of imprisonment increases'.[548] The 'diminishing effect is explained by studies that suggest that offending outcomes are highly skewed by a small number of chronic offenders who commit a large proportion of offences', which 'implies as the most serious offenders are imprisoned, the benefits of incapacitation fall rapidly'.[549]

The protective effect of incarceration for the community and the harm and cost of additional crime avoided is of critical importance to the purpose of this scheme. Offenders who commit serious offences included in the scheme, such as serious violent and sexual violent offences, could cause great harm if they reoffended and committed similarly serious offences. As noted in the Productivity Commission's report notes, the net benefit of avoided crime for very serious offences is much greater compared to less serious offences (comparing net benefits of incarceration to prevent homicide and burglary respectively).[550]

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546 The findings of this inquiry are reported in: Queensland Productivity Commission, *Inquiry into Imprisonment and Recidivism* (Report, 2019).

547 Ibid 85 (emphasis in original).

548 Ibid citing Alessandro Barbarino and Giovanni Mastrobuoni, 'The Incapacitation Effect of Incarceration: Evidence from Several Italian Collective Pardons' (2014) 6(1) *American Economic Journal: Economic Policy* 1; Paolo Buonanno and Steven Raphael, 'Incarceration and Incapacitation: Evidence from the 2006 Italian Collective Pardon' (2013) 103(6), *American Economic Review* 2437.

549 *QPC Imprisonment and Recidivism Report* (n 546) 85.

550 Ibid.

The Productivity Commission's conclusions about deterrence based on current evidence[551] align with the findings of the authors of the University of Melbourne literature review that deterrence 'is probably best achieved through front-end crime prevention and detection strategies rather than through sentencing'.[552] Further, research evidence suggests 'for any given probability of arrest once an individual receives a penalty, further or harsher penalties do not cause further deterrence'.[553]

Impact on victim and public confidence in the criminal justice system

In addition to any potential benefits in avoided crime, imprisonment also delivers potential benefits to victims and the community through the punishment of the offender and its potential to build community confidence in the justice system through the delivery of just and fair sentencing responses. As the QPC has noted: '[e]stimating the value of these benefits is possible but challenging — for example, there is no market price on the benefits an individual might receive from perceptions of "just" outcomes'.[554]

It is of paramount importance for the public to have trust in the criminal justice system. The level of community confidence in the criminal justice system has potential impacts across the system, including on reporting rates of crime to the police, cooperation with criminal justice agencies and general community attitudes towards government agencies. The Council considers that the reformed SVO scheme will promote victim and public confidence in the criminal justice system, which leads to benefits that cannot be directly assessed or measured.

Need to balance risks and benefits

A challenge faced more broadly by the criminal justice system is the conflict that can sometimes arise between the system's various objectives. As the Australian Productivity Commission found:

> a long prison sentence might meet the community's desire for justice for victims, but be excessively harmful for offenders and their families, and increase the risk of reoffending. If this is the case, there can be a conflict between justice for victims and offenders, between justice and community safety, and between community safety in the short term and in the long term.[555]

As discussed in section 17.4, the Council views the reformed scheme as better able to promote confidence in the criminal justice system by balancing different purposes of the scheme and minimising the risk of unintended consequences.

The balancing of these competing objectives and interests, in conjunction with the evidence of how the current scheme is being applied, was a central concern of the Council in developing its advice and recommendations.

19.7 Monitoring the impacts of the reforms

The Council has a strong commitment to evidence-informed policy development and law reform. For this reason, the Council considers it important that any reforms it recommends are monitored to ensure they are meeting their intended objectives and are not having any unintended impacts.

In developing its recommendations, the Council has been concerned to promote consistency of approach, while providing for some flexibility in how the scheme is applied. This approach recognises that each case is unique, and while it is important that the seriousness of offences is acknowledged by providing for a statutorily defined period to be served, this should not be at the expense of ensuring a just and appropriate sentence.

As discussed in section 19.5 of this report, the manner in which sentencing courts choose to exercise the sentencing discretion afforded to them under the reformed scheme cannot be determined in advance. However, the Council considers it is likely the reforms will lead to more declarations being made for sentences between 5–10 years, including for offences involving sexual violence. The application of the reformed scheme may also lead to slightly higher head sentences for sentences that, under the current scheme, attract either a mandatory or discretionary declaration given the greater flexibility provided to courts about where parole eligibility is set.

To determine whether the reformed scheme is meeting its intended objectives, it is important its impact is monitored over time. The Council suggests 5 years as a reasonable period of time to undertake this initial assessment.

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551 Set out at ibid.

552 *University of Melbourne Literature Review* (n 19) 18.

553 *QPC Imprisonment and Recidivism Report* (n 546) 85 citing Francesco Drago, Roberto Galbiati and Pietro Vertova, 'Prison Conditions and Recidivism' (2011) 13(1) *American Law and Economics Review* 103; Giovanni Mastrobuoni and David Rivers 2016, 'Criminal Discount Factors and Deterrence' (Discussion Paper No 9769, 2016) *Institute for the Study of Labor (IZA) Discussion Papers*.

554 *QPC Imprisonment and Recidivism Report* (n 546) 85.

555 Ibid 15.

In addition to analysis of sentencing data, the Council recommends further consultation should occur with victims and survivors, advocacy and support organisations and legal stakeholders as part of conducting a monitoring review of the reformed scheme. This will also provide an opportunity to review the impact of the scheme on Aboriginal and Torres Strait Islander peoples and other groups from a background of disadvantage.

Recommendation: Monitoring the impact of the reforms

26. The Attorney-General should request that the Council, or another suitable entity, undertake a review of the operation and efficacy of the new scheme after the scheme has been in operation for a period of 5 years or another appropriate period deemed suitable. This review should consider and report on matters including:

a. the proportion of eligible cases that attract a declaration;

b. the offences that most commonly result in a declaration being made;

c. the distribution of sentences of imprisonment and parole eligibility dates for both declared and non-declared offences; and

d. what types of factors are referred to by a court when deciding to make or not make a declaration.

This review should include an analysis of how the scheme is impacting on Aboriginal and Torres Strait Islander peoples and other marginalised or disadvantaged groups. It should also involve consultation with victims and survivors, relevant support and advocacy groups and legal stakeholders.

Chapter 20

Other issues

20.1 Recognition of the rights of victims and survivors and information and support needs

During the course of the Council's consultation, a number of victim and support service agencies highlighted the lack of recognition of victims' rights, as well as information and support needs during the course of a prosecution.

20.1.1 *Human Rights Act* issues

A number of organisations during consultation reflected on the fact that Queensland's *Human Rights Act 2019* (Qld) ('HRA') does not have specific protections or safeguards for victims of crime, which might result in an unbalanced approach to the consideration of human rights in the criminal justice system.

DV Connect was among those that highlighted the need to balance the focus on offenders' rights with the rights of victims, and submitted that 'the experience of DFSV [domestic, family and sexual violence] is one of the greatest aggressions against a person's human rights and must therefore be prioritised'.[556]

The Queensland Sexual Assault Network and Gold Coast Centre Against Sexual Violence went further in calling for the HRA to be amended to specifically recognise the human rights of victims of crime.[557] The Queensland Sexual Assault Network stated:

> A problematic limitation of the HRA is that it only specifically recognises the rights of a "person charged in a criminal process" in Queensland and does not specifically recognise the human rights of the victim of the offence, including the human rights of children who are victims. This does not mean victims do not have human rights, however the lack of specific reference in Section 31 (Right to a Fair Hearing) and Section 32 (Rights in Criminal Proceedings) means for all intent and purposes in Queensland, the rights of the defendant are elevated above other rights in the criminal process ...
>
> The rights of victims in the criminal process may be recognised to a limited extent in other provisions of the HRA such as for example, Section 15 (Recognition and equality before the law) and Section 26 (Protection of families and children), however the lack of specific reference is problematic as it promotes a lack of focus on victims' rights.[558]

556 Submission 6 (DV Connect) 2.
557 Submission 17 (Queensland Sexual Assault Network) 3–4; Submission 18 (Gold Coast Centre Against Sexual Violence) 3–4.
558 Submission 17 (Queensland Sexual Assault Network) 3–4.

As acknowledged by the Queensland Sexual Assault Network, there are no specific rights for victims identified in the HRA — although a number are also of relevance to victims and survivors (in particular, the right to security of person and to be protected from cruel, inhuman or degrading treatment). Crime can be viewed as a violation of a victims' right to life, right to liberty and security of person, and right to property. Procedural rights might arise out of the right to recognition as a person before the law,[559] which suggests that victims cannot be treated merely as Crown witnesses.[560] Case law, both international and Australian, has established that the right to a fair hearing 'extends beyond the rights of the accused to include the interests of the community and the protection of witnesses'.[561] The Council, in its human rights analysis, has considered both the rights of offenders and the rights of victims.

The Council also notes the work of the Women's Safety and Justice Taskforce which is currently reviewing sexual violence and the experiences of victims. It has recently published its third Discussion Paper, titled *Women and Girls' Experiences across the Criminal Justice System as Victims-Survivors of Sexual Violence and also as Accused Persons and Offenders* and discusses the topic of enforceable victims' rights.[562]

Victims' rights are also recognised through a range of other sources, including:

- The Charter of Victims' Rights[563] — which applies to all government and government-funded agencies that work with victims.
- The *Director's Guidelines* which apply to Office of the Director of Public Prosecutions ('ODPP') employees, and includes obligations that ODPP employees have towards victims.
- The Queensland Corrective Services Victims Register which allows registered to be kept informed about specific information relevant to the offender.

While there is a complaint process available for victims with respect to the Charter of Victims' Rights, it is not legally enforceable.[564] When a complaint is made, the entity must give the victim information about the process that will be used to resolve the complaint and take all reasonable steps to resolve the complaint as soon as is reasonably practicable.[565]

There have been recent efforts to strengthen victims' rights such as in the Victorian Law Reform Commission's report into the Victorian Justice System's response to sexual offences, which recommended that: '[v]ictims of sexual offences should have specific rights in the *Victims' Charter Act 2006* (Vic) and the Victims of Crime Commissioner should make sure these rights are respected'.[566]

20.1.2 Information and support needs

Many victim and survivor support services made submissions referring to the need for victims to feel heard, and to be provided with timely information surrounding investigation and prosecution of matters, and called for a trauma-informed practice towards victims and survivors of crime.[567]

Organisations called for sentencing frameworks to use plain language, as victims and survivors 'do not feel equipped enough with information to properly navigate the system'.[568] Reference was also made to the Victorian Law Reform Commission's recently released report into the Victorian Justice System's response to sexual offences, which found that victims and survivors need information which is in plain language and easily accessible, about how the justice system works and what the likely outcomes are from the justice process.[569]

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559 Jo-Anne Wemmers, 'Victims' Rights are Human Rights: The Importance of Recognizing Victims as Persons' (2012) (June) *Temida* 71, 80.

560 Susanne Walther, 'Victims' Rights: Procedural and Constitutional Principles for Victim Participation in Germany' in Edna Erez, Michael Kilchling, Jo-Anne Wemmers (eds.) *Therapeutic Jurisprudence and Victim Participation in Justice: International Perspectives* (Carolina Academic Press, 2011) 97.

561 Women's Safety and Justice Taskforce, *Women and Girls' Experiences Across the Criminal Justice System as Victim-Survivors of Sexual Violence and also as Accused Persons and Offenders* (Discussion Paper 3, 22 February 2022) 22, citing Phoebe Bowden, Terese Henning and David Platter, 'Balancing Fairness to Victims, Society and Defendants in the Cross-Examination of Vulnerable Witnesses: An Impossible Triangulation?' (2014) 37 *Melbourne University Law Review* 558.

562 Ibid 21–3.

563 *Victims of Crime Assistance Act 2009* (Qld) Schedule 1AA.

564 Ibid s 7.

565 Ibid s 20(2).

566 Victorian Law Reform Commission, *Improving the Justice System Response to Sexual Offences* (Final Report, September 2021) Recommendation 16 ('*Improving the Justice System Response to Sexual Offences*').

567 Submission 19 (Queensland Homicide Victims' Support Group) 3.

568 Submission 7 (Full Stop Australia) 6–7.

569 Ibid citing *Improving the Justice System Response to Sexual Offences* (n 566) 30.

The Council acknowledges the need to provide information in an easily accessible and understandable format and has produced a community summary about the recommendations in this report for victims, survivors and community members.

20.2 Post-sentence orders for offenders convicted of non-sexual violent offences

The Council's view is that it is highly undesirable, and not in the interests of longer-term community safety, for serious violent offenders to serve out their full sentence (or most of it) without spending a substantial period under supervision in the community. This is most commonly a risk in Queensland in circumstances where an offender chooses not to apply for parole at all and is released without any form of supervision. One exception to this is where, in the case of serious sexual offenders, a supervision order is made under the *Dangerous Prisoners (Sexual Offenders) Act 2003 (*Qld) ('DPSOA').

Similar concerns about certain offenders being unsupervised on their release in the United Kingdom led to the introduction of sentences for offenders of particular concern[570] — requiring an additional one-year period under supervision to be spent at the end of the 'custodial period' at which point parole release becomes automatic (eligibility is sooner at two-thirds of the 'custodial period'). This period is considered to be part of the sentence imposed by the court rather than a post-sentence form of supervision order.

The Women's Safety and Justice Taskforce has recommended that the Attorney-General and Minister for Justice, Minister for Women and Minister for the Prevention of Domestic and Family Violence invite the Legal Affairs and Safety Committee to consider reviewing and investigating the operation of the DPSOA to examine the effectiveness of the operation of the current scheme and whether it should be expanded to dangerous violent offenders.[571] This recommendation has now been accepted by the Queensland Government.[572]

The Council supports the proposed review and considers it would be premature to consider the merits of providing for a form of mandatory post-custodial supervision as part of a sentencing order until the recommended review of the DPSOA is complete. The Council notes that a number of stakeholders referred to the intersections between the DPSOA scheme and the SVO scheme during the review, as well as the need for adequate and high quality post-release supervision.

The Council notes that the application of DPSOA orders for offenders subject to an SVO declaration currently varies by offence. For offenders sentenced for rape, orders were made over the relevant data period in 35 cases (33.9%). For offenders sentenced for maintaining a sexual relationship with a child, 8 offenders (17.3%) were the subject of a DPSOA order. Beyond these two types of offences, there were only a very small number of other SVO cases in which the offender received a DPSOA order. This is because these orders are made on the basis of the person posing a serious danger to the community, which does not necessarily correlate to offence seriousness or sentence length.

Consultation with Queensland courts, the Parole Board Queensland, Queensland Corrective Services, the Queensland Police Service, legal stakeholders and services working with victims and offenders should form part of any future review initiated to ensure any scheme is appropriately targeted.

20.3 Mental health and wellbeing of offenders

A number of stakeholders commented on the importance of addressing underlying mental health issues for prisoners and parolees.

Studies into the Australian prison population, conducted by the Australian Institute of Health and Welfare, suggest that 40 per cent of prisoners have been diagnosed with a mental health condition,[573] 25 to 30 per cent have a borderline intellectual disability and 10 per cent have a mild intellectual disability.[574] This is significantly higher for Aboriginal and Torres Strait Islander peoples.[575]

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570 See Explanatory Notes, Criminal Justice and Courts Bill 2015 (UK) 3.
571 *Hear Her Voice* (n 38) Recommendation 72.
572 *Queensland Government Response to Hear Her Voice* (n 491).
573 Australian Institute of Health and Welfare, *The Health of Australia's Prisoners 2018* (Catalogue no. PHE 246, 2019) vi.
574 Ibid. See also Mike Hellenbach, Thanos Karatzias and Michael Brown, 'Intellectual Disabilities Among Prisoners: Prevalence and Mental and Physical Comorbidities' (2017) 30(2) *Journal of Applied Research in Intellectual Disabilities* 230.
575 Anti-Discrimination Commission Queensland, *Women in Prison 2019: A Human Rights Consultation Report* (Report, 2019) 80.

The Royal Australian and New Zealand College of Psychiatrists submitted that:

> It is well known that relatively few prisoners with a mental illness are so seriously ill that they require inpatient treatment, but they may still require some mental health treatment, and that treatment, if provided, will generally be in the prison setting. The availability and adequacy of treatment for mentally ill people within Queensland's prisons is therefore an important issue for consideration.
>
> Regarding this forensic patient cohort, the current evidence is that treatment of mental illnesses in Australian prisons is inadequate. Forensicare, in their submission to the Parliament of Australia Senate Select Committee on Mental Health, stated that, 'Adequate mental health services are rare in prison'.[576]

Similarly, the Queensland Network of Alcohol and Other Drug Agencies noted that while they could not comment specifically on services provided within prison, 'generally speaking there are known service gaps for AOD (alcohol and drug) treatment and harm reduction services across Queensland (both public and non-government)'.[577]

The Royal Australian and New Zealand College of Psychiatrists were also concerned about post-release support for prisoners:

> Another key concern for the RANZCP Queensland Branch is that, at the point of release, coherent plans for a managed return to the community with prearranged mental health support almost never occur. This is especially concerning given that persons released from prison are at heightened risk of homelessness. This is neither optimal for achieving integration of recently released prisoners back into the community, or safe for the community at large.[578]

Legal Aid Queensland noted that longer periods on parole would allow for issues such as housing, psychological counselling and access to the National Disability Insurance Scheme to be addressed in a way that cannot be addressed by incarceration.[579]

The Council notes the concerns of these and other stakeholders, including victim support agencies, about the importance of addressing underlying mental health issues to reduce risks of reoffending and ensure offenders receive adequate support both while in prison and on release under sentence in the community.

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576 Submission 15 (Royal Australian and New Zealand College of Psychiatrists) 3 citing the Victorian Institute of Forensic Mental Health submission to Parliament of Australia Senate Select Committee on Mental Health, Submission 306, p 19.

577 Submission 9 (Queensland Network of Alcohol and Other Drug Agencies) 6.

578 Submission 15 (Royal Australian and New Zealand College of Psychiatrists) 5.

579 Submission 13 (Legal Aid Queensland) 53.

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